

NO. 46361-0

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SUSAN A. KIRCHOFF f/k/a SUSAN LOWE, a/k/a SUSAN CASSIDY, a
married person,

Appellant,

v.

CITY OF KELSO, a municipal corporation of the State of Washington,
COWLITZ COUNTY, a municipal corporation of the State of
Washington, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
a subdivision of the State of Washington,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Over 35 years ago, in late 1979, the Department of Social and Health Services (DSHS) received a report that two sisters, C.B. and N.B., were being sexually abused by their mother's boyfriend, Lotus Cassidy. After investigating these allegations, DSHS and Kelso Police Department substantiated the sexual abuse against C.B. and N.B., but did not substantiate any abuse against their younger sister, Appellant Susan Kirchoff. C.B. and N.B. were removed from the family home, but Ms. Kirchoff remained there until the end of January 1980, when her mother sent her to live with her maternal grandparents for several months.

Ms. Kirchoff alleges that she too was sexually abused by Mr. Cassidy both before January 1980 and after her sisters' removal. This abuse led Ms. Kirchoff to experience psychological issues such as depression, anxiety, and Post-Traumatic Stress Disorder (PTSD) which, after reaching adulthood, she connected with the abuse she endured and addressed through therapeutic counseling and medication. However, in this lawsuit, filed in 2009, Ms. Kirchoff asserts that only in 2007 did she become aware that DSHS owed and violated a duty to her in 1980 to remove her from the family home, and that this awareness created "institutional betrayal trauma" and a "re-awakening" of her PTSD symptoms.

The trial court granted summary judgment for DSHS on statute of limitations, correctly concluding that 1) Ms. Kirchoff's suit was untimely because she had connected her psychological injuries to childhood sexual abuse more than three years before filing her lawsuit; and 2) even accepting institutional betrayal trauma theory, her experience of betrayal trauma and re-awakening of PTSD symptoms in 2007 were not newly discovered or qualitatively different harm that would allow her to timely bring suit in 2009 under RCW 4.16.340(1)(c). Even if it had been timely brought under RCW 4.16.340, Ms. Kirchoff's claim still fails because she cannot meet the elements of a negligent investigation claim.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly dismiss Ms. Kirchoff's negligent investigation claim against DSHS as untimely under RCW 4.16.340(1)(c) where, more than three years before filing her lawsuit in 2009, Ms. Kirchoff knew the facts supporting her claim as well as the connection between the childhood sexual abuse she experienced and her psychological injuries?

2. Did the trial court correctly determined Ms. Kirchoff's 2007 "betrayal trauma" experience failed to constitute newly discovered or qualitatively different harm that would render her suit timely under RCW 4.16.340(1)(b) where the harm experienced was merely a "re-

awakening” of the PTSD she previously connected with childhood sexual abuse?

3. Do alternate grounds to affirm the trial court’s dismissal of Ms. Kirchoff’s negligent investigation claim exist, where she has both failed to prove DSHS’s investigation was negligent and failed to prove that its investigation was the proximate cause of her damages?

III. COUNTERSTATEMENT OF THE CASE

Ms. Kirchoff’s lawsuit is premised upon her belief that she was wrongfully left in the home of her mother, Rosalin Brewer, and her mother’s boyfriend, Lotus Cassidy, during the pendency of a Child Protective Services (CPS) and police investigation in late 1979 and early 1980 into allegations of sexual abuse perpetrated by Mr. Cassidy against Ms. Kirchoff’s two older sisters. The facts of this case focus on a short span of time between early January and March 1980—now 35 years ago. Due to the age of Ms. Kirchoff’s claims, very few records exist from this time period. Pertinent DSHS records were destroyed in the early to mid-1990s, pursuant to records retention schedules. CP at 19. The only available records—59 pages regarding Mr. Cassidy’s indecent liberties conviction and 18 pages regarding N.B.’s dependency—were obtained from Cowlitz County Superior Court. CP at 19. The parties and the court

have substantially relied upon these court documents, as well as documents from the Kirchoffs' 2002 foster parent licensing file, to piece together the events of late 1979 and early 1980 that comprise Ms. Kirchoff's suit.

A. C.B.'s Sexual Abuse Allegations Initiate An Investigation By DSHS And The Police

In late 1979, Susan Kirchoff, then 13 years old, lived in Kelso, Washington with her mother Rosalin Brewer, her mother's boyfriend/common-law husband Lotus Cassidy, and her two older sisters, 17-year-old N.B. and 14-year-old C.B.^{1,2} CP at 148, 174, 245. In October 1979, C.B. disclosed to a school employee that Mr. Cassidy was engaging in sexual acts with her and, she believed, with her older sister N.B. CP at 33-34, 65, 115, 267. CPS Social Worker Ann Watkins³ was assigned C.B.'s case. CP at 65, 115. Ms. Watkins met with C.B., determined the extent of the allegations, and immediately contacted Kelso Police Department ("Kelso P.D."). CP at 66, 116.

Ms. Watkins then attempted to speak with C.B.'s family about her allegations. CP at 66, 116. The family (Ms. Brewer, Mr. Cassidy, N.B.,

¹ Ms. Brewer and Mr. Cassidy later had two sons together, neither of whom are the subject of this lawsuit.

² Individuals who were minor children at the time of the allegations and are not parties to this lawsuit will be referred to by initials to maintain their privacy.

³ Ms. Watkins is sometimes referred to by her married name (Riley) in the records.

and Ms. Kirchoff) vehemently denied the abuse. CP at 66, 116. The family became infuriated at C.B., stating C.B. was lying and merely looking for attention. CP at 66, 116. Frustrated with what they deemed as C.B.'s lies, the family voluntarily relinquished custody of C.B., who was taken into DSHS protective custody and placed in a foster home. CP at 66, 116.

Kelso P.D. subsequently arranged for C.B. to sit for a polygraph test. CP at 33-34, 174. At that time, polygraph examinations were administered through the Washington State Patrol. The results of C.B.'s polygraph indicated C.B. was not being deceptive about her statements that Mr. Cassidy had sexual intercourse with C.B. CP at 33-34, 174, 176.

Ms. Watkins also interviewed N.B., who was pregnant, about the sexual abuse allegations. CP at 148, 160. N.B. initially denied being pregnant or being sexually active with anyone. CP at 160. N.B. eventually explained that she believed she may have become pregnant by bathing after Mr. Cassidy in the same bath water. CP at 160.

On January 7, 1980, Kelso P.D. arrested Lotus Cassidy on a charge of indecent liberties as to C.B. CP at 33-34, 175-77. Mr. Cassidy was interviewed by Kelso P.D, and admitted to having sexual relations with N.B. around five or so times and with C.B. between ten and twenty times. CP at 33-34, 175-77. When asked about Ms. Kirchoff, Mr. Cassidy

replied, “I’ve just gotten fresh, you know patting her.” CP at 33-34, 175-77. Mr. Cassidy was then charged with indecent liberties in regards to C.B. and released on his own recognizance.⁴ CP at 33-34, 36, 175-77. Based upon Mr. Cassidy’s admissions, N.B. was taken into shelter care that same day. CP at 116.

Social Worker Watkins again interviewed Ms. Kirchoff, who continued to deny C.B.’s allegations. CP at 116. Susan Kirchoff remained in the family home with Ms. Brewer and Mr. Cassidy until the end of January 1980, when her mother sent her to live with maternal grandparents in Shelton. CP at 25-25, 64.

B. DSHS Forwarded Its Investigation Results To The Prosecutor And Court For Action

In order for CPS social workers to remove a child from the home in 1979 and 1980, a court order was necessary. CP at 116. During this time frame, the County Prosecutor’s Office was the entity providing legal representation to DSHS in dependency cases. In addition, the Prosecutor’s Office made decisions about whether to institute dependency actions, which included obtaining orders authorizing a child’s removal from the home. CP at 116-17.

⁴ The police reports indicate that Mr. Cassidy was “PR’d”, which is shorthand for released on his personal recognizance.

Social Worker Watkins presented the information she had obtained during her investigation about N.B. and Ms. Kirchoff to the Cowlitz County Prosecutor's Office. CP at 117, 165. Although the Cowlitz County Prosecutor's Office did not institute an independent dependency action for the Ms. Kirchoff, the court would have been appraised about Ms. Kirchoff through N.B.'s dependency case. CP at 117.

After Mr. Cassidy's arrest, Ms. Brewer and Mr. Cassidy began a concerted effort to prevent CPS from having Ms. Kirchoff taken into protective custody. CP at 99. On January 13, 1980, Ms. Brewer wrote to members of her extended family:

Dear Kristy & Jimmy,
Were in a pile of trouble up here & need a little help. If you can keep Susan & Exxx⁵ for a while it will help immensely. On the next pages, I'll tell how it started but one major fact is the Wash. Dept. of Social Health & Services, Child Protective Agency, came in our home and took Nxxxx against her will & placed her in a foster home. You'll have to read the rest to understand it. We were afraid they would take Susan & Exxx so the only thing we could do to protect them is to get them out of state where they can't get to them, we have to do our darndest to get Nxxxx released & if we can get this mess straightened out, Lotus said we'll be on a plane out of here so fast it won't be funny. You can't call here, we don't trust our phones, you can call to let us know they got there all right but don't come out and say so. Do it by code. Don't put Susan in school keep her home to watch Exxx so they can't trace where there at. We'll try and call by pay phone soon...

⁵ Name altered to protect privacy.

CP at 41-43, 46. Despite plans with these relatives in Texas, Ms. Kirchoff went to live with her grandparents, Lynn and Clyde Brewer, in Shelton, Washington in January 1980, where she remained until April 1980. CP at 24, 54, 64. Ms. Kirchoff alleges that between January and March 1980, Lotus Cassidy continued to sexually abuse her. CP at 246-47.

From April to December 1980, Ms. Kirchoff lived with her mother's family in Louisiana, her aunt and uncle in Texas, and another aunt and uncle in Oregon. CP at 25-26, 54, 64. In 1980, after Lotus Cassidy was incarcerated, she returned to Shelton with her mother and brothers, where she remained until she graduated from high school in 1984. CP at 26-27, 54. After graduation, Ms. Kirchoff lived with a friend and her friend's mother until she turned 18 in August 1984. CP at 27-28.

C. As An Adult, Ms. Kirchoff Sought Counseling And Worked To Recover From The Sexual Abuse

Susan Kirchoff first began seeing a therapeutic counselor⁶ when she was 21 years old. CP at 29. She and her second husband, Jeffrey Wohl, engaged in premarital counseling with a "Pastor Steve" out of Portland prior to their marriage in 1988. CP at 22, 29-30. She and Mr. Wohl also met with counselor Sharon Kadlub during their eight-year

⁶ Ms. Kirchoff did not remember the name of this counselor.

marriage. CP at 31, 60. There, Ms. Kirchoff first discussed the sexual abuse perpetrated by Mr. Cassidy, and she “did a lot of exercises to help [herself] with it.” CP at 31, 60. Ms. Kirchoff’s marriage to Mr. Wohl ended in 1996 and she married her present husband, Bert Kirchoff, that same year. CP at 52-53.

In June 2002, the Kirchoffs applied to DSHS/CPS for a foster care license. CP at 75. During this application process, Ms. Kirchoff advised the licensor, Doug Jensen, that her stepfather had been physically, sexually and emotionally abusive, and that while her sisters had been taken into foster care as a result of this abuse, she had not. CP at 76-77, 86. Ms. Kirchoff repeatedly assured Mr. Jensen that despite the fact she had been a victim of sexual, physical, and emotional abuse as a child, she had sought counseling for those issues and considered them resolved. CP at 77. Her treatment with counseling and ongoing use of antidepressants had remedied any anxiety/depression related to that abuse. CP at 77.

Around this same time period, the Kirchoffs applied to DSHS to qualify to become adoptive parents. CP at 90. During this application process, Ms. Kirchoff again repeatedly assured the adoption social worker, Karen Thompson, that she had recognized and resolved any issues relating to the abuse by Mr. Cassidy. CP at 91. Specifically, in answer to whether

there was any family history of physical or sexual abuse and how she feels about it now, Ms. Kirchoff stated:

Yes both. I have went to numerous counseling and I believe that God allow [sic] what happened for a reason. Now I am able to share with others ways to help prevent child abuse, which is my eventual goal to help others. I feel sorry for my step-father because he has a problem and I have forgave [sic] him.

CP at 94. During her interview with Ms. Thompson, Ms. Kirchoff again explained that her stepfather had molested her and her two sisters; that her stepfather was charged with indecent liberties for this sexual abuse; the criminal charges resulted in her two sisters' placement into foster care; and for reasons unknown to her, she was not placed into foster care.

CP at 97. After this follow-up interview, Adoption Worker Thompson noted:

[Susan] feels she has confronted her step-father and the abuse, resolved it in her mind and has severed the relationship... Forgiveness has been possible, she believes, because of the extensive counseling she has had and because of her deep religious faith. Counseling was so effective for Susan in dealing with issues of abuse that prior to her first marriage, she insisted that she and her husband to be participate [sic] in premarital Christian counseling... Susan has also been involved in abuse survivors support groups and found them to be helpful.

CP at 97.

D. In 2007 Ms. Kirchoff Experienced A Re-awakening Of PTSD Symptoms And Filed Suit Against DSHS

In October 2007, Ms. Kirchoff attended a class offered by DSHS in order to become a foster home licensor, at which she says she learned about CPS's duties in investigating child abuse allegations. CP at 248. She asserts that until attending this class, she was unaware of any duties DSHS may have owed her regarding its investigation in 1979 and 1980. CP at 248.

In 2008, psychologist Laura Brown evaluated Ms. Kirchoff at her attorney's request and diagnosed her with aggravation of pre-existing Post-Traumatic Stress Disorder (PTSD) attributable to "institutional betrayal trauma"—a theory that posits that when an individual perceives that an institution she believes owed her a protective duty allegedly fails to protect her, she experiences feelings of betrayal that induce trauma.⁷ CP at 198, 200, 206, 208, 249. Ms. Kirchoff subsequently filed this lawsuit against DSHS,⁸ alleging DSHS was negligent by failing to remove her from her home in late 1979 or early 1980.

⁷ DSHS moved in its summary judgment reply brief to strike testimony about this theory as incompetent evidence. CP at 274-80. Although the trial court did not set forth the evidence it considered in granting summary judgment as required by CR 56(h), it apparently considered evidence regarding institutional betrayal trauma theory. CP at 366.

⁸ Ms. Kirchoff also named as defendants in her suit the City of Kelso and Cowlitz County. She voluntarily dismissed these defendants prior to the hearing on DSHS's summary judgment motion. CP at 126-27. Neither are parties to this appeal.

Five years after the suit was filed, the trial court heard DSHS's Motion for Summary Judgment on April 23, 2014. After requesting supplemental briefing regarding the statute of limitations in RCW 4.16.340, the trial court granted summary judgment to DSHS, concluding that Ms. Kirchoff's claims were barred by the applicable statute of limitations, RCW 4.16.340(1). CP at 354, 363-66. Ms. Kirchoff appealed.

IV. SUMMARY OF ARGUMENT

The Legislature, realizing that many childhood sexual abuse victims are unable to connect the abuse they endured with psychological harm until years later, enacted a special statute of limitations, RCW 4.16.340. RCW 4.16.340 applies to all claims based upon the predicate conduct of childhood sexual abuse, whether they are intentional tort claims against the perpetrator or negligence claims against third parties. Accordingly, RCW 4.16.340 applies to Ms. Kirchoff's claim in this case: that negligent investigation by DSHS in 1979-80 resulted in a harmful placement decision—Ms. Kirchoff remaining in the family home, where she was subject to further sexual abuse.

While the RCW 4.16.340 statute of limitations provides a broad avenue of redress for victims to bring suit, it is not limitless. Its limits are grounded in the point when a victim causally connects the childhood

sexual abuse and the injury sustained from that abuse. In this case, Ms. Kirchoff made that connection not later than 2002, making her 2009 lawsuit untimely. Her 2007 “discovery” that DSHS may have breached a duty to her and the alleged resulting re-awakening of her PTSD from betrayal trauma is not the type of newly discovered, quantitatively different harm that RCW 4.16.340(1)(b) or (c) requires to restart the statute of limitations. The interpretation of RCW 4.16.340 that Ms. Kirchoff suggests this Court adopt is not only unsupported by the law, but also contrary to public policy considerations regarding the fairness of answering stale claims and continually facing the threat of suit. For all these reasons, the trial court correctly determined Ms. Kirchoff’s suit was time-barred.

Even if not barred by RCW 4.16.340, this Court should dismiss Ms. Kirchoff’s negligent investigation claim on the alternative grounds that she has failed to satisfy two essential elements: 1) that DSHS’s investigation was negligent; and 2) that DSHS’s investigation proximately caused her injuries.

V. ARGUMENT

A. Standards Of Review

An appellate court reviews *de novo* a trial court’s order granting summary judgment, performing the same inquiry as the trial court.

Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Like the trial court, the appellate court construes all evidence and reasonable inferences in the light most favorable to the non-moving party. *Keck v. Collins*, 181 Wn. App. 67, 79, 325 P.3d 306 (2014). Summary judgment is appropriate if the documents filed with the trial court show no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 22, 292 P.3d 833 (2013). Matters of statutory interpretation are also reviewed *de novo*. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014).

B. Ms. Kirchoff’s Claims Are Barred By The Statute Of Limitations Because She Brought Her Suit More Than Three Years After Connecting Her Psychological Injury To Childhood Sexual Abuse

1. RCW 4.16.340 Provides The Applicable Statute Of Limitations For Claims Based On Childhood Sexual Abuse

Ordinarily, a cause of action accrues, and the statute of limitations begins to run at the time the challenged act or omission occurred. *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988). Most personal injury actions fall under a three-year limitations period. RCW 4.16.080(2). In cases where the cause of action accrues against a minor, the statute of limitations is tolled until that person turns 18. RCW 4.16.190(1).

However, a special statute, RCW 4.16.340, sets forth the applicable statutes of limitations for actions based upon childhood sexual abuse. This statute governs “[a]ll claims or causes of actions based upon intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse ” RCW 4.16.340(1). Recognizing that victims of childhood sexual abuse may not discover the connection between their injury and the abuse until years after the abuse ends, the Legislature created RCW 4.16.340 “to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation.” *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 712, 985 P.2d 262 (1999).

RCW 4.16.340(1) provides:

All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

- (a) Within three years of the act alleged to have caused the injury or condition;
- (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
- (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

PROVIDED, That the time limit for commencement of an action under this section is tolled for a child until the child reached the age of eighteen years.

RCW 4.16.340. In amending RCW 4.16.340 in 1991 to enlarge the timeframe in which to bring claims, the Legislature acknowledged that by its nature, childhood sexual abuse may pose difficulties for victims to associate any injuries sustained with the abuse they experienced:

- (1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
- (2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
- (3) **The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.**
- (4) **The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.**
- (5) **Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.**
- (6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986).⁹

⁹ Responding to *Tyson*, the Legislature enacted the original version of RCW 4.16.340, which included the provisions now codified as (1)(a) and (1)(b). Laws of 1988, ch. 144, § 1. The Legislature intended to clarify that the discovery rule does apply to cases stemming from childhood sexual abuse. In *Tyson*, the Court was confronted with whether the discovery rule applied to a suppressed memory case involving childhood sexual abuse where the plaintiff was now age 26. That plaintiff alleged that she had suppressed the memory of her childhood until recently when she entered psychological therapy. The plaintiff filed suit within one year of recalling her past sexual abuse. The Court held that the “discovery rule does not apply to an intentional tort claim where the

It is still the legislature's intention that *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986) be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. **The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.**

Laws of 1991, ch. 212, § 1 (emphasis added).

Accordingly, victims of childhood sexual abuse may sue for damages suffered as a result of the sexual abuse within the later of: a) three years of the abusive act; b) three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the abusive act; or c) three years from the time the victim discovered the abusive act caused the injury for which the claim was brought. RCW 4.16.340(1)(a)-(c); *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 733-34, 991 P.2d 1169 (1999). The limitations period is determined according to the victim's knowledge. *Cloud*, 98 Wn. App. at 734. The time for commencement of an action under this section is tolled for a child until he or she turns 18. RCW 4.16.340(1).

plaintiff has blocked the incident from her conscious memory during the period of the statute of limitations.” *Tyson*, 107 Wn.2d at 80.

In addition to being superseded by statute, *Tyson* and all other cases like it are irrelevant to the pending matter because Ms. Kirchoff has not alleged a claim that involves suppressed memory. All suppressed memory cases fall within paragraph (1)(b) of RCW 4.16.340.

a. RCW 4.16.340 Applies To Claims Sounding In Negligence

In addition to intentional torts, RCW 4.16.340 applies to negligence claims against third parties stemming from childhood sexual abuse. In *C.J.C.*, the Washington Supreme Court directly addressed the applicability of RCW 4.16.340 to claims sounding in negligence. *C.J.C.*, 138 Wn.2d at 704-05. In that case, the court examined the meaning of “all claims based upon intentional conduct” and concluded that RCW 4.16.340 applied to all claims, including negligence, where intentional sexual abuse is the predicate conduct upon which the claim is based. *C.J.C.*, 138 Wn.2d. at 709. In reaching this conclusion, the court reasoned that “[t]he alleged abuse is essentially an element of the plaintiffs’ negligence claims. Absent the abuse, plaintiffs would not have suffered any injury and their negligence claims could not stand.” *Id.* at 710.

While *C.J.C.* made clear that RCW 4.16.340 applies to negligence claims against third parties based upon underlying childhood sexual abuse, the calculation of when such claims accrue under the statutes of limitations remained unchanged. *C.J.C.*, 138 Wn.2d at 710-12. The *C.J.C.* court focused on the predicate conduct for claims to fall under RCW 4.16.340’s purview, not on tolling and accrual determinations. *See, C.J.C.*, 138 Wn.2d. at 711-12 (the phrase “childhood sexual abuse” limits

the predicate sexual conduct to violations of the criminal code; if not a criminal law violation, “no claim of any type, against any person, lies.”) To the extent *C.J.C.* even discussed timeliness of claims, it emphasized that commencement of the limitations period is determined according to the knowledge of the child “victim.” *Id.* at 729 (parents’ claims based upon their children’s sexual abuse begin to run at the same time as the children’s underlying claims.) Consequently, all claims or causes of action based on childhood sexual abuse—intentional torts and claims sounding in negligence—must be brought within three years of discovery that the sexual abuse led to the injury for which the claim was brought. *Id.* at 711-12; *see also Cloud*, 98 Wn. App. at 735 (limitations period for claims for intentional torts and negligence commenced at the same time.)

b. RCW 4.16.340 Governs Ms. Kirchoff’s Claim That DSHS’s Allegedly Negligent Investigation Resulted In Injury To Her From Childhood Sexual Abuse

There is no general cause of action for “negligent investigation.” A negligent investigation claim is a narrow exception that arises from the State’s statutory duty under RCW 26.44.050 to investigate allegations of child abuse. *Tyner v. State Dep’t. of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003).

This statutory duty arises only after the police or DSHS receive a report of child abuse or neglect. *See* RCW 26.44.050. To prevail on a negligent investigation claim, a plaintiff must show 1) that the DSHS conducted a biased or incomplete investigation; and 2) that this allegedly faulty investigation led to a harmful placement decision. *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004). Examples of harmful placement decisions include wrongfully removing a child from a non-abusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home. *Id.* at 59.

A negligent investigation claim is subject to the RCW 4.16.340 special statute of limitations when the harmful placement decision is harmful due to a predicate act of childhood sexual abuse. Accordingly, Ms. Kirchoff must show that DSHS's allegedly negligent investigation in 1979 and 1980 led to a harmful placement decision—her remaining in the family home where she was further subjected to sexual abuse by Mr. Cassidy.

Applying RCW 4.16.340(1) to the facts of Ms. Kirchoff's claim, Mr. Cassidy's sexual abuse of Ms. Kirchoff as well as DSHS's interactions with the family—the acts giving rise to this suit—concluded in or around March 1980. The applicable statutes of limitations were tolled until Ms. Kirchoff reached 18 in August 1984.

Under RCW 4.16.340(1)(a), Ms. Kirchoff's cause of action expired when she turned 21 years old in 1987 and would have been brought 22 years untimely.

RCW 4.16.340(1)(b) is equally unavailing. It allows a childhood sexual abuse victim to bring a claim within three years of the time she discovered or reasonably should have discovered that her injury was caused by that abuse. Section (1)(b) has been interpreted to "address[] repressed memory claims where the victim discovers his or her injury or condition was caused by a previously undiscovered act" of abuse. *Hollmann v. Corcoran*, 89 Wn. App. 323, 334, 949 P.2d 386 (1997). The legislative findings added as part of the 1991 amendment of RCW 4.16.340 confirm this interpretation. Therein the Legislature specifically referenced claims based upon repressed memory as a reason to extend the statute of limitations to allow these claims to proceed. Laws of 1991, ch. 212, § 1 ("The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.") Ms. Kirchoff offers no evidence here that she had repressed memories or otherwise did not recognize the abuse perpetrated upon her, and accordingly RCW 4.16.340(1)(b) is therefore inapplicable to her claim.

Finally, under RCW 4.16.340(1)(c), a plaintiff may file suit for claims stemming from childhood sexual abuse within three years of connecting the act to the injury for which the claim is brought. Section (1)(c) refers to the discovery of the causal connection between a known act of abuse and subsequently discovered injuries. *Hollmann*, 89 Wn. App. at 334. Here, Ms. Kirchoff's claims fall under RCW 4.16.340(1)(c) as the latest of the RCW 4.16.340(1) provisions. However, as explained below, even with the extremely "broad avenue" of redress RCW 4.16.340 provides, Ms. Kirchoff failed to timely pursue her claim against DSHS upon connecting her injuries to the childhood sexual abuse.

2. Even Under RCW 4.16.340(1)(c) Ms. Kirchoff's Claims Are Untimely Because She Made The Connection Between The Abuse And Her Injury Not Later Than 2002

In order for the statute of limitations to accrue under RCW 4.16.340(1)(c), a victim of childhood sex abuse must make a causal link or connection between the past sexual abuse and a present injury for which the suit is brought. *Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006). Even under this provision, Ms. Kirchoff's claims are untimely.

a. The Evidence Establishes That Ms. Kirchoff Made The Requisite Connections Not Later Than 2002

The undisputed facts demonstrate that by 2002, Ms. Kirchoff had made a causal connection between the past sexual abuse and the resulting injury that would trigger RCW 4.16.340(1)(c)'s statute of limitations. She admitted the past sexual abuse drove her to seek counseling during and after her marriage to Mr. Wohl from 1988 to 1996. CP at 22, 29-31, 60. She admitted she "went to numerous counseling and I believe that God allow [sic] what happened for a reason." CP at 94. During different conversations with DSHS employees in connection with applying to be an adoptive parent, Ms. Kirchoff admitted that she felt she had confronted Mr. Cassidy about the abuse and resolved it in her own mind. CP at 77, 91. She attributed this forgiveness to "extensive counseling" and her "deep religious faith." CP at 97. Accordingly, not later than 2002, Ms. Kirchoff had 1) identified that she was sexually abused; 2) identified her resulting injuries required counseling and medications (or some combination of the two); and most significantly, 3) causally connected the past sexual abuse with the need for that counseling and/or medication. In short, she had clearly made a causal connection between the alleged sexual abuse and the ensuing injury as demonstrated through these 2002 records.

These same records also evidence that Ms. Kirchoff knew CPS had removed her sisters from the home due to sexual abuse, and that she had not been removed. CP at 76-77, 86, 91, 97. The only new information Ms. Kirchoff arguably “discovered” within three years of 2007 is that there was potentially a legal basis on which to file a claim against DSHS. This is not the “connection” between abuse and resulting injury envisioned by RCW 4.16.340(1)(c).

The uncontroverted evidence shows that Ms. Kirchoff made these connections and had sufficient knowledge of the facts giving rise to all claims and causes of action stemming from her childhood sexual abuse in 2002 at the latest. Ms. Kirchoff then had until 2005 to file suit, but failed to file until 2009. Under RCW 4.16.340(1)(c), her claims were at least four years untimely, and the trial court properly concluded her claims should have been dismissed as a matter of law.

b. “The Act” Triggering RCW 4.16.340’s Applicability Is Sexual Abuse Subsequent To The Alleged Negligent Investigation In 1980, Not Discovery Of A Potential Cause Of Action In 2007

Ms. Kirchoff asserts that “the act” triggering RCW 4.16.340’s statute of limitations is her discovery in 2007 of DSHS’s allegedly negligent investigation in 1980. Brief of Appellant (Br. of Appellant) at 9-14. That interpretation contravenes RCW 4.16.340’s plain language. The

limitation periods apply to actions “for recovery of damages for injury suffered as a result of childhood sexual abuse.” RCW 4.16.340(1). The “act” referred to in the subsections of RCW 4.16.340 is the act of sexual abuse. Any alleged breach of duty by DSHS permitting Ms. Kirchoff to be injured by that “act” occurred in 1980, not upon her purported discovery in 2007 that DSHS may have owed a duty to her in 1980 that may have been breached.

The plain language of RCW 4.16.340 unambiguously indicates that “the act” referred to in the limitation provisions is the act of sexual abuse. All three means for calculating the limitation period refer to **the act causing the alleged injury**—i.e., the “**injury suffered as a result of childhood sexual abuse.**” Compare RCW 4.16.340(1)(a) (“ . . . the act alleged to have caused the injury or condition”); RCW 4.16.340(1)(b) (“ . . . the injury or condition was caused by said act”); RCW 4.16.340(1)(c) (“ . . . the act caused the injury for which the claim is brought”). The statute goes on to explain that the victim “need not establish **which act** in a series of continuing sexual abuse” caused the complained-of injury, as the date of discovery may be computed from the date the victim discovered “the last act” of a common scheme or plan of sexual abuse by the same perpetrator. RCW 4.16.340(2) (emphasis added). The statute expressly states that “‘child sexual abuse’ means **any act**

committed” against a complainant who is a minor “at the time of **the act** and which **act**” would have violated applicable criminal statutes “at the time **the act** was committed.” RCW 4.16.340(5) (emphasis added). Thus, RCW 4.16.340(1)(c) permits a claim for damages suffered as a result of childhood sexual abuse “[w]ithin three years of the time the victim discovered that the act [of abuse] caused the injury for which the claim [wa]s brought.” RCW 4.16.340(1)(c); *Cloud*, 98 Wn. App. at 734.

Ms. Kirchoff argues that when RCW 4.16.340 applies to actions in negligence, “no statute of limitations begins to run until plaintiff’s actual ‘discovery’ of her cause of action.” Br. of Appellant at 11. But interpreting RCW 4.16.340(1)(c) in the way Ms. Kirchoff suggests essentially permits a longer statute of limitations period for claims sounding in negligence against third parties than for claims against the abuser for intentional torts—a notion unsupported by *C.J.C.* and subsequent case law. As explained above, RCW 4.16.340 applies to actions in negligence where the negligence allowed the act of abuse to occur. But “the act” referred to in the statute remains the act of abuse—it is not the act of claimed negligence.

Furthermore, the Legislature’s statutory extension of the discovery rule for claims arising from childhood sexual abuse is generous, but not limitless. The exercise of due diligence in discovering a basis for a cause

of action is a longstanding court-established backstop on the application of the discovery rule. *See Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992); *In re Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992). The discovery rule tolls the statute of limitations only until the time a plaintiff should have discovered through the exercise of due diligence the basis for the cause of action. *Allen*, 118 Wn.2d at 758. Even with extended discovery rule applications, courts still require the exercise of due diligence by an injured party to discover an actionable claim. *Hibbard*, 118 Wn.2d at 746. Under the discovery rule, the key consideration is the factual, not the legal, cause of action. *Allen*, 118 Wn.2d at 758. As the *Allen* court explained,

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

Id. at 758 (citations omitted). While a due diligence inquiry normally involves a fact question, courts can resolve such questions on summary judgment if reasonable minds could reach but one conclusion about those facts. *Mayer v. Huesner*, 126 Wn. App. 114, 123, 107 P.3d 152 (2005) (citing *Allen*, 118 Wn.2d at 760).

Although a plaintiff is not expected to know whether a defendant owed a legal duty or whether it breached any duty to her, the law does in fact expect laypersons to make efforts to inquire about whether or not a cause of action is available to them based upon **facts** available to them. *Allen* is instructive on this point. There, plaintiff's husband was murdered in December 1979 by initially unknown assailants. *Allen*, 118 Wn.2d at 754-55. The plaintiff followed the police investigation for a few months, but eventually stopped. *Id.* at 755. In May 1982, widely-publicized media reports indicated that two men, both recent parolees, had been convicted in connection with plaintiff's husband's murder. *Id.* The plaintiff's family members did not see the initial media reports but became aware of them in 1983 and 1984. *Id.* at 755-56. The plaintiff herself learned the publicized facts and the State's role in paroling the offenders in late September 1985 when her son and his attorney presented the information to her, and filed suit in early October 1985. *Id.* at 756-57. The court there found the plaintiff's claims time-barred because had she exercised due diligence, she could have rather easily found out the facts supporting her claim before the applicable statute of limitations expired. *Allen*, 118 Wn.2d at 758-59. While the court sympathized that a due diligence inquiry might force potential plaintiffs to delve into painful subjects, it explained that such inquiry was required to protect defendants against stale claims. *Id.* at 759.

From a practical standpoint, defendants' abilities to present meaningful defenses to stale claims are compromised by the passage of time due to the likelihood that important evidence may be lost or forgotten; witnesses may become unavailable through death or incompetency; and witnesses' memories regarding key issues may fade. *C.J.C.*, 138 Wn.2d at 751-52 (Durham, J., dissenting) (describing the challenges posed in defending stale claims). The justice system's remedial goal of permitting persons with justiciable grievances ample opportunity to assert them in court is balanced by the recognition that compelling one to answer a stale claim is in itself a substantial wrong. *Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992). Furthermore, stale claims may be spurious, they generally rely on untrustworthy evidence, and society benefits from an assurance that a time comes when one is freed from the threat of litigation. *Id.*; *see also C.J.C.*, 138 Wn.2d at 752 (Durham, J., dissenting) (entities facing "a perpetual threat of liability for negligent omissions that occurred decades earlier . . . will all be hindered in their financial planning and insurance decisions for the future, because they will never be free from the threat of suit").

3. Ms. Kirchoff's Claims Of Exacerbated PTSD And Institutional Betrayal Trauma Do Not Extend The Statute Of Limitations

Ms. Kirchoff asserts that she did not connect DSHS to the harms she suffered in childhood until her attendance at tort liability training in 2007, and that the resulting feelings of betrayal she experienced triggered a “reawakening” of her PTSD symptoms. Ms. Kirchoff asserts that the relevant statute of limitations under RCW 4.16.340 was tolled until her discovery of her cause of action against DSHS in 2007 “reawakened” her PTSD symptoms previously connected to her childhood sex abuse. She argues that because she did not experience this trauma until 2007, she could not have filed suit any earlier. Br. of Appellant at 14.¹⁰

In order for the statute of limitations to accrue under RCW 4.16.340(1)(c), a victim of childhood sex abuse must make a causal link or connection between the past sexual abuse and a present injury for which the suit is brought. *Korst*, 136 Wn. App. at 208. However, as the legislative findings state, a causal link to “any injury whatsoever” is not

¹⁰ DSHS opposed the admissibility of institutional betrayal trauma theory as incompetent evidence and argued that reliance on an inadmissible theory of damages could not support the connection between DSHS’s alleged breach of duty and Ms. Kirchoff’s harm. CP at 274-80. Ms. Kirchoff inaccurately contends that the trial court explicitly accepted this theory as sufficiently scientifically based to satisfy the *Frye* test; the trial court actually assumed without deciding it would meet *Frye*’s requirements. Br. of Appellant at 16; CP at 366.

the focus of this statute. The injury connected must be a “serious injury” as opposed to a “less serious injury.” See Laws of 1991, ch. 212, § 1.

While the Legislature has not defined “serious injury” or “less serious injury” in the context of commencement of RCW 4.16.340’s statute of limitations, case law provides some guidance. In *Raymond v. Ingram*, 47 Wn. App. 781, 737 P.2d 314 (1987), the plaintiff alleged making a recent connection between her *insomnia* and *stomach problems* (stomach aches) to her past abuse. After the court concluded that such an allegation triggered the running of the statute of limitations, the Legislature added an intent section to RCW 4.16.340, focusing on the seriousness of the discovered injury. Based upon the 1991 amendment in *Raymond*’s wake, it is reasonable to infer that injuries like insomnia and stomachaches are what the Legislature meant by “less serious” injuries that do not trigger the running of the statute.

Ms. Kirchoff’s claims are similar to those alleged in *Carollo v. Dahl*, 157 Wn. App. 796, 798-799, 240 P.3d 1172 (2010), where the Court of Appeals held the statute of limitations precluded a claim brought in 2008 by a church intern who alleged sexual abuse by a camp counselor. In 1988, the plaintiff had sought “counseling for emotional difficulties” and had been told that the “molestation was likely the source of his psychological difficulties.” *Carollo*, 157 Wn. App. at 798. In 1995, the

plaintiff went to additional counseling and was diagnosed with symptoms of PTSD including depression, flashbacks, and nightmares. *Id.* at 798-799. Later, in 2008, the plaintiff was diagnosed with worsened PTSD symptoms, “experiencing regular nightmares, memory loss, dissociative periods, and became unable to accomplish even minor tasks.” *Id.* at 799. He was also diagnosed with panic disorder, major anxiety, major depressive disorder, and agoraphobia. His counselor stated that these were diagnoses related to the sexual abuse. *Id.* The plaintiff had also left his employment because he was unable to function. *Id.*

In applying the statute of limitations to preclude the plaintiff’s claims brought based on the alleged “discovery” of a connection in 2008, the court observed that there are two circumstances in which the RCW 4.16.340(1)(c) permits a claim to be brought: “(1) where there has been evidence that the harm being sued upon is **qualitatively** different from other harms connected to the abuse which the plaintiff had experienced previously, or (2) where the plaintiff had not previously connected the recent harm to the abuse.” *Carollo*, 157 Wn. App. at 801 (emphasis added). There must be a “different” injury, not just new or worsened symptoms, in order to fall within RCW 4.16.340(1)(c). *Id.* at 802. An increase in the severity of symptoms or recurrence of previously existing symptoms is not a new “discovery” of injury to permit a claim to

be brought outside the three year statute of limitations from the time the abuse occurred. *Id.* at 803.

Like in *Carollo*, Ms. Kirchoff's psychological injury of PTSD is not a new qualitative injury sufficient to fall within the ambit of RCW 4.16.340(1)(c). She had suffered symptoms related to PTSD for years and connected these symptoms to childhood sex abuse more than three years prior to filing this lawsuit. Nor are Ms. Kirchoff's claims of damages associated with institutional betrayal trauma resulting in a reawakening of her PTSD symptoms evidence of new injuries. At most, it constitutes an exacerbation of a previously-diagnosed condition. CP at 340.

As the *Carollo* court observed, the worsening of a condition is not compensable under RCW 4.16.340(1)(c) because "the statute says nothing about quantity of harm, it speaks of 'injury' and connection of 'injury' to 'acts.'" *Carollo*, 157 Wn. App. at 802. Accordingly, Ms. Kirchoff's experience of "betrayal trauma" is not a "qualitatively" different injury. She has failed to demonstrate that she is suffering from any new injury other than PTSD and the symptoms associated with such an injury. The "aggravated symptoms" she describes from 2007 do not constitute newly "discovered" harm as contemplated by RCW 4.16.340(1)(c). Her theory

of “institutional betrayal trauma” does not restart the statute of limitations that expired years before Ms. Kirchoff’s 2009 lawsuit.

By the very nature of her PTSD diagnosis, Ms. Kirchoff may experience additional symptoms throughout her life. If she could restart the statute of limitations each time the discovery of some new “fact” about the childhood sexual abuse she experience, there would be no timeliness bar to her claims. A more reasonable reading of RCW 4.16.340, as explained above, is that the statute of limitations begins upon the discovery that the abuse caused a serious injury (here, PTSD) and that subsequent symptoms of such an injury does not restart the statute of limitations period.

In this case, Ms. Kirchoff had the requisite knowledge of relevant facts to support a claim against DSHS well before the lawsuit’s filing in 2009. She knew that she had been sexually abused by Lotus Cassidy and that the abuse continued after her older sisters were no longer in the home. CP at 59-60, 247. Based upon her statements to DSHS personnel in connection with her applications to become a licensed foster home and adoption placement, Ms. Kirchoff knew CPS had removed her sisters from the home due to sexual abuse, and that she had not been removed. CP at 76-77, 86, 91, 97. She knew that as a result of that abuse, she had been traumatized. CP at 76, 82, 86, 97. She sought out counseling and

medication to treat the symptoms caused by that trauma. CP at 29-31, 77, 83, 88, 91, 94, 97. All of the relevant facts were available to her by 2002. Had she exercised due diligence, she could have learned that she possibly may have had a cause of action against DSHS. Accordingly, the claims she now asserts accrued then, not in 2007 when she says she learned that CPS had a duty regarding investigations of child abuse, which she surmised may have been breached with respect to her. As she failed to exercise due diligence to bring her lawsuit within three years of discovering her claims, the trial court correctly concluded Ms. Kirchoff's claims were untimely.

C. Ms. Kirchoff's Claim For Negligent Investigation Should Be Dismissed As She Fails To Prove Essential Elements Of This Claim

Even if the statute of limitations did not bar Ms. Kirchoff's claim, as explained above, her claim still fails. The appellate court may affirm the superior court's ruling on any grounds adequately supported by the record. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012). Here, Ms. Kirchoff's claim fails because she cannot satisfy the elements of her claim of negligent investigation. Despite Ms. Kirchoff's assertion that DSHS should have removed her from her home in 1980, she cannot prove two essential elements of her claim—that

DSHS's investigation was somehow incomplete and that this investigation caused her injuries.

No general cause of action for negligent investigation exists. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003). A negligent investigation claim is a narrow exception that arises from the State's statutory duty under RCW 26.44.050 to investigate allegations of child abuse. *Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *M.W.*, 149 Wn.2d at 601. In order for a plaintiff to prevail on a claim for negligent investigation, she must prove that 1) DSHS conducted an incomplete abuse investigation and 2) that such investigation resulted in a "harmful placement" decision. *M.W.*, 149 Wn.2d at 602. For a "harmful placement decision" to be actionable, it must have been preceded by 1) receipt of a report of child abuse or neglect, and 2) an incomplete or biased investigation of that report conducted pursuant to RCW 26.44.050. *M.W.*, 149 Wn.2d at 602; *Petcu v. State*, 121 Wn. App. 36, 58-59, 86 P.3d 1234, *review denied*, 152 Wn.2d 1033 (2004). An actionable breach of duty does not occur every time the State conducts an investigation that falls below a reasonable standard of care, for example, failing to follow proper investigative procedures. *Petcu*, 121 Wn. App. at 59; *M.W.*, 149 Wn.2d at 601-02. There is no stand-alone tort for "negligent placement"

that is independent of the tort of negligent investigation based on RCW 26.44.050. *See Petcu*, 121 Wn. App. at 59; *M.W.*, 149 Wn.2d at 602.

1. Ms. Kirchoff Cannot Show That The Investigation Conducted By DSHS Was Negligent

Ms. Kirchoff here fails to identify any evidence that the CPS investigation conducted in her case was incomplete or lacking. Indeed, she offers no evidence other than her self-serving statements that she does not recall being interviewed by Social Worker Ann Watkins.

By contrast, Ms. Watkins, in her declaration, explains that in conducting her investigation she spoke with C.B., N.B., Ms. Brewer, Mr. Cassidy, and Ms. Kirchoff herself—all of whom denied Ms. Kirchoff was being abused. CP at 116, 166.¹¹ The available contemporaneous records support Ms. Watkins' recollection that no one disclosed to her that Ms. Kirchoff was sexually abused by Mr. Cassidy.¹² Ms. Watkins' investigation began with C.B.'s disclosure that she and N.B. were being sexually abused by Mr. Cassidy. CP at 34-35, 121-22. Ms. Watkins contacted Kelso Police to arrange a polygraph for C.B., the results of

¹¹ Due to the length of time between the sexual abuse allegations in 1979 and 1980 and her testimony 34 years later, Ms. Watkins does not have a specific recollection of all the steps she undertook in her investigation. CP at 163. However, she did recall talking with Ms. Kirchoff, and she testified that her practice would have been to interview all three children separately outside the parents' presence. CP at 163, 172.

¹² Again, due to the age of these claims, DSHS's records were purged in the 1990s pursuant to its retention schedule. The only available records consist of 59 pages regarding Mr. Cassidy's indecent liberties conviction and 18 pages regarding N.B.'s dependency obtained from Cowlitz County Superior Court. CP at 19.

which corroborated her disclosure of abuse. CP at 36, 174. Ms. Watkins then interviewed N.B., who, in spite of her pregnancy, denied sexual contact with anyone, let alone sexual abuse by Mr. Cassidy, even in the face of Mr. Cassidy's confession. CP at 121-22. Ms. Watkins specifically recalled that, when questioned, Ms. Kirchoff categorically denied Mr. Cassidy abused her. CP at 168-69, 170. Not only did each member of the family deny Mr. Cassidy was sexually abusing any of the children, the family members expressly accused C.B. of lying to the authorities about the abuse, even in light of Mr. Cassidy's confession and conviction. CP at 47, 124, 187.

Thus, in late 1979 and early 1980, the sexual abuse claims made by Ms. Kirchoff's older sister, C.B., were investigated by both law enforcement and CPS. Ms. Kirchoff points to no other contacts or sources Ms. Watkins should have pursued to obtain more information that would have led her to determine that Ms. Kirchoff was being abused. In other words, Ms. Kirchoff does not identify some manner in which the investigation was incomplete. Nor does Ms. Kirchoff show that Ms. Watkins' investigation was biased in any way. Ms. Kirchoff's theory appears to be simply that the investigation's outcome should have been different, which does not satisfy the elements of negligent investigation.

Without proving a negligent investigation occurred, her claim necessarily fails.

2. Ms. Kirchoff Cannot Show That The Allegedly Negligent Investigation By DSHS Proximately Caused Her Damages

Even if this Court were to find that the Department breached a duty to Ms. Kirchoff, her claim would still fail as she cannot establish that a breach of the duty owed to her proximately caused her injuries. “To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.” *Petcu*, 121 Wn. App. at 56 (citing *M.W.*, 149 Wn.2d at 595.) A cause is “proximate only if it is both a cause in fact and a legal cause.” *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997). An intervening superseding cause will break the chain of proximate causation between an alleged act or omission and injuries or damages. RESTATEMENT SECOND OF TORTS § 440 (1965). Proof of both legal cause and cause in fact are absent in this case.

a. Ms. Kirchoff Cannot Establish Cause In Fact

Cause in fact refers to the “but for” consequences of an act – the physical connection between an act and an injury. “Cause in fact is a jury question, established by showing that “but for” the defendant’s actions, the claimant would not have been injured.” *Petcu*, 121 Wn. App. at 56;

Tyner, 141 Wn.2d at 82. There must be evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred “but for” the defendant’s act or omission. *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th. ed. 2013); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon ex rel. Anderson v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

Ms. Kirchoff cannot establish facts that show had DSHS conducted its investigation differently, her alleged injuries would not have occurred. As pointed out by Ms. Watkins, in 1979 and 1980, DSHS did not have the authority to remove children from their home. CP at 116. Instead, law enforcement could place a child into protective custody, or DSHS could ask the county prosecutor to seek dependency. CP at 116-17; *see also* RCW 13.34.050-.055 and RCW 26.44.050. The Kelso Police Department was contacted and was aware of the allegations of sexual abuse in the Brewer/Cassidy home, including the fact that N.B. had been impregnated by Mr. Cassidy, that C.B. had passed a polygraph exam indicating that she had been sexually abused by Mr. Cassidy, and that Mr. Cassidy had

admitted to getting fresh with Ms. Kirchoff. CP at 33-34, 36, 149, 166, 176. Based upon all this information in its possession, Kelso Police Department arrested Ms. Cassidy for indecent liberties, yet did not place Ms. Kirchoff into protective custody.

Furthermore, Ms. Watkins indicated that she fully informed the County Prosecutor as well as the Juvenile Court Judge of all of the allegations made by Ms. Kirchoff's sisters regarding the sexual abuse in the home. CP at 71, 117, 149, 164, 166, 170, 174-77. The County Prosecutor elected to file a dependency petition regarding N.B., but not regarding Ms. Kirchoff. CP at 117, 121-22, 165. Ms. Watkins also informed the County Prosecutor and the Juvenile Court Judge of Ms. Kirchoff's living status during N.B.'s dependency proceedings. CP at 117, 124. Despite DSHS providing this information to both law enforcement and the County Prosecutor's Office, neither of those entities took any further action to remove Ms. Kirchoff from her home.

Ms. Kirchoff cites no further investigative action DSHS could have taken to effectuate her removal from the home. DSHS did not have a duty to remove Ms. Kirchoff from her home; DSHS had a duty to investigate allegations of abuse and neglect and refer matters to law enforcement and the courts for action, which it did here. Other entities' failure to act on that investigation cannot be attributed to DSHS.

b. Ms. Kirchoff Cannot Establish Legal Causation

Even if factual causation could somehow be proved, legal cause is lacking. The second prong of the proximate cause analysis, legal causation, “involves a determination of whether liability **should** attach as a matter of law given the existence of cause in fact.” *Hartley*, 103 Wn.2d at 779 (emphasis in original). Legal causation “is a legal question involving logic, common sense, justice, policy, and precedent.” *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). One of the policy considerations is how far should the consequences of a defendant’s acts extend. *Hartley*, 103 Wn.2d at 779. As with factual causation, Ms. Kirchoff’s claim here falls short for many reasons.

Ms. Kirchoff’s main complaint here is that DSHS did not remove her from the home at the same time that it removed her two sisters from the home. However, her claim fails because DSHS did not have the authority to do so. Ms. Brewer voluntarily relinquished custody of C.B., allowing DSHS to remove her from the home. CP at 116. N.B. was removed from the home subsequent to a shelter care hearing where an order was entered by the court requiring her removal from the home. CP at 116. DSHS presented the evidence of its investigation to the authorities who had the ability to remove Ms. Kirchoff from the home, who did not act upon it. Other entities’ inaction does not make DSHS’s

investigation negligent. Because Ms. Kirchoff cannot show that her injuries would have not occurred had DSHS acted any differently, she cannot establish that DSHS's alleged negligence was the proximate cause of her injuries. Dismissal is therefore appropriate based upon Ms. Kirchoff's failure to establish proximate cause between DSHS's investigation and any injuries she sustained.

VI. CONCLUSION

Ms. Kirchoff's negligent investigation claim against DSHS in 2009, based upon events occurring in 1980, was untimely under RCW 4.16.340(1)(c) because she possessed the requisite factual knowledge and connected her psychological injuries to the childhood sexual abuse not later than 2002, more than three years before filing suit. Her discovery in 2007 about DSHS's alleged duties toward her and resulting "institutional betrayal trauma" was not newly discovered or qualitatively different harm that would extend the deadline under RCW 4.16.340(1)(c). Nor does her 2007 "discovery" trigger the applicability of RCW 4.16.340(1)(b). The trial court correctly determined Ms. Kirchoff's action was barred by the statute of limitations.

However, even if her action had been timely, it was properly dismissed because she failed to prove two essential elements of her

negligent investigation claim—a breach of duty and causation. This Court should affirm the trial court’s dismissal of this action.

RESPECTFULLY SUBMITTED this 2nd day of March, 2015.

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DECLARATION OF SERVICE

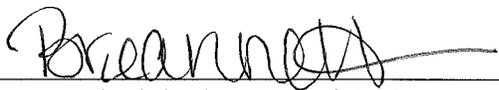
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of March, 2015, at Tumwater, WA.



Breanne Higginbotham, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

March 02, 2015 - 4:02 PM

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