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COURT OF APPEALS
DIVISION 2

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COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

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Christian Doscher, petitioner,
v.
State of Washington and Thurston County, respondents

APPELLANT'S BRIEF

Court of Appeals No. 39776-5-II

Mason County Superior Court No. 09-2-00338-0
The Honorable Judge Amber Finlay

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Restatement (Second) of Torts, Section 918, illustration 6 (recklessly caused barn-fire)

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42 Wn. App. 675, 713 P.2d 736, VERN SIMS FORD v. HAGEL (1986)

126 Wn. App. 34, Maison de France, Ltd. v. Mais Oui!, Inc. (2005)

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Tolling by Coexisting Disabilities:

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92 Wn. App. 156, STATE v. EDWARDS (1998)

Cerrillo v. Esparza, 158 Wn.2d 194, 200, 142 P.3d 155 (2006)

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III. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1990 - falsified court order from WSP to TCSC saying PSP2 (CP 26)

1990 - Order of Dismissal (CP 37)

2003 – TCSC denies deferred status of case (CP 17)

1990-2009 - TCSC failed to disclose dismissal (CP 16)

2009 - Mason County Superior Court Summary Judgment Order (CP 10)

Abbreviations

VRP = Verbatim Report of Proceedings (August 24, 2009 Official Transcript)

PSP2 = Possession of Stolen Property in the 2nd Degree

TCSC = Thurston County Superior Court Clerk's Office

WSP = Washington State Patrol

CCC = Continuing Course of Conduct

SOL = Statute of Limitations

CP 20, par. 12 = Clerk's Papers, page 20, paragraph # 12.

IV. ASSIGNMENTS OF ERROR

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Error # 1: The trial court erred by giving no consideration to Defendants' failure to rebut Plaintiff's August 12 Declaration. Whether such failure to rebut would have required Court to accept all factual averments of Plaintiff as true thus precluding dismissal.

Error # 2: The trial court erred by dismissing case with prejudice on the basis of the SOL running out on the felony-related damages and refusing to consider other damages (VRP, p. 20), when in fact other damages by means of different criminal history errors which Plaintiff had not reasonably discovered until 2009 ("sentencing deferred: no" CP 17) were argued at summary judgment, which Washington's prohibition on claim-splitting prevents from being sued on in a separate action. Whether the SOL expiring against the damages based on the felony, also foreclosed possibility of recovery for damages caused by all other criminal history errors involved in the same "nucleus of facts", when Plaintiff's lack of discovery of those until the time of summary judgment was never addressed or challenged by either Defendant.

Error # 3: Defendants claimed immunity at summary judgment (CP 65, lines 11-12). Whether the WSP and TCSC clerks who created and

disseminated the defamatory errors at issue have immunity that might extend to their government employers (Defendants).

Error # 4: The trial court erred by refusing to applying tolling by reason of continuing course of conduct (VRP, p. 18, lines 17-20). Whether the unlawful actions/omissions of Defendants between 1990 and 2009 constitute a “continuing wrong” that tolled the statute. Whether Plaintiff’s filing a lawsuit within the 3 year statutory period for fraud (RCW 4.16.080 (4)) after Defendants latest act of fraud on July 15, 2008 (failure to disclose material fact of the 1990 dismissal to WSP while under the statutory duty of RCW 10.97.045 to do so) bootstrapped the earliest violations into timely action under the continuing wrong doctrine.

Error # 5: The Court erred by finding that the statute of limitations applied to Plaintiff’s causes of action (VRP, p. 18, lines 6-9). Whether Defendants had successfully pleaded and proved that Plaintiff Doscher knew or should have known about Defendants’ multiple frauds between 1990 and 2006.

Error # 6: The Court erred by failing to find evidence of fraud (VRP, p. 18, lines 20-22). Whether anything in the designated clerk’s papers was evidence of Defendants’ fraud, and whether those frauds tolled the statute until filing of the lawsuit.

Error # 7: The trial court erred by failing to find exercise of due diligence by Plaintiff (VRP, p. 18, lines 23-25). Whether the efforts Plaintiff made in 1990 as recalled in his timely summary judgment Declaration, were evidence of due diligence. Whether petitioning TCSC's attention to the felony issue in 1990 was an act of due diligence. Whether relief from duty to mitigate, given the facts of this case, constituted relief from duty to exercise due diligence.

Error # 8: The Court made no finding on whether the errors creating damages in this case constituted a breach of contract. Whether the criminal history errors at issue in this case constituted a breach of contract. If so, whether the continuous representation rule tolled the statute from 1990 to 2009.

Error # 9: The Court erred by failing to equitably toll the statute. Whether the predicates for equitable tolling are met in this case by Defendants' deceptions, bad faith and false assurances, and by Plaintiff's exercise of diligence.

Error # 10: The Court erred in finding that Plaintiff's coexisting disabilities were not the type that justify tolling under RCW 4.16.260. Whether that statute is governed by RCW 11.88 and 4.16.190. Whether a finding of coexisting disabilities requires tolling regardless of Plaintiff's knowledge of harm.

VI. ARGUMENT

Since Defendants moved for Summary Judgment and won, the Court must construe all evidence for and against summary judgment in favor of the non-moving party, here, Plaintiff, 92 Wn.2d 507, 598 P.2d 1358, *OHLEER v. TACOMA GENERAL HOSPITAL* (1979). The Court must construe all conflicting evidence on what plaintiff knew in 1990, in favor of Plaintiff, 44 Wn. App. 167, 721 P.2d 553, *WEISERT v. UNIVERSITY HOSPITAL* (1986); 164 Wn.2d 261, *Rivas v. Overlake*, 2008. Where different inferences may be drawn from evidentiary facts as to ultimate facts such as knowledge, summary judgment is not warranted, 44 Wn. App. 167, 721 P.2d 553, *WEISERT v. UNIVERSITY HOSPITAL* (1986). If there is a disputed factual issue as to the timeliness of the suit, the plaintiff must be allowed to present evidence on this issue in trial, *Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d 100, 103 (9th Cir. 1979);

1. DEFENDANTS FAILED TO REBUT PLAINTIFF'S

DECLARATION (Error # 1): County's opposition was filed August 3 (CP 72), State's opposition was filed August 7 (CP 58). Thus, neither Defendant intended their responses to rebut anything in Plaintiff's August 12 Declaration, except perhaps by clairvoyance. A party who has failed their burden to rebut the other party's summary judgment declaration, loses the right to criticize any part of it, and any hearsay proofs of lawyer

contacts therein become proof of due diligence as a matter of law, 44 Wn. App. 654, 722 P.2d 1373, LaMON v. BUTLER (1986); 110 Wn.2d 216, 751 P.2d 842, LaMON v. BUTLER (1988).

2. Viewing all Plaintiff's Declarations as true, would force a finding that Plaintiff's efforts at further inquiry, which did not disclose the fraud, were reasonable (CP 22, par. 30), and that he neither constructively nor actually discovered the facts constituting the fraud (here, the PSP2 court order, CP 26) until July 15, 2008 (CP 23, par. 31), making claim timely.

3. DISMISSAL WITH PREJUDICE WAS ERROR (Error # 2):

Plaintiff neither discovered nor reasonably should have discovered County's failure to report the 1990 dismissal (CP 37) to WSP as required under RCW 10.97.045 until 2008, nor did he reasonably discover the inexplicable "sentencing deferred: no" error in TCSC records (CP 17) until 2008, nor did he reasonably discover the defective docket of the 1990 case placed on the internet by AOC until 2008, which incorrectly associates withdrawal of guilty plea with the 2009 vacation, instead of the 1990 dismissal. The trial Court excluded these concerns when it limited its finding to damages related solely to the false PSP2 felony from 1990 (VRP p. 20, lines 2-9). If Plaintiff tried to sue separately for these, the Defendants would surely cry "claim-splitting!". This Court should

reverse, at least in part, and remand for trial on these factual matters even if all damages related to the felony are time barred.

4. Obviously, if the 3-year statute for fraud (RCW 4.16.080 (4) began running with County's new act of fraud on July 15, 2008 (failure to disclose dismissal to WSP as required in RCW 10.97.045, CP 16), it could not have expired by the time complaint was filed in 2009, therefore damages related to this latest act would remain recoverable in trial even if earlier damages were time-barred. The purpose of the CCC doctrine is to prevent defendants from using their earlier time-barred acts to shield themselves from liability for their later similar violations, 229 F3d 871 Carole O'Loughlin v. County of Orange (9th Cir. 2000).

5. NEITHER DEFENDANT HAS IMMUNITY (Error # 3): Judge Doran and Prosecutor Franzen in the original 1990 case are certainly "known". Yet Defendants answered that the felony error was the act of some 'unknown' person (CP 64, lines 10-11). TCSC Judge, the Honorable Christine Pomeroy, and MCSC Judge, the Honorable Amber Finley, both specifically found that neither Judge Doran nor Prosecutor Franzen from the 1990 case had any responsibility in the fraud (CP 39) (VRP, p. 19, lines 5-8). Therefore Defendants themselves exclude the only entities that might have opened the door to immunity for State and County. Clerk errors that cause damages are actionable against their

government employers, 26 Wn. App. 538, 613 P.2d 195, MAURO v. KITTITAS COUNTY (1980). See also 111 Wn. App. 79, Oda v. State (2002), quoting Savage v. State, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995) at 445.

6. TOLLING BY CONTINUING COURSE OF CONDUCT (CCC):

(Error # 4) Statutes of limitation are designed to keep stale claims out of the court. But “where the charged violation is continuing, the staleness concern disappears,” said the US Supreme Court, in a case having nothing to do with medical negligence or employment discrimination, Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) at 380; This sentiment was repeated in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). The Washington Supreme Court follows the full scope of the Morgan ruling, 153 Wn.2d 256, Antonius v. King County, 2004

7. Washington recognizes CCC tolling in cases having nothing to do with employment discrimination or medical negligence *even if Plaintiff knew from the earliest period that the conduct was actionable*, 86 Wn. App. 732, GOODYEAR TIRE v. WHITEMAN TIRE, 1997, quoting Rock Falls v. Chicago Title & Trust Co. 13 111. App. 3d 359, 300 N.E.2d 331, 334 (1973); Callfas v. Dept. 129 Wn. App. 579, 595-96, 120 P.3d 110 (2005); See also 830 F2d 1480 Wehrman v. United States (8th. Cir.

1987); *Martin v. Voinovich*, 840 F. Supp. 1175, (1993); *Hull v. Cuyahoga Valley Bd. of Educ.* 926 F.2d 505, 511 (6th Cir.)

8. The Ninth Circuit does not require the later wrongs to be identical to the earlier wrongs, they only need to be “similar”, *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir.1981); 71 F.3d 776, *NESOVIC v. U.S.* 1995; 307 F3d 1045 *RK Ventures Inc v. City of Seattle* (2002). See also: *Doe v. State*, 216 Conn. 85, 92 (1990); *Bodner v. Banque* 114 F Supp 2d 117 (2000).

9. The Washington Supreme Court specifically rejects the knowledge-prong of the continuing violation doctrine’s substantial relationship multifactor inquiry, and does not attribute significance to time-gaps in the pattern of illegal conduct, 153 Wn.2d 256, *Antonius v. King County*, 2004.

10. CCC tolling will be appropriate even if all traditional elements for a Title VII claim are not present, 207 F3d 636 *Christine v. City of Glendora Arthur Cook*, (9th Cir. 2000).

11. Consistent with *Callfas* and *Goodyear*, supra: “where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury.” 54 C.J.S. *Limitation of Actions* § 177 (1987).

12. “One should not be allowed to acquire a right to continue the tortious conduct, therefore it follows logically that statutes of limitation do not run prior to the cessation of such conduct”, 729 F.2d 818, Page v. United States, 234 App. D.C. 3321, 1984; Gross v. United States, 676 F.2d 295, 300 (8th Cir.1982); Donaldson v. O'Connor, 493 F.2d 507, 529 (5th Cir.1974); Leonhard v. United States, 633 F.2d 599, 613 (2d Cir.1980); Lavellee v. Listi, 611 F.2d 1129, 1132 (5th Cir.1980); Fletcher v. Union Pac. R.R. 621 F.2d 902, 907-908 (8th Cir.1980); Logiurato v. ACTION, 490 F.Supp. 84, 91 (D.D.C.1980).

13. Supreme Court of Idaho: a CCC tolls even when victim admits knowing the conduct was illegal from the earliest part of the original SOL period, Curtis v. Firth, 123 Idaho 598, 603, 850 P.2d 749, 754 (1993).

14. Public policy favors viewing a CCC as a single tort, "it would impose an unreasonable burden on the courts to entertain an indefinite number of suits and apportion damages among them." 253 F3d 316 Heard v. Sheahan, (7th Cir. 2001).

15. Proof of Defendants' continued course of wrongful conduct between 1990 and 2009 now follows:

- A. February 28, 1990 - TCSC clerk sent a false “PSP2” court order to WSP after Doscher and State agreed to PSP3 plea deal, (CP 26), violating RCW 10.97.045.
- B. February 28, 1990 - TCSC clerk then

sent an unjustifiably blank “disposition document” to WSP, which said nothing except “PSP1” (CP 25), giving the deceitful impression that the ‘first amended information’, also not sent, was a reduction from PSP1 to PSP2. C. February 28, 1990 - TCSC clerk then failed to give WSP a copy of the first amended information, which correctly said PSP3 in 1990, an omission noted for its significance by State’s witness Deborah Collinsworth (CP 31). D. If PSP2 was the original form of the Court order, then the TCSC copy saying PSP3 indicates that the County corrected the Court’s copy but didn’t notify WSP of such correction, thus violating WAC 446-20-150 and RCW 10.97.045. E. If PSP3 was the original form of the order, then the only way WSP could have received a copy one month later saying PSP2 is if that copy was deliberately falsified, showing intent to harm, relieving Plaintiff of duty to mitigate. F. March 1990 - TCSC clerk then refused to file Plaintiff’s motion for injunctive relief which had addressed the felony to the Court’s attention (CP 21, par. 16). G. March 1990 – WSP chose to go by what the “charging document” said (CP 21, par. 20), falsely confirming Plaintiff’s earlier legal counsel saying WSP had a legal right to view the case in its pre-amended form. WSP’s answer suggesting TCSC clerk still had not given WSP a copy of the PSP2 order, or, that WSP deliberately avoided mentioning the PSP2 court

during this effort of inquiry. Collinworth said the 1st amended information (i.e. charging document) was never sent to them (CP 31).

H. April 1990 - Plaintiff Doscher filed a motion for dismissal, mentioning the felony as some of the reason for seeking dismissal (CP 20, par. 13). TCSC lost said motion. I. April 27, 1990 – TCSC granted Plaintiff's motion for dismissal (CP 37), but refused to address the felony, misleading Doscher to believe only probation had been dismissed and that the Court agreed with lawyers Kopp and Messer that the felony was not due to anybody's wrongful conduct or breach (CP 20, par. 13). J. April 1990 – The order says Defendant Doscher completed all terms of his probation. This is not true, the probation was to be for a full year starting January 24, 1990, but dismissal was granted April 27, 1990 (CP 37). K. April 1990-2009 – The wording of this Order of Dismissal also confused WSP criminal records history manager Becky Miner in 2009 on what exactly it was dismissing (CP 16). L. April 1990-2009 - TCSC communicated to Becky Miner in March 2009 that the Dismissal order was pursuant to RCW 9.95.240. However, in nonconformity to that statute, the order states neither that a guilty plea is being withdrawn, nor that a not-guilty plea is being entered (CP 37). M. April 1990-July 2008 – The TCSC clerk's office failed to disclose this dismissal disposition to WSP, thus violating

RCW 10.97.045 (CP 16). N. July 15, 2008 – TCSC Clerk’s office collaborated with WSP to correct Plaintiff’s WSP rap sheet, but once again, failed to disclose the 1990 Dismissal (CP 16). O. 1996-2010 - The AOC, a State agency, placed a docket of Doscher’s 1990 case on the internet for free public access, incorrectly attributing the withdrawal of guilty plea to the 2009 vacation instead of the 1990 dismissal, see RCW 9.95.240 and RCW 9.94a.240. P. February 19, 2003 – TCSC Clerk’s office created a publicly accessible docket for Plaintiff’s 1990 criminal case, inexplicably saying on the first page “sentencing deferred: no”, not corrected until 2010 (CP 17).

16. A jury must decide how many times Doscher suffered defamation due to these publicly disseminated errors. They show intent to harm, allowing presumed damages.

17. Division Two says “The gravamen of the equitable estoppel claim is that the defendant made representations or promises to perform that lulled the plaintiff into delaying timely action”, 134 Wn. App. 696, Teller v. APM Terminals, 2006. Since "gravamen" means "the issue upon which a particular controversy turns", (West's Encyclopedia of American Law, edition 2, 2008), the issue on which estoppel turns is whether misrepresentations were made that led Plaintiff to delay filing suit, nothing

more. Therefore misrepresentations only, and not concerns about plaintiff's knowledge, should decide equitable tolling here.

18. TCSC ignored the felony issue addressed to its attention in 1990 by Doscher's motion for dismissal (CP 37). When a court ignores a person's timely motions causing delay in resolution of the issue, equitable tolling is appropriate, 99 Wn. App. 423, PERSONAL RESTRAINT OF HOISINGTON, 2000.

19. State says CCC tolling is restricted to medical negligence and employment discrimination. Not so, and many of the following cases allowed CCC tolling in spite of Plaintiff's early knowledge that the conduct was wrongful:

- a) intentional infliction of emotional distress for 10 years and more, plaintiff's early and undeniable knowledge of harm irrelevant: Curtis v. Firth , 850 P.2d 749, 754 (Idaho 1993); Feltmeier v. Feltmeier, 2003 Ill. LEXIS 1421 (Sept. 18); Cusseaux v. Pickett, 652 A.2d 789, 794 (N.J. App. 1994); Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982); Page v. United States, 729 F.2d 818, 234 App. D.C. 3321, 1984;
- b) invasion of privacy tort claim: 691 F. Supp. 1548, Rochon v. FBI (1988).
- c) negligence tort claims: Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001).
- d) land-use contracts: Baker v. F & F Investment, 420 F.2d 1191 (Jan. 6, 1970).
- e) fair housing practices:

202 F.Supp.2d 492, MOSEKE v. Miller and Smith, 2002); Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982).

f) antitrust cases: Zenith Radio v. HAZELTINE 401 U. S. 321 (1971);

g) parole board decisions: 327 F.3d 1181, LOVETT v. RAY, 2003.

h) original construction defects persisting uncorrected and causing future damage: Graham v. Samuel H. Beverage (Supreme Court, West Virginia, (2002).

i) rate discrimination cases: Booker v. The Boeing Co. Tennessee, No. M2005-00832-SC-R23-CQ (April 19, 2006).

j) civil RICO cases: Bankers Trust v. Feldesman, 648 F.Supp. 17, 36

(.1986). k) A state's duty to construct wheel-chair ramps: Martin v.

Voinovich, 840 F. Supp. 1175, 1993; Barrier Busters v. Erie, No. 02-203 E (2003). l) EPA issues: Mafix, Inc. Docket No. EPCRA-III-113,

1998. m) pay-discrimination: Bazemore v. Friday, 478 U.S. 385

(1986). n) claims brought under NLRA; Brenner v Local 514, 927 F

2.d 1283, 3rd Cir. (1981). o) procedural due process claims: Centifanti v.

Nix, 865 F 2.d 1422, 3rd Cir. (1989). See also Sameric v. Philidelphia,

142 f 3.d 582, 599-600, 3rd Cir (1998). p) land flooding allowed by

government, US v. Dickinson, 331 US 745 (1947). q) ordinance

interfering with construction, Gordon v. Warren 579 F 2.d 386 (1978)

r) continuing nuisance; State v. Swartz (2000), 88 Ohio St. 3d 131

s) real estate fraud, Fichera v. Mine Hill Corp. 207 Conn. 204, 209-10 (1988). t) good time credits for prisoners, Rickard v. Utley, 2001 (Illinois, 2nd District). u) racist abatement ordinances: 307 F3d 1045 Rk Ventures Inc v. City of Seattle (2002).

20. The original fraud was the falsified court order in 1990 (CP 26). The breach persisted uncorrected until 2008. The latest act of fraud was County's failure to disclose the dismissal to WSP July 15, 2008, while under the RCW 10.97.045 duty to do so. Plaintiff filed his lawsuit alleging fraud on March 31, 2009, which was within three years of County's July 15, 2008 act of fraud (failure to disclose dismissal to WSP, (CP 16, CP 43). Thus this lawsuit was timely filed within the statutory period following the latest similar violation, and under the CCC doctrine, this bootstraps even the earliest violations from 1990 into action.

21. In harmony with Washington, a single breach constitutes a CCC for as long as the duty continues and the breach persists uncorrected, Blanchette v. Barrett, 229 Conn. 256, 275 (1994) (quoting Fichera v. Mine Hill Corp. 207 Conn. 204, 209-10 (1988)). State and County's duty to Plaintiff was individual by means of plea deal from 1990, therefore, a "special relationship" exception to the public duty doctrine. Thus all damages from the original PSP2 felony-error are actionable, as the duty continued, the breach persisted uncorrected, and suit was filed less than a year after

the July 15, 2008 “latest act”. The same reasoning is followed also in: Graham v. Samuel H. Beverage (Supreme Court, West Virginia, (2002). State v. Swartz ,88 Ohio St.3d 131, 723 N.E.2d 1084, 2000 (quoting 17 Kan. 224, 231, Kansas Pacific Ry. Co. v. Muhlman (1876); 69 Conn.App. 151, 795 A.2d 572, ROSENFELD v. ROGIN, 2002; Handler v. Remington Arms Co. 144 Conn. 316, 321, 130 A.2d 793 (1957). Since the “failure to correct” persisted consistently without break between 1990 and 2008, there are no “gaps” in the pattern.

22. The Federal Circuits follow suit: “Each day that the invalid resolution remained in effect, it inflicted ‘continuing and accumulating harm’ on [the company]”, Kuhnle Brothers, Inc. v. County of Geauga, 103 F.3d 516, 522 (6th Cir.1997); Tolbert v. State of Ohio Department of Trans. No. 98-3299, 1999 WL 218722 (6th Cir. Apr. 16, 1999).

23. FEDERAL CRITERIA ONE (quoting Tolbert v. Ohio Dept Trans, 172 F.3d 934, 1999; Paschal v. Flagstar Bank, 2002 FED App. 0239P (6th Cir.); Baker v. F&F, supra): “defendant's wrongful conduct must continue after the precipitating event that began the pattern.” The long list of Defendants’ continuing wrongful conduct and illegal omissions after the original PSP2 error has already been cited. CRITERIA TWO: “Injury to the Plaintiff must continue to accrue after that point.” Plaintiff Doscher’s Declaration (CP 19, par. 7, par. 9) testifies to much injury he

endured continually between 1990 and 2008 as a result of both the false felony at WSP and other later similar violations of Defendants. Since this CCC shows defamation per se or with malice, a jury instruction allowing presumed damages would be justified, removing concern that damages are based on faded memories, 42 Wn. App. 675, 713 P.2d 736, VERN SIMS FORD v. HAGEL (1986); 126 Wn. App. 34, Maison de France, Ltd. v. Mais Oui!, Inc. 2005. A finding of recklessness is a finding of scienter, Nelson v. Serwold, 576 F.2d 1332 (9th Cir.). CRITERIA THREE: “further injury to the plaintiffs must have been avoidable if the defendant had at any time ceased [its] wrongful conduct.” If the TCSC clerk had ceased its disobedience to WAC 446-20-150 and reported its 1990 correction of PSP2 to PSP3 in their court record (CP 29) to the WSP, the felony at WSP would have been corrected in 1990, thus most of the harm done to Plaintiff between then and now based on the felony would have been avoided. If Thurston County had ceased its disobedience to RCW 10.97.045 and reported its 1990 dismissal-disposition to WSP (CP 16 & 37), WSP would have been alerted to inconsistency between a dismissed PSP3 charge and the court order saying PSP2, showing the damages were avoidable had County ceased its CCC.

24. DEFENDANTS DID NOT PROPERLY PLEAD THE SOL (Error # 5): Those who plead the SOL must “prove the *facts* that establish it”,

134 Wn. App. 921, Rivasv. Eastside Radiology Assocs (2006). Juries try “facts”. They are not allowed to know about dismissed convictions, 17 Wn. App. 804, 565 P.2d 1207, STATE v. DIXON, 1977. Thus when one has predicated their SOL defense on a dismissed conviction, they are not predicating it on “facts”, and have therefore failed their rightful burden under RIVAS to “prove the *facts* which establish” it.

25. Defendants insisted that the PSP3 record is *critical* to their ability to argue the statute of limitations, right up to the very end of summary judgment (CP 60, lines 20-22). But this guilty plea was dismissed April 27, 1990 (CP 37). The record of a dismissed guilty plea is absolutely inadmissible in all contexts outside the strict exception of a criminal prosecution, (therefore inadmissible in this civil suit) and no other use will be allowed by implication, 144 Wn.2d 829, 31 P.3d 1155, STATE V. BREAZEALE (2001). County and State also “vacated” said record on April 2, 2009. A conviction is “entirely destroyed” by vacation, 163 Wn.2d 664, STATE v. SCHWAB, 2008.

26. The privacy benefits for juvenile record expungement are the same as those for dismissal of an adult guilty plea, i.e. the court must treat both persons as if they were never convicted, even if the offender is the one that brought the earlier guilty plea to the Court’s attention, compare 120 Wn. App. 470, In re Firearm Rights of Nelson (2003) with 99 Wn. App. 400,

STATE v. BREAZEALE (2000). There is no way this Court could treat Plaintiff as if he had never been convicted of PSP3, if it allows Defendants to use that record or allow a jury to see it.

27. Plaintiff's right to deny conviction in public and in civil action is substantive under statute (68 Wn.2d 882, MEMPA v. RHAY, 1966). "The express language of RCW 9.95.240 entitles Stroh to assert that he has never been convicted." 108 Wn.2d 410, 739 P.2d 690, IN RE STROH (1987). But Defendants' right to make an SOL defense is *procedural* under court rule (CR 56). When a procedural right interferes with exercise of a substantive right, the substantive right prevails, 122 Wn. App. 40, City of Spokane v. Ward (2004). Thus Defendants' right to an SOL defense must be sacrificed. Any evidence that interferes with a substantive right must be excluded, ER 103.

28. Because the PSP3 guilty plea is no longer fact, it fails the test of relevancy in ER 401, and therefore that guilty plea is now irrelevant evidence that must be excluded under ER 402. Swept along with such exclusion is any SOL defense predicated on fiction, such as the one at bar.

29. Even if that record was relevant, Dixon 1977, *supra*, proves that a dismissed guilty plea's prejudicial nature totally outweighs its probative value, so it would require suppression under ER 403 even if it had been otherwise relevant.

30. Defendants were informed months before summary judgment that the PSP3 record was inadmissible (CP 92, lines 22-25). Yet they refused thereafter to recast their SOL argument using different and admissible evidence (CP 60, lines 16-22). Because (1) the SOL being predicated on the PSP3 record now before the Court is identical to the SOL issue they raised in the prior proceedings, and (2) estopping Defendants from recasting the SOL defense using admissible evidence would not work an injustice to them (no new evidence has come to light since summary judgment), all 4 elements of collateral estoppel against a government agency are fulfilled (83 Wn.2d 618, *Faye v. Shafer* (1974)).

31. Statutes of limitation are disfavored, and neither the facts nor law should be strained to aid its defense, which is exactly what Defendants are doing with an SOL argument that places Plaintiff's 1990 guilty plea at issue when he now has the overriding legal right to wholly deny this under RCW 9.95.240: 52 Wn.2d 633, *EVANS v. YAKIMA VALLEY*, 1958; *Bain v. Wallace* (1932), 167 Wash 583, 10 P. (2d) 226; There is nothing special about the statute of limitations, especially when it turns largely on disputed facts, as here, 165 Wn.2d 255, *Mutual of Enumclaw v. T&G* (2008).

32. ER 410 specifically prohibits the use of a withdrawn guilty plea in civil proceedings.

33. Since Plaintiff's due diligence in 1990 is inexorably tied to his free acknowledgment of the PSP3 guilty plea in 1990, as even Defendants themselves admit (CP 61, lines 1-2), *any* SOL defense is going to transfer the burden of proof to him to toll by showing due diligence, and reciting those 1990 efforts to a jury would be meaningless unless he admitted to the PSP3 guilty plea that was at issue during those 1990 inquiries, thus infringing his substantive right to deny the PSP3 guilty plea, a right gained by 1990 dismissal (CP 37). Thus the SOL defense in this case must be rejected regardless of what "facts" Defendants base it on.

34. The Supreme Court construed RCW 9.95.240 dismissal to be meaningless without sealing some form of publicly available conviction record, 144 Wn.2d 829, 31 P.3d 1155, STATE V. BREAZEALE (2001). The Supreme Court's construction of a statute becomes a part of the statute and operates as if it were written into the statute at the time it was enacted, 153 Wn.2d 614, State v. Roggenkamp (2005). RCW 9.95.240 was enacted in 1939. Reading the Supreme Court's 2001-construction back into the 1939 enactment as we must, the 1939 Legislature must have believed that dismissal without sealing some form of public record of conviction was meaningless. But in 1939, the only record of conviction would have been the Court's record. Thus the rules of judicial construction require that the Legislature of 1939 intended an RCW

9.95.240 dismissal to be automatically followed by sealing the only record of conviction that existed in 1939, the court record. Because the Supreme Court has declared this statute to be unambiguous, 74 Wn.2d 231, Matsen v. Kaiser (1968), Defendants are strictly limited to the statute's wording alone to make their reply, 153 Wn.2d 614, State v. Roggenkamp (2005), and are not allowed to use considerations extrinsic to the statute to help construe it, Cerrillo v. Esparza, 158 Wn.2d 194, 200, 142 P.3d 155 (2006).

35. If Defendants succeed in proving the above criminal statute RCW 9.95.240 to be ambiguous, then “under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant”. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). In this case, the Court must adopt Plaintiff's reasonable interpretation given above, and view the PSP3 court record as having been sealed even though it wasn't.

36. Plaintiff's interpretation is reasonable because the District of Columbia Circuit agrees that it is unrealistic to leave a court record of conviction open to public access after the conviction has been dismissed, 606 F.2d 1226, Doe v. Webster (1979).

37. It is only on the assumption that this Court might find the TCSC record of the 1990 PSP3 guilty plea admissible, that Plaintiff now proceeds to make use of it.

38. DEFENDANTS' FRAUDS TOLL STATUTE (Error # 6):

Defendants will certainly attempt a constructive notice argument, but this is merely a complaint that he should have done more with the info at his disposal. But as proven later, they have no right to criticize anything Plaintiff did in 1990 or thereafter, 49 Wn.2d 216, HOGLAND v. KLEIN, (1956). The same effect obtains with reference to estoppel in general, see 31 Wn.2d 157, E. J. Kessinger v. Anderson (1948), quoting "31 C. J. S. 236, Estoppel, § 59". Thus the Court should reject all complaining by Defendants and arguments based on such complaints.

39. Fraud may be demonstrated by pleading and proving the 9 civil elements of fraud, or by simply showing that Defendants failed to disclose a material fact while they were under a duty to do so, 85 Wn. App. 15, CRISMAN v. CRISMAN (1997). As will be proven here, Defendants violated WAC 446-20-150 and RCW 10.97.045 numerous times between 1990 and 2008, and the breach of a legal or equitable duty constitutes fraudulent conduct *irrespective of moral guilt*, 103 Wn. App. 452, GREEN v. MCALLISTER, 2000.

40. The US Supreme Court held April 27, 2010 (Merck v. Reynolds), that "facts constituting the fraud" as stated for example in RCW 4.16.080 (4) requires actual or reasonable discovery of *scienter* (i.e., intent to mislead) before the fraud statute begins to run. There is nothing about the

unspecified “felony” Plaintiff knew of in 1990, that would have or should have indicated Defendants’ intent to mislead or defraud, therefore, Plaintiff had no duty to investigate beyond that point. The same was held in *Betz v. Trainer Wortham & Co.* 519 F.3d 863, 869 (9th Cir. 2008) (cert. granted). The County at summary judgment argued that Doscher’s evidence failed to indicate fraud by judge, prosecutor and court clerks (CP 64-45). The County therefore takes the position that there was no fraud for Doscher to discover in 1990. Because (1) the issue of fraud here is the same as was litigated at summary judgment, (2) the prior ruling was a decision on the merits, (3) Doscher would be damaged if Defendants suddenly turned from their original stubborn position and admitted evidence of fraud existed between 1990 and 2008 and (4) estoppel will not work an injustice to either Defendant, both of them should be estopped from arguing Plaintiff should have discovered fraud before 2006, which they held to the very end of summary judgment as not even existing in the first place.

41. If a person makes at least a *single* inquiry, they cannot be charged with constructive knowledge of fraud, 76 Wn.2d 479, 457 P.2d 600, *Enterprise Timber v. Washington Title*, 1969. Thus 2008, when he actually discovered the PSP2 fraud, (CP 23, par. 31), is the proper date from which the SOL runs, since he declared making inquiries in 1990 (CP 21).

42. General naiveté was dispositive to toll the statute in 70 Wn. App. 150, 855 P.2d 680, GILLESPIE v. SEATTLE- FIRST (1993) *even though the Gillespies had possessed all the facts underlying their cause of action for years*, see also Vucinich v. Paine, Webber, Jackson & Curtis, Inc. 739 F.2d 1434, 1436 (9th Cir.1984). Likewise, even if Plaintiff's coexisting mental disabilities do not allow disability tolling under 4.16.260, they surely give him far more reason to be naïve regarding facts underlying his cause of action, than non-disabled people have. This Court should take those disabilities into account when considering granting tolling by reason of naïveté, and why in 1990 he didn't see through the faulty legal counsel and Defendants' frauds.

43. 'Tolling is a way to protect the reasonably diligent from their innocent lapses.' 141 F.3d 1178, PNP HOLDINGS v. COURT SQUARE (9th Cir. 1998). Failing to file a timely lawsuit because Defendants led Plaintiff by acts of fraud to believe there were no facts underlying any cause of action, is an "innocent lapse".

44. Liability will be found whether the misrepresentation was innocent or with malice, 55 Wn. App. 367, 777 P.2d 1056, PEOPLES STATE BANK v. HICKEY (1989).

45. Fraud by failure to disclose: Plaintiff has already provided all the proof in the record of Defendants' multiple failures to disclose when under a statutory duty to do so, in the CCC section of this brief.

46. Estoppel is uniquely appropriate to a fraud case, that is, where defendants have concealed info that caused Plaintiff to delay bringing suit, 92 Wn.2d 317, 596 P.2d 280, WATTERS v. DOUD (1979). Clearly, the County, by correcting it's court file from PSP2 to PSP3 in 1990 (CP 60-61), knew that the PSP2 form they had previously sent to WSP was false, but, by then refusing to notify WSP of this correction for 18 years, thus violating WAC 446-20-150 and RCW 10.97.045 in the process, concealed facts not only from Doscher but from co-defendant State as well. Estoppel is thus appropriate here. Equitable estoppel focuses on the defendant's blameworthy conduct, rather than his intentions, therefore not even a factual finding that Defendants' errors were accidental would prevent equitable tolling, Roberts v. Maine Bonding & Casualty Co. 404 A.2d 238, 241 (Me.1979).

47. RCW 4.16.080 (4) says "An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;" It was only upon being given the PSP2 rap sheet from WSP on July 15, 2008 that Doscher first reasonably discovered "facts constituting

the fraud” (CP 42)-A14). This was also a declaration at summary judgment that went entirely unrebutted by both Defendants (CP 23, par. 31). Since he filed his lawsuit alleging fraud and other torts 7 months after this July 2008 discovery, he filed well within the 3-year statutory time period following “the discovery of the facts constituting the fraud”, so the claim is timely.

48. This statute says “until the discovery...”. The dictionary definition requires *actual* discovery: ”to see, get knowledge of, learn of, find, or find out; gain sight or knowledge of (something previously unseen or unknown) (“discover.” Dictionary.com Unabridged. Random House, Inc. 08 Mar. 2010). Therefore the fraud discovery rule is not ambiguous but capable of correct understanding based on the words alone.

49. The Court does not ask what the Legislature intended, but what the statute’s words mean, *North Coast Air. V. Grumman Corp*, 1988. Where the wording of a statute is plain, a court must derive Legislative intent from the words ALONE, no extrinsic aids of interpretation such as case law or legislative history are allowed, 104 Wn.2d 543, 707 P.2d 1319, *Elovich v. Nationwide* (1985); 155 Wn.2d 585, *Berrocal v. Fernandez*, (2005). For a statute to be ambiguous, two or more reasonable interpretations must arise from the language of the statute itself, **not from considerations extrinsic to the statute**, and a statute is not ambiguous

merely because different interpretations are conceivable, *Cerrillo v. Esparza*, 158 Wn.2d 194, 200, 142 P.3d 155 (2006). Case law may not be used to help construe a statute unless its wording, considered alone, proves to be ambiguous, 142 Wn.2d 801, *COCKLE v. LABOR & INDUS.* (2001). If the language is unambiguous, a reviewing court is to rely solely on the statutory language. 153 Wn.2d 614, *State v. Roggenkamp* (2005), quoting *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000). The plain meaning of unambiguous statutory language must be given effect without resorting to any other rules of statutory construction, 136 Wn. App. 859, Dec. 2006 *Westway Constr. Inc. v. Benton County*, 2006. It is inappropriate to look to case law where the Legislative intent can clearly be divined from the plain language, *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 279, 823 P.2d 1132 (1992). The meaning of a statutory term, that the statute does not define, (here, discovery) depends upon the term's common usage and the context in which it is used, without reference to other statutory or case law definitions. 92 Wn. App. 156, *STATE v. EDWARDS* (1998). When legislative intent is clear, a court is governed by it despite the fact that the court or case law shows preference for somewhat different choice of language than that employed by the legislature, 80 Wn.2d 633, *ROZA v. STATE* (1972). If the statute is clear and unambiguous, we may not look

beyond the statute's plain language or consider legislative history, 134 Wn. App. 648, Aug. 2006 State v. Stivason, 2006. Unambiguous statutes are read in conformity with their obvious meaning, without regard to the previous common law. STATE EX REL. MADDEN v. PUD 1, 83 Wn.2d 219, 517 P.2d 585 (1973). Even if Defendants could prove that the wording alone would create tension with other Legislative enactments, a conflicting legislative intent cannot override a meaning that is plain on the statute's face, 111 Wn.2d 315, 759 P.2d 405, NORTH COAST AIR v. GRUMMAN CORP (1988). The Supreme Court must give effect to unambiguous language in a statute of limitation, even if that language would effectively nullify the purpose of statutes of limitation, Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997). Courts cannot amend statutes by judicial construction even if a Legislative omission appears to be an oversight, 11 Wn. App. 887, State v. ROCHELLE (1974), unless construction is necessary to make the statute rational, 97 Wn.2d 724, 649 P.2d 633, STATE v. TAYLOR (1982). Thus the time Doscher actually discovered the frauds (i.e. the PSP2 court order, July 2008, A76, par. 31) is where the SOL begins to run according to the unambiguous language of the fraud statute, in light of standard rules of judicial construction.

50. Remedial statutes must be liberally interpreted to effectuate their purpose, State v. Breazeale, 2001 supra. The liberal interpretation of

“discovery” in 4.16.080(4) is the common and dictionary definition of “discovery”, i.e. creation of new actual knowledge.

51. Because Plaintiff was harmed by TCSC clerks failing to obey RCW 10.97.045, he has a cause of action as described in RCW 10.97.110, which does not contain a statute of limitations, and the above rules of judicial construction also prevent Defendants from going outside this unambiguous statute for any reason, 166 Wn.2d 444, HOMESTREET, INC. V. DEP'T OF REVENUE (2009).

52. If the Court finds 4.16.080 (4) ambiguous from the wording alone, Plaintiff now cites some extrinsic aids for his interpretation: The fraud discovery rule does not say “or should have discovered” or other similar “constructive notice” -styled qualification, yet the Legislature uses this language in other statutes, RCW 4.16.340; 7.72.060 (3), including the one in the same section on medical fraud, 4.16.350, thus giving rise to an inference that the missing language (here, “or in the exercise of due diligence should have discovered”) was *intentionally* excluded, 127 Wn.2d 420, WESTERN PETROLEUM v. FRIEDT (1995), quoting Bour v. Johnson, 122 Wn.2d 829, 836, 864 P.2d 380 (1993); 144 Wn. App. 214, DET. OF D.F.F. (2008). “We will not imply exceptions to statutes of limitation where they have not been expressly provided by the

Legislature,” 112 Wn.2d 216, 770 P.2d 182, *Young v. Key Pharm.* (1989).

53. Since Plaintiff had been advised by public defender of WSP’s right to view the case in its pre-amended form (CP 21, par. 14), his later learning in a WSP traffic stop that WSP viewed that case as a felony, did not place him “on guard” of possible wrongful conduct or breach of duty. Therefore the maxim that says ‘notice sufficient to put one on guard is notice of everything a reasonable inquiry would have led to’, does not apply here.

54. Such maxim does not hold true in a fraud case anyway: Suspicion (i.e. being placed “on guard”) of fraud is not discovery of the fraud, nor is it a clue which Plaintiff should have followed, 53 Wn. App. 662, 769 P.2d 869, *BUSENIUS v. HORAN* 1989 (quoting 6 Wn.2d 131, *Davison v. Hewitt*, 1940).

55. A plaintiff “must [have] more than mere suspicion” before being charged with “knowledge of fraud as a matter of law.” 2 Corman §11.5.1, at 185. “Suspicion that a fraud has been perpetrated...should not be equated with knowledge of facts that point to the actual existence of fraud.”, 2 Calvin W. Corman, *Limitation of Actions* §11.5.7, at 203 (1991).

56. “The facts constituting [inquiry] notice must be sufficiently probative of fraud--sufficiently advanced beyond the stage of a mere suspicion,

sufficiently confirmed or substantiated--not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit," Fujisawa Pharmaceutical Company, Ltd. v. Kapoor, 115 F.3d 1332 (7th Cir.1997).

57. If Defendants argue that Doscher, having less knowledge of the facts in the record in 1990 than the clerks, still "should have known" of the fraud, then the clerks having custody of said records can only have had FULL knowledge of their contents, therefore their failure to disclose was intentional, estopping them from pleading the very delay caused by their intent to harm as a defense. County's failure of its statutory duty to disclose after it corrected PSP2 to PSP3 in its court records in 1990 (WAC 446-20-150), shows nothing less than intent to harm. The first amended information correctly said PSP3 as early as the date on that document, January 24, 1990 (CP 31). But WSP did not receive the PSP2 court order until February 28, 1990 (CP 26). That means the County knew that the Order saying "PSP2" was incorrect *before* they sent it to WSP. Or, that they should be charged with constructive knowledge of such because exercise of reasonable care would have alerted them to this error (and actually did, since County corrected PSP2 to PSP3 later in 1990). Being charged with constructive knowledge that the PSP2 order was faulty BEFORE they sent it to WSP, now such dissemination proves to be intent

to harm, relieving plaintiff of duty to mitigate and placing FULL blame for his failure to discover this fraud 100% on the Defendants.

58. If at the time of inquiry, Defendants provided facially believable explanations for the facts suggesting something other than fraud, as they did here (CP 21, pars. 19-20) the plaintiff has no further duty of inquiry and cannot be charged with constructive notice, 143 Wn.2d 206, WINBUN v. MOORE (2001), quoting 73 Wn. App. 448, LO v. HONDA MOTOR COMPANY, 1994. The Arizona Supreme Court clarified a point that it holds in agreement with other jurisdictions; that where fraud is proven in the context of a relationship of trust, as here, an **actual** knowledge standard applies for triggering the statute of limitations. Walk v. Ring, 202 Ariz. 310, 44 P.3d 990 (2002).

59. If a court order is based on fraud (as here), it's entry is not constructive notice of fraud, 58 Wn. App. 773, ABERDEEN FEDERAL v. HANSON, 1990, quoting Johnstone v. Peyton, 59 Wash. 436, 439, 110 P. 7 (1910). And the PSP2 version does not appear to have been "entered" anyway.

60. Defendants' failures to disclose and other misleading activity listed above constituted willful and unreasoned action/omissions without consideration and regard for facts or circumstances, and would be constructive fraud anyway, 80 Wn.2d 392, HOVE v. SEATTLE, (1972). Conduct that is not actually fraudulent but has all the actual consequences

and legal effects of actual fraud is constructive fraud, and breach of a legal or equitable duty is fraud **irrespective of moral guilt**, (statutory violations already proven), 103 Wn. App. 452, GREEN v. MCALLISTER, 2000, quoting Dexter Horton Bldg. Co. v. King County, 10 Wn.2d 186, 191, 116 P.2d 507 (1941). See also 17 Wn.2d 457, THOMPSON v. J. F. HUSTON, 1943, supra.

61. Even if the "gist" of a complaint is negligence, not fraud or deceit, an action based on misrepresentation, as here, is an action for fraud in the context of statutes of limitations, 996 F2d 1224 Evergreen v. Columbia (9th Cir.) 1993.

62. When a statute requires notice from one party to another (such as WAC 446.20-150 and RCW 10.97.045 requiring notice of correction and disposition to be sent from TCSC clerk to WSP), the failure to comply creates an exemption to the time bar, and any action filed before notice is given is timely. In re Pers. Restraint of Vega, 118 Wn.2d 449, 451, 823 P.2d 1111,(1992). Since Plaintiff filed his lawsuit (March 2009) within three years of the time the County complied with the notice-requirements in RCW 10.97.045 and WAC 446-20-150 (i.e. March 2009, see (CP 16)-19) it was timely.

63. Even if the Court finds there is evidence suggesting Doscher "should have" discovered fraud sooner, there is also evidence that his reasonable

inquiries did not uncover sufficient information to justify an inquiry motivated by concern about possible fraud. When there is conflicting evidence on what a person knew and when, or whether they “should” have known something, there must be jury trial since a court at summary judgment may not weigh evidence, 164 Wn.2d 261, *Rivas v. Overlake*, 2008. Where different inferences may be drawn from evidentiary facts as to ultimate facts such as knowledge (as here), summary judgment is not warranted, 44 Wn. App. 167, 721 P.2d 553, *WEISERT v. UNIVERSITY HOSPITAL* (1986).

64. An action for fraud does not accrue until the fraud is both (a) known and (b) actual appreciable damages occur, 72 Wn. App. 278, 864 P.2d 17, *FIRST MARYLAND v. ROTHSTEIN* (1993). Knowledge of harm and how harm happened does not prove one knew enough to set the statute running, 92 Wn.2d 507, 598 P.2d 1358, *OHLEER v. TACOMA GEN. HOSPITAL* (1979); *Northcoast Air v. Grumman Corp* (1988). Because plaintiff was innocently ignorant of the falsified PSP2 court order until 2008, and was misled by Defendants’ frauds in 1990 to believe the felony was neither wrongful nor a breach of duty, he could not have known that hardships in his life created by the felony (such as inability to secure work), were “damages” due to “fraud”, thus proving he excusably did not

know of the fourth element (damages) until July 15, 2008, thus tolling the statute until that year.

65. TOLLING BY DUE DILIGENCE (Error # 7): Defendants never supplied rebuttal to any fact asserted in Plaintiff's summary judgment Declaration after he filed it August 12 (CP 18-23), therefore this Court must find that Defendants have admitted them all to be true, which means all testimony to due diligence therein are verities in this appeal.

66. The trial court ruled that discussing the felony with various entities in 1990 did not meet the standard of due diligence (VRP, p. 18, lines 23-25). Addressing an issue to a superior Court by means of motions is *less* than reasonable diligence (CP 21, pars. 16 and 20) ?! What is more reasonable than petitioning a court?

67. Plaintiff attempted legal suppression of the felony twice in 1990 with motions to TCSC (CP 20, par. 13; CP 21, par. 16), not because he thought the felony was wrongful or result of a breach, but for the same reason anybody with a legitimate felony would seek suppression; to avail themselves of a legal way to remove a legitimate though defamatory entry on their criminal history. Tolling is appropriate when delay in resolution was caused by a Court ignoring relevant issues timely addressed to its attention, 99 Wn. App. 423, PERSONAL RESTRAINT OF HOISINGTON, 2000.

68. Summary judgment is not appropriate where a party took "some" action to mitigate/inquire, see footnote 12 in 74 Wn. App. 408, Senn v. Northwest Underwriters, (1994).

69. The standard for due diligence is whether the conduct was what a reasonable person would have done under the same circumstances, 60 Wn. App. 252, HIBBARD v. GORDON, 1991. A reasonable person would have brought the felony to the attention of WSP, where it appeared to Plaintiff (at the time) to have originated, and this is what Plaintiff did in 1990 (CP 21, par. 20). If that didn't work, a reasonable person would have brought the felony to the attention of the TCSC clerk, with motions to the Court, and plaintiff did this too, (CP 20, par. 13; CP 21, par. 16). Defendants agree that addressing the felony to WSP and then TCSC in 1990 would have demonstrated due diligence (CP 62, pars. 6-10).

70. Defendant County believes it corrected PSP2 to PSP3 in 1990 (CP 61, lines 1-5). Thus County most likely made such correction after Plaintiff approached TCSC in 1990 about the felony, wherein the court clerk refused to file his motion for injunctive relief (CP 21, par. 13) or else when he filed for dismissal mentioning the felony (CP 20, par 13). Will Defendants now argue that Plaintiff's efforts of further inquiry were not reasonable *in spite of being at least partially successful*? If County says

PSP3 was the original form of the order, then the later PSP2 form given to WSP can only have been a deliberately falsified copy.

71. Conflicts in the evidence on what a person knew and when preclude summary judgment, 164 Wn.2d 261, Rivas v. Overlake, 2008. County acknowledges without denial that Doscher's 1990 efforts are relevant evidence (CP 92, lines 15-20), then later asserts he did "nothing" for 18 years (CP 62, lines 13-14, (CP 63, lines 8-9). County says original prosecutor Franzen should be allowed to testify to his involvement in the 1990 case (CP 92, lines 10-12), but then later says the individuals involved in the case in 1990 cannot be expected to remember any details of it (VRP, p. 3. lines 5-15). Defendant State shields itself from liability by denying that it owed Doscher any duty in 1990, but will surely insist in response to this Appeal that Doscher should have discovered State's duty before 2008. Under the assumption that counsel for Defendants are reasonable people, their own contradictory stance regarding duty, breach, causation, damages and proof of due diligence explode their attempted argument that reasonable people could only reach one conclusion on these essential considerations.

72. The County says Plaintiff's attempts in 1990 to address the felony issue constitute "sleeping" on his rights, because he could have done "more" (CP 62, lines 13-14). But in Washington, sleeping on one's rights

is not a failure to do “more”, but a failure to do *anything whatsoever*, an “utter lack” of effort, hence, **“sleeping”**, see 129 Wn. App. 599, *Clare v. Saberhagen Holdings, Inc.* (2005); 128 Wn. App. 901, *Gutz v. Johnson* (2005); Restatement of Torts, § 918, illustration #7. A claimant who fails to make “any” meaningful inquiry, has breached the due diligence duty, *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 114, 802 P.2d 826 (1991)....thus requiring that a *single inquiry* will suffice as due diligence.

73. In Washington, a blamelessly uninformed tort victim cannot be said to have slept on his rights, 111 Wn. App. 725, *Architectonics Constr. Mgmt. Inc. v. Khorram* (2002). Defendants’ proven frauds and faulty legal counsel in 1990 (CP 21, par. 14) misled Plaintiff to think in 1990 that the felony at WSP was neither wrongful conduct nor a “breach” of “duty”. Faulty professional advice will excuse the late-filing of a claim, even if the facts underlying one’s cause of action were in one’s personal possession for years before filing of the lawsuit, 70 Wn. App. 150, 855 P.2d 680, *GILLESPIE v. SEATTLE-1ST FIRST BANK* (1993). Plaintiff was a blamelessly uninformed tort victim, therefore he did not sleep on his rights, therefore, the consequences for sleeping on rights (time barring a claim) cannot obtain here.

74. Defendants complain that Plaintiff did not exercise due diligence because he did not do “more”. But this constitutes an inquiry into what Plaintiff *didn't* do. A court analyzing a claim of due diligence may not inquire into what a plaintiff didn't do, but can only focus on what they *did* do, 77 Wn. App. 588, CARRAS v. JOHNSON, 1995. A single telephone call can suffice to show due diligence, 119 Wn. App. 319, State v. Austin (2003). An effort can be due diligence *even if the inquirer consciously disregarded an alternative line of inquiry he knew posed greater likelihood of resolving the problem*, 120 Wn.2d 585, P.2d 971, STATE v. GREENWOOD (1993) at 596-602.

75. When one seeks the advice of a professional advisor or attorney, this is reasonable diligence: 70 Wn. App. 150, 855 P.2d 680, GILLESPIE v. SEATTLE-1st FIRST BANK (1993). Plaintiff sought professional advice from both his public defender (CP 21, par. 14), and at least one other attorney (CP 22, par. 24). Unless Defendants wish to argue that seeking professional legal advice is unreasonable, then reasonable diligence is demonstrated. Excising the hearsay would still leave intact Plaintiff's claim of reasonably seeking legal counsel to no avail. Reporting what was actually said is not necessary to show due diligence here.

76. The TCSC court clerk in 1990 chose to answer legal questions and refused to file Plaintiff's motion for injunctive relief (CP 21, par. 16), thus

requiring a jury to decide whether those assurances should have been relied on, 78 Wn. App. 616, *SUNDBERG v. EVANS* (1995).

77. Plaintiff's testimony to having consulted lawyers about the felony in 1990 places his credibility as a witness at issue. Summary judgment is improper when the case turns on witness credibility, 85 Wn. App. 822, *MORINAGA v. VUE*, 1997.

78. Plaintiff's and Defendants' inability to locate 1990 public defender William Kopp *after* his availability became an issue at summary judgment creates an exception to allow Plaintiff's hearsay under ER 804 (a) (5).

The 2004 death of attorney William Messer (CP 22, par. 24), creates an exception for the hearsay regarding him under ER 804 (a) (4). Thus Defendants' "concerns" about "inadmissible hearsay" are without merit.

79. Doscher corrected "stole" to "possessed" regarding the truck, in 1990 (CP 15; see also CP 19, par. 4). The correction was suggested by counsel William Kopp. But this correction corrected nothing, since the truck itself was excluded from the items Doscher pled guilty to unlawfully possessing, and the court wholly excluded the truck from consideration. A jury could find Kopp's failure to advise correctly in this elementary matter is evidence that he also advised Doscher incorrectly and before plea deal agreement about the WSP's legal right to view the case in pre-amended form (CP 21, par. 14).

80. It is only “**IF** the plaintiff fails to exercise due diligence” that “he or she is charged with the knowledge due diligence would have revealed”, 136 Wn.2d 87, GREEN v. A.P.C. (1998). Because Doscher exercised due diligence, he cannot be charged with more knowledge that what he *actually* uncovered.

81. Defendants rely on a maxim in case law that says the SOL begins running from plaintiff’s knowledge of the facts underlying their cause of action, not from their discovery that those facts will justify a civil lawsuit. This is true, but their interpretation is not. The first two ‘facts’ that must be known or reasonably known before the SOL even starts running are “duty” and “breach”. Specifically, one must possess or reasonably should have possessed knowledge that the facts in one’s possession **indicate that the harm was caused by another’s breach of duty:**

70 Wn. App. 150, 855 P.2d 680, GILLESPIE v. SEATTLE- FIRST (1993); 111 Wn.2d 315, 759 P.2d 405, NORTH COAST AIR v. GRUMMAN CORP. (1988); 92 Wn.2d 507, 598 P.2d 1358, OHLER v. TACOMA GENERAL HOSPITAL (1979) Since County changed the court record from PSP2 to PSP3 in 1990, it had equal opportunity to mitigate the felony by simply obeying WAC 446-20-150 and reporting this correction to WSP as required. Since they had equal opportunity, and since their wrong forced Plaintiff’s mitigation-choice, they are not

permitted to criticize Plaintiff's efforts, complain that he should have mitigated, or complain that he should have mitigated differently, 49 Wn.2d 216, HOGGLAND v. KLEIN, (1956, quoted in 65 Wn. App. 399, 828 P.2d 621, WALKER v. TRANSAMERICA, 1992.) Therefore the Court should reject any attempt of Defendants to base a constructive knowledge argument on their "complaints" that he "should have" done more. Among the 4 elements (duty, breach, causation, damages), knowledge of the second element, breach, requires the presupposition of duty. When there is no duty known, breach "of duty" logically remains an unknown too. Legal counsel misled Plaintiff in 1990 to believe that WSP had a legal right to view the case in its pre-amended and felony form (CP 21, par. 14), therefore it was reasonable for him to lack knowledge of even the duty-element.

82. The TCSC clerk in 1990 refused to file his motion for injunctive relief (CP 21), par. 16), justifying his belief that the felony issue he was addressing to the Court was nothing the Court felt was worthy to address.

83. Plaintiff filed a motion to dismiss mentioning the felony issue therein (CP 20, par. 13), and although dismissal was granted (CP 37), the Court said nothing in response to the felony issue, and the Clerk not only failed to notify WSP of the felony issue, but didn't even disclose the dismissal itself to WSP (CP 16), as required by RCW 10.97.045. These failures to

respond, some of them being statutory violations, constitute Defendants' failure to disclose a material fact when under a (statutory) duty to do so, i.e., fraud, and could easily be interpreted by a jury as intent to keep the PSP2 court order hidden from Plaintiff. Constructive notice does not apply when Defendants respond to reasonable inquiries with information that gives a reasonable person no reason to suspect wrong-doing.

84. Defendants may say Plaintiff's inquiries, if true, gave him enough knowledge to force a finding of at least constructive notice of wrongful conduct in 1990, as a matter of law. Not so. An inquiry by the plaintiff or attorney into a possible cause of action (such as Doscher's inquiry about the felony in 1990 with WSP/TCSC and several lawyers) is not enough to establish, as a matter of law, that the plaintiff discovered all 4 essential elements of that action. 52 Wn. App. 221, 758 P.2d 991, OLSON v. SIVERLING (1988); SEE WEISERT, 44 Wn. App. at 170-71, 173.

85. PLAINTIFF HAD NO DUTY TO MITIGATE (Error # 7):

Defendants said the existence of a correct PSP3 order in TCSC in 1990 is highly relevant to whether Plaintiff's took reasonable steps in 1990 to 'mitigate' his damages (CP 60-61). Plaintiff agrees that the correction from PSP2 to PSP3 in this record can only have occurred after Plaintiff attempted mitigation with TCSC concerning the felony in 1990. This further means Defendants and Plaintiff agree that efforts of 'further

inquiry' (i.e. due diligence) in 1990 cannot be logically distinguished from efforts of mitigation. Efforts of inquiry in 1990 carried tremendous mitigation potential by raising the possibility of bringing the PSP2 order to light causing correction and thus mitigation of all damages now claimed. Thus, any argument that successfully relieves Plaintiff of duty to mitigate, relieves him also of duty to further inquire.

86. The injured party has no duty to mitigate if tort is a continuing course of conduct (CCC), *Desimone v. Mutual Materials Co.* 23 Wn.2d 876, 162 P.2d 808 (1945). The long list of Defendants' continuing torts has already been given in the CCC section.

87. If Defendants, who caused negligence, had 'equal opportunity' to mitigate, Plaintiff had no duty to mitigate, 65 Wn. App. 399, 828 P.2d 621, *WALKER v. TRANS AMERICA*, 1992. Defendants call the PSP2 error "negligence" (CP 64, lines 10-11). **Equal opportunity 1:** Since Thurston County assumes PSP3 represents the 1990-wording of the order (CP 90-91, esp. CP 61, line 1), the County is admitting that it corrected PSP2 to PSP3 in 1990. If the County does not accept this explanation, their only other choice is to admit the original form of the Order correctly said PSP3, which means the later PSP2 version given to WSP was a deliberately falsified copy, indicating intent to harm/defraud. By correcting PSP2 to PSP3, the County had actual knowledge in 1990 that

the original PSP2 form of the court order it previously gave WSP was false, thus the County had equal opportunity to mitigate by obeying WAC 446-20-150 and reporting such correction to WSP. **Equal Opportunity 2:** County gave WSP a blank “disposition document” (DR) in 1990 to accompany the falsified PSP2 court order (CP 25). Had the County properly filled out this DR with ‘PSP3’ as required (and nothing prevented them from doing so), WSP would have noted an inconsistency between amended PSP3 and “PSP2” in the order, thus mitigating. **Equal Opportunity 3:** County did not give WSP in 1990 a copy of the first amended information, which correctly said PSP3, an omission noted for its significance by WSP employee Deborah Collinsworth (CP 31). Giving WSP a copy of the first amended information is and was otherwise standard procedure, and would have alerted WSP to a PSP2/PSP3 inconsistency, leading to full mitigation in 1990. **Equal Opportunity 4:** The TCSC Clerk’s office failed their statutory duty (RCW 10.97.045) to disclose Plaintiff’s dismissal (CP 37) to the WSP (CP 16). Had the clerk not violated that law, such disclosure would have alerted WSP to the PSP2/PSP3 inconsistency, leading to mitigation of everything. **Equal Opportunity 5:** The TCSC clerk was notified of the felony issue at WSP (CP 20, par 13; A74, par. 16), yet failed to notify WSP of same, (CP 16). As little as a single phone call revealing all that the Clerk knew would

have mitigated. **Equal Opportunity 6:** TCSC's 1990 order of dismissal failed to state the nature of the charge being dismissed, an omission cited by WSP as one reason why it was confused on what it was dismissing (CP 16). The Order also failed to state that a guilty plea was being withdrawn and that a not-guilty plea was being entered (CP 37). County's failure to report this dismissal to WSP (CP 16), and County's inexplicable docket summary of the case in 2003 as "sentencing deferred: no" (CP 17) indicated the County never included this dismissal in its own publicly accessible Court files, which, had the original clerk of 1990 done so, would have increased possibility that a future clerk would catch these errors, thus mitigating. Failure of a dismissal order to explicitly state that it is voiding or negating a prior judgment, as here, provides a court-acceptable excuse to those who claim to have misunderstood it to their peril, 44 Wn. App. 654, 722 P.2d 1373, LaMON v. BUTLER (1986), see (CP 19, par. 6). **Equal Opportunity 7:** Plaintiff placed State on notice of the felony issue (CP 21, par. 20). Presumably WSP had this PSP2 court order at the time of this inquiry. Had the WSP clerk conducted the most minimal checking, it would have identified its PSP2 order as false, thus mitigating. Because Defendants had numerous equal opportunities to mitigate, this Court should follow Hogland and Walker, supra, and reject any argument Defendants make that derives from complaining about

Plaintiff's lack of effort. Since the SOL defense restores their unlawful right to criticize (i.e. criticism of plaintiff's allegations of due diligence), that defense should be struck too.

88. In Washington, if Defendants caused Plaintiff harm by either intent to harm or recklessness, Plaintiff had no duty to mitigate, 86 Wn. App. 223, COBB v. SNOHOMISH COUNTY (1997); 54 Wn. App. 361, 773 P.2d 873, SUNLAND INVESTMENTS v. GRAHAM (1989). 12 Wn. App. 152, 153, 528 P.2d 1006, Wilson v. City of Walla Walla (1974).

Restatement (Second) of Torts, § 918, Illustration # 6. The long list of Defendants tortious conduct has already been recited in the CCC section. Fraud is an intentional tort, so if fraud is established, so is intent to harm.

89. Plaintiff can recover all damages caused by intent to harm or recklessness *even if he did not react to the issues he knew of as a reasonable person would have*, Restatement (Second) of Torts, Section 918, illustration 6 (recklessly caused barn-fire). This illustration assumes the injured party knows everything they need to know about the damages. Thus full recovery would be allowed even if the Court believes Plaintiff reacted to harm he knew of in an unreasonable way.

90. Mitigation would have, as County agrees, required consulting with TCSC and WSP about the felony. But this would have (and did) require him to acknowledge the truth of the PSP3 guilty plea. That was ok before

April 27, 1990. But after dismissal (CP 37), it was his substantive right to completely avoid the PSP3 subject altogether. A tort victim does not have to surrender a substantive right in order to mitigate, see Restatement (Second) of Torts § 918, examples “h” and “j”. Since Plaintiff would naturally have had to admit to the PSP3 guilty plea in efforts of due diligence after the dismissal was granted April 27, 1990, during his inquiries that year, his refusal to engage in such infringement of his substantive rights should be excused. Since filing a lawsuit is a mitigation effort (91 Wn. App. 750, STATE v. DYSON(1998), then the previous arguments which free Plaintiff from duty to mitigate, also free him from duty to file a lawsuit, which “caps” or minimizes damages. But the SOL would still potentially apply for plaintiffs who DID have a duty to mitigate.

91. When a plaintiff has been harmed by negligence, they are **not required** to give the tortfeasor further opportunity to make mistakes, and so are justified to refuse attempting mitigation with them, Restatement (Second) of Torts,(RSOT) § 918, illustration “i”. When Plaintiff mentioned the felony in his motion for dismissal in 1990 (CP 20, par. 13), the Clerk sent nothing about the felony to WSP (further mistake 1), not even the Dismissal order itself, thus violating RCW 10.97.045 (further mistake 2), the dismissal order was misleading as to what exactly it was

dismissing (CP 37) misleading Plaintiff (CP 19, par. 6) and WSP (CP 16) about what it meant, (further mistake 3), then the TCSC clerk's office corrected PSP2 to PSP3 in their own records in 1990 sometime after Doscher inquired of them about the felony, but failed their WAC 446-20-150 duty to report such correction to WSP (further mistake 4). Additional mistakes of both Defendants are listed in the CCC section. Since Defendants engaged in actual further mistakes in response to Plaintiff's attempt to mitigate with them, any subsequent refusal of Plaintiff to interact with them was justified under the 2nd Restatement of Torts.

92. TOLLING BY BREACH OF CONTRACT (Error # 8): The breach of a plea deal contract affects substantive and constitutional rights, and is therefore properly before this Court. Plaintiff agreed with State and County to a PSP3 charge in 1990. This was breached by its characterization in the court order as PSP2, causing a "felony" to be on his public record for 18 years. But the plea deal requires "lifetime" representation as guilty of PSP3, or as "dismissed" if a dismissal is later lawfully entered, and it was (CP 37). The discovery rule applies to breach of contract claims, 1000 Virginia Ltd. P'ship v. Vertics, 158 Wn.2d 566, P.3d 423 (2006). Plaintiff's plea deal with Defendants was a contract, 132 Wn.2d 80, STATE v. MOLLICHI (1997). A plea deal is in the nature of a contract and the rights and duties of the parties to a plea

agreement are denned both by contract law and the principles of due process, 133 Wn.2d 828, STATE v. SLEDGE (1997). The State represented Doscher as guilty of a felony through WSP records (CP 26, CP 42), and then placed his 1990 guilty plea to PSP3 on the internet through the AOC website, though he didn't discover this in time for summary judgment. Washington recognizes that the SOL for breach of contract remains tolled for as long as representation in a specific matter continues, under the continuous representation rule, 135 Wn. App. 285, Burns v. McClinton, 2006. Since the misrepresentation continued until 2008, that is the proper year from which the SOL would begin to run under the continuous representation rule, if at all. Damages for breach of contract are those that could naturally be expected to have occurred by reason of the breach and are not limited to the terms of the contract alone, 128 Wn. App. 760, Crest Inc. v. Costco Wholesale Corp. (2005).

93. “it is more equitable to place the burden of loss on the party best able to prevent it, i.e. the contracting party who could avoid breaching the contract” 1000 Virginia Ltd. P'ship v. Vertics, 158 Wn.2d 566, 579, 146 P.3d 423 (2006), here, Defendants.

94. EQUITABLE TOLLING (Error # 9): The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff, 165 Wn.2d 135, IN RE PERS.

RESTRAINT OF BONDS, 2008. The bad faith and deception of Defendants by reason of fraud and recklessness/intent to harm have already been proven in the list provided in the CCC section. It is also proven from their choice to continue forcing Plaintiff to acknowledge and deal with the PSP3 guilty plea by predicating their SOL argument on it, when they knew perfectly well he had a substantive right to avoid that matter entirely, which was more important than their procedural right to make an SOL defense. The County at summary judgment promised not to impeach plaintiff with the PSP3 record (CP 60), but then seeks to impeach Plaintiff's legally justified denial of same on almost every page of their pleadings at trial court level, even the same sentence in (CP 60). Plaintiff's exercise of due diligence is testified to in his Declaration (CP 18-23), and must be assumed true at least for purposes of summary judgment. Deception by Defendants and due diligence by Plaintiff are proven in this case, thus the predicates for equitable tolling have been met and this is enough to survive summary judgment dismissal.

95. ESTOPPEL: Both Defendants held, to the very end of summary judgment, that they committed no tortious acts after 1990 (CP 62, line 15). The issue of whether their tortious acts continued past 1990 in this appeal is identical to the CCC issue raised at summary judgment, and estopping Defendants from reversing their original denial of acting tortiously after

1990 (when Plaintiff had provided absolute proof of such to them at summary judgment giving them plenty of time to conform their position to the clear, cogent and convincing facts) would not work an injustice to them. As such, all 4 elements of estoppel are fulfilled, and this court should prohibit Defendants from acknowledging any of their tortious post-1990 conduct or omissions. "When a party unjustly contrives to put another in a dilemma and to subject him to necessity and distress and he acts one way, it is not for the wrongdoer to insist that he should have acted another way." 31 Wn.2d 157, E. J. Kessinger v. Anderson (1948), quoting "31 C. J. S. 236, Estoppel, § 59". The County unjustly contrived to put Doscher in a dilemma and subject him to distress by failing to report the PSP2 order as false to the WSP in 1990, after County corrected it to PSP3. (compare CP 26 and CP 29). Thus it is not for County, the wrong-doer, to insist, as their SOL defense permits them to, that Plaintiff should have acted another way than the reasonable way that he did. Therefore the SOL defense, which unfairly and unjustly restores their right to criticize claims of due diligence, should be prohibited.

96. Estoppel has the power to toll the statute even if the plaintiff has not followed the law, 28 Wn.2d 1, State v. Magnesite, 1947, quoting Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

97. “The purpose of the doctrine of equitable estoppel is to prevent a party from taking inequitable advantage of a situation he or she has caused.” *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. 1998). County clearly caused this felony-situation when it violated various statutes mandating disclosure in spite of its knowledge of ‘error’. The State caused this situation by responding ineptly to Plaintiff’s inquiries to WSP in 1990 (CP 21, par. 20), drawing State into shared responsibility with County for why the felony persisted uncorrected so long. Defendants should be equitably estopped from taking advantage of the delay in filing a lawsuit (as they do with an SOL defense) when it is their own wrongful conduct and concealment that caused said delay. “One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute [of limitations], and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.” *Bedford v. James Leffel & Co.* 558 F.2d 216, 217-18 (4th Cir.1977) at 218. The County cannot equitably violate statutes requiring disclosure (causing Plaintiff and co-defendant to remain ignorant), lulling Plaintiff into a false sense of security, and thereby cause Plaintiff to subject his claim to the SOL bar, and then be permitted to plead the very delay caused by County’s course of conduct as a defense to the action when brought.

98. PLAINTIFF'S CLAIM IS NOT STALE: As long as evidence is objective enough for the Court to fairly determine that a violation occurred, the evidential problems that the SOL is concerned with are not present, the case is not stale, and that is a situation that alone justifies extending the time to bring suit: "Since the evidentiary problems which the SOL is designed to prevent did not exist or were reduced, **it was reasonable to extend the period for bringing the action.**" 107 Wn.2d 72, 727 P.2d 226, TYSON v. TYSON (1986). Proof of Defendants' torts comes from their own source documents now in evidence, so proofs of their wrongful conduct are not subject to faded memories, lost evidence or unavailable witnesses. Plaintiff's defense by means of summary judgment declaration (CP 18-23) must be construed by the Court as true for summary judgment purposes, and all factual averments should be taken as admitted by Defendants since they filed nothing after that August 12 Declaration to rebut it, so Plaintiff's defense is not plagued by faded memories, lost evidence or unavailable witnesses. If the Court finds defamation per se or by malice, it will allow *presumed* damages, removing any concern that the proof of damages rested on lost evidence, unavailable witnesses or Plaintiff's faded memories, 42 Wn. App. 675, 713 P.2d 736, VERN SIMS FORD v. HAGEL (1986); 126 Wn. App. 34, Maison de France, Ltd. v. Mais Oui!, Inc. 2005. The Ninth Circuit declares that a

finding of recklessness is a finding of scienter, (Nelson v. Serwold, 576 F.2d 1332 (9th Cir.). Thus the three major evidentiary problems that make up a stale claim are present here neither in proof of wrongdoing, plaintiff's defense, nor in the claim for damages, thus "**it was reasonable to extend the period for bringing the action.**" (Tyson, supra).

99. TOLLING BY COEXISTING DISABILITIES (Error # 10): As admitted by Defendants, Plaintiff Doscher was diagnosed in 2008 by Social Security with two collateral mental disabilities of the sort experts say arise during childhood trauma and/or as a result of genetics (borderline personality disorder and functional anxiety disorder) for which he received and continues to receive full monthly social security benefits, (CP 67), lines 14-17). RCW 4.16.260 says "When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed." The rules of judicial construction demonstrate that this statute strictly requires tolling after a finding that Plaintiff had coexisting disabilities at the time their right of action accrued. **It does not invite discussion of whether the coexisting disabilities were so severe that the person 'could not understand the nature of the proceedings'.**

100. Litigants are not permitted to consult other statutes dealing with similar subject matter, if the statute in dispute is unambiguous, 166 Wn.2d

444, HOMESTREET, INC. V. DEP'T OF REVENUE (2009). The meaning of a statutory term, that the statute itself does not define (here, the term 'disabilities' in 4.16.260), depends upon the term's common usage and the context in which it is used, without reference to other statutory or case law definitions. 92 Wn. App. 156, STATE v. EDWARDS (1998). Here "disabilities" only has the common reasonable meaning of "medically diagnosed disabilities". An enactment is not subject to judicial interpretation if its language is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning. 127 Wn.2d 420, WESTERN PETROLEUM v. FRIEDT (1995). There is nothing about "coexisting disabilities" in 4.16.260 that gives rise to any interpretation other than "medically diagnosed coexisting disabilities", since that is how "disabilities" is understood according to its natural and ordinary sense and meaning in that context. And a person can have a medically diagnosed mental disability without being fully incompetent (in 1990, RCW 11.88.010 included "or other mental disability, but cannot be found to be fully incompetent" among the substantive standards of disability, 112 Wn.2d 216, 770 P.2d 182, Young v. Key Pharm. 1989. Thus the only inquiry the Court can allow is for a jury to inquire as to whether Plaintiff's currently coexisting mental disabilities existed also in 1990, that is, if the

Court accepts Defendants untenable position that the SOL began running in 1990.

101. When the legislature wants one statute to be interpreted in the light of another, it makes this clear (see RCW 4.16.190, which requires use of the disability-criteria in RCW 11.88). Therefore, an inference arises that what was left out of a statute (here, a statement in .260 requiring it to be read in the light of 4.16.190 or 11.88) was *intentionally* excluded, 127 Wn.2d 420, WESTERN PETROLEUM v. FRIEDT (1995), quoting Bour v. Johnson, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). Thus justifying the position that they wished neither 11.88 nor 4.16.190 to govern 4.16.260.

107. .260 was last revised in 1881, and the Legislature has admitted that early statutory language on disability-determination before the 1970's was "imprecise, required no fulfillment of criteria, and did not require judicial determination" (SSB 2872, Final Legislative Report, 1977, p. 175). Thus it would be anachronistic for Defendants to argue that the Legislature of 1881 desired the coexisting disabilities they mentioned in 4.16.260, to pass criteria in statutes that didn't exist at the time and would not for another 100 years (4.16.190 and 11.88).

108. If the Court rejects this argument, then use of extrinsic aids to interpretation are allowable for both parties to use: The US Supreme Court allowed another state's identically-worded coexisting disabilities

statute to toll for a woman who had perfectly understood her cause of action for 20 years before she filed suit, *Sims v. Everhardt*, 102 U.S. 300, 1880, a liberal interpretation. A federal court found that procedural legal disadvantages, having nothing to do with medical disability whatsoever, yet qualify as “coexisting disabilities” to toll the statute, 173 F.Supp. 423, *Dickinson v. Kansas City Star*, No. 12134, (June 3, 1959), again, a liberal interpretation. RCW 4.16.260 is remedial, so it should be interpreted liberally.

109. If the Court rejects the previous arguments and requires the coexisting disabilities of .260 to be evaluated by the criteria in 4.16.190 and hence RCW 11.88.010, then:

110. “disabled to such a degree that he or she cannot understand the nature of the proceedings” in RCW 4.16.190 is not criteria in addition to those in RCW 11.88, because according to the statute, fulfillment of the 11.88 criteria demonstrates that a person did not understand the nature of the proceedings. .190 says “SUCH disability AS DETERMINED by 11.88 RCW.” That is, proof that one did not understand the nature of the proceedings, must be predicated on the criteria of RCW 11.88. Thus a fulfillment of that criteria indicates the tolling advocate did not understand the nature of the proceedings. If a person understands the nature of the proceedings, they do not need a guardian to understand for them. Another

reason why the statement in .190 cannot be requiring full or nearly full incompetence (which is what the literal interpretation certainly requires) is because the 1990 wording of RCW 11.88 included “or other mental disability, but cannot be found to be fully incompetent” among the substantive standards of disability, 112 Wn.2d 216, 770 P.2d 182, Young v. Key Pharm. (1989).” If .190 requires full incompetence, this would create a contradiction with the 1990 version of 11.88 which does not require full incompetence as a condition to a finding of incapacity.

Another reason why .190 cannot require full incompetence is because the Supreme Court in 164 Wn.2d 261, RIVAS V. OVERLAKE HOSP. MED. CTR (2008), ruled that disability-tolling is even a possibility for those who do not fulfill the “management insufficiencies over time” criteria in RCW 11.88. That makes Defendants’ strictly literal interpretation ridiculous: How can a person be “disabled to such a degree that he or she could not understand the nature of the proceedings” , but yet disabled so little that they manifest no management insufficiencies in their life? Impossible, under the strictly literal reading of .190, and absurd, strained or unlikely interpretations must be rejected, 155 Wn.2d 585, Berrocal v. Fernandez, (2005). The solution is to interpret “could not understand the nature of the proceedings” in .190 not as “fully incompetent” but as “disabled to such a degree that he or she could not understand the facts underlying their cause

of action” or “disabled to such a degree that he or she could not understand that what happened to them gave them a right to sue”. Even the strictly literal interpretation contemplates within full incompetence, a failure to appreciate one has a civil cause of action.

111. Naiveté-tolling was allowed to excuse late-filing in both 70 Wn. App. 150, 855 P.2d 680, GILLESPIE v. SEATTLE- FIRST (1993), and Vucinich v. Paine, Webber, Jackson & Curtis, Inc. 739 F.2d 1434, 1436 (9th Cir.1984). In neither case did Plaintiff’s have mental disabilities. The Gillespies had previously been in personal possession of the facts underlying their cause of action for many years. Even if Plaintiff’s mental disabilities are not sufficient for disability-tolling per se, they certainly give him more reason to be naïve with respect to what the facts in his possession signified, and therefore he should be accorded naiveté-tolling at least with as much gusto as it was accorded to the non-mentally disabled plaintiffs in Gillespie and Vucinich.

V. CONCLUSION

The trial court should be reversed, the statute tolled and Plaintiff allowed jury trial on the merits for all damages caused by the proven errors in the record and acts/omissions by Defendants between 1990 and 2008. First alternative: Plaintiff should be allowed trial to recover felony-related damages that occurred within the 6 years previous to the filing of the

lawsuit (6-year SOL for breach of contract damages, (RCW 4.16.040 (1).
Second Alternative: Plaintiff should be allowed to recover for felony
related damages that occurred within the 3 years prior to the filing of the
lawsuit (3-year SOL for fraud, RCW 4.16.080 (4). Third alternative:
Trial court should be reversed and Plaintiff allowed trial to recover all
damages created by public dissemination of TCSC's errant docket
"sentencing deferred: no" (CP 17), which he did not reasonably discover
between 2003 and 2008. Fourth alternative: trial court should be reversed
to allow for damages between 1990 and 2008 for the County's defamatory
refusal in that period to disclose the dismissal he motioned for and was
granted in 1990, to the WSP (CP 37; CP 16) , a failure to disclose he did
not reasonably discover until 2008. Fifth alternative: trial court should be
reversed and Plaintiff allowed to recover for damages stemming from
State's AOC website that listed his criminal case docket from 1990, which
incorrectly associates the withdrawal of guilty plea to the 2009 vacation
instead of the 1990 dismissal.

Respectfully submitted,

 5-20-10

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Date

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DIVISION 2

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COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON STATE OF WASHINGTON

BY C
DEPUTY

Certificate of Service

Court of Appeals No. 39776-5-II

Mason County Superior Court No. 09-2-00338-0
The Honorable Judge Amber Finlay

I, Christian Doscher, certify under penalty of perjury, that I served a copy of Appellant's Brief, which included Appendix, by personal delivery, to the parties named below, on the date noted below:

Date of service: 5-20-10

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I affirm under penalty of perjury and the laws of the State of Washington that the facts contained in this certificate of service are true and accurate to the best of my knowledge.

Christian Doscher 5-20-10
Christian Doscher Date
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COURT OF APPEALS
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STATE OF WASHINGTON

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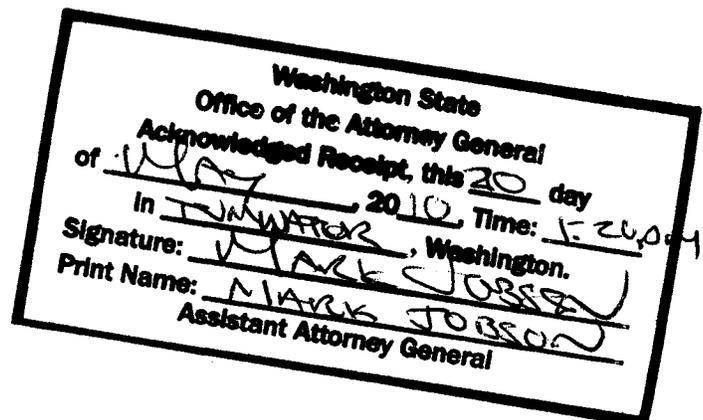
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