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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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K.C. and L.M.,

Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Respondent.

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Appellants/Plaintiffs K.C. and L.M. file this appeal and ask that the erroneous trial court order dismissing these matters at the summary judgment phase of litigation be reversed. K.C. and L.M. were sexually abused for nearly their entire childhood by a predator named Walter Johnson. In 1980, Mr. Johnson was convicted for molesting his daughter, Jacqueline. As a result, Mr. Johnson was sentenced to probation, counseling, and lost custody of Jacqueline. In 1983, Mr. Johnson regained custody over Jacqueline after marrying K.C. and L.M.'s mother, Donna Johnson. K.C. and L.M. were prepubescent little girls at that time and even younger than Jacqueline. In 1986, Child Protective Services learned that Mr. Johnson again molested Jacqueline while still living in a home with K.C. and L.M. Based upon the allegations, Child Protective Services removed Jacqueline, but left K.C. and L.M. in the home. As a result, K.C. and L.M. were molested for years thereafter. Evidence on the form of a DSHS expert's opinion was submitted indicating that even in 1986 it was negligent for Child Protective Services not to have taken steps to protect K.C. and L.M. particularly in light of the fact that the Juvenile Court ruled that it was not safe for Jacqueline to be near Mr. Johnson. Flouting this evidence as too speculative, and evidence of negligent investigations and

referral handling on the part of Child Protective Services, the trial court dismissed this matter based upon a purported lack of sufficient evidence to prove the claims.

## **II. ASSIGNMENTS OF ERROR**

**Assignment of Error 1: The trial court erred in granting the CR 56 motion for summary judgment in relation to the substantive claims.**

**Issue 1: Should this Court reverse the trial court's order dismissing the substantive claims of the Plaintiffs based upon a purported lack of sufficient evidence to support the claims?**

**Assignment of Error 2: The trial court erred in granting summary judgment in relation to the tolling of the childhood sex abuse statute of limitations of Plaintiff K.C.**

**Issue 2: Should this Court reverse the trial court's order to the extent that it relied upon the purported tolling of the statute of limitations of K.C.'s claim?**

## **III. BACKGROUND**

This case arises out of the preventable childhood sexual abuse of K.C. and L.M. The evidence proves that K.C. and L.M. were routinely molested by a known sex offender, Walter Johnson, and his son, Kenny Johnson, for a period spanning approximately fifteen years, between 1981 and 1995.<sup>1</sup> As DSHS noted, in the early 1980s, Walter Johnson was introduced into the lives of K.C. and L.M. by way of their mother, Donna

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<sup>1</sup> CP 400-517: Declarations of K.C. and L.M.

Johnson.<sup>2</sup> K.C. and L.M. were approximately ages 4 and 5 at the time. And it must be noted that when a child herself, Donna Johnson had already been a molestation victim of Walter Johnson -- a man many years her senior.<sup>3</sup>

As to the material facts, the circumstances giving rise to this case are clear and relatively uncontroverted.<sup>4</sup> On March 26, 1980, Walter Johnson was charged, and later on July 23, 1980 convicted, of molesting his naturally born daughters.<sup>5</sup> The charges included raping Jacqueline Johnson at the prepubescent age of eleven.<sup>6</sup> Walter Johnson's corresponding sentence, dated September 25, 1980, included five (5) years probation, successful sex offender treatment, and to following all "*instructions per the parole officer.*"<sup>7</sup> The conviction required that Walter Johnson remain on probation until September 25, 1985.<sup>8</sup> At the time, the role of probation

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> DSHS will attempt to persuade the Court that there is an absence of relevant evidence thereby providing for a skewed result. That assertion is not accurate. Plaintiffs' claims are premised upon the plethora of documentary evidence that is available. Beyond that, Plaintiffs' argument relies upon the uncontroverted information that is known and undisputed. The negligence on the part of the defense is so clear, embellishment and speculation are not necessary in this case.

<sup>5</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

<sup>6</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

<sup>7</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

<sup>8</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

supervision was fulfilled by a subdivision of DSHS, the Adult Corrections Division.<sup>9</sup>

Walter Johnson first underwent post-conviction court mandated offender therapy with a gentleman named H.R. Nichols, Ph.D.<sup>10</sup> According to Dr. Nichols, as documented in correspondence to the probation officer dated January 20, 1981, Walter Johnson's attempt at counseling was a failure: "*...he had not admitted to himself that he was actually accountable. He blamed his wife and his older daughter for his behavior...What concerned me most was his negative attitude about dealing with the problem with me.*"<sup>11</sup> Dr. Nichols also reported clear and specific probation violations: "*His January 5, 1981 sessions (his last was the most difficult thus far. He reported to me that he had been alone with his woman friend's two daughters [K.C. and L.M.] while she entered her son in school. I told him this was a violation of treatment conditions and tried to learn why he allowed this to happen. He became outraged and justified it by telling me that it was only for a short while in his car outside of the school.*"<sup>12</sup>

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<sup>9</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

<sup>10</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Letter dated January 20, 1981 authored by H.R. Nichols, Ph.D.

<sup>11</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Letter dated January 20, 1981 authored by H.R. Nichols, Ph.D.

<sup>12</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Letter dated January 20, 1981 authored by H.R. Nichols, Ph.D.

Records reflect a referral to Child Protective Services by Corrections Officer Davis during October of 1981.<sup>13</sup> The assigned Child Protective Services worker was Peter Coleman.<sup>14</sup> According to the file, Social Worker Coleman “*expressed concern regarding this change of residence. Mr. Coleman’s concern primarily hinges upon the failure of Johnson to complete his treatment with Nichols and Molinder and the subsequent Nichols and Molinder report. In addition, Mr. Coleman, in his report dated 3/11/81, indicated that Mrs. Melby had witnessed sexual abuse of her own children by her ex-husband but contended that she was helpless to protect them until her pastor provided her with transportation to leave the State.*”<sup>15</sup> At trial, a DSHS expert reined on behalf of the Plaintiffs would opine that Social Worker Coleman should have initiated a dependency proceeding and had K.C. and L.M. removed from the Johnson home upon receiving notice that they were allowed to reside with a newly minted sex offender.<sup>16</sup>

During the same timeframe, DSHS was taking steps in Juvenile Court to ensure that Walter Johnson did not have supervised access to his

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<sup>13</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Report dated October 1, 1981 authored by Kenneth J. Davis

<sup>14</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Report dated October 1, 1981 authored by Kenneth J. Davis

<sup>15</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Report dated October 1, 1981 authored by Kenneth J. Davis

<sup>16</sup> CP 361-380: Declaration of Barbara Stone

own children.<sup>17</sup> As of April 3, 1980, DSHS had obtained an Order indicating that Walter Johnson could not be left unsupervised around children: *“The father is not to be on or near the premises where the child is living and is not to return to the family home until it is deemed safe by the assigned caseworker and therapist and until it is demonstrate that the conditions which led to the dependency no longer exists.”*<sup>18</sup> Another Order dated May 24, 1982 documented that Walter Johnson was only permitted supervised access to his daughter: *“approved by the therapist and supervised by the Department of Social and Health Services caseworker.”*<sup>19</sup> A similar Order mandating only supervised visits was entered on July 22, 1982.<sup>20</sup> And another Order dated January 3, 1983 again prohibited unsupervised contact with Jacqueline Johnson.<sup>21</sup> Admittedly, in September 1983, the Juvenile Court returned Jacqueline to the custody of Walter Johnson, with conditions, and back into the Johnson home.<sup>22</sup> At trial, a DSHS expert retained on behalf of the Plaintiffs will opine that DSHS should have initiated a dependency proceeding for K.C. and L.M. and

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<sup>17</sup> CP 518-861: See Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020001-137

<sup>18</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020124-27

<sup>19</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Record 02020099

<sup>20</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020095-96

<sup>21</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020082

<sup>22</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020065-67

removed them from the Johnson home for the same time periods (between 1980 and 1983) that Walter Johnson was denied unsupervised contact with Jacqueline Johnson.<sup>23</sup>

Walter Johnson's probation was formally terminated on September 24, 1985.<sup>24</sup> A few months later, during February of 1986, a Child Protective Services caseworker, Rejeana Goolsby, was notified (a Child Protective Services referral under RCW 26.44.050) that Walter Johnson had again began molesting then sixteen-year-old Jacqueline: "*Child stated that her father has been waking her up by kissing her stomach and her thighs since counseling terminated...Child stated that her father requests her to model new underwear and bathing suits.*"<sup>25</sup> This information was documented in Child Protective Services record and Social Worker Goolsby even reported the matter to the Pierce County Sheriff's Office.<sup>26</sup> Within that report and Social Worker's Goolsby's notes was a statement by Jacqueline describing the re-molestation efforts of Walter Johnson.<sup>27</sup> Social Worker Goolsby expressly noted the "*imminent risk of likely harm to the child*" and on February 26, 1986, re-initiated a dependency proceeding, but only as to

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<sup>23</sup> CP 361-380: Declaration of Barbara Stone

<sup>24</sup> CP 518-861: Exhibit 1 to Declaration of Beauregard: Criminal Court File, Pierce County Cause No. 57120

<sup>25</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020050 -- Declaration of Rejeana Goolsby

<sup>26</sup> CP 518-861: Exhibit 4 to Declaration of Beauregard: South Sound 911 Records Incident No. 86-056-370

<sup>27</sup> *Id.*

Jacqueline.<sup>28</sup> As of that same day, by Court Order, Jacqueline was removed from the Johnson home.<sup>29</sup> Originally, before the trial court, DSHS's moving brief failed to even mention the circumstances and occurrences surrounding the 1986 referral.

Child Protective Services left behind the other juvenile cohabitants of the Johnson home, including K.C. and L.M.<sup>30</sup> At the time, K.C. and L.M. were between 5-6 years younger than Jacqueline and therefore even more vulnerable and susceptible to be victimized.<sup>31</sup> Records reflect that Social Worker Goolsby could only know that there were multiple children living within the Johnson home.<sup>32</sup> In an Order from the Juvenile Court dated June 22, 1987, based upon the risk of future sexual offense, it was again confirmed that Walter Johnson could not be left alone or unsupervised with his naturally born daughter, Jacqueline.<sup>33</sup> Based upon what occurred in February 1986 and the risk to children, Walter Johnson was never again permitted to have unsupervised access with Jacqueline.<sup>34</sup> However, DSHS took no steps to remove K.C. or L.M. from the Johnson home and

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<sup>28</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Records 02020050 -- Declaration of Rejeana Goolsby

<sup>29</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Record 02020049

<sup>30</sup> CP 400-517: Declarations of K.C. and L.M.

<sup>31</sup> CP 1133-1152: Declaration of Barbara Stone

<sup>32</sup> *Id.*

<sup>33</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Order (Pierce County Cause No. 019766) dated June 22, 1987

<sup>34</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: Juvenile Court Record 02020001

the presence of Walter Johnson.<sup>35</sup> At trial, a DSHS expert retained on behalf of the Plaintiffs would opine that DSHS should have removed all of the children within the Johnson home, including K.C. and L.M., as of February 26, 1986 upon learning of the re-offense on the part of Walter Johnson against Jacqueline:

*This was incredibly negligent on the part of Child Protective Services. As of February 1986, Child Protective Services knew that Walter Johnson was again abusing Jacqueline Johnson. Any investigation, or by just asking Jaqueline, would have led Social Worker Goolsby to the understanding that Walter Johnson was living in a home with other minor children that were likely to be abused. The address listed on the referral form authored by Social Worker Goolsby was the same location where Walter Johnson was residing with K.C. and L.M.: "10415 59<sup>th</sup> Ave, E, Puyallup, Washington." But instead of taking steps to remove all of the children, the court records make it clear that Social Worker Goolsby failed to ensure that the other children in the Johnson home were protected. When you investigate any child protection report, it has always been standard practice that you move to protect all of the children in the home, not just one.<sup>36</sup>*

More years elapsed with no Child Protective Services action to protect K.C. and L.M.<sup>37</sup> Then, in the 1990s, the cycle of DSHS systemic failures continued. On November 11, 1990, a school nurse, Elaine Miller, reported to Child Protective Services that L.M. disclosed being molested: "CHILD DISCLOSED THAT HER BROTHER, KEN (DOB: 1/11/75)

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<sup>35</sup> CP 400-517: Declarations of K.C. and L.M.

<sup>36</sup> CP 361-380: Declaration of Barbara Stone

<sup>37</sup> *Id.*

HAS BEEN SEXAULLY MOLESTING HER TOUCHING INSIDE HER PANTS; ALSO THAT CARL CAME INTO HER BEDROOM AND PULLED HER PANTS DOWN HER UNDERWEAR. SHE ALSO RECALLED LAYING IN BED (AWAKENING) AND CARL WAS THERE.”<sup>38</sup> At trial, a DSHS expert retained on behalf of K.M. and L.C. will opine that this November 11, 1990 referral coupled with the information already known about Walter Johnson should have prompted all of the children in the home to be removed.<sup>39</sup> The primary basis of the intervention would be removing the children for failing to keep them away from a known and repeat sex offender.<sup>40</sup>

On December 6, 1990, Child Protective Services received a different referral from a social worker, Ann Kaluzny, indicating Carol Johnson had again been allowed back into the Johnson home: “KAREN SEEMS UNCOMFORTABLE WITH CARL BACK IN HOME...”<sup>41</sup> It should be noted that Social Worker Kaluzny recalls interacting with the Johnson family and knowing that the “*family was in chaos.*”<sup>42</sup> At trial, a DSHS expert retained on behalf of K.M. and L.C. will opine that this December 6, 1990 referral coupled with the information already known about Walter

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<sup>38</sup> CP 518-861: Exhibit 5 to Declaration of Beauregard: DSHS Record 01030002

<sup>39</sup> CP 361-380: Declaration of Barbra Stone

<sup>40</sup> *Id.*

<sup>41</sup> CP 518-861: Exhibit 2 to Declaration of Beauregard: DSHS Record 01030012

<sup>42</sup> CP 289-291: Declaration of Ann Kaluzny

Johnson should have prompted all of the children in the home to be removed.<sup>43</sup>

On May 29, 1991, Child Protective Services received another referral from the school nurse, Elaine Miller, indicating that “SEX ABUSE REFERRENT REPORTS THAT THIS IS AN INCESTUOUS FAMILY SYSTEM. PRIOR ALLEGATIONS CONCERNED VICTIM’S BROTHER KEN AND STEP FATHER CARL AS SUBJECTS...MOTHER HAS PUT A LOCK ON LORI’S DOOR TO KEEP KEN OUT. BUT LAST NIGHT KAREN WOKE UP AND SAW KEN IN HER BEDROOM...CARL HAS ADMITTED TO S/A HIS OWN DAUGHTER JACKIE JOHNSON (B.D. 9 1 69) WHEN SHE WAS A CHILD.”<sup>44</sup> At trial, a DSHS expert retained on behalf of K.M. and L.C. will opine that this May 29, 1991 referral coupled with the information already known about Walter Johnson should have prompted all of the children in the home to be removed.<sup>45</sup>

On November 7, 1991, Child Protective Services received a referral from a mental health professional, Mary Kralik, indicating that “LORETTA DISCLOSED THAT HER STEPFATHER, WALTER C. JOHNSON, HAD SEXUALLY ABUSED HER IN THE PAST, AND IS STILL BEING

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<sup>43</sup> CP 361-380: Declaration of Barbra Stone

<sup>44</sup> CP 518-861: Exhibit 2 to Declaration of Beauregard: DSHS Record 01030019

<sup>45</sup> CP 361-380: Declaration of Barbra Stone

ALLOWED UNSUPERVISED CONTACT WITH HER. LORETTA SAYS THAT WHEN SHE WAS ABOUT 11 YEARS OLD JOHNSON USED TO COME INTO HER BEDROOM AT NIGHT AND PULL DOWN HER P.J.S AND 'DO THINGS' TO HER...HE STILL HAS REGULAR UNSUPERVISED CONTACT WITH LORETTA WHEN HE DRIVES HER TO THE HOSPITAL WHICH OCCURS REGULARLY..."<sup>46</sup> DSHS did not even "screen in" this referral for investigation.<sup>47</sup> At trial, a DSHS expert retained on behalf of K.M. and L.C. will opine that this November 7, 1991 referral coupled with the information already known about Walter Johnson should have prompted all of the children in the home to be removed.<sup>48</sup>

On February 26, 1992, Child Protective Services received another referral, this one again from the counselor, Mary Kralik, indicating that "LORI AND KAREN ARE BOTH CLIENTS OF REFS...KAREN DISCLOSED TO REF TODAY THAT CARL WAS OUT OF THE HOUSE THIS LAST WEEKEND FOR LORI'S (GOES BY LORETTA) BIRTHDAY...CARL HAS BEEN AT THE HOUST AT LEAST 3 TIMES OVER THE LAST 2 WEEKS...REF QUESTIONS MOTHER'S DONNA JOHNSON CAPABILITY TO PROTECT THESE GIRLS. MR.

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<sup>46</sup> CP 518-861: Exhibit 2 to Declaration of Beauregard: DSHS Record 01040011

<sup>47</sup> *Id.*

<sup>48</sup> CP 361-380: Declaration of Barbara Stone

JOHNSON HAS A HX OF MOLESTING BIO DAUGHTERS...”<sup>49</sup> At trial, a DSHS expert retained on behalf of K.M. and L.C. will opine that this February 26, 1992 referral coupled with the information already known about Walter Johnson should have prompted all of the children in the home to be removed.<sup>50</sup> In all, the Plaintiffs can and will prove a strong case of negligence on the part of the State of Washington in failing to protect K.C. and L.M. from foreseeable years of molestation.

#### **IV. STANDARD OF REVIEW**

When reviewing summary judgment, the appellate court engages in the same inquiry as the trial court. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c). All facts must be considered in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wash.2d at 26, 109 P.3d 805. Summary judgment is granted only if, given the evidence, reasonable persons could reach only one conclusion. *Id.*

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<sup>49</sup> CP 518-861: Exhibit 2 to Declaration of Beauregard: DSHS Record 01040017

<sup>50</sup> CP 361-380: Declaration of Barbara Stone

**V. LEGAL AUTHORITY ON DSHS  
NEGLIGENCE: RCW 26.44.050**

DSHS admitted that there is a well recognized tort that is established when Child Protective Services conducts a faulty, biased, and/or incomplete investigation of a referral under RCW 26.44.050. *See M.W. v. DSHS*, 131 Wn. App. 589, 70 P.3d 954 (2003), citing, *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000). The law is crystal clear: by and through Child Protective Services there was an obligation and a duty to take reasonable steps to prevent the foreseeable abuse that was suffered by K.C. and L.M. *Id.* Additionally, a cause of action exists according to controlling authority, DSHS fails in “removing a child from a non-abusive home, placing a child in an abusive home or **letting a child remain in an abusive home.**” *Id.* at 602 (emphasis added). *M.W., supra.*

**Breach on the part of Child Protective Services:**

In this instance, DSHS conducted a faulty investigation in multiple respects and failed to prevent the foreseeable abuse that was perpetrated for over a decade against K.C. and L.M.<sup>51</sup> In 1981, the referral to Social Worker Coleman should have prompted Child Protective Services to take steps to prevent K.C. and L.M. from living in a home with Walter Johnson.<sup>52</sup> At trial, a DSHS expert retained on behalf of the Plaintiffs will opine that

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<sup>51</sup> CP 361-380: Declaration of Barbara Stone

<sup>52</sup> *Id.*

Child Protective Services should have required that Donna Johnson either (1) required that Walter Johnson reside elsewhere, or (2) have filed a dependency petition and removed K.C. and L.M. to the State's custody.<sup>53</sup>

In 1986, Child Protective Services learned that Walter Johnson was again molesting Jacqueline. Expert testimony will establish that Child Protective Services, specifically Social Worker Goosby, was grossly negligent by removing one child from the Johnson home based upon the danger posed by Walter Johnson and leaving the much younger girls, namely K.C. and L.M., there to be victimized.<sup>54</sup>

*To be clear, the most minimalistic investigation under RCW Chapter 26.44 required that during the screening process that the assigned social worker to review the file for prior offender history. It has always been standard practice at DSHS that a social worker would know the prior history when investigating the case. In this instance, we know that the history and file on Walter Johnson included information that this sex offender was a danger to children and not allowed to be in proximity to his own daughter as a result of the original offense and conviction in 1980 and subsequent re-offense that was discovered and investigation by Social Worker Goolsby in 1986.<sup>55</sup>*

Expert testimony would establish that the succession of five (5) additional referrals from nurses, social workers, and school officials on November 11, 1990, December 6, 1990, May 29, 1991, November 7, 1991, and February

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

26, 1992, should have prompted Child Protective Services to realize and taken action upon the fact that in 1986 they removed Jaqueline Johnson from the home but left K.C. and L.M. behind.<sup>56</sup>

*At the prompting of Child Protective Services, the Juvenile Court had ruled Johnson was a danger to children. The November 11, 1990 referral, and any subsequent referrals, would have revealed that Walter Johnson was being allowed access to K.C. and L.M. and should have prompted immediate intervention. The most basic investigation and screening process of the Child Protective Services case history by the assigned social worker would have revealed this information. Many of the subsequent referrals actually did cross reference this history, but Child Protective Services failed to act.<sup>57</sup>*

At trial, a wealth of evidence would establish that DSHS handled a succession of Child Protective Services referrals negligently and that over a decade of horrific abuse could have been prevented.

**Causation:**

“Negligence and proximate cause are ordinarily factual issues, precluding summary judgment.” Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure Section 69:20, at 581 (2012 ed.). Proximate cause is an essential element of any negligence theory; it consists of two elements: (1) factual or “but for” causation and (2) legal causation. *Baughn v. Honda Motor Corp.*, 107 Wash.2d at 142, 727

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

P.2d 655; *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred “but for” the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 \*\*1184 (5th ed. 1984). As noted in *Baughn*, 107 Wash.2d at 142, 727 P.2d 655: “Cause in fact refers to the ... physical connection between an act and an injury.” The existence of factual causation is generally a question of fact for the jury. *Baughn*, at 142, 727 P.2d 655 (1986).

In this regard, the evidence reflects that Child Protective Services should have taken action to ensure that Walter Johnson was not living in a home with little girls. According to the DSHS expert retained by the Plaintiffs, action could have been taken to ensure that this did not occur.<sup>58</sup> At the same time that Child Protective Services removed Jacqueline Johnson from the home premised upon the indecent liberties in 1986, K.C. and L.M. should have been removed as well:

*The steps to prevent harm would have included placing a condition that if Walter Johnson was not kept out of the home that a dependency would have been filed and then K.C. and L.M. removed for their own safety. This was standard practice for Child Protective Services. It is always a paramount concern and cause for intervention when*

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<sup>58</sup> *Id.*

*children such as K.C. and L.M. are being exposed to a known child sex offender.*<sup>59</sup>

The Juvenile Court ruled that Walter Johnson was a threat to Jacqueline and prudent actions on the part of Social Worker Goolsby would have resulted in that Order applying to the protection of K.C. and L.M. In the worst case scenario, if K.C. and L.M. continued to be left in a home with this known child molester, prudent social work and investigation in response to the assorted RCW 26.44.050 referrals should have resulted in a dependency proceeding that would have removed them from the home – and harms way.<sup>60</sup> There is ample evidence to prove that DSHS could have prevented years of abuse.<sup>61</sup>

## **VI. NEGLIGENT PROBATION SUPERVISION**

Before the trial court, Appellants also submitted evidence that established negligence in relation to the probation supervision of Walter Johnson. On appeal, based upon the fact that the negligence arising out of the RCW 26.44.050 claims is so clear, though viable, Appellants are not even arguing the negligent probation at this phase of these proceedings. Based upon the evidence noted herein, even in the absence of a negligent

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

supervision claim pertaining to Walter Johnson, this matter must be reversed for a trial on the merits.

**VII. LEGAL AUTHORITY REGARDING STATUTE OF LIMITATIONS: RCW 4.16.340 – CHILDHOOD SEX ABUSE TOLLING**

In a related appeal, this Court already ruled that the prior sex abuse tolling dismissal was in error. *See KC and KM v. Good Sam*, Case. No. 48029-8 II (Feb 28, 2017). The Supreme Court has noted that the Legislature’s purpose in enacting RCW 4.16.340 was to provide a broad avenue of redress for victims of childhood sexual abuse. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 985 P.2d 262 (1999). “The three-year statute of limitations on a claim arising from an act of childhood abuse does not begin to run at least until the victim discovers ‘that the act caused the injury for which the claim is brought.’” *Miller v. Campbell*, 137 Wash. App. 762, 767, 155 P.3d 154 (2007), citing RCW 4.16.340(1)(c). “Legislative findings supporting this statutory discovery rule state the Legislature’s intent ‘that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.’” *Id.* “The special statute of limitations, RCW 4.16.340, indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet not have knowledge of the potential tort claim against his abuser.” *Id.* at 773. “Indeed, as our Legislature has

found, childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later.” *Cloud v. Summers*, 98 Wash. App. 724, 735, 991 P.2d 1169 (1999).

The interpretive case law weighs in favor of preserving childhood sex abuse claims whenever possible. *See e.g. Hollmann v. Corcoran*, 89 Wash. App. 323, 949 P.2d 386 (1997). In *Hollmann*, the trial court dismissed a similar childhood sex abuse claim premised upon evidence presented by the defense demonstrating that the victim had received therapy related to the abuse and also had been diagnosed with PTSD, on appeal, the trial court was found to have committed reversible error for the dismissal. *Id.* When reversing the trial court for the improper dismissal, Division III noted that victim subjectively continued to claim that “he did not recognize the causal relationship between his present problems and [the abuser’s] acts.” *Id.* at 333. In relation to the PTSD diagnosis, the Court noted that while the counselor “made an initial diagnosis of PTSD as early as 1989, a jury could find [the victim] did not relate this diagnosis to [the perpetrator’s] abuse.” *Id.* at 334.

In *Hollman*, over three (3) years before the lawsuit was filed, the plaintiff Mr. Hollman had undergone two separate psychological evaluations and treatment with two treatment providers. *Id.* at 328-29.

During the course of each evaluation and treatment, the Plaintiff disclosed he had been sexually molested by the defendant Mr. Corcoran. *Id.* Each provider then treated Mr. Hollman for the symptoms he exhibited. *Id.* Mr. Corcoran then brought the motion to dismiss based on statute of limitation. In reversing the trial court, this Court noted the distinct legislative policies applicable to childhood sex abuse claims:

The Legislature specifically stated its intent in its findings:

(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).

*Id.* at 333.

The higher courts held that legislative policies (4) and (5) are particularly applicable to the scenario where a child sex abuse victim fails to recognize the causal relationship between the victim's present problems and the sexually abusive acts. Therefore, even when a child sex abuse plaintiff discloses having been sexually abused for purposes of treating mental illness, the disclosure and subsequent treatment in and of themselves, do not necessitate the conclusion that the plaintiff made the causal connection between the abuse and injury.

Another trial court made a similar error in dismissing a childhood sex abuse claim in *Korst v. McMahon*, 136 Wash. App. 202, 148 P.3d 1081 (2006). In *Korst*, Division II engaged in a discussion about RCW 4.16.340, specifically noting that there was no “reasonably should have discovered” portion of the law that applies to the victims bringing claims. *Id.* at 207. “In light of the Legislature’s findings, the *Hollman* Court interpreted the plain language of RCW 4.16.340(1)(c) as not imposing a duty on the plaintiff to discover her injuries in childhood sex abuse cases.” *Id.* at 207-8. According to the *Korst* Court, the trial court erred in that RCW 4.16.340 “does not begin running when the victim discovers an injury.” *Id.* at 208. “The legislature specifically anticipated that **victims may know they are suffering emotional harm or damage, but not be able to understand the**

**connection between those symptoms and the abuse.”** *Id.* (emphasis added).

Further, the *Korst* Court provided illumination to the high burden imposed upon a defending party in establishing, as a matter of law, that a victim made the necessary subjective damages connections in their minds supportive of dismissal. In *Korst*, the defense cited to evidence in the form of “a letter that she wrote to her father” illustrating ongoing suffering stemming from childhood sexual abuse. *Id.* at 208. The Court noted that the “letter simply indicates that she resented her father for sexually abusing her, not that Korst understood the effects of the abuse.” *Id.* at 209. Moreover, even though the victim had been diagnosed with PTSD, the Court cited approving to trial testimony from the diagnosing health care practitioner noting that “a person with no psychology background would ‘simply not have the capacity to link these varied miscellaneous feelings to posttraumatic stress.’” *Id.* at 210. Division II overruled the trial court finding that “[f]rom this evidence, the trial court could not reasonably infer that [the victim] already knew in 1995 that her father’s sexual abuse caused her physical and emotional symptoms.” *Id.* at 211.

According to the controlling case law, “victims of childhood sexual abuse know that they have been hurt, but RCW 4.16.340 makes it clear that a plaintiff’s cause of action does not accrue until she knows that the sexual

abuse **has caused her more serious injuries.**” *Korst v. McMahon*, 136 Wash. App. 202, 148 P.3d 1081 (2006). To meet the heavy burden of getting a case dismissed, the defending party must show that the victims “discovered that the act caused the injury **for which the claim is brought.**” *Id.*, citing, RCW 4.16.340(c). In this instance, DSHS will be unable to meet this burden with regard to either K.C. or L.M.

DSHS argued that K.C.’s claim has lapsed and that even the special statute of limitations that the Legislature enacted to preserve childhood sex abuse claims, RCW 4.16.340, has tolled. In so arguing, DSHS does not identify and date or time that the statute of limitations tolled. Instead, DSHS offers the conclusory argument that because K.C. felt poorly throughout life she already comprehensively connected her injuries “for which the claim is brought” with the pervasive childhood sexual abuse. For assorted reasons, based upon the evidence and the law, DSHS’s argument fails.

First and foremost, DSHS offers no evidence that K.C. actually connected her childhood sexual abuse with any injury prior to 2012. The evidence reflects that in 2012, during the course of seeking treatment for ADHD and depression with a treating health care provided, Dr. Markman, that only then K.C. began the process of any sort of self exploration and

understanding.<sup>62</sup> It was during 2012 that Dr. Markman explained that K.C.'s condition was likely induced by abuse.<sup>63</sup> In 2012, Dr. Markman first informed K.C. of the PTSD diagnosis.<sup>64</sup>

Prior to this year, K.C. had never been provided any form of comprehensive evaluation designated for the purpose of evaluating the impact of the abuse.<sup>65</sup> It was not until reviewing the workup by Robert Wynne, PhD dated July 11, 2014 that K.C. realized the breadth and severity of the injuries and impact of the childhood sexual abuse upon her entire life.<sup>66</sup> As additional injuries, Dr. Wynne identified that K.C.'s (1) childhood education (she only obtained GED) had been impaired, (2) the abuse had caused substance abuse during K.C.'s life, (3) caused K.C. to place herself in other risky situations that led to other forms of subsequent assaults, (4) caused sever anxiety, (5) compromised multiple personal relationships, (6) prompted opposition behavior and isolation, and (7) assorted other injuries documented by Dr. Wynne and contained within the report. DSHS failed to offer any evidence that K.C. ever connected any of these injuries prior to the consult with Dr. Wynne.

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<sup>62</sup> CP 468-517: Declaration of K.C.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Before the trial court, DSHS's moving brief cited to a singular question and answer from K.C.'s deposition transcript as purported conclusive evidence that K.C. had made these connections:

Q. The symptoms that you feel and experience that have resulted in the PTSD medication given to you by Dr. Markman, have those present since your whole life?

A. I would say yeah. Like it's gotten worse. It gets worse, you know. And she told me I would never be able to get off the medicine and stuff. But it definitely got worse.<sup>67</sup>

This little sole piece of testimony that is relied upon by DSHS only establishes that K.C. felt badly throughout her life. It does not prove that prior to 2012 that K.C. connected the childhood sex abuse with the PTSD diagnosis or any of the corresponding symptoms. As noted in *Korst*, the “legislature specifically anticipated that **victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse.**” *Id.* at 207 (emphasis added). This is the exact circumstance experienced by K.C.

In order to have this claim dismissed, in accord with RCW 4.16.340, DSHS had the burden of proving that a jury could only conclude that K.C. connected all of her injuries more than three (3) years prior to the filing of this lawsuit on April 23, 2013. In this regard, DSHS has failed to submit any evidence that K.C. connected any of her injuries to the childhood sexual

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<sup>67</sup> CP 39-288: Exhibit S to Declaration of Peter Helmberger, Page 52

abuse prior to April 23, 2010. The abuse that K.C. suffered caused her a multiplicity of injuries “for which this claim is brought” and only began the process of connecting these injuries in 2012. The evidence does not suggest anything to the contrary. DSHS’s motion should be denied.

Moreover, the case relied upon by DSHS, *Carollo v. Dahl*, 157 Wn. App. 796 (2010), is not analogous in any respect. In *Carollo*, the trial court dismissed a childhood sexual abuse claim based upon the fact that more than three (3) years prior the child victim had received counseling and fully connected all of his injuries related to the abuse. More than thirteen years (13) years prior to filing the lawsuit, the plaintiff was diagnosed with PTSD. After the lawsuit was filed, the plaintiff failed to identify any distinct injuries that had not already been identified thirteen (13) years earlier. Based upon the fact that the plaintiff had failed to identify any “qualitatively” distinct injuries, the trial court dismissed the case.

In this instance, in addition to filing this claim premised upon the connection that K.C. made in relation to the PTSD diagnosis, the newly connected and qualitatively distinct injuries include the following: (1) childhood education (she only obtained GED) had been impaired, (2) the abuse had caused substance abuse during K.C.’s life, (3) caused K.C. to place herself in other risky situations that led to other forms of subsequent assaults, (4) caused sever anxiety, (5) compromised multiple personal

relationships, (6) prompted opposition behavior and isolation, and (7) assorted other injuries documented by Dr. Wynne and contained within the report. DSHS has failed to prove that these additional injuries are synonymous, as a matter of law, with the PTSD related injuries and that K.C. “connected” any of them prior to April 23, 2010.

Moreover, K.C.’s claim is nothing like that of the plaintiff in *Carollo*. K.C. was not diagnosed with PTSD until 2012 – the year prior to filing this lawsuit.<sup>68</sup> Prior to that occasion, DSHS has submitted no evidence of an earlier diagnosis and failed to establish that K.C. “connected” any of the associated injuries. In the *Carollo* case, the plaintiff was first diagnosed 13 years prior to filing the lawsuit. Furthermore, not until K.C. was evaluated by Dr. Wynne in 2014 did she recognize and connect the multiplicity of other injuries inventoried herein and in the report for which this claim is brought.<sup>69</sup> K.C.’s claim is exactly the type that the Legislature intended to preserve when RCW 4.16.340 was enacted. DSHS’s motion with regard to K.C. and the purported tolling of the statute of limitations should have been denied by the trial court.

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<sup>68</sup> CP 468-517: Declaration of K.C.

<sup>69</sup> *Id.*

**VIII. LEGAL AUTHORITY REGARDING  
STATUTE OF LIMITATIONS:  
CONVENTIONAL DISCOVERY RULE**

The discovery rule is an exception to the normal rules governing when a cause of action accrues. *In re Estate of Hibbard*, 118 Wash. 2d 737, 744-75, 826 P.2d 690 (1992). “Under the discovery rules, a cause of action accrues when the plaintiff knew or should have know the essential elements of the cause of action.” *Allen v. State*, 118 Wash. 2d 753, 757-58, 826 P.2d 200 (1992). In this regard, it was not until 2012 that K.C. and L.M. learned that DSHS had failed them.<sup>70</sup> For reasons unrelated to filing a lawsuit, K.C. was fishing through court files and stumbled on the records indicating that DSHS and the probation officers knew of the dangers posed by Walter Johnson as early as 1980, but failed to act.<sup>71</sup> Based upon the conventional discovery rule, K.C. and L.M.’s claim did not begin the tolling period until the spring of 2012. DSHS has failed to produce any evidence to controvert this conclusion. Premised, in addition to the special tolling provisions for childhood sex abuse claims, and based upon the conventional discovery rule, DSHS’s statute of limitations motion should have been denied.

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<sup>70</sup> CP 400-517: Declarations of K.C. and L.M.

<sup>71</sup> *Id.*

## **IX. BANKRUPTCY ISSUE**

At the trial court level, DSHS originally argued that L.M.'s case should be dismissed based upon a bankruptcy filing. At oral argument, counsel for DSHS admitted that the issue was mooted based upon the fact that L.M.'s bankruptcy was a Chapter 13. Based upon this oral concession, DSHS must not be permitted to revive this issue on appeal.

## **X. CONCLUSION**

DSHS'S original motion should have been denied in entirety. There is an abundance of evidence from which a jury could find that DSHS was negligent and failed to prevent K.C. and L.M. from being abused. As for the technical defenses premised upon the statute of limitations and upon judicial estoppel, DSHS's arguments are not availing. The trial court should be reversed, and this matter should proceed to trial.

DATED this 7<sup>th</sup> day of May, 2018.

Respectfully submitted,

*Lincoln Beauregard*

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

K.C. and L.M.,

Appellants,

v.

STATE OF WASHINGTON and  
DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

No. 51400-1-II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellants' Opening Brief

in the manner indicated to the parties listed below:

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DATED this 7<sup>th</sup> day of May, 2018.

*Vickie Shirer*

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**VICKIE SHIRER**

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