

No. 36113-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

LAURA BARDO,

Plaintiff/Appellant

v.

CLIFF COOPER, Personal Representative of the Estate of Alwin Winsten Cooper,

Defendant/Respondent

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REPLY BRIEF OF APPELLANT

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CARTER W. HICK  
WSBA # 36721  
Of Attorneys for Plaintiff/Appellant

Connolly, Tacon & Meserve  
201 5<sup>th</sup> Ave. SW, Suite 301  
Olympia, WA 98501-1063  
(360)943-6747

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COURT OF APPEALS  
DIVISION II

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## I. INTRODUCTION

Plaintiff relies on the introduction, assignments of error, statement of relevant facts, argument and conclusion originally filed with this court.

As a preliminary matter, the Plaintiff asserts that "ISSUE #1" in the Brief of Respondent is not properly before this court as it was not raised by the Plaintiff on appeal, and the Defendant did not file for a cross review or assign it as error. The Plaintiff's reply will only briefly address this matter and will focus instead primarily on the Defendant's "ISSUE #2".

## II. ARGUMENT

**A. The Defendant's "ISSUE #1" was answered in the affirmative by the trial court, and is not properly before this court on appeal.**

At oral argument on January 5, 2007, the trial court held that a jury could find at least some of the Defendant's conduct violated RCW 9A.44.100, the indecent liberties statute, thereby triggering the statute of limitations applicable to claims of childhood sexual abuse found within RCW 4.16.340. (RP Jan. 15, 2007 at 12-13; CP 76-77). This is stated throughout the record on appeal. When the Defendant "respectfully requests that the court uphold the trial court's decision that there was not 'sexual contact' as defined by RCW 9A.44.010(2)", *see* Brief of Respondent, at 7, he misstates the trial court's finding on the issue. (RP Jan. 15, 2007 at

12-13; CP 76-77).

The issue of whether there was “sexual contact” as defined by RCW 9A.44.010(2), such that a juror could find the Defendant’s conduct violated RCW 9A.44.100, thereby triggering the statute of limitations found in RCW 4.16.340, is not properly before this court on appeal.

The Rules of Appellate Procedure 5.1(d), (RAP), provides that a respondent can initiate a cross review, but must first file a notice of appeal or a notice for discretionary review within the time allowed by RAP 5.2(f). Furthermore, RAP10.3(b) requires a respondent seeking review to state the assignments of error and the issues pertaining to those assignments of error. Here, the Defendant failed to do either of these things with regard to his “ISSUE #1”, and therefore the issue is not properly before the court on appeal and should be struck. It is anticipated that the Defendant will agree with this position.

To the extent that this court considers the Defendant’s “ISSUE #1”, the Plaintiff relies on the arguments set forth in the Plaintiff’s Supplemental Brief in Opposition to Defendant’s Motion to Dismiss Based on Statute of Limitations Defense, and the trial court’s finding on the issue. (CP 64-85; RP Jan. 15, 2007 at 12-13).

**B. The Defendant's "ISSUE #2" incorrectly applies a constructive discovery standard pursuant to RCW 4.16.340(1)(b).**

Section 1(b) of RCW 4.16.340 addresses repressed memory claims wherein the victim discovers his or her injury or condition was caused by a previously undiscovered act. *Hollmann v. Corcoran*, 89 Wn. App. 323, 334, 949 P.2d 386 (1997). In such cases, a constructive discovery standard is applied in determining whether an action for damages is timely. In contrast, Section 1(c) addresses claims of abuse from victims who know they suffered abuse, but failed to make the connection between the abuse and the injuries experienced until years later. *Hollmann*, 89 Wn. App. at 334. The standard for determining whether an action for damages is timely in these cases is subjective to the victim.

Although *Hollmann* and *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999), can be distinguished in some ways factually from the case at bar, the Plaintiff's reliance on these cases supports a reversal of the trial court's decision to grant the Defendant's motion for summary judgment. That is, both cases addressed situations where the victims knew they suffered sexual abuse, but nonetheless failed to make the causal connection between the abuse and the injuries until years later. This factual scenario triggers the statute of limitations standard found

in 4.16.340(1)(c).

Neither *Hollmann, Cloud ex rel. Cloud*, or the case at bar involve repressed memory claims necessitating the constructive discovery statute of limitations standard found within 4.16.340(1)(b). As such, the factual differences that may pertain to when a victim *should* have discovered the sexual abuse is not relevant. What is relevant in each case is that the victims knew the sexual abuse they suffered as children occurred, and neither of them made the connection between the abuse and the harm suffered until years later. As a result, RCW 4.16.340(c) applies.

The Plaintiff in this case has been aware for some time that she suffers psychological disorders, including depression and PTSD. (CP 38, 53-56). She is also aware that she suffered physical, emotional, and sexual abuse at the hands of the Defendant. (CP 26-40, 52-55). However, the Plaintiff did not connect the sexual abuse to her psychological disorders until she recently discovered, in a February 21, 2006 email exchange, that her sister was also abused by the Defendant. (CP 38, 53-56). Until that exchange, the Plaintiff believed that the abuse was the result of something she had done instead of the result of what was presumably the Defendant's own psychological disorder. (CP 19-20).

The fact that the Plaintiff in this case knew she was abused and knew that the Defendant's conduct was "wrong" is irrelevant to whether she understood the full extent of her psychological injuries. *See Cloud*, 98 Wn. App. 724; *Hollman*, 89 Wn. App. 323. As recognized by the court in *Cloud*, a victim's knowledge that he or she was molested and the fact that the victim "may even know that some injury resulted" does not necessarily mean that the victim understood the full extent of the psychological injuries caused by the abuse.

After the February 21, 2006 email exchange with her sister, and upon understanding the connection between the sexual abuse and her psychological disorders, the Plaintiff filed suit on September 13, 2006. (CP 5-7). Because she filed within seven months after the email exchange with her sister, her claim for damages is timely.

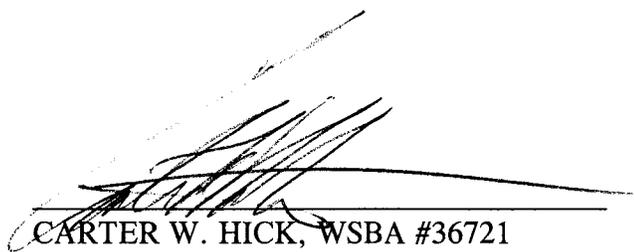
### III. CONCLUSION

Because the Plaintiff knew she was abused by her mother, RCW 4.16.340(1)(c) applies. Because the Plaintiff did not in fact discover the causal connection between the childhood sexual abuse and her depression and PTSD until the February 21, 2006 email exchange with her sister, the subsequent filing of this claim on September 13, 2006 –seven

months after the email exchange- is timely. As such, the trial court erred in granting the Defendant's motion for summary judgment and its decision should be reversed because there is a genuine issue of material fact as to when the Plaintiff subjectively made the causal connection between the abuse suffered and the full extent of her harm.

For these reasons, and for the reasons stated in the Plaintiff's original brief, this court should reverse the trial court's decision to grant the Defendant's motion for summary judgment as it pertains to the Plaintiff's claim of childhood sexual abuse.

RESPECTFULLY SUBMITTED this 30th day of July, 2007.



CARTER W. HICK, WSBA #36721  
Of Attorneys for Plaintiff  
Connolly, Tacon & Meserve  
201 5<sup>th</sup> Ave. SW, Suite 301  
Olympia WA 98501

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4 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
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**CERTIFICATE OF  
TRANSMITTAL OF  
REPLY BRIEF OF  
APPELLANT**

13 I certify under penalty of perjury under the laws of the state of Washington that on  
14 July 31, 2007, I delivered via ABC Legal Services a true copy of Reply Brief of Appellant in the  
15 above-captioned matter to:

16 Rick Klessig  
17 Attorney at Law  
18 908 5<sup>th</sup> Avenue SE  
19 Olympia, WA 98501

Dated at Olympia, Washington, on July 31, 2007

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21   
22 LA RAE SHOTSWELL

23  
24  
25 **CERTIFICATE OF TRANSMITTAL - 1**  
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