NO. 96259-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Melissa Eckstrom,

Respondent,

v.

Sigurd Hansen,

Petitioner.

RESPONDENT MELISSA ECKSTROM'S RESPONSE BRIEF REGARDING PETITION FOR REVIEW

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I. INTRODUCTION

The plaintiff/respondent, Melissa Eckstrom, submits this memorandum in response to her father the defendant/appellant, Sig Hansen, and the request for Supreme Court review. Division I's published opinion regarding this matter should stand. *See Eckstrom v. Hansen*, -- App. --, 422 P.3d 926 (2018). Mr. Hansen failed to articulate any persuasive basis, under RAP 13.4(b), that justifies continuing appellate litigation. Moreover, Mr. Hansen offers glaringly untrue statements related to this proceeding such as the opening proposition that Ms. Eckstrom "*offers no new evidence*."[1] Ms. Eckstrom was only 2-years old at the time that Mr. Hansen, the now fading television "star" of the Deadliest Catch, molested her. Ms. Eckstrom is now a licensed member of the WSBA and prepared to testify as to her own recollection in front of a jury. In this most basic way, Ms. Eckstrom will offer "*new evidence*" and this reality belies most every other claim on the part of Mr. Hansen suggesting that his daughter, a sex abuse victim, ever received her fair day in court. It must be noted that it is well understood that there is "a trend in Washington courts to move away from looking technically at adverseness, instead asking if the party to be bound had 'the motivation and the opportunity to present the case fully and fairly in the first

[1] Hansen Petition for Review, Page 2

proceeding.'"[2] Moreover, the appellate courts have repeatedly held that by the Legislative enactment of RCW 4.16.340, the childhood sex abuse tolling statute, that the trial courts should err on the side of allowing childhood sex abuse victims to have their day in court. Ms. Eckstrom is entitled to a jury trial. In any appeal of a collateral estoppel ruling, the trial court's ruling will be reviewed for an abuse of discretion. In this regard, it was not an abuse of discretion for the trial court deny Mr. Hansen's original motion. Division I's opinion regarding this matter is in full comport with the existing laws and associated policies that favor giving sex abuse victims their day in court. For these reasons, the trial court's rejection of Mr. Hansen's prior arguments was correct and this matter should proceed on the merits.

II. BACKGROUND

As a matter of history, in 1990, Ms. Eckstrom's mother and father separated and sought to divorce each other.[3] In July of 1990, Ms. Eckstrom's father began having private parental visits. Upon return from a visit, Ms. Eckstrom's mother was bathing her and observed "*a protuberance of the rectum and that the area seemed blue or discolored*."[4] Ms. Eckstrom's uncle, maternal grandmother, and aunt were witnesses to the

[2] *Revisiting Claim Preclusion in Washington*, Washington Law Review, 90 WASH. L. REV. 75, 90 (2015).
[3] CP 24 (Dec of M.E. dated November 3, 2016)
[4] *Id*.

related occurrences. Ms. Eckstrom was brought for a medical examination at Harborview Medical Center, at which point she explained "*daddy puts his finger in my potty pot...*"[5] In that same timeframe, Ms. Eckstrom also told her maternal grandmother that "*daddy pottied on my leg*," which is documented in writing.[6] The statement was later repeated to her paternal grandmother.[7]

Several of Ms. Eckstrom's own health care providers documented the occurrence of the abuse at the time that it occurred. As reflected in a declaration authored by the Harborview Medical Director of the Sexual Assault Center, Mary Gibbons, M.D., a forensic medical examination that occurred on July 23, 1990 medically verified that the Ms. Eckstrom was violated:

> Impression: A child with a history of sexual abuse. An exam today revealed posterior labial fusion and some tissue in the posterior fossa suggestive of scar tissue and an unusual anal exam with dilatation and angulation at 3 o'clock. All of these findings would be consistent with a history of sexual abuse and the photographs from the initial evaluation revealed significant erythema around the posterior forchette and anterior peritoneal body, and probably a very superficial laceration of the posterior forchette, which certainly would be consistent with sexual abuse, but may have been caused by retraction. The area that is erythematous is usual for an inflammatory cause and would be suggestive of frictional injury constent with sexual abuse. Her anal exam was similar to her anal exam today, constent with, but not diagnostic of anal penetrating trauma.
>
> 8

[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.; *see* also CP 55 (Declaration of Beauregard dated March 2, 2017: Exhibit 2 Declaration of Gibbons)

Dr. Gibbons also concluded the following:

> 1. The anus immediately dilated, remained dilated in a fashion with angulation plus with mild extrusion of the inner tissues (rectal prolapse). All of these findings are rarely seen in children without a history of sexual abuse. In follow-up these findings persisted.

[9]

During counseling sessions, Ms. Eckstrom elaborated further about the molestations:

> Information available to me about Melissa's history regarding sexual abuse suggests that her father [redacted] is the alleged offender. In this matter I would defer to the mental health professionals to make recommendations that would broaden the evaluation to identify the offender.
>
> * * *
>
> I have never seen a little girl who was so clear about what she had experienced, both with her father and with the emotional trauma experienced at the Hansens [redacted]

[10]

In private forensic interview that occurred on October 17, 1990 with another examining physician, John E. Dunne, Ms. Eckstrom again privately

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[9] *Id.*

[10] *Id.*; *see* CP 55 (Declaration of Beauregard dated March 2, 2017: Exhibit 3 Declaration of Bridges)

admitted and confided that "*she liked her mother but did not like her father, because 'daddy hurt my bottom'*."[11] In another interview that occurred on November 5, 1990 with Dr. Dunne, Ms. Eckstrom described more specifics: "*When asked if her father hurt her bottom she first said no, then quickly changed to her mind and said yes. She indicated that her father poked her with his big 'peepee'. When asked to show how he did that she held the male and the female dolls back to back touching at the buttocks…*"[12] A interview summary reflects the following:

When it came time for the mother to leave Melissa bec[redacted] immediately distressed and clung to her mother. Her mother tried to reassure her and distract her and finally said that she had to go to the bathroom, would get some juice for her and be back soon. Then aside to the evaluator she indicated that Melissa was more fearful be with men than with women. With the mother's [redacted] promise to be back quickly Melissa accepted her mother leaving. Although crying and distressed [redacted]er mother's leaving, Melissa did not avoid the eva[redacted]. She walked with the evaluator to get a tissue and allowed the evaluator to dry her t[redacted] said that she wanted her mommy. She continued to cry for about 8 minutes after her mother left but gradually allowed herself to be distracted by play with the school. She tended to focus on putting the children in their chairs or putting their hats. She frequently asked the evaluator for assistance. The "teacher" told the "students" a story about a little girl whose mother and father lived in different places and did not like each other. Melissa wanted to know why they did not like each other and said that she did not know why her parents did not like each other. When asked if she liked her mother and father she said that she l[redacted]ther but did not like her father, because "daddy hur[redacted]". She did not remember how her father hurt her bottom but did say that her bottom does not hurt anymore. At the end of the session she helped clean up with minimal encouragement and did not complain. She seemed somewhat eager to leave and indicated that she did not want to come back the next day with her father to play.

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[11] *Id*.
[12] *Id*.
[13] *Id* at Page 14.

Child Protective Services was ultimately notified and conducted an investigation. According to a written report dated March 30, 1992, the investigation confirmed that Mr. Hansen repeatedly molested Ms. Eckstrom.

> Melissa disclosed sex abuse by her father to Edmonds Police interview specialist Cindy Long. In addition, Dr. Mary Gibbons confirmed Dr. Lozano's initial diagnosis in her colposcopy exam (#9090264). Her findings stated:
>
> > IMPRESSION: Tanner State I female with an abnormal genital exam in that there is significant erythema, particularly posteriorly of the vulva, which would certainly be consistent with irritation from some things such as labial intercourse. The anus does appear quite unusual with significant dilation and angulation of the margins, although measurement would not be obtainable from the photographs. This would certainly be suggestive of some anal penetrating trauma, but not diagnostic of the same.
>
> Mr. Hans[redacted]ested for the sexual abuse of his daughter. However, charges were not filed by the Snohomish County Prosecutor.

* * *

> Marilyn Leibert, R.N., documented the child saying "Daddy is bad." (then recanted) and that he urinates on her. She also documents, "when Missy u[redacted]tty chair she occasionally lets urine dribble down her legs and then S/T 'Daddy did it,' but when questioned again, she either repeats accusation - or - denies accusation by saying, 'Daddy didn't - I did.'"

* * *

> If a child this age is coached to give a description of sexual abuse, one would expect to find the child stilted in her statements and using the same words repeatedly. She would not be able to answer questions. She would not be able to provide a variety of detail. Lying about such events is difficult for a child this age in that they do not have the knowledge of sexual acts, do not have rote memory capability over long periods, and do not hold the motivation to lie about the sexual abuse. Melissa[redacted]nts were spontaneous and detailed, in trusting situations she was able to answer questions, and her statements were consistent over time. That Melissa[redacted]eously made statements to people she saw as allied with her father contradicts the theory she was coached to make these statements.

* * *

In conclusion, as a supervisor with the Division of Children and Family Services for six years following an additional six years of front line work, I found this investigation to be thorough and conclusive of sexual abuse. The only perpetrator named by the child is Mr. Han[redacted]statements are made consistent with his access to the child. In addition, the medical findings corroborate the child's statement.

* * *

This statement is made under penalty of perjury pursuant to the laws of the State of Washington, and the foregoing is true and correct to the best of my knowledge and belief. This statement is dated and

SIGNED this 30th day of March, 1992 at Lynnwood, Washington.

Christine Robinson, MSW
Division of Children and Family Services

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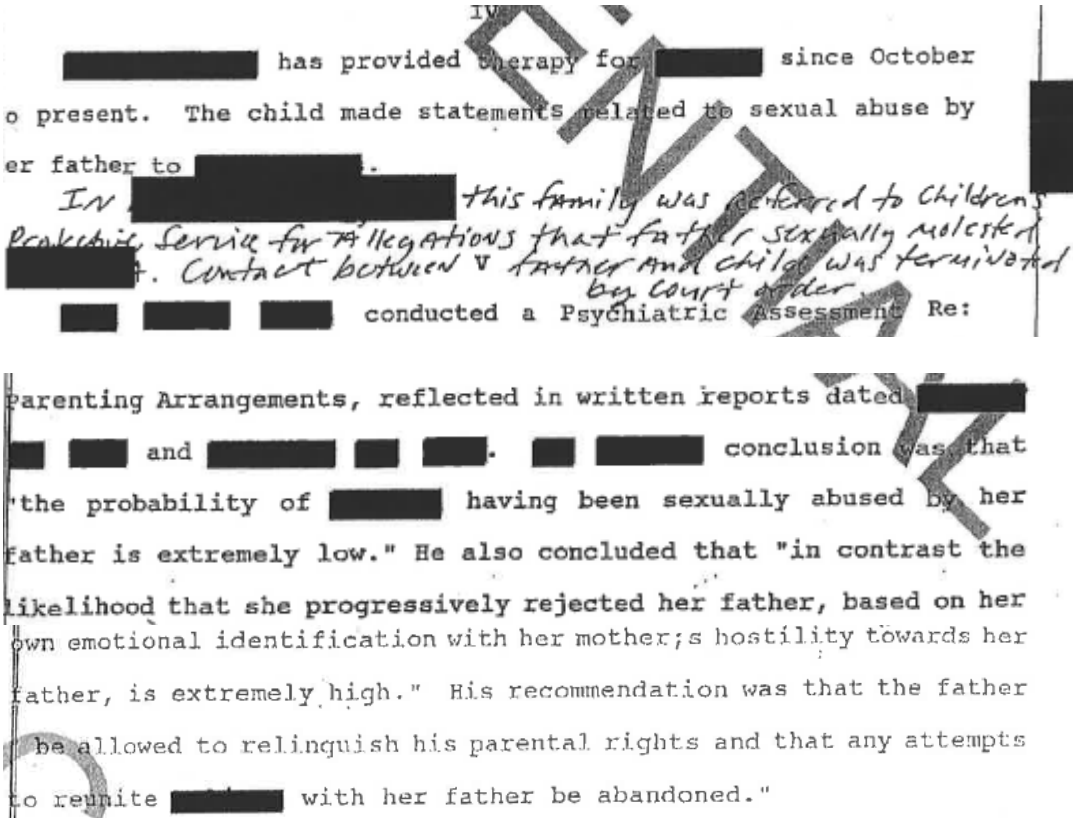
Ms. Eckstrom did not testify during the prior proceedings and is now prepared to tell her version of events to a jury in this case.[15] During the 1990 proceedings, when ruling, in part, in Mr. Hansen's favor, the presiding Commissioner relied, upon the now debunked "*Parental Alienation Syndrome*" when finding "*extremely low*" the probability that Mr. Hansen committed the offense:

[14] CP 24 (Dec of M.E. dated November 3, 2016)
[15] *Id*.



has provided therapy for since October
o present. The child made statements related to sexual abuse by
er father to .
In this family was referred to Children's
Protective Service for Allegations that father sexually molested
. Contact between V father and child was terminated
by court order
conducted a Psychiatric Assessment Re:

Parenting Arrangements, reflected in written reports dated
and . conclusion was that
"the probability of having been sexually abused by her
father is extremely low." He also concluded that "in contrast the
likelihood that she progressively rejected her father, based on her
own emotional identification with her mother;s hostility towards her
father, is extremely high." His recommendation was that the father
be allowed to relinquish his parental rights and that any attempts
to reunite with her father be abandoned."

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The ruling from prior proceeding was not even described on a more likely than not basis.[17] In reality, Mr. Hansen basically gave up his parental rights as to Ms. Eckstrom to avoid an adverse sex abuse finding against him.[18]

To this day, Ms. Eckstrom recalls being molested by Mr. Hansen.[19] As of November 7, 1990, Ms. Eckstrom disclosed the details of the abuse

[16] CP 70 (*See* Exhibit H to Declaration of Campos filed In Opposition to Motion to Amend Findings of Fact and Conclusions of Law, Pages 3-4).
[17] *Id*.
[18] *Id*.
[19] *Id*.

to multiple psychologists, and drew the following anatomical picture of her and Mr. Hansen's bodies:

[20]

After growing up without Mr. Hansen in her life, and after completing law school, on May 23, 2016, Ms. Eckstrom filed a complaint suing her father, Mr. Hansen, for molesting her as a child. On February 22, 2017, the trial court entered an order denying Ms. Hansen's original motion to dismiss. This appeal followed.

III. ARGUMENT RE: MS. ECKSTROM NEVER RECEIVED HER DAY IN COURT AND WAS NOT IN PRIVITY WITH HER MOTHER

"The doctrine of collateral estoppel may not be applied to preclude a party from litigating an issue in a subsequent proceeding if that party had

[20] *Id*.

no opportunity in the prior proceeding to fully litigate that issue." *Everett v. Abbey*, 108 Wash. App. 521, 532, 31 P.3d 721 (2001) (reversing summary judgment on estoppel principles); *See Ward v. Torjussen*, 52 Wash. App. 280, 284-85, 758 P.2d 1012 (1988). For preclusive principles, the privity element typically only applies to "nonparties who control the prior litigation; and nonparties who participate in the previous litigation, including, most expansively, a person who testified as a witness in the case."[21] *E.g.*, *McDaniels v. Carlson*, 108 Wash. 2d 299, 304-05, 738 P.2d 254, 258 (1987) (rejecting argument that cohabitants were in privity regarding woman's dissolution proceeding when partner had different interests and did not participate in his partner's action); *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wash. App. 41, 66, 316 P.3d 1119, 1131, review granted, 180 Wash. 2d 1009, 325 P.3d 913 (2014) (rejecting virtual representation because no evidence of tactical maneuvering); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wash. App. 891, 905-06, 251 P.3d 908, 916-17 (2011) (discussing virtual representation but concluding it would be premature to apply it, given procedural posture of the case); *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wash. App. 507, 515, 94

[21] *Revisiting Claim Preclusion in Washington*, Washington Law Review, 90 WASH. L. REV. 75, 84 (2015); 2 LEWIS H. ORLAND, WASHINGTON PRACTICE SERIES, TRIAL PRACTICE § 373, at 415-16 (3d ed. 1972) (Precluding witnesses or participants if they did not actually control the litigation had been criticized).

P.3d 372, 376 (2004) (finding lawyer who testified on client's behalf in prior action had no opportunity to litigate issues, nor to intervene, so preclusion would be improper); *Ward v. Torjussen*, 52 Wash. App. 280, 286, 758 P.2d 1012, 1015 (1988) (reversing issue preclusion based on nonparty police officer's testimony at prior traffic court proceeding; noting "appellant did not have an opportunity to control the litigation or participate at a level commensurate with due process"). Ms. Eckstrom did not even testify during the prior proceedings, and had no control over the trajectory of the prior litigation.[22] In these ways, Ms. Eckstrom was not in privity with her mother, and has not had a fair opportunity to present her own case, or to even testify in open court.

At the trial court level, and again in these proceedings, Mr. Hansen relies heavily upon two specific cases in an effort to establish the privity element: *Wagner v. McDonald*, 10 Wash. App. 213, 516 P.2d 1051 (1973) and *In Re Robinson*, 9 Wash. 2d 525, 115 P.2d 734 (1941). *Wagner* involved the application of res judicata wherein the child's claim was properly represented by the parent in the personal injury action and dismissed. This case is distinguishable in that Ms. Eckstrom's interests have never been represented for purposes of pursuing her own personal

[22] CP 24 (Declaration of M.E.)

injury claim. In *Robinson*, a guardian was also appointed for purposes of protecting the minor's property rights in ongoing litigation. Division I explained:

> we find no authority permitting collateral estoppel to operate against a minor who is represented by a guardian ad litem in an earlier proceeding when the minor's interests in the second proceeding are not the same as in the first proceeding. In Robinson, the foundation was asserting the minors' interest in having their assets handled honestly. The exact same interest was at stake at the earlier hearing on the final account. Here, the interest now asserted by Eckstrom is to receive monetary compensation for the damages she has allegedly suffered as the result of Hansen's conduct. This is different from the Marriage of Hansen matter, where her interest was in being protected from sexual abuse, not in receiving compensation.

Eckstrom, 422 P.3d at 929-30.

As noted by Division I, the cases that were cited by Mr. Hansen are not persuasive and highlight the fact that Ms. Eckstrom's right should not be extinguished as nobody advocated for her own personal rights to pursue a civil claim during the prior proceedings. Mr. Hansen has failed to come forward with any persuasive precedent supporting his position. For this reason alone, Mr. Hansen's motion to dismiss was properly denied.

IV. ARGUMENT RE: THE APPELLATE COURTS HAVE RULED THAT ESTOPPEL PRINCIPLES SHOULD NOT BAR CHILDHOOD SEX ABUSE CLAIMS

The applicable public policy should be considered when evaluating the application of estoppel principles. *See e.g. McDaniels*, 108 Wash. 2d at 309; *see e.g. K.C. and L.M. v. State, et al*., No. 48029-8-II (Feb 28, 2017).

The Washington State Legislature enacted a strong statute that preserves the rights of child victims to bring claims on this nature well into adulthood. *See* RCW 4.16.340. The Legislature's primary concern in enacting the special statute of limitations "was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation." *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wash.2d 699, 712, 985 P.2d 262 (1999). Appellate courts have expressly rejected the invocation of estoppel principles to extinguish meritorious childhood sex abuse claims of this nature. *See Miller v. Campbell*, 137 Wash. App. 762, 155 P.3d 154 (2007), review granted 163 Wash.2d 1005, 180 P.3d 784, remanded 164 Wash.2d 529, 192 P.3d 352 (Judicial estoppel would not bar alleged victim of childhood sexual abuse from raising claim against the estate of his deceased abuser, even though victim had failed to disclose the potential claim five years earlier in bankruptcy proceedings; victim believed that any claim arising from the relationship difficulties and memories of abuse was barred by statute of limitations, claim against estate was premised on major depression and post-traumatic stress disorder recently discovered by victim through therapy, and victim's knowledge of abuse was not inconsistent with a knowledge of a potential tort claim.) As illustrated in *Miller v. Campbell*, it would be contrary to the intentions of the Legislature to bar this claim

premised upon any sort of estoppel principles. *Id.* Division I agreed, stating: "the injustice of precluding Eckstrom from bringing her own claim is underscored by the public policy of RCW 4.16.340(1). That statute provides 'a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse.'" *Eckstrom*, 422 P.3d at 930.

V. CONCLUSION

On the merits, Mr. Hansen failed to prove Ms. Eckstrom enjoyed any form of privity with her mother or the prior GAL in such a way that would justify precluding this claim. The prior proceedings involved matters of family law and the trial court from 1990 did not even have jurisdiction to preside over Ms. Eckstrom's personal injury claim against Mr. Hansen. By law, Ms. Eckstrom is not even permitted access to the court files from the prior proceedings. After maturation, and with much reflection, Ms. Eckstrom decided that it was right for her to seek justice against her celebrity father, Mr. Hansen, by way of these proceedings. Under the law, Ms. Eckstrom has a right to have a jury hear this very strong evidence and determine innocence or fault by way of these civil proceedings.

Respectfully submitted this 20th day of September, 2018

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 20, 2018, I arranged for service of the foregoing Respondent Melissa Eckstrom's Response Brief Regarding Petition to Review, to the Court and to the parties to this action as follows:

Lafcadio Darling Holmes Weddle & Barcott, P.S. 999 Third Avenue, Suite 2600 Seattle, WA 98104 (206)292-8008 ldarling@hwb-law.com *Attorney for Petitioner Hansen*	Via Email (per agreement)
Michael D. Helgren Matthew J. Campos McNaul Ebel Nawrot & Helgren, PLLC One Union Square 600 University Street, 27th Floor Seattle, WA 98101 (206)467-1816 MHelgren@mcnaul.com MCampos@mcnaul.com *Attorney for Petitioner Hansen*	Via Email (per agreement)

Dated this 20th day of September, 2018 at Tacoma, Washington.

Marla H. Folsom

Marla H. Folsom, Paralegal

CONNELLY LAW OFFICES

September 20, 2018 - 12:11 PM

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