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No. 52609-3-II

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

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T.W.,

Respondent,

v.

BOYS AND GIRLS CLUBS OF SOUTH PUGET SOUND,  
a Washington corporation,

Appellant.

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BRIEF OF RESPONDENT T.W.

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A. INTRODUCTION

The Boys and Girls Clubs of South Puget Sound (“Club”) allowed T.W. to be victimized and sexually assaulted by its staff many years ago at its Gonyea branch while he was entrusted to its care and custody. A properly instructed jury so concluded after a fair trial in which the Club not only made T.W.’s credibility a central issue, but an issue as to virtually every witness T.W. presented at trial. And the trial court rejected the Club’s post-trial motions raising a plethora of issues regarding the trial.

Now, on appeal, the Club hopes that this Court will adopt its arguments on instructional error, alleged jury misconduct, and the exclusion of Dr. Elizabeth Lofthus, a rebuttal witness, whose testimony was properly excluded under ER 702-03. This Court should reject these baseless arguments, just as the trial court did.

Additionally, the Club has the audacity to offer a red herring to this Court by broadly implying that the jury’s verdict was unsupported factually because T.W. lied or improperly recalled who abused him. The Club fails to actually make a sufficiency of the evidence argument, and, on review of the trial court’s post-trial motions, the facts must be viewed in a light most favorable to the verdict in T.W.’s favor. This Court should reject the Club’s tawdry tactic and disregard its alleged “facts” relating to Gene Anderson that are irrelevant to any of the issues on review by this

Court.

B. STATEMENT OF THE CASE

T.W. began attending the Club's Gonyea facility in Tacoma ("Gonyea ") in the fall of 1984. He and his family lived less than two miles away from it. During this time period, Gonyea offered a woodworking class, taught by Charles Urlacher.<sup>1</sup> Urlacher, a woodworking enthusiast, had been arrested and investigated for a sex-related crime with a minor in 1984, investigated for indecent liberties in 1988, charged with child molestation in the second degree, but pleading guilty to assault in the fourth degree in 1995, and pleaded guilty to first and second-degree rape of a child charges in 1999. CP 682. T.W. described and illustrated the woodshop as located in Gonyea's northeast corner. Ex. 1; RP 471-75. Facility blueprints later produced confirmed that T.W.'s recollection was correct. Ex. 18; RP 496-98.

The Club initially claimed to not have any record of Urlacher working or volunteering at the Club, RP 1025-26, but that was untrue, as the jury learned during the course of the trial. Gene Anderson recalled Urlacher applying for volunteer status at the Club, and so advised the Club's present CEO, Carrie Holden, and its attorneys. RP 1026, 1032-35,

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<sup>1</sup> The Club tried unsuccessfully to exclude any reference to Urlacher's involvement in T.W.'s abuse. CP 901; RP (7/31/18):58-80.

1038-39, 1045-46.<sup>2</sup> T.W. recalled Urlacher teaching the woodworking class. RP 401-03. T.W.'s sister, Shelley Lynn Brown, recalled seeing Urlacher inside Gonyea's woodworking classroom when she went to pick up T.W., Ex. 20; RP 529, 532-37, 542, 548-49. Urlacher's former neighbor, Nick Shank, testified that Urlacher instructed him to find other young people at Gonyea and bring them back to Urlacher's home, which was nearby. CP 700, 712.<sup>3</sup> Moreover, Nick Urlacher and Shank both confirmed that Urlacher was a woodworking enthusiast, had woodworking tools, and would discuss woodworking with guests at his home. RP 515, 712.<sup>4</sup>

Urlacher engaged in classic grooming behavior, setting up T.W. as his potential victim. RP 695-97. T.W. attended woodworking classes conducted by Urlacher at Gonyea prior to the first sexual assault. RP 401-03. During these initial classes, Urlacher sought out and befriended T.W. *Id.* On the day of the first sexual assault, Urlacher approached T.W. during the woodworking class at Gonyea, and asked T.W. if he wanted to look at Playboy magazines at Urlacher's home. RP 403-04. T.W.

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<sup>2</sup> The jury was no doubt unimpressed by the Club's failure to disclose this fact to T.W. or his attorneys until late in the case.

<sup>3</sup> The Club tried unsuccessfully to exclude Shank's testimony in its motion in limine. CP 901; RP (7/1/18):52-58.

<sup>4</sup> The Club unsuccessfully sought the exclusion of Nicholas Urlacher's testimony. CP 901; RP (7/31/18):85-91.

hesitated, but Urlacher instructed him to call his mom, and inform her that Urlacher would be driving him home. RP 404. T.W. complied with the instructions from his teacher. *Id.* After the class, Urlacher left Gonyea with T.W. and instructed T.W. to get inside his station wagon, a vehicle that T.W. described in detail. RP 404. Upon arriving at Urlacher's home, Urlacher brought T.W. into his basement where there were stacks of pornographic magazines. RP 404-05, 476-78. Urlacher raped T.W. in Urlacher's basement and upstairs bedroom, while Urlacher's wife watched, and then drove T.W. home. RP 405-06.

After initially identifying Gene Anderson, Gonyea's program director, as an attacker, CP 60, T.W. testified at trial that Joe Taylor was his attacker, in addition to Urlacher, in a second sexual assault at Gonyea. RP 417-21, 423-27, 490-96, 498, 506-08, 512.<sup>5</sup> T.W. never returned to Gonyea after the second assault. RP 428. He buried any memories of the two assaults. RP 429-30, 452-53. Joe Taylor was terminated at Gonyea because of his involvement in sexual misconduct. Ex. 32; RP 1009-19,

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<sup>5</sup> T.W.'s confusion about Anderson and Taylor was understandable. He testified that his assailant in the second attack was someone in Gonyea's administration whose name began with a G or a J; in discovery, the Club only produced information that Anderson was on staff and T.W. concluded that Anderson was his attacker. RP 490-96.

However, the Club failed to reveal until very late in this case that Urlacher and Taylor were also involved with Gonyea, as the jury learned. RP 776-93, 1045-46. The Club's effort in its brief at 12 to sanitize this conduct and the failure to disclose its association with Urlacher referenced *supra* by claiming discovery was "difficult," did not survive the jury's scrutiny.

1027-30. But the Club never reported Taylor's abusive conduct to CPS or law enforcement as it was obligated to do under RCW 26.44.050 even as to volunteers. RP 811, 813-14, 819, 1004, 1037.<sup>6</sup>

T.W. filed the present action against the Club in the Pierce County Superior Court on June 9, 2017. CP 2-7. The case was assigned to the Honorable Shelly K. Speir. Extensive discovery ensued. The Club moved for summary judgment on the application of the statute of limitations to T.W.'s case. CP 250-63. T.W. vigorously opposed that motion. CP 355-77.<sup>7</sup> The trial court denied the Club's motion on May 18, 2018. CP 595-97. The parties both filed motions in limine. CP 615-35, 663-79, that the trial court addressed in extensive orders. CP 890-902. The case was then tried over 8 days. CP 1208-27.

As noted *supra*, at trial, the Club aggressively challenged T.W.'s memory of events, and whether Urlacher had any association with Gonyea. However, Nick Urlacher and Shank confirmed the layout of Urlacher's home, as described by T.W. RP 515, 700, 712. Shank also testified that Urlacher used pornography to lure him while a young boy

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<sup>6</sup> The jury likely found the testimony of Carrie Holden, the Club's present CEO, and Gene Anderson that the Club had to terminate Taylor for his misconduct, ex. 32, but not report him as required by RCW 26.44.050, RP 815-16, 1012-13, 1028-30, to be wanting.

<sup>7</sup> The Club previously filed a motion to dismiss, CP 12-15, opposed by T.W., CP 16-61, that the trial court denied.

into Urlacher's home – just as Urlacher had done with T.W. RP 709. Moreover, as noted *supra*, Urlacher's woodworking role was confirmed by Nick Urlacher, Nick Shank, and Shelley Lynn Brown. Again, only in the course of trial did the jury learn that despite its protestations of having no association with Urlacher, the Club's Gene Anderson had interviewed Urlacher for a role at Gonyea.

Mary B. Ormiston, an expert with an extensive background in volunteer organizations, RP 649-51, testified that reporting of child abuse was mandatory in 1984, RP 656-57, that Anderson had a reasonable belief that abuse had occurred when Taylor was fired, CP 690-91, and that the Club failed to meet its statutory reporting duty when it failed to immediately report the events associated with Urlacher and Taylor. RP 662-65, 671-72.

Moreover, despite the Club's clear-cut knowledge that sexual abuse training was needed for its staff,<sup>8</sup> the Club provided no training on sexual abuse issues in 1984. RP 821, 1022-23, 1041-42. The Club's

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<sup>8</sup> 1982 executive board meeting minutes from Craig Lowry, Gonyea's executive branch manager, discussing the need for training on sexual abuse prevention (*i.e.* foreseeable risk of sexual abuse) (RP 823); a 1984 Gonyea termination letter for Taylor relating to an indecent exposure incident involving him (*i.e.* notice of potential for inappropriate sexual acts at Gonyea *and* control/disciplinary power over volunteers) (ex. 32); Urlacher's 1984 arrest and investigation for inappropriate sexual contact with a minor (*i.e.* reasonable notice of potential for Urlacher's sexual abuse of youth), and the expert testimony of T.W.'s youth organization expert, Mary Beth Ormiston, regarding general awareness and prevention of sexual abuse during the time period in question (RP 665-72).

sexual abuse training was inadequate. CP 665-67.

On the question of when T.W. learned of his cause of action for abuse, T.W. testified to his treatment by family therapist Rebecca Schiltz and how his therapy sessions in 2015 allowed him to piece together the fact that he had been raped at Gonyea. RP 407-08, 453, 455. Schiltz's testimony confirmed that T.W. mentioned to her that he started to remember the sexual abuse, and its connection to his injuries, something that did not occur until after he discussed the abuse with Schiltz. RP 772-73. That session with Schiltz prompted T.W. to investigate Urlacher. RP 409-10, 455-62.<sup>9</sup>

In addition, Dr. Sarah Heavin conducted a psychological examination and interview of T.W. in July and October 2017. RP 566. Dr. Heavin diagnosed T.W. as suffering from post-traumatic stress disorder ("PTSD"). RP 572-73. She testified that T.W. avoided memories of that sexual abuse as part of his PTSD. RP 571-72. His memories of the abuse re-surfaced in 2015. RP 574, 606-07. Psychological testing bore out her opinion. RP 576-80. T.W. scored highly on the validity scale. *Id.* Nothing in T.W.'s medical records to support the view that he made a

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<sup>9</sup> T.W. testified that his recollection of Urlacher was prompted by news articles on Urlacher's prosecution for sexual offenses. RP 394-96. The Club's counsel told the jury such articles did not exist, RP 385-87, and cross-examined T.W. on them. RP 462-64. The articles existed. RP 502-04.

connection between the sexual assault and his injuries prior to 2015. RP 575.<sup>10</sup>

The Club attempted to provide the testimony of Dr. Elizabeth Loftus on rebuttal,<sup>11</sup> but T.W. moved to exclude that testimony. CP 1079-86. The trial court granted that motion. RP 931.

Upon appropriate instructions by the trial court, CP 1186-1207, the jury returned a verdict for T.W. in the amount of \$1.53 million. CP 1228-29; RP 1194-95. The court polled the jury, RP 1195-98. Jurors 11 and 12 indicated that they did not agree. RP 1197-98. The trial court entered a judgment on that verdict on September 21, 2018. CP 1372-73.<sup>12</sup> Thereafter, the Club filed an extensive motion for a new trial, CP 1376-92, that T.W. opposed. CP 1399-1424. The trial court denied the motion. CP 1587-89, and this appeal ensued. CP 1590-99.

### C. SUMMARY OF ARGUMENT

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<sup>10</sup> When Dr. Heavin provided a declaration on summary judgment (CP 458-97) in which she articulated her examination, diagnoses, and opinions, including that T.W. did not make any causal connection between the sexual abuse and the injuries at issue in this lawsuit until after July 2015; CP 461, the Club moved to exclude certain of Dr. Heavin's causation opinions, CP 954-61, and the trial court granted the motion as to medical issues, but denied it as to psychological opinions. RP 588-89.

<sup>11</sup> The Club did not timely disclose Dr. Loftus's testimony as a witness under PCLR 26(d)(3). RP(7/31/18):2-3, 11. As a consequence, the trial court determined that the Club engaged in "a willful failure" to disclose evidence and ordered that her testimony was admissible only on rebuttal. *Id.* at 12-15, 35-36; CP 1093. The Club has not assigned error to those decisions.

<sup>12</sup> T.W. was forced to file a motion to compel when the Club refused to disclose information on its liability insurance. CP 1258-65. The trial court granted that motion. CP 1368-69; RP 1224-27.

The trial court did not abuse its discretion in rejecting the Club's CR 59 motion for a new trial where the jury, properly instructed on the law relating to child sexual abuse and the applicable statute of limitations, ruled against it.

In particular, the trial court properly instructed the jury on the duty owed by the Club to T.W., given their special relationship, in Instruction 15. The trial court did not abuse its discretion in rejecting the Club's additional, unnecessary proposed instructions. Similarly, the trial court properly instructed the jury on the child sexual victim statute of limitations in Instructions 10-11.

The trial court did not abuse its discretion in excluding the rebuttal evidence of Dr. Elizabeth Loftus, an expert whose testimony on the reliability of witness identification has been routinely excluded by Washington courts in their exercise of discretion. That testimony failed to meet the well-recognized protocol for the admission of expert testimony where it failed to satisfy the *Frye* standard for acceptance in the scientific community and ultimately was unhelpful for the jury, as the trial court ruled.

The trial court did not abuse its discretion in rejecting the Club's contention that the jury rendered a "quotient verdict" where the evidence it offered from two jurors was improper as it related to matters inhering in

the verdict and, even if it was admissible, it failed to document that the jurors agreed in advance to be bound by any averaging of verdicts they undertook in their deliberations. The jury was not bound by any averaging where they took multiple ballots on their verdict.

#### D. ARGUMENT

Before addressing the Club's explicit assignments of error, T.W. believes it is important to address the Club's *implicit* error contention. Lacking the courage of its convictions to make a direct argument that the jury's verdict is not supported by substantial evidence, the Club instead spends considerable effort throughout its brief to "hint" broadly to this Court that the jury's verdict is not sustainable because T.W. allegedly could not identify his abuser at Gonyea. This invitation for the Court to substitute its decision on the facts for the jury's assessment of T.W.'s credibility should be rejected.

This Court can readily note that whatever confusion T.W. may have had regarding Gene Anderson or Joe Taylor did not exist as to Urlacher, an individual with a criminal history of sexual offenses who was allowed to teach woodworking classes at Gonyea. RP 479. Moreover, T.W. testified *extensively* at trial. RP 392-513. He was cross-examined *extensively* on his memory as to Anderson and Taylor. RP 435-80, 506-

11, 513.<sup>13</sup> The Club’s counsel argued T.W.’s credibility *extensively* in his opening statement, RP 373-78, and in closing. In fact, to lead off his closing, counsel made that point: “The case is about credibility.” See RP 1142, 1160-74. The Club’s lawyer specifically confronted T.W. with his declaration under oath identifying Anderson as his assailant in the second assault. RP 437-39, 442-43, 446-48. On multiple occasions, he also elicited T.W.’s concession that Anderson was not his attacker. RP 479, 507-08, 510. The Club even called Anderson as a witness, obviously for the purpose of eliciting jury sympathy for his mis-identification. RP 973-87. As the Court can readily discern from the Report of Proceedings, the Club’s counsel never missed an opportunity to raise the issue of T.W.’s credibility. The jury assessed his credibility in rendering its verdict,<sup>14</sup> rejecting the Club’s position on T.W.’s abuse. The Club’s tawdry tactic of trying to tar the jury’s verdict as factually unsupported should be rejected by this Court.

(1) The Applicable Standard of Review for the Club’s Post-Trial Motions

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<sup>13</sup> As noted *supra*, T.W.’s confusion about Anderson and Taylor was fully explained to the jury, emanating from the Club’s late disclosure of Taylor’s role at Gonyea.

<sup>14</sup> It has long been understood in Washington that credibility decisions are for the jury. *State v. Holbrook*, 66 Wn.2d 278, 279, 401 P.2d 971 (1965) (“It is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses and to decide the disputed questions of fact.”). See CP 1187 (Instruction 1 on jury role in assessing witness credibility).

The Club filed an *extensive* post-trial motion raising a blizzard of issues. CP 1376-92.<sup>15</sup> The trial court properly rejected them. CP 1587-89. Now, on appeal, the Club revisits some of the issues it raised below and it contends that this Court must give it special treatment tantamount to *de novo* review with respect to its review of the trial court's denial of its CR 59 new trial motion. Appellant Br. at 15. That is wrong.

Under CR 59(a), the Club bore a high burden to justify a new trial. A trial court has broad discretion in determining whether to grant a motion for a new trial, as the Club acknowledged. Appellant Br. at 15. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494-95, 415 P.3d 212 (2018); *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). *See also, Hollins v. Zbaraschuk*, 200 Wn. App. 578, 402 P.3d 907 (2017), *review denied*, 189 Wn.2d 1042 (2018) (rejecting contention that *de novo* review governed granting of new trial). In general, a court exercising its discretion under CR 59(a) must determine that there is such a feeling of prejudice in the minds of the jury so as to have deprived a party of its right to a fair trial. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). This Court then reviews that decision for an abuse of discretion. *Collins v. Clark County*

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<sup>15</sup> The Club has abandoned a number of issues by not raising them in its brief. Appellant Br. at 2.

*Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).<sup>16</sup>

The Club cites *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 282 P.3d 1124 (2012), *review denied*, 176 Wn.2d 1002 (2013) for the proposition that a denial of a motion for a new trial deserves a “critical abuse of discretion review.” Appellant Br. at 15. (Club’s emphasis.) But *M.R.B.* merely stands for the unremarkable proposition that an appellate court reviewing the denial of a motion for a new trial should do so with care because denial of that motion concludes a party’s rights. *Id.* at 848. The *M.R.B.* court did not create a new standard of review, as the Club would have this Court believe.

Our Supreme Court in *Gilmore* made crystal clear how review of the denial of a motion for a new trial is properly undertaken. The *trial court*, being in the best position to assess the requisite prejudice to a party’s right to a fair trial<sup>17</sup> is invested with considerable discretion, and this Court only reviews such a discretionary decision for its abuse – a

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<sup>16</sup> The reason for the high burden in connection with post-trial motions rests in the public policy of Washington beginning with article I, § 22 of our Constitution, which requires that the right to trial by jury be held “inviolable.” The jury has the constitutional role of finding facts. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). In deference to the key role of the jury, our courts strongly presume the jury’s verdict is correct. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989).

<sup>17</sup> It has been the rule in Washington that appellate courts defer to trial courts’ “first hand” perception of errors allegedly prejudicing a party’s trial rights because the trial court is plainly in the best position to assess the effect of any such error on a party’s rights. *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001); *Rich v. Starczewski*, 29 Wn. App. 244, 247, 628 P.2d 831, *review denied*, 96 Wn.2d 1002 (1981).

manifestly unreasonable decision or one based on untenable grounds unsupported by the record or based on the wrong legal standard. 190 Wn.2d at 494. Indeed, merely because the appellate court disagrees with the trial court decision is not enough; the appellate court must be convinced no reasonable person would have taken the view the trial court adopted. *Id.*

The Club fails to meet its high burden of documenting that the trial court abused its discretion in denying the Club's new trial motion.

(2) The Court Properly Instructed the Jury on the Duty of Care Owed to T.W.

The Club contends in its brief at 19-33 that the trial court committed instructional error and that this Court should review its arguments *de novo*. The Club, however, incorrectly states Washington law on the duty it owed T.W. and the appropriate standard of review. This Court should reject the Club's attempt to mischaracterize the trial court's instructions and the standard of review.

(a) Washington Law on Protective Duty

At its core, this is a case addressing the Club's duty to protect T.W. where it had a special relationship with him. Washington law is clear on the existence of such a duty. Under the *Restatement (Second) of Torts*, the Club owed T.W. a broad protective duty of care relationship to protect a

person with whom he/she has a special relationship from harm caused by a third person. *Restatement (Second) of Torts* § 315.<sup>18</sup> *Petersen v. State*, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). The necessary special relationship is discussed in *Restatement (Second) of Torts* §§ 314A<sup>19</sup> and 320.<sup>20</sup> The provisions of § 320 apply to children in the custody of others: “the actor who takes custody...of a child is properly required to give him

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<sup>18</sup> § 315 states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

<sup>19</sup> § 314(A) states:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

<sup>20</sup> § 320 states:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

the protection which the custody or the manner in which it is taken has deprived him.” Cmt. b to § 320. Indeed, this duty requires the actor to *anticipate danger*:

One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

Cmt. d to § 320. While this protective duty has arisen most often in the school setting,<sup>21</sup> it has arisen in other settings as well.<sup>22</sup>

Washington has made clear that a church has a duty to children under its care who are sexually abused. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). A nursing home has a duty to its residents who are sexually abused by its staff. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). A church has a duty to children when a Boy Scout Scoutmaster for a troop it sponsored sexually abused them, *N.K. v. Corp. of Presiding Bishop of the Church of*

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<sup>21</sup> *E.g., McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953) (school child under the care and custody of school district). There, our Supreme Court made clear that the district's duty was to *anticipate* dangers that were reasonably foreseeable and to take steps to address them. *Id.* at 320. That students might sexually assault other students in a dark, unsupervised area under bleachers in a gym was reasonably foreseeable. *Id.* at 322.

<sup>22</sup> A special relationship may even require protection of the plaintiff from the custodian or himself/herself. *E.g., Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (inmate's special relationship with jailer requires jailer to ensure inmate's "health, welfare, and safety" so that city was liable for inmate's suicide).

*Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730, review denied, 179 Wn.2d 1005 (2013). The State itself has a duty to children it places in foster care or adoption, once it has terminated any parental rights as to those children, to protect them from sexual abuse at the hands of their foster or adoptive parents. *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018).

It is not the existence of actual physical control, however, that dictates whether a special relationship is present. Our Supreme Court squarely rejected the argument that the location of the victim's injury controlled. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016) (special relationship existed as to student–district even though student was raped far away from campus by another student who was a registered sex offender). It has also rejected the notion that a special relationship is confined to situations of physical control over the defendant in cases like *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (recognizing that a professional takes charge over an outpatient who harms others). In fact, in *H.B.H.*, the Court made clear that custody meant “entrustment.” 192 Wn.2d at 173 (“...our case law confirms that entrustment for the

protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship.”).<sup>23</sup>

The scope of any special protective relationship duty is determined by the foreseeability of the harm. As the Court of Appeals noted in *N.K.*, the existence of a duty based on take charge liability requires only that the harm be in the *general field of danger*. 175 Wn. App. at 526 (citing *McLeod*, 42 Wn.2d at 322). Foreseeability limits the scope of duty. *Id.* at 530. Foreseeability is a *question of fact* for a jury. *Id.* See also, *Niece*, 131 Wn.2d at 50.

The Club contends that *Anderson v. Soap Lake School District*, 191 Wn.2d 343, 423 P.3d 197 (2018), limits its duty, appellant br. at 20-26, but that is incorrect. *Anderson* is not pertinent.<sup>24</sup> In particular, that case involved the off-campus death of a student in an automobile accident after a high school basketball coach gave the student and her boyfriend alcohol at a party at his home. The boyfriend and the student left the party

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<sup>23</sup> The Court has also determined that a special relationship duty exists even when there is no “custodial” relationship at all. *E.g.*, *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business has special relationship with customers invited to premises); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (city has *Restatement* § 281 duty to protect harassment victim from her harasser when city officers served anti-harassment order).

<sup>24</sup> The Club’s citations to *Kyreacos v. Smith*, 89 Wn.2d 425, 572 P.2d 723 (1977), and *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 667 P.2d 125, *review denied*, 100 Wn.2d 1025 (1983), appellant br. at 25, are equally inapplicable, as they pertain to intentional assault under a *respondeat superior* claim, which is not the case at issue here.

in the boyfriend's car after heavy drinking. Both were killed in a one-car accident. The student's estate asserted that the school district that employing the basketball coach was negligent in its hiring, training, and supervision of him. The Supreme Court affirmed dismissal of those claims against the district because it did not know or should have known that it needed to exercise control over the coach when he was acting outside the scope of his employment when conducting a party. *Id.* at 367.

On the district's protective duty, the Court did not alter the fundamental basis for liability in such cases. Rather, its focus was on whether a "school activity" was involved in the coach's impromptu party and whether such a party foreseeably resulted in the student's death. *Id.* at 372-73.

The Court also held that the district could not be vicariously liable for the coach's activities so far outside the scope of his employment by the district. *Id.* at 373-75.

Simply put, *Anderson* does not alter the law on a protective duty arising out of a special relationship, as here, or the scope of such a duty, as the Club contends, particularly where T.W. specifically relinquished any vicarious liability claims against the Club. RP 371-72.

(b) This Court Reviews the Trial Court's Instructions for an Abuse of Discretion

While an instruction that erroneously states the law is reviewed *de novo* on appeal, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995), the trial court retains considerable discretion on the number, the language, and the specificity of any instructions. *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). In particular, a court’s decision not to instruct the jury on a matter is reviewed for an abuse of discretion. *Rekhter v. Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014). The touchstone of appellate review of instructions is whether an instruction allows a party the opportunity to argue its theory of the case to the jury, does not mislead the jury, and properly informs the jury of the law. *Hue*, 127 Wn.2d at 92.

(c) The Trial Court Correctly Instructed the Jury

The trial court instructed the jury on the Club’s duty in Instructions 15 and 18. CP 1202, 1205. *See* Appendix. Both correctly apprised the jury of the law and allowed the Club ample opportunity to argue its theory of the case. Nevertheless, the Club contends that the trial court improperly instructed the jury on duty. Appellant Br. at 19-33. Specifically, the Club claims that Instruction 15 is somehow a “strict liability” instruction and that it was entitled to an instruction on vicarious liability, although it was not an issue in the case. Its complaints are baseless.

Instruction 15 was a proper statement of the law on the Club’s

protective duty to T.W.; it was far from a “strict liability” instruction, as the Club repeatedly mischaracterizes it. The Club could argue its theory of the case. Instruction 15 described the law on the Club’s protective duty, describing when “custody” was present under the many court decisions addressing such a duty. The *exact same language defining “custody” appears in the Club’s own proposed instruction, D-17. CP 932.*

Notwithstanding the Club’s contrary assertion, appellant br. at 29, the Club’s protective duty arose here because T.W. was entrusted to it and his well-being and safety were the Club’s responsibility. *Niece*, 131 Wn.2d at 50; *N.K.*, 175 Wn. App. at 525–26. Since “[a]s a matter of public policy, the protection of children is a high priority,” a duty to protect while arise where the plaintiff was “delivered into the custody and care” of the defendant organization. *C.J.C.*, 138 Wn.2d at 721. The Club controlled access to the premises. It exercised on-the-ground control of day-to-day operations at Gonyea. Mary Ormiston, Gene Anderson, and Carrie Holden testified that the Club was obliged to ensure the safety of youth members, but also to supervise and monitor the premises, employees, and volunteers. RP 657, 810, 819, 821-22, 1004, 1008, 1018-19. Urlacher’s and Taylor’s grooming and sexual assaults occurred while T.W. was within the Club’s custody and protective care. The Club

breached its duty to protect T.W.

Second, the discussion of foreseeability in paragraph 3 of Instruction 15 was a correct statement of the law and did not constitute a “comment on the evidence,” as the Club contends in its brief at 22.<sup>25</sup> As noted *supra*, the Club’s duty was bounded by whether the risk to T.W. was within the “general field of danger” – that is, the *potential* for danger or harm stemming from a person or place that is known or should have been reasonably anticipated. *McLeod*, 42 Wn.2d at 322; *Niece*, 131 Wn.2d at 50-51; *C.L.*, 200 Wn. App. at 198. With respect to the “general field of danger,” it is *not* necessary to show that the defendant knew of a specific risk of criminal conduct. If a reasonable person could anticipate a potential risk of harm to the plaintiff, a general field of danger exists, and the duty of care to protect the plaintiff will be recognized. *N.L.*, 186 Wn.2d at 435-36.<sup>26</sup> Specifically, as to the foreseeability of the sexual assault of minors by adults in positions of power over them, Division I held in *N.K.* that the possibility of an adult volunteer sexually abusing a minor in an isolated setting – particularly a volunteer with a relatively

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<sup>25</sup> The jury was told to disregard any inadvertent comment on the evidence in the instructions. CP 1188 (Instruction 1).

<sup>26</sup> It is for these precise reasons that the Club’s proposed foreseeability instructions, D-15 and D-17, CP 930-32, are erroneous. Neither references the Club’s duty to anticipate harm that fall reasonably within the field of danger, requirements of foreseeability since *McLeod*.

unknown history – was a reasonably foreseeable risk of harm, and therefore, was within the “general field of danger, ” precluding summary dismissal. *Id.* at 531.<sup>27</sup> Critical for this Court’s analysis, “Foreseeability is a question for the jury unless the circumstances of the injury are ‘so highly extraordinary or improbable as to be wholly beyond the range of expectability.’ A sexual assault is not legally unforeseeable ‘as long as the possibility of sexual assaults ... was within the general field of danger which should have been anticipated.’” *N.K.*, 175 Wn. App. at 530 (internal citations omitted) (emphasis added). In sum, it was necessary for the trial court to instruct the jury on the scope of the Club’s duty as foreseeability is a jury question. Paragraph 3 of Instruction 15 was not a comment on the evidence accordingly.<sup>28</sup>

But the Club seems to want to go farther in its attack on the trial court’s instructions in raising an argument it did not surface below in its new trial motion. CP 1379-91. It asserts that T.W. was never in its “custody” as *a matter of law* citing federal authority to support its argument. Appellant Br. at 27-33. As noted *supra*, when focusing on

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<sup>27</sup> The court’s finding was bolstered by record evidence establishing the defendant’s *general awareness* of – and training/policies regarding – the potential for sexual abuse prior to the subject incidents. *N.K.*, 175 Wn. App. at 531.

<sup>28</sup> As noted *supra*, T.W. adduced considerable evidence establishing a known and foreseeable general field of danger for the potential sexual assault of youth members at Gonyea, thus imposing a duty to protect T.W.

“custody” for purposes of the existence of a special protective duty of care, the proper analysis is not physical custody but “entrustment.” Paragraph 2 of Instruction 15 was a proper statement of the law in light of *C.J.C.*, *N.K.*, *N.L.*, or *H.B.H.* The federal cases cited by the Club do not support its position.<sup>29</sup>

Finally, the Club’s complaints about the lack of instructions on *respondeat superior* concerns are misplaced. Appellant Br. at 23-27. The Club contends that there is a distinction between what it describes as a negligent supervision and negligent protection claims. *Id.* at 21. More to the point, there is a distinction between liability based on *respondeat superior* and the broad protective duty based on *Restatement* §§ 315, 320. This has been clear since *Niece*. 131 Wn.2d at 49 (“While an employer generally does not have a duty to guard against the possibility that one of

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<sup>29</sup> Those cases are not controlling on the application of Washington law discussed *supra*. Both cases, of course, predate our Supreme Court’s discussion of what constitutes “custody” for purposes of a special protective relationship in cases like *N.L.*, *Volk*, or *H.B.H.* Moreover, both are distinguishable on their facts.

Unlike the situation here as between the Club and T.W. in *Boy 1 v. Boy Scouts of America*, 832 F. Supp. 2d 1282, 1289 (W.D. Wash. 2011), the plaintiffs in their negligence action failed to even plead the existence of any entrustment to BSA. Specifically, the plaintiffs’ complaint did not allege that they were in BSA’s custody or that BSA controlled the premises where the abuse occurred. Similarly, in *Boy 1 v. Boy Scouts of America*, 993 F. Supp. 2d 1367 (W.D. Wash. 2014), the court ruled that a special relationship was not present as a matter of fact between the BSA and a Scout abuse victim under the Sexual Exploitation of Children Act, RCW 9.68A, predicated upon the actions of an unofficial adult troop volunteer and a senior patrol leader where neither individual had such statuses at the time of the abuse, and BSA had no knowledge of those individuals’ alleged affiliation with the Scout troop. *Id.* at 1371-72. The jury here had ample evidence of Urlacher’s and Taylor’s affiliations with Gonyea.

its employees may be an undiscovered sexual predator, a group home for developmentally disabled persons has a duty to protect residents from such predators regardless of whether those predators are strangers, visitors, other residents, or employees.”). But T.W. has not pursued a *respondeat superior* theory here, as the Club acknowledges. Appellant Br. at 21. This was not a *respondent superior* case. Under Instruction 15, T.W. had to prove that the sexual assault was within the anticipated field of danger. T.W. was entrusted to Gonyea’s care and the sexual assault was within the general field of danger that the Club should have anticipated.

The Club’s contention that the trial court abused its discretion<sup>30</sup> by failing to give instructions about a theory that is *not* in the case as T.W.’s counsel told the jury in closing, RP 1132, is meritless. The trial court did not abuse its discretion in concluding that the Club’s proposed vicarious liability instructions, D-23 through D-26, CP 950-53, were simply unnecessary and ultimately would confuse the jury by having them address a non-existent issue in the case, as the trial court properly noted. CP 1081-82.

Instruction 1 made clear to the jury that it was only to decide the law and facts to decide the case. CP 1187. In other words, it was to

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<sup>30</sup> As noted *supra*, a trial court’s decision on the number or language of instructions is within its discretion; the Club’s claim of a blanket *de novo* standard of review, appellant br. at 19-20, is consequently misplaced.

decide the precise issues presented to it by the trial court's instructions and *not* a theory not found in the law presented to it like vicarious liability. The jury is presumed to follow the court's instructions. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012) ("Washington courts have, for years, firmly presumed that jurors follow the court's instructions.").

Additionally, if there have been any question in the jury's mind regarding the conduct of the Club's employees, Instruction 18 precluded Club vicarious liability for acts by Urlacher and Taylor, stating that any damages "caused solely by acts of Charles Urlacher and/or Joe Taylor and not proximately cause[d] by the negligence of the defendant . . . must be segregated and not made a part of any damage award against the defendant." CP 1205. T.W.'s counsel specifically acknowledged during closing argument that the Club was not "automatically liable" merely because an employee or volunteer committed the act, RP 1132, and noted Instruction 18. RP 1136. The Club's counsel argued at length to the jury that Instruction 18 exonerated the Club. RP 1175-78. Ultimately, the Club was not liable for Taylor's intentional acts, only for its own negligence in allowing T.W. to be raped while attending programs at Gonyea. The jury was properly instructed.

In sum, the trial court did not abuse its discretion in instructing the jury and it properly denied the Club's motion for a new trial.

(3) The Trial Court Correctly Instructed the Jury on the Childhood Sexual Abuse Statute of Limitations

The Club contends that the trial court erred in instructing the jury on RCW 4.16.340, the childhood sexual abuse statute of limitations. Appellant Br. at 33-40. In that assertion, it is wrong. Under the statutory language, *see* Appendix, T.W. did not discover the connection between his harm and his rape at Gonyea until after June 9, 2014.

Washington has long recognized the application of the discovery rule as to when a plaintiff's knowledge of her/his claim triggers a statute of limitations. *E.g., Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). Generally, the plaintiff's knowledge of the essential elements of her/his claim is a *question of fact* for the jury. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). That is particularly true in the childhood sexual abuse context where the Legislature statutorily *rejected* the strict application of the statute of limitations announced by the Supreme Court in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986) (rejecting discovery rule in cases of childhood sexual victimization where plaintiff repressed recollection of abuse from her conscious memory). Where cases of child abuse are often exceedingly difficult because the victims repress the memories of such traumatic experiences, the Legislature recognized this fact when it amended RCW 4.16.340 in 1991. It made specific

findings as to why its amendments were necessary, *broadening* the time period for discovery of the abuse, and specifically stating its intent to override *Tyson*. Laws of 1991, ch. 212, § 1. *See* Appendix.

The trial court here gave two instructions pertaining to the statute of limitations, Instructions 10 and 11, that were accurate statements of the law. CP 1197-98. Instruction 10 tracks verbatim with RCW 4.16.340(1)(b) and (c). The Club *concedes* that it is a correct statement of the law. Appellant Br. at 35. Instruction 11 was also proper and accurate.

The centerpiece of the Club's appellate argument is that Instruction 11 was incorrect in discussing what harms trigger the statutory limitation period. Instruction 11 speaks in terms of qualitatively different or distinct harms. The trial court's language in Instruction 11 was correct where the Legislature expressed its intent "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. Instruction 11 merely articulates the meaning of that aspect of the statute and is well-supported in case law. Moreover, the Club's objection to the instruction was not so much that the language of the instruction was wrong as much as it was its assertion that there was no evidence in the record of quantitatively different or distinct harm. RP 1103-04. As noted *supra*, T.W.'s testimony and Dr. Heavin's supported the jury's decision that T.W. did not fully

appreciate the connection of his harm to the events at Gonyea.

Case law discussing the issue supports the language of Instruction 11. Cases like *Hollman v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386 (1997) and *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999) made clear that causation is established only when the victim of childhood sexual abuse *actually* discovers the causal connection between her/his sexual abuse, and not necessarily when she/he became aware in prior therapy of lesser harms. In *Carollo v. Dahl*, 157 Wn. App. 796, 801, 240 P.3d 1172 (2010), Division III reaffirmed its decision in *Hollman*, stating:

Appellate courts have found actions in compliance with the three year limitation of RCW 4.16.340(1)(c) in two sets of circumstances: (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.

(emphasis added). Division I stated in *Cloud*:

[T]he victim may know ... that he or she was molested, and may even know that some injury resulted, but may not know the full extent of the injury.... 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.

98 Wn. App. at 734-35.

Likewise, in *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081

(2006), this Court held a survivor’s recognition in 1995 that the abuse resulted in “constant hurts,” “is something that never goes away,” and “haunted” her for over 20 years did not prevent her from filing suit in 2002 after she was first diagnosed with abuse-related PTSD. *Id.* at 209-10. The *Korst* court also distinguished injuries such as “anger” at the abuser, ulcers, and even irritability over intimacy as qualitatively distinct, noting that “a reasonable person could not infer that she knew that her father’s abuse had caused her ulcers or had caused her to grind her teeth at night.” *Id.*<sup>31</sup>

The Club proposed an instruction and verdict form that would have precluded any suit if a plaintiff discovers a causal connection between the childhood sexual assault and “any injury.” CP 1051, 1176. The Club ignored the intent of the Legislature in enacting RCW 4.16.340 as expressed in Laws of 1991, ch. 212, § 1(5), and the case law cited above. As this Court indicated in *Korst*, and as other divisions of the Court of Appeals have held, the statute of limitations is tolled for qualitatively

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<sup>31</sup> Since *Korst*, this Court has at least twice reaffirmed the principles expressed there. *See B.R. v. Horsley*, 186 Wn. App. 294, 345 P.3d 836 (2015) (reversing summary judgment on basis of statute of limitations where there were fact issues as to whether childhood sex victim’s injuries were new so as to trigger RCW 4.16.340); *K.C. v. Johnson*, 197 Wn. App. 1083, 2017 WL 888600 (2017) (reversing summary judgment in favor of hospital on triggering of limitation period in RCW 4.16.340). *See also, P.L. v. Wash. State Dep’t of Soc. & Health Servs.*, 184 Wn. App. 1010, 2014 WL 5340007 (2014) (Division I reverses trial court dismissal of sex abuse claim on summary judgment where fact issues were present as to whether the victim knew of the causal connection of his harm to his abuse, citing *Korst*).

distinct injuries for which the causal connection has not been made. The Club's instructions were erroneous.

In any event, the Club had an opportunity to argue, and did argue aggressively on the basis of Instructions 10 and 11, that T.W. should have discovered the causal connection between his rapes and subsequent injuries prior to June 9, 2014, and his injuries were the same and only increased in severity. CP 382-89 (opening), 1145-59, (closing). As noted *supra*, that is all the law requires. The jury did not accept the Club's argument and returned a verdict in T.W.'s favor.<sup>32</sup>

The trial court did not abuse its discretion in denying the Club's motion for a new trial on the statute of limitations instructions where the Club misreads the legislative intent for RCW 4.16.340 and the case law applying it.

(4) The Trial Court's Exclusion of Rebuttal Witness Elizabeth Loftus Was Warranted and Proper

The Club contends that the trial court erred in excluding the testimony of rebuttal witness Dr. Elizabeth Loftus. Appellant Br. at 40-

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<sup>32</sup> The verdict form stated:

QUESTION 1: Do you find that plaintiff discovered or reasonably should have discovered that the injury or condition was caused by said act or discovered that the act caused the injury for which the claim is brought after June 6, 1992 and before June 9, 2014?

ANSWER: No ("yes" or "no")

CP 1228.

46. The trial court did not abuse its discretion in doing so.<sup>33</sup>

In making its argument on the admission of Dr. Loftus's testimony, the Club repeats its mantra that T.W.'s testimony "flipped on a dime" as to Anderson and Taylor, overlooking the fact that his testimony was consistent as to *Urlacher*. Moreover, the Club gives short shrift to the trial court's actual reasons for confining the belated Loftus testimony to rebuttal, and its exclusion of her testimony generally. The court specifically noted that the Club's counsel agreed that Dr. Loftus's testimony failed to meet *Frye* as to repressed memory. RP 903-04. The court further noted that to the extent that Loftus intended to address suggested memory, that was not an issue in the case so that Loftus's testimony would not assist the jury:

On the representation that she's going to talk about suggestion, creation of false beliefs or memories, I'm concerned about that because my recollection of the testimony is that no witnesses have testified that there has been any suggestions made.

I believe Ms. Brown, I believe it was, the plaintiff's sister, specifically testified that they had no idea that any of that occurred until Mr. Wagner informed them. So as far as the family is concerned, there's no suggestion. I haven't heard any other witness say that they suggested anything to Mr. Wagner about what happened.

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<sup>33</sup> This Court reviews such an evidentiary decision for an abuse of discretion. *Gilmore*, 190 Wn.2d at 494. If there was a tenable basis for the exclusion of an expert's testimony, the court did not abuse its discretion. *State v. Briggs*, 55 Wn. App. 44, 65, 776 P.2d 1347 (1989) (holding that Dr. Elizabeth Loftus was properly excluded).

If the only source of the suggestion is going to be documents that were disclosed during discovery, then really all Dr. Loftus is doing is commenting on Mr. Wagner's credibility, and I think that's already been handled through cross-examination. I think that the Joe Taylor letter, the circumstances of its disclosure, the documents that had to be searched for, all of that has been covered in cross-examination already in trial.

So I don't think that her testimony on subject would be helpful to a trier of fact. In fact, I think it actually invades the province of the jury because they're all supposed to be determining credibility and witnesses don't get to give opinions about credibility.

I also think that the testimony regarding suggestibility or creation of false memories is helpful because it's a matter of common knowledge. I mean, all of these jurors have memories. They all know how memory works because they live it every day. I don't think they need an expert to tell them that.

So I am going to exclude Dr. Loftus. I don't think that there's anything that she can provide that would be helpful to a trier of fact.

RP 904-05. After an offer of proof, the trial court reaffirmed its prior ruling:

THE COURT: I am not going to change my prior ruling. I'm still not convinced that there is a sound scientific basis for the methodology that Dr. Loftus has used in this case. I'm concerned that she lacks a proper factual foundation for any opinions she might give. I'm also concerned that she could not confirm that her opinions were being given on a more-probable-than-not basis, and so I am going to exclude her testimony.

RP 931.

In general terms, under ER 702-03, expert testimony is admissible

if three questions are answered affirmatively: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). In applying this test, trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent a "very plain abuse" of such discretion. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013); *Gilmore*, 190 Wn.2d at 494.

Here, the trial court excluded the Loftus testimony because it was not generally accepted in the scientific community and it was unhelpful to the jury.

(a) Not Generally Accepted in the Relevant Scientific Community

The second element of the *Allery* test largely incorporates the so-called *Frye* test for novel scientific evidence.<sup>34</sup> *Frye* is applicable where

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<sup>34</sup> In *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), a case involving lie detector results, the court ruled that evidence derived from a scientific theory is admissible only if the underlying theory has gained general acceptance in the relevant scientific community. Washington has adhered to *Frye*, rejecting the federal approach to scientific evidence established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (adhering to the *Frye* analysis, Court permits admission of expert testimony on DNA testing); *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984) (evidence derived from hypnosis); *State v. Canaday*, 90 Wn.2d 808, 812-13, 585 P.2d 1185 (1978) (breathalyzer results); *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974) (polygraph results).

either the theory and technique or method of arriving at data upon which the expert relies is not generally accepted in the relevant scientific community. The *Frye* court held that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F.3d at 1014. Our Supreme Court has noted that the *Frye* rule uses a “conservative approach” to keep “pseudoscience” out of the courtroom. *Copeland*, 130 Wn.2d at 259. In *Anderson v. Azko Nobel Coatings, Inc.*, 172 Wn.2d 593, 600-01, 260 P.3d 857 (2011), the Court further held that trial judge’s gatekeeping role in applying *Frye* is to exclude “scientific-seeming evidence” which is unreliable because “unreliable evidence is not helpful to the jury.” *Accord, L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 127, 436 P.3d 803 (2019). The *Anderson* court held that “both the scientific theory *underlying* the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*.” 172 Wn.2d at 603. The burden of demonstrating that both the theory and methodology on which the testimony is based are generally accepted is on the proponent of the evidence, here, the Club.

*Frye* has been applied to bar “science” not generally accepted in the relevant scientific community. In *Lake Chelan Shores Homeowners*

*Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 313 P.3d 408 (2013), *review denied*, 179 Wn.2d 1019 (2014) for example, Division I upheld the exclusion of an expert's testimony in a civil case where the expert, after initially indicating there was no way that an expert could determine from existing rot in a structure when that rot initially started, the expert purported to testify that it was possible to determine the date rotting started based on a formula developed by his colleague that was nowhere supported in the scientific community. Similarly, in *Kelso v. Olympia Sch. District*, \_\_ Wn. App. 2d \_\_, 2019 WL 2184982 (2019), this Court upheld the exclusion of the opinions of an expert that were tantamount to the profiling of alleged sexual abuse victims, concluding that expert's opinions did not meet *Frye* where he merely "reverse engineered" victim symptoms to arrive at a conclusion that a particular individual abused them. *Id.* at \*7-8.

Dr. Loftus's opinion on repressed or suggested memory is no more well-established in the scientific community than was the expert's novel opinion in *Kelso*, as the Club's own counsel *admitted* to the trial court. RP (7/31/18):21 ("... actually both sides have argued that it [repressed memory testimony] doesn't meet the *Frye* test and there is a controversy as far as whether it is evidently sound."). T.W.'s counsel noted that

stipulation. *Id.* at 22-23.<sup>35</sup>

In addition to whether the scientific basis for an expert's opinion is generally accepted in the relevant scientific community, the expert's *methodology* must similarly be accepted. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994); *L.M.*, 193 Wn.2d at 128. Dr. Loftus's methodology was unsupported. Following the Club's offer of proof, T.W.'s counsel cross-examined Dr. Loftus. It became evident that she could not articulate any methodology on which her conclusions were based. RP 920. At one point, she even speculated that maybe it was Gene Anderson who raped T.W. RP 927.

Articles authored by Dr. Loftus reinforced the absence of a methodology or a sufficient scientific foundation for her belief in implanted memories. In a law review article, CP 1110-43, Dr. Loftus stated that there is only "anecdotal evidence" that repressed memories can be influenced by suggestion. Elizabeth Loftus, *Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. Crim. L. & Criminology 129, 157 (1993) ("Little is known about how and where a repressed memory might be stored in the brain. It is likely, however, that a repressed memory would be

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<sup>35</sup> When the trial court initially excluded any testimony regarding repressed memories under *Frye*, the Club's counsel expressly told T.W.'s counsel and the court that Dr. Loftus's opinions on repressed memory were not accepted in the scientific community and she would not be offering them. CP 1107-08; RP 903-04.

affected by new inputs, and indeed, while experimental evidence is lacking, there is anecdotal evidence that ‘repressed memories’ may be altered by additional information received.”).

In a chapter of a *Manufacturing False Memories Using Bits of Reality*, CP 1145-68, Dr. Loftus there posited that “postevent information often becomes incorporated into memory, supplementing and altering a person’s recollection. The new information invades us, like a Trojan horse, precisely because we do not detect its influence.” CP 1082. Because of this, she speculated, repressed memory is not real, and false memories are very possible. However, to support her novel theory, Dr. Loftus cited to a short story written by Mark Twain, in which the character convinces himself of an event which did not occur. She also referenced a “lost in the mall” study in which 24 participants were told by a loved one that they were lost in a mall when they were 5 or 6 and then asked questions about it. “The false event was constructed from information provided by the relative who gave us details about a plausible shopping trip.” The subject was then asked to remember the false event; only 6/24 subjects did. *Id.*

Dr. Loftus’s results and methodology did not meet the *Frye*’s requirement of methodological reliability. Her opinion was based entirely on speculation. Her book chapter plainly stated that “people can be led to

believe that entire events happened to them after explicit suggestions to that effect.” *Id.* There is no evidence anywhere that anyone suggested to T.W. —implicitly, let alone explicitly—that he had been raped by Urlacher and Taylor when he was 13 years old. As the trial court correctly noted, there was no evidence of suggestion from anyone. RP 904. In short, Dr. Loftus had no foundation, other than sheer speculation, on which to base her opinion. This is exactly the sort of “conclusory or speculative expert opinion[] lacking an adequate foundation” that must not be admitted. *See Miller v. Likins*, 109 Wn. App. 140, 149, 34 P.3d 835 (2001); *Moore v. Hagge*, 158 Wn. App. 137, 155-56, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004 (2011) (court should keep in mind the danger that a jury may be overly impressed by witness having the aura of an expert).<sup>36</sup>

Dr. Loftus’s writings documented that her methodology did not include sexual abuse victims. The only reference to sexual abuse in her paper was in its discussion of the role of imagination in forming memories, citing to a therapist who recommended telling their patients: “Spend time imagining that you were sexually abused, without worrying about accuracy, proving anything, or having your ideas make sense.” CP

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<sup>36</sup> In fact, in her law review article, and in her report, Dr. Loftus stressed the need for corroboration for repressed memory recalls, which T.W. obtained in the form of newspaper articles regarding the rapes Urlacher perpetrated on countless other children.

1083.

Dr. Loftus's ostensible methodology for her opinion also demonstrated that even in scientific settings where researchers were actively trying to persuade participants of a false memory, it is unlikely that participants will adopt a purported false memory. A majority of participants in Dr. Loftus's mall study—18/24, or 75%—*resisted* the false memory suggestion.

Finally, one of the key factors for acceptance of the methodology on which the novel scientific evidence is predicated is whether the opinion is scientifically reliable, that is, whether it produces consistent results that are capable of analysis and verification by other scientists. *Riker*, 123 Wn.2d at 363-64; *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919-20, 296 P.3d 860 (2013). Dr. Loftus conceded in her testimony that other scientists could not verify the results of her alleged methodology. RP 929-30. For that reason, too, Dr. Loftus's testimony was based on an unreliable methodology and fails to meet *Frye*.

In sum, the trial court correctly found that Loftus's opinion, both as to its science and methodology, was unsupported in the relevant scientific community.

(b) Unhelpful to the Jury

The third facet of the *Allery* protocol requires a trial court to

determine that an expert's testimony would be helpful to the jury. Ultimately, Loftus's rebuttal would not be helpful to the jury, as the trial court determined. The trial court prohibited Dr. Loftus from testifying as a rebuttal witness because, among other things, she did not have the necessary foundation to rebut the expert opinion and testimony of Dr. Heavin, where she had not read Heavin's testimony, her testimony would be an improper comment on T.W.'s credibility, and memory issues are within the common knowledge of jurors. RP 904-05.<sup>37</sup>

Initially, it is noteworthy that Dr. Loftus's opinions on eyewitness identification have been the subject of *numerous* appellate opinions in which courts have upheld the trial court's discretion in excluding them. *E.g.*, *State v. Brown*, 17 Wn. App. 587, 564 P.2d 342 (1977); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980); *State v. Jordan*, 39 Wn. App. 530, 694 P.2d 47 (1985), *review denied*, 106 Wn.2d 1011 (1986),

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<sup>37</sup> An additional reason for concluding that Loftus's testimony would not help the jury was the fact that she was equivocal as to her certainty regarding her conclusion. She could not offer her opinion on a more-probable-than not basis:

Q: And based on a more-probably-true-than-not-true basis?

A: Well, I mean, it – we don't talk like that.

Q: I'm sorry. We do.

A: So I can just say that I've used scientific methodology to reach my conclusions.

RP 927-28. Such a degree of certainty is required, particularly for an expert whose opinion is subject to *Frye* concerns. *Anderson*, 172 Wn.2d at 606-07.

*cert. denied*, 479 U.S. 1039 (1987); *State v. Coe*, 109 Wn.2d 832, 750 P.2d 208 (1988); *Jordan v. Ducharme*, 983 F.2d 933 (9th Cir. 1993), *cert. denied*, 510 U.S. 878 (1993). Her effort to branch out into the field of repressed or suggested memory is also subject to trial court discretion.

It has long been the rule in Washington that the purpose of a rebuttal witness is to rebut specific testimony and evidence elicited at trial. *See Kremer v. Audette*, 35 Wn. App. 643, 647-48, 668 P.2d 1315 (1983). An expert rebuttal witness, just like all expert witnesses, must still have the requisite foundation to testify. ER 702, 703. It is “well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Miller*, 109 Wn. App. at 148. Here, Dr. Loftus lacked foundation to rebut Dr. Heavin’s testimony. If a defense rebuttal expert was not present for, or did not read the transcript of, the testimony she is to rebut, then she has no knowledge of what she is rebutting. In *Poole v. O’Keefe*, 2002 WL 550961 at \*2 (D. Minn. Apr. 10, 2002), *aff’d sub nom. Poole v. Goodno*, 335 F.3d 705 (8th Cir. 2003), a case in which Dr. Loftus was excluded for, among other things, a lack of foundation, the court stated:

Dr. Loftus was also excluded because Petitioner failed to meet the foundational requirements for expert testimony. Dr. Loftus was classified as a rebuttal witness. She was to testify to the unreliability of testimony by government witnesses based on recovered-repressed memories. It was

thus necessary for Dr. Loftus to be present during the testimony of these witnesses. Her failure to be present during this testimony meant that her testimony did not have the proper foundation.

Dr. Loftus was to rebut the testimony of Dr. Heavin, of which she was unaware. Dr. Heavin gave no opinion on repressed memory. RP 604-05. After hearing from counsel, the trial court inquired of defense counsel whether Dr. Loftus was present for, or had read a transcript of, Dr. Heavin. RP 897-98. The Club's counsel responded that she had not. RP 898. Moreover, per defense counsel, Dr. Loftus was going to testify "that there is no general agreement in the scientific community with regard to repressed memory and that it is not a proper area of expert opinion." RP 903. Because Dr. Heavin did not offer any testimony about repressed memory, there was nothing for Dr. Loftus to rebut, and her opinion was wholly unnecessary. Accordingly, the Court did not abuse its discretion in refusing to allow Dr. Loftus to testify as a rebuttal witness.

Finally, as the trial court noted, the essence of Dr. Loftus's testimony was to attack T.W.'s credibility, RP 905, a matter for the jury to decide. *See, e.g., State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005) (police officer's opinion on witness credibility predicated on training in particular investigative technique was improper opinion invading the province of the jury).

The Court did not abuse its discretion in refusing to permit Dr. Loftus to testify as a rebuttal witness because her testimony would not be helpful for the jury.

(5) The Jury's Well-Considered Verdict Was Not a Quotient Verdict

The Club contends that the trial court erred in denying its CR 59 motion to set aside the jury's verdict because it allegedly was the product of a "quotient verdict." Appellant Br. at 15-19. The Club is wrong, and the trial court did not abuse its discretion in denying that motion.

The Club offers a bare-bones discussion of the jury deliberative process. Appellant Br. at 16. Moreover, yet again, it gives scant attention to the trial court's well-reasoned analysis for denying its new trial motion. In the argument on the post-trial motions, the trial court specifically asked the Club's counsel to focus on the issue in argument. RP 1249. The court noted that it was something of a new issue and that it "actually looked up every case in Washington that talks about quotient verdicts," RP 1251, evidencing the fact that the court took the exercise of its discretion very seriously.

The court then ruled:

In looking at this case, I read the declarations very carefully. They both sort of describe the process. Apparently there was disagreement on damages, so the jurors decided that they would try taking an average. So

they performed a calculation.

But then they had further discussion and ultimately there was a second calculation. After that was done, Juror 12, as Mr. Moberg has indicated, didn't agree and wanted to round down, so there was some more discussion and ultimately a verdict was reached.

One thing that wasn't discussed in the cases, or if it was, I missed it, was the fact that I polled the jury after the verdict was read. Interestingly, Jurors 11 and 12 both indicated that it was not their verdict. They disagreed.

So I am concluding that there is no quotient here because obviously Jurors 11 and 12 didn't feel like they had to agree with everybody else. They came out and disagreed. And so I don't think that they were restricted improperly in their deliberations or their ability to act on the verdict.

So I am going to deny the motion on that as well, and I will sign an order this morning.

RP 1252-53.

In discussing the question of alleged juror misconduct in arriving at what the Club claims was a "quotient verdict," it misstates the standard of review for the denial of a new trial motion as to such an issue as being *de novo*. Appellant Br. at 15. That is inaccurate. Rather, as our Supreme Court has held, because the secrecy of jury deliberations is central to our jury system that enjoys constitutional status under article I, § 22, courts must assess whether the activity was, in fact, misconduct or the activity inhered in the jury's verdict; matters that inhere in the jury's verdict involve facts linked to juror motives, intent, or belief, or facts that

generally cannot be rebutted without probing juror mental processes. *Matter of Lui*, 188 Wn.2d 525, 567-68, 397 P.3d 90 (2017); *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131-32, 368 P.3d 478 (2016). Whether a matter inheres in the verdict is a question of law reviewed *de novo*. *Id.* at 131. But the question of whether juror misconduct had a prejudicial effect requiring a new trial is a matter of trial court discretion reviewed for its abuse. *Id.* at 132.

Here, arguably, the information provided by Jurors 11 and 12 inhered in the jury's verdict. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967); *Gardner v. Malone*, 60 Wn.2d 836, 841-42, 376 P.2d 651 (1962). Indeed, in *Brusco Tug* and in *Lui*, the Court held that efforts to impeach the jury's verdict implicated the jury's mental processes and therefore inhered in the verdict. *Accord, Monroe v. City of Seattle*, 4 Wn. App. 2d 1069, 2018 WL 3738995, *review denied*, 192 Wn.2d 1006 (2018); *Matter of Detention of Malone*, 199 Wn. App. 1010, 2017 WL 2335811, *review denied*, 189 Wn.2d 1024 (2017).

But even if this evidence did not inhere in the jury's verdict, the Club failed to meet what our Supreme Court described in *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994), *review denied*, 145 Wn.2d 1018, *cert. denied*, 536 U.S. 943 (2002) as a "strong, affirmative showing of misconduct ... to overcome the policy favoring stable and certain

verdicts and the secret, frank and free discussion of the evidence by the jury.” The trial court did not abuse its discretion in concluding that the Club failed to meet its burden.

The law on juror misconduct in this context is unambiguous since 1896. Jurors may use averaging of verdicts to arrive at a result so long as they do not agree to be bound *in advance* by such averaging. *Watson v. Reed*, 15 Wash. 440, 442, 46 Pac. 647 (1896).<sup>38</sup> As this Court has explained:

Where the jurors have not, in advance, agreed to abide by the result of the computation, and, after a quotient has been arrived at by adding and dividing, the requisite number of jurors vote for a verdict in this sum, it is not subject to the objection that it was arrived at by lot or chance.

*Sorenson v. Raymark Industries, Inc.*, 51 Wn. App. 954, 959, 756 P.2d 740 (1988). If the “jurors’ affidavits do not disclose that they agreed in advance to be bound by the results of their procedure,” then an assignment of error is without merit. *Id.*<sup>39</sup>

Even when jurors actually agree to be bound by an average of their

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<sup>38</sup> The trial court relied on *Watson* in ruling on the Club’s new trial motion. RP 1251-52.

<sup>39</sup> *Accord, Stanley v. Stanley*, 32 Wash. 489, 493, 73 Pac. 596 (1903); *Bell v. Butler*, 34 Wash. 131, 132, 75 Pac. 130 (1904); *Wiles v. Northern Pac. Ry. Co.*, 66 Wash. 337, 344, 119 Pac. 810 (1911); *Loy v. Northern Pac. Ry. Co.*, 77 Wash. 25, 30, 137 Pac. 446 (1913); *Sears v. Int’l Bhd. of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524*, 8 Wn.2d 447, 456-57, 112 P.2d 850 (1941); *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 518, 476 P.2d 713 (1970).

verdicts, no misconduct is present if the averaged verdict is not agreed to and subsequent ballots result in a different verdict. Such a verdict cannot be said to be a quotient verdict. *See Conover v. Neher-Ross Co.*, 38 Wash. 172, 178-79, 80 Pac. 281 (1905); *Carlisle v. Hargreaves*, 112 Wash. 383, 387-88, 192 Pac. 894 (1920).

Applying the proper review standard, the trial court did not abuse its discretion in rejecting the Club's baseless quotient verdict argument. In particular, the Club's own evidence did not ultimately support its position. The affidavits from Jurors 11 and 12 failed to show that the damages award was arrived at by lot or chance for three reasons, all of which independently supported the denial of the Club's motion. Neither Juror 11 nor Juror 12 stated that the jurors agreed to be bound by the result prior to averaging their damages awards, only that this was discussed after the second averaged result was determined. CP 1394, 1397. Indeed, neither Juror 11 nor 12, who were apparently the ones upset about the result, testified that they agreed to be bound by the results prior to proceeding with the process Juror 11 recommended, and, in fact, both voted *against* the verdict. CP 1393, 1396. In the absence of testimony that the jury agreed *beforehand* to be bound by the result, under *Sorenson*, the Club failed to present sufficient evidence to justify the granting of a new trial.

Moreover, the jury was not bound by the result because after the

first averaging, and after a discussion, the jury decided to add Juror 11's damages number (\$0), and recalculate because Juror 12 felt it was not fair to do otherwise. CP 1397. Had the jury agreed to be bound by the result beforehand, they would not have used such a process. It is also clear from the affidavits that the jury did discuss the second result as well. This again shows that the jurors did not agree *beforehand* to be bound by the results of their calculation. As in *Conover*, where the jurors averaged their damages awards, did not accept the first result of \$1,370, and took subsequent ballots to arrive at an award of \$1,500, our Supreme Court held that this demonstrated that there was no agreement in advance to be bound by the result. 38 Wn.2d at 178-79. Accordingly, *Conover* further supports the trial court's decision to deny the Club's new trial motion.

Finally, the requisite number of jurors, ten, voted for the damages award. In Washington, 10 out of 12 jurors are all that is required to sustain a damages award. Here, even though Juror 12 wanted to round the number down from \$1,530,000 to \$1,500,000, CP 1394, 1397, at least ten jurors voted to award \$1,530,000. CP 1393, 1396. Under *Sorenson*, 51 Wn. App. at 959, where the requisite number of jurors are in agreement, there is no misconduct.

The trial court properly denied the Club's CR 59 motion in connection with the quotient verdict issue.

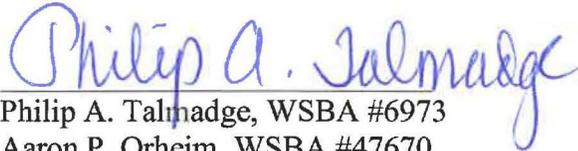
E. CONCLUSION

The Club had a fair trial on proper instructions, and the jury rejected its contentions, awarding a verdict to T.W. The trial court appropriately exercised its discretion in rejecting the Club's multiple allegations of error and denying the Club's post-trial motions.

This Court should similarly reject the Club's efforts to evade responsibility for T.W.'s abuse and affirm the judgment on the jury's verdict. Costs on appeal should be awarded to T.W.

DATED this ~~24th~~ day of July, 2019.

Respectfully submitted,



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# APPENDIX

Instruction 10:

A statute of the State of Washington provides:

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

1. 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
2. Within three years of the time the victim discovered that the act caused by the injury for which the claim is brought.

CP 1197.

Instruction 11:

For purposes of the statute of limitations, the “injury for which the claim is brought” includes all of the qualitatively different and/or distinct harms.

CP 1198.

Instruction 15:

A defendant has a legal duty to exercise ordinary care to protect a minor from reasonably foreseeable dangers during times when the minor is in the “custody” of the defendant.

A minor is in a defendant’s “custody” when the minor is in the defendant’s facility during programs provided by the defendant.

Sexual contact with minors is not unforeseeable as long as the possibility of sexual contact was within the general field of danger which the defendant should have anticipated.

CP 1202.

Instruction 18:

In calculating a damage award, you must not include any damages that were caused solely by acts of Charles Urlacher and/or Joe Taylor and not proximately cause by the negligence of the defendant. Any damages caused solely by Charles Urlacher and/or Joe Taylor and not proximately caused by the negligence of the defendant must be segregated from and not made a part of any damage award against the defendant.

CP 1205.

RCW 4.16.340:

(1) 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 reaches the age of eighteen years.

(2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

(3) The knowledge of a custodial parent or guardian shall not be imputed to a person under the age of eighteen years.

(4) For purposes of this section, “child” means a person under the age of eighteen years.

(5) As used in this section, “childhood sexual abuse” means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

Laws of 1991, ch. 212, § 1:

(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).

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.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Respondent T.W.* in Court of Appeals, Division II Cause No. 52609-3-II to the following parties:

Lincoln C. Beauregard, WSBA #32878  
Evan T. Fuller, WSBA #48024  
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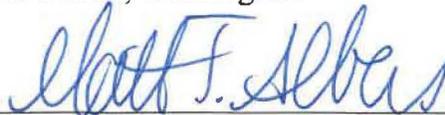
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Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

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

DATED: July 29, 2019 at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick

# TALMADGE/FITZPATRICK

July 29, 2019 - 4:36 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52609-3  
**Appellate Court Case Title:** T.W., Respondent v. Boys and Girls Club of South Puget Sound, Appellant  
**Superior Court Case Number:** 17-2-08564-8

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- Evan Thomas Fuller (Undisclosed Email Address)
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### Comments:

Brief of Respondent

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