NO. 46944-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TASHA OHNEMUS, Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, Appellant/Cross-Respondent.

BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

The trial court properly dismissed this case on summary judgment based on the statute of limitations. In the mid-1990s, Child Protective Services (CPS) investigated two abuse allegations involving Tasha Ohnemus and closed the investigations as unfounded. Ms. Ohnemus claims no abuse after May 2002. She turned 18 years old on May 24, 2005, which started the three-year statute of limitations on a potential negligent investigation claim. She turned 21 on May 24, 2008, which terminated the statute of limitations. She filed this lawsuit on August 15, 2012, more than four years after the statute of limitations expired. In an attempt to evade the untimeliness of her claim, Ms. Ohnemus argues two exceptions: (1) the discovery rule and (2) RCW 4.16.340(1)(c), a special provision for childhood sexual abuse victims that extends the time bar three years from a victim's discovery that the abuse "caused the injury for which the claim is brought." Neither applies.

The discovery rule does not extend the time bar on Ms. Ohnemus' negligent investigation claim because even if she did not know the factual basis for that claim more than three years before filing it, there can be no question that in an exercise of due diligence she should have. First, Ms. Ohnemus' actual knowledge of CPS involvement with her family in the mid-1990s is established by treatment chart notes from 2003 and 2007, when

she reported to counselors that she tried to tell CPS and social workers about the abuse and was "very angry" at CPS for allowing the abuse to continue "so much longer." Second, regardless of her actual knowledge, Ms. Ohnemus claims that she discovered CPS's involvement in 2011 *when she read the 2002 police reports investigating her stepfather*. Those reports are public records and were equally available to Ms. Ohnemus before she turned 18 in 2005 and thereafter. Due diligence obliged her to obtain the reports and timely bring her claim.

The special statute of limitations for child sexual abuse, RCW 4.16.340(1)(c), does not extend the time bar for Ms. Ohnemus to bring her claim based on sexual abuse. The record establishes that before she turned 18, Ms. Ohnemus made the causal connection between the sexual abuse and her resulting medical and psychological conditions. While earlier discovery of less serious injuries does not prevent claims for "more serious injuries," Ms. Ohnemus' claimed increase in symptoms and awareness that her psychological injuries are likely permanent do not constitute the more serious injuries to which RCW 4.16.340(1)(c) applies.

Finally, on cross-appeal, the State of Washington (State) appeals the denial of summary judgment on Ms. Ohnemus' claim that the State is liable for her sexual exploitation under RCW 9.68A, which criminalizes the sexual exploitation of children, and her associated plea for costs and

attorneys' fees under RCW 9.68A.130. Because the State is incapable of violating RCW 9.68A, Ms. Ohnemus' claim must be dismissed as not cognizable. Her plea for costs and fees pursuant to RCW 9.68A.130, which applies when a "minor prevail[s] in a civil action arising from violation" of RCW 9.68A, must also be dismissed. The legislature's intent was "to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children." Laws of 2007, ch. 368 § 1. As the statute's language confirms, recovery against the State is plainly not what the Legislature intended.

II. RESTATEMENT OF ISSUES ON MS. OHNEMUS' CROSS-APPEAL[1]

1. Did the trial court correctly dismiss Ms. Ohnemus' negligent investigation claim as untimely because she knew or reasonably should have known all the facts necessary to bring her claim more than three years before she filed suit?

2. Did the trial court correctly dismiss Ms. Ohnemus' claim based on sexual abuse as untimely under RCW 4.16.340(1)(c) because more than three years before filing suit, she made the causal connection between her childhood sexual abuse and her injuries?

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[1] The State is denominated "Appellant" in this matter because it filed the first notice of appeal. However, at the parties' request the Court of Appeals set a briefing schedule whereby Ms. Ohnemus would file the initial opening brief addressing the statute of limitations issues, followed by the State's opening brief addressing Ms. Ohnemus' claim under RCW 9.68A.100.

III. ASSIGNMENTS OF ERROR ON STATE'S APPEAL

1. The trial court erred in denying summary judgment and summary judgment on reconsideration, seeking dismissal of Ms. Ohnemus' claim under RCW 9.68A.100. (Appeal Issue No. 1.)

2. The trial court erred in denying summary judgment and summary judgment on reconsideration, seeking dismissal of Ms. Ohnemus' plea for costs and reasonable attorneys' fees under RCW 9.68A.130. (Appeal Issue No. 2.)

IV. STATEMENT OF ISSUES ON STATE'S APPEAL

1. RCW 9.68A.100 criminalizes engaging, or agreeing or offering to engage, in sexual conduct with a minor in return for a fee. Must Ms. Ohnemus' claim under RCW 9.68A.100 be dismissed as a matter of law because the State is incapable of committing a crime under RCW 9.68A; she has alleged no facts that would support such a claim; and in any event, the statute of limitations has run?

2. Under RCW 9.68A.130 "[a] minor prevailing in a civil action arising from violation of [RCW 9.68A] is entitled to recover the costs of the suit" including reasonable attorneys' fees. Must Ms. Ohnemus' plea under RCW 9.68A.130 be dismissed as a matter of law because the remedy is limited to civil actions that *result from* - could not have been brought *but for* - the defendant's commission of a crime

defined by RCW 9.68A and the State is incapable of violating that chapter?

V. RESTATEMENT OF THE CASE

A. DSHS Investigated Referrals About Ms. Ohnemus and Her Family and Provided Counseling Services to Them

In April 1996, when Ms. Ohnemus was eight years old and in the third grade, some classmates told a school counselor that Ms. Ohnemus was physically and sexually abused by her stepfather (Quiles). CP 93-95. The counselor reported that allegation to the Department of Social and Health Services (DSHS) and DSHS made a report to law enforcement. CP 86-95; 378. CPS and law enforcement investigated the allegation and both interviewed Ms. Ohnemus. CP 406. Ms. Ohnemus said that Quiles had "disgusting" movies and magazines, and that she had seen him masturbating, but she denied any sexual touching. CP 402. CPS offered the family services, but Ms. Ohnemus' parents declined. CP 405-06.

In April 1997, CPS received a referral alleging that Quiles had hit Ms. Ohnemus' sister, Elizabeth, as punishment for playing with matches. CP 432-44. There was no allegation of sexual abuse. CP 432-44. When CPS interviewed Ms. Ohnemus and Elizabeth at school, Elizabeth denied the allegation and said that she only received timeouts as discipline. CP 432-44. After this investigation ended, Ms. Ohnemus' parents agreed to

and received in-home counseling. CP 433. Her parents also agreed to enroll the girls in daycare when they were not in school. CP 434.

CPS had no further contact with Ms. Ohnemus' family until June 2001, when her mother contacted DSHS and asked for services because Ms. Ohnemus was not following house rules. CP 590-93. The family received in-home counseling in July and August 2001. CP 597-98. In April 2002, Ms. Ohnemus' mother again requested services after Ms. Ohnemus ran away. CP 599-600. When DSHS tried to schedule a meeting, the family refused and the file was closed. CP 599-603.

B. Ms. Ohnemus Disclosed Her Sexual Abuse in May 2002 and was Immediately Removed from the Home

On May 9, 2002, two weeks before she turned 15, Ms. Ohnemus and her sister told a school counselor that Quiles had sexually abused them. CP 97-103. The counselor relayed that information to CPS, which contacted law enforcement. CP 97-103. Police immediately removed the girls from the home and CPS placed them with relatives. CP 607.

During a May 16, 2002 police interview, Ms. Ohnemus described specific acts of sexual abuse, including performing oral sex on Quiles. CP 122-37. (Ms. Ohnemus later said that Quiles took pornographic pictures of her and posted them on the internet. CP 300.) Quiles was arrested that day

and on August 1, 2002, pled guilty to multiple sexual offenses. CP 436; 52-63. Ms. Ohnemus was returned to her mother. CP 207.

C. Starting in 2002, Ms. Ohnemus Received Counseling and Medical Treatment for Injuries She Related to Sexual Abuse

In July 2002, Ms. Ohnemus voluntarily entered an inpatient psychiatric unit and disclosed being depressed since the seventh grade due to daily sexual abuse by Quiles starting in the fifth grade. CP 193. Ms. Ohnemus said that she suffered recurrent and intrusive memories and flashbacks of the abuse. CP 193. She admitted acting out, being promiscuous, and using drugs to avoid thinking about the trauma. CP 193. Her discharge diagnoses included PTSD, major depression, alcohol abuse, and Ecstasy and marijuana dependence in early full remission. CP 186-87.

In March 2003, Ms. Ohnemus was hospitalized again and reported suicidal thoughts. CP 271-74. Records indicate that she showed poor judgment, impulsive behavior, depressive symptoms, and suicidal gesturing. CP 272. Her records also noted a history of experiencing severe symptoms of PTSD and depression related to being sexually abused by her stepfather from approximately ages 11 to 14. CP 271. Similar to the prior year, her discharge diagnoses included PTSD, chronic; Depressive Disorder, NOS [not otherwise specified]; and Polysubstance Abuse, by history. CP 272.

After discharge, Ms. Ohnemus ran away, associated with drug-and-alcohol users, and was non-compliant with medication. CP 267-70. In August 2003, she voluntarily returned to in-patient treatment, where she disclosed experiencing distressing, recurrent, intrusive thoughts, images, and memories of past abuse. CP 267-70. She also showed a number of avoidant behaviors, hypervigilance, increased startle response, significant insomnia, irritability, significant impulsivity, sexual promiscuity, and poor judgment. CP 267. Ms. Ohnemus also reported a history of mood swings with periods of depression and heightened elation. CP 267. On August 7, 2003, she told a counselor about being "very angry" at CPS and "hating" them for not believing her allegations and allowing the abuse to continue "so much longer." CP 584. Consistent with the prior year, her diagnoses on discharge included PTSD; Sexual Abuse of a Child, focus on victim; Mood Disorder, NOS; and History of Polysubstance Abuse. CP 269.

Ms. Ohnemus turned 18 on May 24, 2005. CP 374.

In March 2006, while still 18, Ms. Ohnemus again sought counseling for PTSD. CP 205. She disclosed extended periods of depression followed by short periods of increased energy and spending. CP 205.

In late 2007, at age 20, Ms. Ohnemus again sought counseling and disclosed sexual abuse between ages 5 and 15. CP 277-79; 310. She reported significant flashbacks of previous trauma; anxiety in social

situations, nightmares, difficulty with sleep and appetite, weepy affect and tearfulness, mood swings, decreased energy level or interest in activities, physical pain impacting performance and mood, attempts to avoid thoughts and people associated with trauma, hypervigilance, hypersensitivity to stimuli, poor concentration and attention, episodes of depression lasting over two weeks with suicidality, isolation, and low self-esteem. CP 286-88; 301; 310. Her records state that by October 2007, Ms. Ohnemus had "been on a variety of psychotropic medications." CP 300-01. In October 2007, Ms. Ohnemus told a counselor that she was abused between the ages of 4 and 15 and that she "tried to tell CPS and social workers about [Quiles'] sexual abuse." CP 300.

In November 2007, Ms. Ohnemus sought a psychiatric evaluation and medication. CP 310. She reported an increase in high risk sexual and drug behavior, feelings of euphoria, and over-spending. She relayed a history of Bipolar Disorder and depression. CP 298-99; 310. She also disclosed being in counseling since age 15, taking multiple medications since age 16, and approximately 10 in-patient stays. CP 311. As in prior years, Ms. Ohnemus was diagnosed with PTSD, Bipolar Disorder I, and a history of drug abuse. CP 313.

Ms. Ohnemus turned 21 in May 2008. That year, she continued to receive treatment and medication for her PTSD and Bipolar conditions,

and reported a significant increase in flashbacks, mania, and paranoia. CP 296. In June 2009, Ms. Ohnemus told a counselor that she wanted to focus on her PTSD symptoms. CP 206. In July, Ms. Ohnemus again sought hospitalization. CP 167-78. She complained of flashbacks and sleeplessness. CP 175. She relayed being sexually abused from ages 5 and 15 and said she "has PTSD because of this." CP 175. She also said that she had been diagnosed with Bipolar Disorder. CP 176.

In January 2010, Ms. Ohnemus told a counselor that she was molested by her stepfather from ages 6 and 15 and thought she had "been in survivor mode since then." CP 207. She admitted being "addicted to drugs and alcohol and to sex," using cocaine and Ecstasy, and working as a prostitute. CP 207-08. Ms. Ohnemus continued to receive counseling for PTSD and Bipolar Disorder. CP 207.

In 2011, Ms. Ohnemus continued to receive counseling. CP 209-21; 255-63. An April 2011 intake assessment indicated that she again met diagnostic criteria for PTSD and Bipolar I. CP 257.

Also in April 2011, Ms. Ohnemus applied for Social Security Disability benefits, claiming that she became disabled and unable to work on January 1, 2002, due to limitations/symptoms associated with PTSD, Bipolar Disorder, personality disorder, and anxiety. CP 328-41. Her

application stated that she "[h]ad PTSD due to being raped and molested" by her stepfather "from ages 5 to 15." CP 341.

Ms. Ohnemus continued to experience symptoms. In May 2012, she again sought in-patient treatment. She reported being very anxious, having chest pains, and feeling suicidal. CP 163-66. She again reported having flashbacks of when she was sexually molested from ages 5 and 15, and thoughts of self-harm. CP 163-66. In April 2013, Ms. Ohnemus again went to the hospital and reported flashbacks related to sexual abuse during childhood. CP 162. She told hospital staff that she had applied for SSI disability due to her Bipolar and PTSD conditions. CP 162.

D. Ms. Ohnemus Sued the State and the Trial Court Granted Summary Judgment for the State on All But One Claim

In the summer of 2011, Ms. Ohnemus claims that she obtained a copy of Quiles' 2002 criminal investigation file, which contained records of DSHS' involvement with her family. CP 349. In August 2012, at age 25, Ms. Ohnemus filed suit against the State of Washington. CP 3-6; 374.

In August 2014, the State moved for summary judgment on Ms. Ohnemus' claims. CP 12-341. That motion was limited to whether the statute of limitations barred Ms. Ohnemus' negligent investigation claim based on sexual and physical abuse; whether she failed to state a claim under 18 U.S.C. § 2252 and § 2255; and whether she could bring claims

under RCW 9.68A.100 and .130. CP 12-341. The motion specifically did not address the merits of her negligent investigation claim. CP 12.

The trial court granted summary judgment on Ms. Ohnemus' claims of sexual abuse and her claims under 18 U.S.C. § 2252 and § 2255.[2] CP 669-71. That order was silent on her physical abuse claims. CP 669-71. On the State's motion for reconsideration, the trial court granted summary judgment on Ms. Ohnemus' physical abuse claims. CP 673-75. In both orders, the trial court denied summary judgment on Ms. Ohnemus' claims under RCW 9.68A.100. CP 669-71; 673-75. On joint motion, the trial court entered partial final judgment on Ms. Ohnemus' abuse claims and certified the case for appellate review. CP 677-80.

VI. ARGUMENT IN RESPONSE TO CROSS-APPEAL

A. Standard of Review

On review of an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. *Ducote v. State, Dep't Soc. & Health Servs.*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). The appellate court may affirm the trial court's ruling on any

[2] Ms. Ohnemus did not appeal the trial court's dismissal of her 18 U.S.C. § 2252 and § 2255 claims and consequently those claims are not before the Court.

alternative ground that the record adequately supports. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008).

B. The Trial Court Properly Dismissed Ms. Ohnemus' Negligent Investigation Claim on Statute of Limitation Grounds Because the Discovery Rule Does Not Apply

Ms. Ohnemus filed her negligent investigation claim against the State on August 15, 2012, more than four years after she turned 21 and the three-year statute of limitations on that claim had expired. Now, Ms. Ohnemus argues that the discovery rule should extend that time period because, she alleges, not until 2011 when she read the police file regarding her stepfather's arrest did she learn of CPS's mid-1990s investigations - an essential element of her cause of action against the State. But the evidence shows that even if Ms. Ohnemus did not know the factual basis for her claim before she turned 18, in the exercise of due diligence she reasonably should have known. She was thus required to file her claims before she turned 21, and her claim is untimely.

1. The discovery rule tolls accrual of a cause of action only until a plaintiff knows or with due diligence should have known the essential factual elements of the claim

Ordinarily, a cause of action accrues, and the statute of limitations begins to run, when the challenged act or omission occurs. *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988). Most personal injury actions fall under a three-year limitations period.

RCW 4.16.080(2). Where the cause of action accrues against a minor, the statute of limitations is tolled until the minor turns 18. RCW 4.16.190(1).

Under Washington's discovery rule, a "cause of action begins to accrue when the claimant knew, or in the exercise of due diligence should have known, the essential elements of the cause of action." *Fradkin v. Northshore Utility Dist.,* 96 Wn. App. 118, 122, 977 P.2d 1265 (1999); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Stated another way, the discovery rule tolls the statute of limitations only until a plaintiff should have discovered through the exercise of due diligence the basis for the cause of action. *Allen*, 118 Wn.2d at 758. "A cause of action will accrue on that date even if *actual* discovery did not occur until later." *Id.*

The due diligence requirement is a longstanding court-established backstop on the application of the discovery rule. *See id.*; *Matter of Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992). As the *Allen* court explained, what matters is knowledge of the facts, not knowledge of a legal cause of action:

> The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.

Allen, 118 Wn.2d at 758 (citations omitted).

"The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Fradkin,* 96 Wn. App. at 122; *Allen*, 118 Wn.2d at 758.[3] Thus, while a potential plaintiff is not expected to know whether a defendant owed or breached a legal duty, the law requires laypersons to make efforts to inquire about whether a cause of action is available to them, based upon the **facts** available to them.

Once a plaintiff reasonably suspects that a wrongful act has occurred, he or she is deemed to be on notice that legal action must be taken and must, from that point, exercise due diligence to learn of any further facts necessary to initiate a lawsuit. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006). A plaintiff with notice of facts sufficient to put him or her on inquiry notice is deemed to have notice of all facts a reasonable inquiry would disclose:

> The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred.

Beard v. King County, 76 Wn. App. 863, 868, 889 P.2d 501 (1995).

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[3] *See also Ret. Pub. Emp. Coun. of Washington v. State*, 104 Wn. App. 147, 151-52, 16 P.3d 65 (2001) (discovery rule does not toll the statute of limitations merely because the plaintiff was ignorant of the law on which to base a cause of action).

Thus, a "smoking gun" is not needed to commence the limitation period; the limitation period begins to run even if a plaintiff is unable to later prove the tortious conduct occurred. *Id.*

At all times, a plaintiff bears the burden of proving that the facts constituting the claim were not, and could not have been, discovered by due diligence within the applicable limitations period. *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005). While a due diligence inquiry normally involves a fact question, courts can resolve such questions on summary judgment if reasonable minds could reach but one conclusion about those facts. *Mayer v. Huesner*, 126 Wn. App. 114, 123, 107 P.3d 152 (2005) (citing *Allen*, 118 Wn.2d at 760).

2. The discovery rule does not extend the time for Ms. Ohnemus to file her negligent investigation claim because she knew or reasonably should have known its factual elements by age 18

a. By age 18, Ms. Ohnemus knew the facts constituting her negligent investigation claim

The evidence shows that by age 18, Ms. Ohnemus knew all of the facts necessary to file her negligent investigation claim. On May 16, 2002, when she was 14, Ms. Ohnemus described to police in detail the abuse Quiles perpetrated against her. CP 122-37. Her treatment records also show that before she turned 18 she made the causal connection between the

abuse and her PTSD, depression, anxiety, and other harms for which she received significant counseling, hospitalization, and medication.

Ms. Ohnemus concedes that she had this factual knowledge. *Brief of Respondent/Cross-Appellant* (*Ohnemus Op. Br.)* at 23-24. Accordingly, she should be (1) deemed to have been on notice that legal action must be taken; (2) deemed to have had notice of all facts a reasonable inquiry would disclose; and (3) required to have exercised due diligence about whether a cause of action was available to her and to learn of any further facts necessary to have initiated a lawsuit related to her past abuse. *1000 Virginia Ltd. P'ship,* 158 Wn.2d at 581.

Ms. Ohnemus nonetheless claims that her cause of action for negligent investigation did not accrue because, she claims, not until 2011 did she "recall CPS's involvement in her family in 1996 and 1997." *Ohnemus Op. Br.* at 27. Ms. Ohnemus declares this claim "undisputed." *Id.* It is not. Ms. Ohnemus' records show that by the time she turned 18 - and certainly more than three years before she filed this action in 2012 - she was aware that DSHS/CPS social workers had investigated prior abuse allegations and not removed her from the home. CP 300; 584. In August 2003, when she was 16, she told a counselor about being "very angry" at CPS and "hating" them for not believing her allegations and allowing the abuse to continue "so much longer." CP 584. And in October 2007, at age 20, she

told a counselor that she was abused between the ages of 4 and 15 and that she "tried to tell CPS and social workers about [Quiles'] sexual abuse." CP 300. The trial court correctly concluded that Ms. Ohnemus had "discovered the alleged acts that caused her injury prior to her eighteenth birthday" and dismissed her claim as untimely. CP 662.

Ms. Ohnemus relies on *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979). *Ohnemus Op. Br.* at 22-24. But the holding of that case simply explains the operation of the discovery rule and applies it to the facts of that case; it does not dictate the result on the facts in this case. In *Ohler*, the Washington Supreme Court held that the plaintiff's medical malpractice claims did not accrue until she "discovered all of the essential elements of her possible cause of action, i.e., duty, breach, causation, damages." *Id.* at 511. The court held that while the plaintiff knew she had received too much oxygen at birth and knew that had resulted in her blindness, "there is a factual issue whether she *knew or should have known* that the result was a breach of the hospital's duty." *Id.* at 510 (emphasis added). The *Ohler* Court "refuse[d] to hold as a matter of law that knowledge received at age 4 imparts to that child a realization that administration of 'too much oxygen' did or may have constituted a breach of duty." *Id.* at 510-11.

Unlike in *Ohler,* Ms. Ohnemus knew - or, as discussed *infra*, in an exercise of due diligence she should have known - the essential elements of her negligent investigation claim when she turned 18. Her claim thus accrued when she turned 18 in 2005, and she was required to bring that claim before she turned 21 in 2008, four years before she filed this lawsuit in 2012. The discovery rule does not extend the time to file her claim.

b. Even if Ms. Ohnemus did not recall CPS' prior investigations, that knowledge is imputed to her because it was discoverable through the exercise of due diligence

Regardless of any dispute about whether, at age 18, Ms. Ohnemus had actual knowledge of the 1996 and 1997 CPS investigations, the discovery rule still does not extend the time bar on her negligent investigation claim. When she turned 18, Ms. Ohnemus knew the facts essential to bring an abuse claim and, before she turned 21, she had a duty to exercise due diligence to discover any remaining facts of that claim, and to file it against the State.

Ms. Ohnemus' own allegations establish that there was no impediment to her exercising the required due diligence and learning any unknown facts before she turned 21. Ms. Ohnemus claims that in 2011, she requested and obtained Quiles' criminal investigation file, including police

reports and DSHS records, and from those records learned of CPS' 1996 and 1997 investigations. *Ohnemus Op. Br.* at 16.

But those same records were equally available to her when she turned 18 and every day thereafter. She could have made public records requests and obtained the records from law enforcement and from the State. She could have obtained many of those documents from the court. She could have sued Quiles for abusing her, and through that action learned about the CPS investigations. If Ms. Ohnemus had exercised the required due diligence and made a reasonable inquiry based on the facts she already knew, she easily could have learned any unknown element of her cause of action before she turned 18 and the statute of limitations began to run, or in the three years thereafter.

Allen is instructive on this point. There, the plaintiff's husband was murdered in December 1979 by initially unknown assailants. *Allen*, 118 Wn.2d at 754-55. The plaintiff followed the police investigation for a few months, but eventually stopped. *Id.* at 755. In May 1982, widely-publicized media reports indicated that two men, both recent parolees, had been convicted in connection with plaintiff's husband's murder. *Id.* The plaintiff's family members did not see the initial media reports but became aware of them in 1983 and 1984. *Id.* at 755-56. The plaintiff herself learned the publicized facts and the State's role in paroling the offenders

in late September 1985 when her son and his attorney presented the information to her. *Id.* at 756-57. She sued the State in October 1985. *Id.* The court found the plaintiff's claims time-barred because if she had exercised due diligence, she could have easily learned the facts supporting her claim before the applicable statute of limitations expired. *Id.* at 758-59. While the court sympathized that a due diligence inquiry might force potential plaintiffs to delve into painful subjects, it explained that such inquiry was required to protect defendants against stale claims. *Id.* at 759.

The discovery rule tolls the statute of limitations until the time a plaintiff should have discovered through the exercise of due diligence the basis for the cause of action. But it is not intended to save a plaintiff who fails to exercise due diligence or who delays the required inquiry until every possible fact and defendant is identified and the claim is stale. As in *Allen,* Ms. Ohnemus cannot ignore the facts she already knew or invoke the discovery rule to avoid her duty to act on that knowledge and bring her claim in the time required by law.

Ms. Ohnemus knew the factual basis for her cause of action before she turned 18. Even if she did not, had she exercised due diligence, she easily could have learned that she might have a cause of action against the State. Thus, Ms. Ohnemus was required to file her claim before she turned

21. Because she did not, the trial court correctly concluded that her claims were untimely.

C. Ms. Ohnemus' Sexual Abuse Claim Should Be Dismissed as Untimely Under RCW 4.16.340(1)(c) Because She Made the Causal Connection Between the Abuse and Her Identified Injuries More Than Three Years Before Filing Suit

Ms. Ohnemus also argues that her claim based on sexual abuse survives under RCW 4.16.340(1)(c),[4] which extends the statute of limitations for three years from "the time the victim discover[s] that the [sexual abuse] caused the injury for which the claim is brought." *Ohnemus Op. Br.* at 35-42. Because Ms. Ohnemus made the causal connection between her abuse and the injuries on which she bases her claim more than three years before bringing her claim, this argument also fails.

1. RCW 4.16.340(1)(c) extends the time to bring a claim based on childhood sexual abuse to three years from when the victim makes the causal connection between the abuse and the resulting injury

RCW 4.16.340 governs claims brought "for recovery of damages for injury suffered as a result of childhood sexual abuse." RCW 4.16.340(1). In addition to intentional torts, this provision applies to negligence claims against third parties stemming from childhood sexual

[4] Ms. Ohnemus does not make any claims under RCW 4.16.340(1)(a) or (b).

abuse, including negligent investigation claims.[5] The time for commencing an action is tolled until a minor turns 18. RCW 4.16.340(1).

The provision relied upon by Ms. Ohnemus, RCW 4.16.340(1)(c), extends the period for bringing a claim to "[w]ithin three years of the time the victim discovered that the act caused the injury for which the claim is brought[.]" Thus, a claim accrues under RCW 4.16.340(1)(c) when a victim of childhood sex abuse in fact makes a causal connection between the past sexual abuse and the injury for which the suit is brought. *Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006).

But RCW 4.16.340(1)(c) does not extend the statute of limitations for all possible injuries. As the Legislature clarified when adding subsection RCW 4.16.340(1)(c), the provision is triggered by discovery of "more serious injuries:"

> (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**.
> . . .

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[5] There is no common law cause of action for negligent investigation. A negligent investigation claim is a narrow exception arising from the State's statutory duty under RCW 26.44.050 to investigate allegations of child abuse. *Tyner v. Dep't. of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003). Negligent investigation claims are subject to the limitations in RCW 4.16.340 if the alleged harmful placement stems from an act of childhood sexual abuse.

> . . . The legislature intends that the **earlier discovery of less serious injuries should not affect** the statute of limitations for **injuries that are discovered later**.

Laws of 1991, ch. 212, § 1 (adding findings and intent to RCW 4.16.340) (emphasis added). These findings makes clear that RCW 4.16.340(1)(c) applies only when a victim makes a causal connection between the childhood sexual abuse and "more serious injuries" than previously suffered. While the Legislature has not defined "more serious injuries" in the context of RCW 4.16.340, case law provides some guidance.[6]

Directly on point is *Carollo v. Dahl*, 157 Wn. App. 796, 240 P.3d 1172 (2010), in which the Court of Appeals specifically considered the meaning of "more serious injuries" and rejected the plaintiff's claim that "the severity of his most recent symptoms should entitle him to the more lenient provisions of the discovery of harm provision" in RCW 4.16.340(1)(c). *Carollo*, 157 Wn. App. at 802. In *Carollo*, the plaintiff in 1988 had sought "counseling for emotional difficulties" and was told that the sexual abuse "was likely the source of his psychological difficulties." *Id.* at 798. In 1995, after two years of additional counseling, the plaintiff was "diagnosed with various [PTSD] symptoms including: depression,

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[6] The Legislature has also not defined "discover" in the context of RCW 4.16.340(1)(c). Webster's defines "discover" as "to make known (something secret, hidden, unknown, or previously unnoticed)." *Webster's Third New International Dictionary* 647 (2002). Applying this definition, experiencing an increase in symptoms or being prescribed a different medication does not constitute "discovering" a more serious injury.

flashbacks, and nightmares" related to the sexual abuse. *Id.* at 798-799. Then, in 2008, the plaintiff was diagnosed with worsened PTSD symptoms, panic disorder, major anxiety, major depressive disorder, and agoraphobia, all related to the sexual abuse. *Id.*

The *Carollo* court rejected the plaintiff's argument that because the 2008 "more severe manifestations of [plaintiff's] underlying PTSD" were "unanticipated, it invoke[d] the discovered harm portion" of RCW 4.16.340(1)(c). *Carollo*, 157 Wn. App. at 802. "[T]he statute says nothing about quantity of harm, it speaks of 'injury' and connection of 'injury' to 'acts.'" *Id.* Reviewing the cases, the court identified two sets of circumstances in which RCW 4.16.340(1)(c) extends the time for a claim to be brought: "(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*, 157 Wn. App. at 801 (emphasis added). The court concluded that with RCW 4.16.340(1)(c) "the Legislature sought to give causes of action for *different* injuries discovered at different times rather than applying to more severe manifestations of a prior injury." *Carollo*, 157 Wn. App. at 803. Thus, an increase in the severity of symptoms or a recurrence of previously existing symptoms is not the type of "injury" that would permit

a claim to be brought outside the three year statute of limitations from the time the abuse occurred. *Carollo*, 157 Wn. App. at 803.

Ms. Ohnemus cites *Hollmann v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386 (1997), but that case is inapposite - *Hollman* focused on the causal connection element of RCW 4.16.340(1)(c), not the more serious injuries element. Specifically, *Hollman* rejected the trial court's insertion of a constructive discovery element into RCW 4.16.340(1)(c) and held that subsection (1)(c) tolls the statute of limitations "until the victim of childhood sexual abuse **in fact discovers the causal connection** between the [abusive] act and the injuries for which the claim is brought." *Hollman*, 89 Wn. App. at 334 (emphasis added).[7]

2. Ms. Ohnemus made the causal connection between her childhood sexual abuse and her injuries more than three years before filing this lawsuit

The evidence shows that, by the time she turned 18, Ms. Ohnemus made the causal connection between her past sexual abuse and the resulting injuries on which she bases her current claim. Further, she has failed to identify any injuries that constitute "more serious injuries" for which RCW 4.16.340(1)(c) could restart the statute of limitations. Thus,

[7] Ms. Ohnemus also cites *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081 (2006). Like *Hollman*, *Korst* turned on when the plaintiff had made the causal connection between her abuse and her injuries, not whether those injuries were "more serious injuries" discovered within three years of bringing suit. *Korst*, 136 Wn. App. at 205, 208.

even with the extremely "broad avenue" of redress RCW 4.16.340(1)(c) provides, Ms. Ohnemus failed to timely file her claim against the State.

a. By the time she turned 18, Ms. Ohnemus made the causal connection between her childhood sexual abuse and her resulting injuries

No reasonable trier of fact could dispute that Ms. Ohnemus repeatedly sought treatment, disclosed her past abuse, and connected her abuse to her injuries. CP 175; 186-87; 193.

Beginning in 2002 at age 15, Ms. Ohnemus had substantial counseling to address her past sexual abuse and its effects on her. She discussed the abuse and resulting injuries with multiple treatment providers, who diagnosed her with PTSD, major depression (severe), anxiety, and other conditions. Ms. Ohnemus' medical and counseling records, law enforcement interviews, SSI claim, discovery responses, and deposition testimony prove that she made the causal connection between her past sexual abuse and her resulting injuries not later than 2003.

By the end of 2003, Ms. Ohnemus (1) knew she had been sexually abused by Quiles as a child; (2) identified her injuries resulting from that abuse, including depression, flashbacks, acting out, sexual promiscuity, drug abuse, poor judgment, impulsive behavior, avoidant behavior, suicidal thoughts and gestures, hypervigilance, increased startle response, insomnia, irritability, mood swings, hopelessness, helplessness, and a

tendency to blame others for her conduct; (3) recognized that the injuries resulting from her sexual abuse required counseling, hospitalization, and/or medication; and most significantly, (4) causally connected her past sexual abuse with her injuries and her need for counseling, hospitalization, and medication for those injuries.

Viewed in the light most favorable to her, the evidence clearly shows that by 2005, when she turned 18, Ms. Ohnemus made the causal connection between her childhood sexual abuse and her resulting injuries. Consequently, under RCW 4.16.340(1)(c), Ms. Ohnemus then had three years, until she turned 21 in May 2008, to file suit. She failed to file until August 2012. Even under RCW 4.16.340(1)(c), her claims are four years untimely and the trial court properly dismissed them as a matter of law.

b. Ms. Ohnemus has not established "more serious injuries" that extend the statute of limitations under RCW 4.16.340(1)(c)

Nonetheless, Ms. Ohnemus argues that the Court should deem her claim timely under RCW 4.16.340(1)(c) because in 2011, after reading the police file relating to Quiles' 2002 arrest, she "became aware of more significant harm, including that her injuries are likely permanent." *Ohnemus Op. Br.* at 43. The Court should reject her argument because neither an "increase in symptoms" of existing injuries nor learning that

existing injuries may be permanent constitutes the discovery of "more serious injuries" that would trigger RCW 4.16.340(1)(c).

Ms. Ohnemus claims that reading about CPS' 1996 and 1997 investigations in 2011 compounded her existing emotional injuries. *Ohnemus Op. Br.* at 18. She also claims that the impact of her abuse has escalated, that her treatment has expanded to include anti-psychotic psychotropic medication, and that she now requires more significant and long term medical care. *Id.* But her records show that as early as 2002, Ms. Ohnemus suffered severe psychological, emotional, and physical injuries - including depression, anxiety, drug use, flashbacks, mood swings, promiscuity, nightmares, suicidal thoughts, and other symptoms of PTSD, Bipolar Disorder and Borderline Personality Disorder - which required over 10 hospitalizations, ongoing counseling, and medication. Her records also show that she and her treatment providers directly and repeatedly linked these injuries to her childhood sexual abuse. Ms. Ohnemus' records also show that by October 2007, she had already "been on a variety of psychotropic medications." CP 300-01. What her records fail to show is a more serious injury, a different diagnosis, or a substantive change in her treatment after she read Quiles' police file in 2011. CP 510-13.

Ms. Ohnemus does not articulate how her alleged "escalation," "expansion" or "increase in symptoms" constitutes more serious injuries

than those she acknowledges she has suffered for years. Thus, as in *Carollo,* Ms. Ohnemus has failed to show that since she turned 18 - or within three years of filing this lawsuit - she has suffered a more serious injury sufficient to trigger RCW 4.16.340(1)(c).

At most, Ms. Ohnemus' claimed injuries constitute a reawakening or exacerbation of her prior symptoms and conditions which she casually linked to her childhood sexual abuse before she turned 21 in 2008. As in *Carollo*, the mere worsening of a condition does not trigger RCW 4.16.340(1)(c) because "the statute says nothing about quantity of harm, it speaks of 'injury' and connection of 'injury' to 'acts.'" *Carollo*, 157 Wn. App. at 802. Thus, RCW 4.16.340(1)(c) does not extend the statute of limitations on Ms. Ohnemus' claim.

Similarly, Ms. Ohnemus' claim that her prior injuries might be permanent also does not trigger RCW 4.16.340(1)(c). Given the nature of her diagnoses (PTSD, depression, bipolar disorder, and substance abuse/dependency), Ms. Ohnemus may experience continued symptoms throughout her life. But if she could restart the statute of limitations each time she claimed an "increase in symptoms" related to her childhood sexual abuse, there would never be a bar to her claim. The Court should reject Ms. Ohnemus' attempt to extend RCW 4.16.340(1)(c) to cover an "injury" not contemplated by the statute or supported by law.

Ms. Ohnemus also claims that "learning of CPS' shoddy investigations . . . sent [her] into a marked tailspin requiring increased medication." *Ohnemus Op. Br.* at 42. To the extent that Ms. Ohnemus is arguing that "the act" triggering RCW 4.16.340(1)(c) was CPS' alleged negligence in 1996 and 1997, or her "learning" of that alleged negligence in 2011, that argument contravenes the plain language and spirit of the statute. The limitation periods under RCW 4.16.340(1) apply to actions "for recovery of damages for injury suffered **as a result of** childhood sexual abuse." (Emphasis added.) The plain language of RCW 4.16.340(1) unambiguously indicates that the "act" referred to in RCW 4.16.340(1)(c) is the act of sexual abuse.[8] Ms. Ohnemus was injured by the "act" of her stepfather's abuse in 1996 or 1997, not by her purported 2011 discovery that the State may have owed and breached a duty to her years earlier. The language of the statute simply does not support the "act" being anything other than the childhood sexual abuse.

[8] All three methods for calculating the limitation period refer to the act causing the alleged injury - i.e., the "injury suffered as a result of childhood sexual abuse." *Cf* RCW 4.16.340(1)(a) ("the act alleged to have caused the injury or condition"); (1)(b) ("the injury or condition was caused by said act"); and (1)(c) ("the act caused the injury for which the claim is brought"). The statute explains that the victim "need not establish which act in a series of continuing sexual abuse" caused the complained-of injury, as the date of discovery may be computed from the date the victim discovered "the last act" of a common scheme or plan of sexual abuse by the same perpetrator. RCW 4.16.340(2). The statute also states that "'child sexual abuse' means any act committed" against a complainant who is a minor "at the time of the act and which act" would have violated applicable criminal statutes "at the time the act was committed." RCW 4.16.340(5).

Ms. Ohnemus' own words show that she recognized the causal relationship between her past sexual abuse and her physical and psychological conditions more than three years before she sued the State. While Ms. Ohnemus claims that she did not discover the full scope of the injuries caused by that abuse until 2011, the injuries she identifies are continuations of previously known injuries which she had connected to her abuse more than three years before bringing her claim. The only information Ms. Ohnemus arguably "discovered" in 2011 was a potential legal basis on which to sue the State. Such a discovery does not trigger an extension of the statute of limitations under RCW 4.16.340(1)(c). *Fradkin,* 96 Wn. App. at 122; *Allen*, 118 Wn.2d at 758.

VII. ARGUMENT ON APPEAL

The State appeals the denial of summary judgment on Ms. Ohnemus' claim that the State is liable for her sexual exploitation under RCW 9.68A, which criminalizes the sexual exploitation of children, and her associated plea for costs and attorneys' fees under RCW 9.68A.130. Ms. Ohnemus' claim must be dismissed as not cognizable because the State is incapable of violating RCW 9.68A. Her plea for costs and fees must also be dismissed because the remedy under RCW 9.68A.130, which applies to a "minor prevailing in a civil action arising from violation" of RCW 9.68A, is limited to plaintiffs prevailing in

civil actions that *result from* - could not have been brought *but for* - the defendant's commission of one of the crimes defined by RCW 9.68A. Recovery against the State is plainly not what the Legislature intended.

A. Standard of Review

The State's appeal involves questions of law, which are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Matters of statutory interpretation are reviewed *de novo*. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). Whether "a statute provides for an award of fees 'is a question of law, reviewed *de novo*.'" *Guillen v. Contreras*, 147 Wn. App. 326, 331, *reversed on other grounds by Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010).

B. The State's Appeal is Not Moot or Premature

Affirming dismissal on summary judgment of Ms. Ohnemus' abuse claims, discussed *supra*, does not dispose of the State's appeal. Ms. Ohnemus raised an independent claim that the State is liable to her "for Sexual Exploitation pursuant to RCW 9.68A.100" (CP at 5 (Complaint ¶ 3.4)), and a related plea for attorneys' fees and costs pursuant to RCW 9.68A.130 (CP at 6 (Complaint ¶ 4.1(G)). The trial court resolved neither the claim nor the related plea for damages.

In particular, the plea for fees and costs raises an important issue of first impression in Washington. To date, no appellate court has addressed

whether RCW 9.68A.130, which awards attorneys' fees and costs in a civil action arising from violation of statutes criminalizing the sexual exploitation of minors, applies against the State.

Ms. Ohnemus may argue, as she did below, that this Court should defer any ruling on her claim under RCW 9.68A until such time as she prevails on her civil action.[9] CP 366. To support her position, she may again attempt to rely on three federal district court orders which have taken that approach. But these orders have no precedential value regarding the interpretation of RCW 9.68A.130. Guidance from the Court on this issue will help future litigants to value and efficiently resolve or litigate claims in which the issue is raised.

C. The State is Not Liable Under RCW 9.68A, Which Criminalizes the Sexual Exploitation of Children

Ms. Ohnemus' claim that the State is liable to her for sexual exploitation under a provision of RCW 9.68A fails for at least three reasons. First, a claim that the State has violated a provision of RCW 9.68A, which criminalizes the sexual exploitation of children, fails because the State, as a matter of law, cannot commit such a crime. Second, Ms. Ohnemus has alleged *no* facts that prove a violation of RCW 9.68A

[9] Below Ms. Ohnemus also indicated that she would "file an amended complaint alleging violation of RCW 9.68A (not 9.68A.100)." CP 366. She has not done so. Nor would doing so benefit her, as explained *infra* in Section VII.C.

by the State. And third, Ms. Ohnemus' claim that a provision of RCW 9.68A has been violated is untimely.

1. Any claim that the State has violated RCW 9.68A fails because the State, as a matter of law, cannot commit RCW 9.68A crimes

RCW 9.68A was enacted in 1984 to "prevent[] sexual exploitation and abuse of children" and to protect children from "those who seek commercial gain or personal gratification based on the[ir] exploitation." Laws of 1984, ch. 262, § 1, *codified at* RCW 9.68A.001. "This chapter of our criminal code reflects the Legislature's intent to protect children from exposure to sexual misconduct for the personal gratification of another." *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). In 2007, the Legislature further clarified this purpose, explaining its intent "to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children." Laws of 2007, ch. 368 § 1, *amending* RCW 9.68A.001.

The State cannot violate RCW 9.68A or RCW 9.68A.100 for at least three reasons: the State is not a "person" who is subject to the crimes defined by RCW 9.68A; the State is incapable of forming the criminal intent required to commit a criminal offense, including those defined by RCW 9.68A; and the State is incapable of engaging in sexual conduct, an element of the crime defined in RCW 9.68A.100. Here, the State was the

entity that prosecuted and convicted Ms. Ohnemus' stepfather for her sexual abuse and exploitation. The State did not, and could not, commit these crimes.

a. The State is not a "person" who is subject to the crimes defined by RCW 9.68A

The State is not subject to the crimes defined by RCW 9.68A because the State is not a "person" for purposes of those crimes. RCW 9.68A defines felony and misdemeanor criminal offenses applicable to the commercial sexual exploitation of children. The statutes specify that a "person" is guilty of or commits the designated offense if he or she engages in particular conduct. *See e.g.* RCW 9.68A.100 (1999) (providing that "[a] *person* is guilty of patronizing a juvenile prostitute if *that person* engages or agrees or offers to engage in sexual conduct with a minor in return for a fee") (emphasis added); *see also* RCW 9.68A.040 - .106, .120, and .150 (providing that a "person" is guilty of or commits the defined crimes upon engaging in particular conduct).

But the term "person" as used in RCW 9.68A does not include the State. Because RCW 9.68A itself does not define "person," the definitions in RCW 9A.04 apply.[10] RCW 9A.04.090. RCW 9A.04.110(17) provides

[10] When construing offenses defined by RCW 9.68A, the general principles and definitions set out in RCW 9A.04 apply. *See* RCW 9A.04.090 (explaining "the provisions of chapters 9A.04 . . . are applicable to offenses defined by this title *or another statute*,"

that "'[p]erson,' 'he or she,' and 'actor' include *any natural person* and, where relevant, a *corporation*, *joint stock association*, or an *unincorporated association*."[11] (Emphasis added.) The State, a governmental entity, is not a "person" as thus defined.

Because "person" does not include the State, the offenses defined by RCW 9.68A do not apply to the State. Thus, the State cannot be liable under RCW 9.68A.

b. The State is incapable of forming criminal intent, a required element in the crimes defined by RCW 9.68A

The State is incapable of committing the crimes defined by RCW 9.68A because the State is incapable of forming criminal intent, an essential element of those crimes. Criminal intent is an element in a criminal offense that is *malum in se*. *City of Tacoma v. Lewis*, 9 Wn. App. 421, 426, 513 P.2d 85 (1973) (citing *Seattle v. Gordon*, 54 Wn.2d 516, 342 P.2d 604 (1959)). A "*malum in se* offense is 'naturally evil as adjudged by the sense of a civilized community.'" *State v. Anderson*, 141 Wn.2d 357, 369, 5 P.3d 1247 (2000) (quoting *State v. Horton*, 139 N.C. 588, 51 S.E. 945, 946 (1905)). Criminal intent "is an implied element of a

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unless specifically provided otherwise) (emphasis added). RCW 9.68A offenses are not specifically exempt.

[11] The definition was the same in all relevant respects in 2002. *See* RCW 9A.04.110(17) (2002) ("'Person,' 'he,' and 'actor' include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.")

mala in se statutory crime which fails to include it as an element, unless the statute expressly eliminates it." *State v. Minium*, 26 Wn. App. 840, 841-42, 615 P.2d 511 (1980) (citing *Morissette v. United States*, 342 U.S. 246 (1952) and *State v. Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970)).

It is indisputable that the criminal offenses defined by RCW 9.68A - offenses involving the sexual exploitation of children - are crimes *mala in se*. Many of the provisions in RCW 9.68A expressly identify the criminal intent required to commit the defined offense, and none expressly eliminate the intent element. Thus, the offenses defined by RCW 9.68A necessarily require criminal intent as one of their essential elements.

But government entities, such as the State, are incapable of forming the criminal intent required to commit a crime. *See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (affirming dismissal on summary judgment because "government entities are incapable of forming a malicious intent"); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 (1981) (noting the existence of "respectable authority" that municipal corporations "cannot, as such, do a criminal act or a willful or malicious wrong"). Accordingly, the State is incapable of committing the crimes defined by RCW 9.68A.

c. The State is incapable of engaging in sexual conduct, a requisite element of the offense defined by RCW 9.68A.100

The plain language of RCW 9.68A.100 also defeats a claim that the State can commit the offense defined therein, because the State cannot engage in sexual conduct. In 2002, when Ms. Ohnemus was last abused, RCW 9.68A.100 criminalized patronizing a juvenile prostitute:

> A person is guilty of patronizing a juvenile prostitute if that person *engages* or *agrees* or *offers to engage in sexual conduct* with a minor in return for a fee, and is guilty of a class C felony[.]"

Former RCW 9.68A.100 (1999) (emphasis added).

The current RCW 9.68A.100 provides a person "is guilty of commercial sexual abuse of a minor if":

> (a) He or she pays a fee to a minor or a third person as compensation for a minor *having engaged in sexual conduct with him or her*;
>
> (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor *will engage in sexual conduct with him or her*; or
>
> (c) He or she solicits, offers, or requests to *engage in sexual conduct* with a minor in return for a fee.

RCW 9.68A.100(1) (emphasis added).

Thus, to commit the offense defined by RCW 9.68A.100, whether in 2002 or today, a perpetrator must be capable of engaging in sexual

conduct.[12] Obviously, the State, a governmental entity, is incapable of engaging in sexual conduct. Thus, the State is incapable of violating RCW 9.68A.100.

2. Ms. Ohnemus alleged no facts to support the State having violated RCW 9.68A.100

The last year Ms. Ohnemus claims abuse by her stepfather was 2002. As discussed *supra*, at that time RCW 9.68A.100 criminalized patronizing a juvenile prostitute, through "engag[ing] or agree[ing] or offer[ing] to engage in sexual conduct with a minor in return for a fee." Former RCW 9.68A.100 (1999).

The version of RCW 9.68A.100 in effect in 2002 does not apply to any facts alleged in this case. Ms. Ohnemus does not allege that the State engaged in, or agreed or offered to engage in, sexual conduct with her in return for a fee. Thus, the State cannot be liable to her for any alleged violation of RCW 9.68A.100 as that statute read in 2002.

Neither is the State liable to Ms. Ohnemus for any alleged violation of the current RCW 9.68A.100. The current version of RCW 9.68A.100 took effect in 2007, more than five years after the abuse of Ms. Ohnemus ended. *See* Laws of 2007, ch. 368, § 2, *amending* RCW

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[12] When RCW 9.68A.100 was amended to its current version in 2007, "sexual conduct" was expressly defined to mean "sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW." Laws of 2007, ch. 368, § 2(4); *see also* RCW 9A.44.010(1) (defining "sexual intercourse") and (2) (defining "sexual contact").

9.68A.100. As discussed *supra*, RCW 9.68A.100(1) now criminalizes commercial sexual abuse of a minor, through a person "pay[ing] a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her" or "pay[ing] or agree[ing] to pay a fee . . . understanding that in return therefore such minor will engage in sexual conduct with him or her" or soliciting such an arrangement.

The current version of RCW 9.68A.100 also does not apply to any facts alleged in this case. Ms. Ohnemus does not allege that the State paid, agreed to pay, or solicited, a fee to her or a third person as compensation for any alleged sexual conduct involving her.

In sum, Ms. Ohnemus does not allege that the State committed any act in violation of the current or the 2002 version of RCW 9.68A.100. The State cannot be held liable for any alleged violation of that statute.

3. The claim under RCW 9.68A.100 is untimely

Ms. Ohnemus has brought a civil action, albeit attempting to formulate a civil claim based on a criminal statute. Her claim is appropriately governed by civil time bars and, for the reasons discussed *supra* in Section VI.C, her claim is untimely.

But even if Ms. Ohnemus' claim were governed under the criminal limitation statute, the claim is still untimely. Time limits for prosecuting criminal offenses are prescribed in RCW 9A.04.080. An offense under

RCW 9.68A.100 may not be prosecuted "more than three years after its commission." RCW 9A.04.080(1)(h).[13] Thus, the period for commencing prosecution under RCW 9.68A.100 elapsed in 2005, three years after Ms. Ohnemus claims she was last sexually abused.

D. Ms. Ohnemus Is Not Entitled to Fees and Costs Under RCW 9.68A.130, a Remedy Available to Plaintiffs Prevailing in Civil Actions Arising from Violation of RCW 9.68A

Just as Ms. Ohnemus' claim that the State is liable under RCW 9.68A.100 fails, so too does her claim that she is entitled to "[a]ttorney fees and costs pursuant to RCW 9.68A.130 . . . ." CP at 6 (Complaint ¶ 4.1(G)). RCW 9.68A.130 allows child victims of commercial sexual exploitation to recover their costs and fees when they prevail in civil actions against those who have exploited them. While the meaning of RCW 9.68A.130 is an issue of first impression, the statute's language and the intent of the Legislature are plain and plainly exclude Ms. Ohnemus from recovering attorneys' fees and costs here.

1. RCW 9.68A.130 provides child victims of commercial sexual exploitation with a means to recover costs and fees in civil actions against their exploiters

RCW 9.68A.130 provides that "[a] minor prevailing in a civil action arising from violation of [RCW 9.68A] is entitled to recover the costs of the suit, including an award of reasonable attorneys' fees." The

[13] For purposes of prosecutions under RCW 9.68A.100, this limitation was the same in 2002. *See* RCW 9A.04.080 (2002).

fundamental objective in construing a statute is to ascertain and carry out the Legislature's intent - if the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "[T]hat meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11.

RCW 9.68A.130 allows child victims of commercial sexual exploitation to recover their litigation costs and fees when they prevail in civil actions against those who have exploited them. When the Legislature amended RCW 9.68A in 2007, it clarified its intent "to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children." Laws of 2007, ch. 368 § 1, *amending* RCW 9.68A.001. Limiting the remedy of RCW 9.68A.130 to civil actions against perpetrators of the crimes defined by RCW 9.68A advances this legislative intent because it enables child victims of commercial sexual exploitation to pursue civil actions against those who pay for or profit from their sexual exploitation. Likewise, limiting the remedy in this manner avoids the unintended consequence of levying costs and fees against third-party defendants in unrelated civil actions in tort, such as the State faces with Ms. Ohnemus' negligent investigation claim.

a. The civil action must arise from violation of RCW 9.68A - in other words, "but for" that criminal act, the action could not arise

RCW 9.68A.130 limits its remedy to civil actions "arising from violation of [RCW 9.68A]." Neither "arising from" nor "violation" are defined for purposes of RCW 9.68A.130. But the plain meaning of those terms confirms the Legislature's intent that RCW 9.68A.130 allow victims to recover costs and fees in civil actions against their exploiters, thereby holding accountable those who pay for or profit from the sexual exploitation of children.

Taking first the term "violation," Webster's defines "violate" as "**1** : to fail to keep : BREAK, DISREGARD <~ the law>." *Webster's Third New International Dictionary* 2554 (2002). Black's confirms this meaning, defining a "violation" as "**1.** An infraction or breach of the law; a transgression. See INFRACTION. **2.** The act of breaking or dishonoring the law; the contravention of a right or duty."[14] *Black's Law Dictionary* 1800 (10th ed. 2009). Thus, "violation" of RCW 9.68A means breaking the law set forth in that chapter. RCW 9.68A defines criminal offenses involving the sexual exploitation of children, so "violation of [RCW 9.68A]" means committing one of the crimes defined in RCW 9.68A.

[14] Black's offers two additional definitions, numbers three and four, which are not relevant in this context. *Black's* 1800.

Second, with respect to the meaning of "arising from," the pertinent definition for "arise" from Webster's is "to come about : come up : take place." *Webster's* 117. Black's defines "arise" as "**1.** To originate: to stem (from) <a federal claim arising under the U.S. Constitution>. **2.** To result (from) <litigation routinely arises from such accidents>."[15] *Black's* 129. Thus, under RCW 9.68A.130 a civil action "arising from" violation of RCW 9.68A must *come about, originate*, or *result* from that violation.

This meaning of "arising from" is consistent with that determined by the State Supreme Court when it considered the term "arising from" in the State's long arm statute. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989). That statute limits specific jurisdiction to "causes of action *arising from* acts enumerated" in the statute, in an action in which jurisdiction over the defendant is based upon it. RCW 4.28.185(3). The *Shute* Court held that "arising from" means "but for," explaining that a cause of action arises from a defendant's act where the cause of action could not have arisen "but for" that act. *Shute*, 113 Wn.2d at 772 (holding "but for" defendant's action within the state, plaintiff would not have been injured, therefore plaintiff's claim "arises from" defendant's action).

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[15] *Black's* offers two additional definitions that are not relevant in this context. *Black's* 129.

Thus, in RCW 9.68A.130 "a civil action arising from violation of [RCW 9.68A]" means that the civil action *results from* - could not have been brought *but for* - the defendant committing one of the criminal offenses defined in RCW 9.68A. Consistent with the Legislature's intent and the plain language of RCW 9.68A.130, the Court should hold that to obtain the statute's remedy, a plaintiff must prevail in a civil action against the perpetrator of a crime under RCW 9.68A, an action that *results from* - could not have been brought *but for* - the defendant's commission of one of the crimes defined by RCW 9.68A.

b. The remedy becomes available upon a victim prevailing in a civil action - the statute itself does not create a cause of action

RCW 9.68A.130 is a remedy statute – "a minor prevail[ing] in a [qualifying] civil action . . . is entitled to" the remedy of recovering "the costs of that suit, including an award of reasonable attorneys' fees." The statute requires "prevailing in a civil action" as a condition precedent to obtaining its remedy. The requirement to prevail in a civil action *before* the remedy is triggered means that the basis for the civil action must lie outside of RCW 9.68A.130. The statute requires first that a qualifying civil action be brought, based in one of the civil causes of action that are available to individuals who are harmed by the actions of others. Upon prevailing in that action, RCW 9.68A.130's remedy becomes available.

RCW 9.68A.130 does not itself create a cause of action. "Where appropriate, a cause of action may be implied from a statutory provision when the Legislature creates a right or obligation without a corresponding remedy." *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697 at 703 (citing *Bennett v. Hardy,* 113 Wn.2d 912, 920, 784 P.2d 1258 (1990)). That is not the case here. RCW 9.68A.130 does not create a right without a remedy - it creates a remedy for a designated class of plaintiffs who have vindicated a right by prevailing in a qualifying civil action (an action arising from violation of RCW 9.68A).

2. Under the plain language of RCW 9.68A.130, Ms. Ohnemus' plea for costs and fees must be dismissed

RCW 9.68A.130 does not provide a remedy to Ms. Ohnemus because her action does not arise from violation of RCW 9.68A. As discussed *supra*, a civil action arises from violation of RCW 9.68A if the action results from - could not be brought *but for* - the defendant's commission of one of the crimes defined by RCW 9.68A. Ms. Ohnemus' civil action does not result from the State's commission of such a crime.

First, Ms. Ohnemus cannot prevail on her claim that the State violated RCW 9.68A.100 because the State is incapable of violating RCW 9.68A. *See supra* Section VII.C. The State is not a "person" to whom the crimes defined by RCW 9.68A apply. The State is incapable of

forming the criminal intent required to commit the criminal offenses defined by RCW 9.68A. And the State is incapable of engaging in sexual conduct, an element of the crime defined by RCW 9.68A.100. Additionally, Ms. Ohnemus has alleged no facts to prove the State violated RCW 9.68A.100, the provision under which she claimed the State was liable. CP at 5 (Complaint ¶ 3.4). And Ms. Ohnemus does not allege that the State engaged in or offered to engage in sexual conduct with her in return for a fee, as is required for violation of RCW 9.68A.100.

Second, nor do the other civil claims brought by Ms. Ohnemus arise from violation of RCW 9.68A. Ms. Ohnemus claims that CPS was negligent when it investigated abuse referrals in 1996 and 1997 and that negligence resulted in her remaining in her home where she was subjected to continued sexual and physical abuse. This negligent investigation claim did not result from the State's commission of any crime defined by RCW 9.68A. Because Ms. Ohnemus' claims do not arise from violation of RCW 9.68A, she is not entitled to the remedy of costs and reasonable attorneys' fees provided by RCW 9.68A.130.

VIII. CONCLUSION

The discovery rule does not extend the statute of limitations on Ms. Ohnemus' negligent investigation claim. Even if she did not know the factual basis for that claim more than three years prior to filing it, there can

be no question that in an exercise of due diligence she should have. Ms. Ohnemus' actual knowledge of CPS' involvement with her family in the mid-1990s is established by chart notes from 2003 and 2007. But regardless of her actual knowledge, Ms. Ohnemus claims that she discovered CPS' involvement in 2011 *when she read the 2002 police reports from her stepfather's investigation.* Those reports are public documents and were equally available to her when she turned 18 in 2005 and thereafter. Due diligence obliged her to obtain the reports and timely bring her claim.

RCW 4.16.340(1)(c) also does not extend the time bar for Ms. Ohnemus to bring her claim based on sexual abuse. The record establishes that by the time she turned 18, Ms. Ohnemus had made the causal connection between her sexual abuse and her resulting medical and psychological conditions. While earlier discovery of less serious injuries does not prevent claims for "more serious injuries," Ms. Ohnemus' claimed increase in symptoms and awareness that her psychological injuries are likely permanent do not constitute the more serious injuries to which RCW 4.16.340(1)(c) applies.

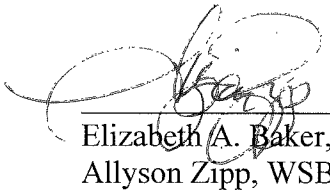
Finally, Ms. Ohnemus' claim that the State is liable for her sexual exploitation under RCW 9.68A and her associated plea for costs and attorneys' fees under RCW 9.68A.130 both fail. Because the State is incapable of violating RCW 9.68A, Ms. Ohnemus' claim must be

dismissed as not cognizable. Her plea for costs and fees must also be dismissed because the remedy under RCW 9.68A.130, which applies to a "minor prevailing in a civil action arising from violation" of RCW 9.68A, is limited to plaintiffs prevailing in civil actions that *result from* - could not have been brought *but for* - the defendant's commission of one of the crimes defined by RCW 9.68A. Recovery against the State is plainly not what the Legislature intended.

The trial court properly dismissed on statute of limitations grounds Ms. Ohnemus' negligent investigation claim and her claim based on sexual abuse. This Court should affirm the trial court's dismissal of those claims and reverse the trial court's denial of summary judgment on Ms. Ohnemus' claims under RCW 9.68A.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

ROBERT W. FERGUSON



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JODIE L. THOMPSON, Legal Assistant

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