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Division II  
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No. 53957-8

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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R.N., individually; J.W., individually; and S.C., individually,

Appellants,

v.

KIWANIS INTERNATIONAL, a non-profit entity; KIWANIS PACIFIC  
NORTHWEST DISTRICT, a non-profit entity; KIWANIS OF  
TUMWATER, a non-profit corporation; KIWANIS OF CHEHALIS, a  
non-profit entity; KIWANIS OF GRAND-MOUND ROCHESTER, a  
non-profit entity; KIWANIS OF GRAND-MOUND, a non-profit entity;  
KIWANIS OF ROCHESTER, a non-profit entity; KIWANIS OF  
CENTRALIA, a non-profit entity; KIWANIS OF CENTRALIA-  
CHEHALIS, a non-profit entity; CHARLES Mc, an individual; GUY  
CORNWELL, an individual; LEE COUMBS, an individual; SAM C.  
MOREHEAD, an individual; EDWARD J. HOPKINS, an individual;  
LEWIS PATON, an individual; HENRY MEISTER an individual; B.  
DALE SHANNON, an individual; and KIWANIS OF CHEHALIS, a  
non-profit corporation,

Respondents.

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**BRIEF OF APPELLANTS**

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## **INTRODUCTION**

After being made wards of the State and placed at Kiwanis Vocational Home (“KVH”), Plaintiffs were physically and sexually abused, mistreated, and neglected by KVH employees, corporate officers, and directors. Those charged with caring for these boys perpetrated abuse directly, or allowed it to exist through their negligent hiring, retention, supervision, and utter failure to protect. When Plaintiffs discovered their injuries as adults, they filed suit.

The trial court dismissed, on summary, all Defendants – corporate entities, directors, officers, and employees – under the corporate dissolution survival statute, permitting claims against dissolved corporations that are brought within three years of dissolution. It refused to apply the childhood-sex-abuse statute codifying the discovery rule to guarantee a three-year limitations period for all victims of childhood sex abuse. It plainly erred.

The court should have harmonized these statutes by applying the discovery rule, where doing so is consistent with both statutes’ core purpose: allowing claims to move forward to resolution on the merits. Alternatively, the court should have applied the childhood-sex-abuse statute, which is far more specific.

This Court should reverse and remand for trial.

## **ASSIGNMENTS OF ERROR**

1. The court erred in granting summary judgment as a matter of law for Defendant Lewis County Youth Enterprises, Inc. dba Kiwanis Vocational Homes (“KVH”), based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing KVH. CP 875-77.
2. The court erred in granting summary judgment as a matter of law for Defendant Lewis Patton based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing Patton. CP 1996-98.
3. The court erred in entering a stipulated order dismissing Defendants Henry Meister and Dale Shannon, entered pursuant to the court’s summary judgment orders and “subject to and without waiver of Plaintiffs’ right to appeal.” CP 2251-62.
4. The court erred in granting summary judgment as a matter of law for Defendant Edward J. Hopkins based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing Hopkins. CP 2533-37.

5. The court erred in granting summary judgment as a matter of law for Defendant Sam C. Morehead based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing Morehead. CP 2538-42.
6. The court erred in granting summary judgment as a matter of law for Defendant Charles McCarthy based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing McCarthy. CP 4079-82.
7. The court erred in granting summary judgment as a matter of law for Defendant Lee Coumbs based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing Coumbs. CP 4083-85.
8. The court erred in granting summary judgment as a matter of law for Defendant Guy Cornwell based on the corporate dissolution statute codified in RCW 23B.14.340, and in dismissing Cornwell. CP 4086-88.
9. The court erred in denying Plaintiffs' Motion for Leave to Amend Complaint. CP 1984-85.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. RCW 4.16.340, the childhood-sex-abuse statute codifying the discovery rule, requires that every survivor of childhood sex abuse receives the full three-year limitations period. RCW 23B.14.340, the corporate dissolution survival of remedy statute, permits a cause of action against dissolved corporations that could not be sued under the common law. The childhood-sex-abuse statute can serve its core purpose only if the discovery rule applies to Plaintiffs' claims regardless of the defendant. Applying the discovery also furthers the core purpose of the survival statute to allow claims against dissolved corporations. Did the trial court err in refusing to harmonize these statutes by applying the discovery rule? If the statutes cannot be harmonized, did the court err in failing to apply the childhood-sex-abuse statute, the far more specific statute that plainly applies to Plaintiffs' claims?
2. Does the childhood-sex-abuse statute apply to individual Defendants McCarthy, Hopkins, Coumbs, and Cornwell, where the survival statute does not apply to employees?

3. Does the childhood-sex-abuse statute apply for the additional reason that the survival does not apply to claims against corporate officers in their personal capacity, where its core purpose is to permit suits against corporations that no longer exist, not to limit personal claims against corporate officers who plainly exist before and after dissolution?
4. Should the court have allowed Plaintiffs to amend their complaint to clarify factual matters, where only one Defendant asserted prejudice that was minimal at best?

## STATEMENT OF THE CASE

**A. Plaintiffs were sexually abused, and subject to other mistreatment, exploitation, and deprivation while living as wards of the State at KVH group home for boys.**

Plaintiffs are adult men who were removed from their homes as children, made wards of the State, and placed in a group foster home known as Kiwanis Vocational Home (“KVH”), operated by Lewis County Youth Enterprises (“LCYE”), a non-profit corporation doing business as KVH. CP 1708-12. Soon after KVH began operating in 1979, defendant Charles McCarthy became the executive director. CP 1734, 2273, 2278. Over the next decade, McCarthy grew KVH by targeting lucrative DSHS contracts. CP 1234-54, 1256, 1258, 1260-66, 1302-15, 1453, 1455, 1457, 1677-80, 1682, 1684. By the time Plaintiffs resided at KVH between 1989 and 1991, it housed 73 boys ages 10-to-17. CP 1260-66, 1453, 1677-80, 1682, 1684, 1708-09, 1732.

The first documented report of sexual abuse at KVH occurred in January 1982, when KVH resident A.Q. reported that volunteer or counselor Brad Feigenbaum allowed him to drive a car in exchange for oral sex. CP 1208, 1217-18; *cf.* CP 1132. There is no indication that McCarthy reported the incident, and A.Q. finally called the Sheriff’s office himself on January 18. CP 1210, 1217-18.

As A.Q. was reporting the sexual assault, McCarthy interrupted the call, claiming that A.Q. was trying to make KVH look bad so that he could leave. CP 1208. McCarthy denies speaking on the call even when presented with the transcript. CP 1132. DSHS concluded that McCarthy attempted to cover up the assault (CP 1223):

As stated previously, there is no evidence that the alleged rape of [A.Q.] was reported by Kiwanis Vocational Home until [A.Q.] himself did so, nor that it ever would have been reported had the child not forced the issue. Mr. McCarthy admitted that [A.Q.] had told him of the incident shortly after its occurrence. He led Ms. Binion to believe that he had reported it to Pierce County authorities the following week when, in fact, he had not. When [A.Q.] tried to report the incident to Lewis County Sheriff's office, Mr. McCarthy interrupted the call and tried to minimize the allegation.

This was not the only time KVH attempted to cover up a sex assault. CP 3448. An anonymous KVH employee reported that a "Boy raped by another boy" in 1985, and that KVH first failed to report the incident, later falsifying the report. *Id.*

In between these attempted cover-ups, allegations surfaced in January 1984 that KVH "counselor" David Pyles was showing the boys pornographic videos. CP 3649, 3656. McCarthy hired Pyles "on the spot" to counsel these at-risk youth, even though he had no formal education or training, and apparently no background check.

CP 3643. McCarthy encouraged Pyles to take boys camping overnight in his windowless panel van with a bed in the back, also encouraging other KVH staff – adult men – to take boys home overnight. CP 3406, 3649, 3652-53. Several staff stated it was not unusual for staff to take boys home overnight. CP 3406, 3653-54.

KVH at least possessed the good sense to let Pyles go. CP 3649. Within a year, Pyles kidnaped, raped, and attempted to murder a young girl, for which he was sentenced to 33 years in prison. CP 3669.

**B. KVH falsified records, including employee credentials, profiting from a staff wholly unqualified to help the boys at KVH.**

The record is replete with examples of KVH falsifying documents, including falsifying its employee's credentials to create the appearance they satisfied State requirements. CP 3221, 3245, 3377, 3541-48, 3589, 3598, 3621. KVH hired L&I recipients without any criminal background checks, promised needed retraining they never provided, and placed these unvetted, untrained adult men in direct contact with the boys. CP 3319, 3326-28, 3330, 3334, 3379-80. At least one was wholly unqualified to work at KVH. CP 3339, 3379-80. Even still, KVH failed to maintain enough counselors to meet State requirements. CP 3469-70. And it terminated at least

one staff person who questioned its billing practices. CP 3469-73. Another quit. CP 3541-48, 3590, 3597.

A DSHS audit in September 1984 found 18 “deficiencies” in KVH’s program operations requiring corrective action, including (among others): (1) housing too many boys, including boys who were not authorized to be at KVH; (2) failing to meet requirements for staff qualifications; (3) failing to document treatment plans and trainings; and (4) numerous violations with respect to foster placement. CP 253-62. An audit published in October 1985 identified 36 significant deficiencies – 12 were repeat findings. *Compare* CP 253-62 *with* CP 269-92. These deficiencies included failure to provide proper counseling, failure to employ qualified counselors, failure to maintain records, failure to provide training, and failure to stay within capacity. *Id.*

**C. KVH boys were routinely assaulted by the “head teacher” (George Lee Coumbs), whose replacement had a known history of violence against children.**

In July 1988, McCarthy elected to transition KVH boys from public to private “school.” CP 3081-82, 4018. Between 1988 and 1990, six of nine staff members lacked the required Master’s Degree in social work or a closely allied field. CP 3318, 3321, 3545. “[H]ead teacher” and defendant George Lee Coumbs physically

assaulted KVH boys not less than 10 times. CP 3296-99, 3780-81, 4010-13, 4015-16. In his five-year tenure, only two or three boys obtained a high school diploma. CP 3271.

Coumbs' replacement, John Halvorsen, possessed only a Bachelor's degree and a known history of violence against children. CP 3871, 3879-80, 3888. Halvorsen admitted KVH fell below State requirements for certified teachers and provided "little supervision." CP 3900-01.

**D. John and Peggy Halvorsen sexually assaulted Plaintiffs after Charles McCarthy allowed them unfettered access to KVH boys despite numerous "red flags," including physical abusing their own children.**

In 1987, McCarthy hired John and Peggy Halvorsen as "teaching family parents," with the idea that John would give "special attention" to boys who caused trouble. CP 3931, 3936-37. They lived on campus as "house parents" for nearly four years when John was fired in 1990. *Id.* Had McCarthy conducted a background check, it would have revealed that Peggy had lost custody of her own then-four-year-old child who was engaging in sexual activity with another very young child. CP 3973-75, 3977-79.

Although John physically assaulted KVH boys twice in 1988, McCarthy increased his responsibilities at KVH. CP 3921-25. In

1989, John became intoxicated and assaulted one of the KVH boys placed in his home. CP 3376. Later that year, he broke his stepson's leg and hand with a baseball bat. CP 3927-29.

Also in 1989, KVH resident L.W., who was known to be a sexual predator, assaulted a five-year-old girl while both were in John's care. CP 4045. John then physically assaulted L.W. CP 3417-30.

The Halvorsen's repeatedly sexually abused Plaintiffs. Plaintiff R.N. was placed in the Halvorsen home in December 1989, after being beaten and sexually assaulted shortly after arriving at KVH. CP 969, 993-94. Within days of being placed with the Halvorsens, Peggy performed oral sex on R.N. while John raped him. CP 999. After R.N. ran away, he was returned to the Halvorsens. CP 1000.

The abuse grew even more violent and "sadistic," Peggy masturbating to John raping R.N. CP 1001. John was so violent, R.N. believed he would die during these attacks. *Id.*

Plaintiff J.W. was placed at KVH in February 1989, when he was quite young, living there a very short time to September. CP 3744. In his first home, he was subjected to group "masturbation

games.” CP 1032, 1034, 1059. He was then sent to the Halvorsens. CP 1035-36, 1059.

Not long after his arrival, Peggy brought J.W. into the bedroom and coaxed him into fondling her breasts. CP 1038-39, 1060. When she repeated this abuse days later, John joined in, forcing J.W. to give him oral sex. CP 1040-41, 1060. John and Peggy repeated this abuse a third time, forcing J.W. to give John oral sex while Peggy gave J.W. oral sex. CP 1043, 1060.

Plaintiff S.C. lived in the Halvorsen home from 1988 to 1989, along with his younger brother. CP 976, 1078. The abuse began when John would become aroused while “wrestling” with the boys, telling them that touching their anuses was a “wrestling maneuver.” CP 1084. Every week, John raped S.C.’s brother while S.C. lay in the bunkbed above them. CP 1087, 1097.

Peggy abused S.C., masturbating while he showered, forcing his hand down her pants, and chasing him with a dildo. CP 1084. John raped S.C. while on a camping trip with other adults and KVH boys. CP 1086-87.

**E. Plaintiffs sued KVH, LCYE, and others responsible for their abuse.**

On February 27, 2015, Plaintiff R.N. sued Kiwanis International, KVH, LCYE, Kiwanis of Tumwater, Kiwanis of Pe Ell, and Washington State, alleging that he and the other KVH boys were “subjected to gross indifference and neglect, physical and emotional injuries and suffering, sexual exploitation, neglect, and abuse, deprivation of the most basic human and social services, including the failure to provide necessary food, shelter, medication, counseling, love, affection, and spiritual and personal guidance, such as constituted their most basic personal and human rights.” CP 1-7. His negligence claims included: (1) negligent failure to supervise; (2) negligent failure to investigate, intervene, and report misconduct to authorities; (3) negligent failure to provide basic services, including simple support, care, and education; (4) negligent use of improper force, detention, and sexual exploitation; and (5) negligent hiring, retention, and supervision. *Id.* As a result, R.N. suffered severe and permanent emotional distress, physical injuries, and life-long pain and suffering. CP 6.

The State answered R.N.’s Complaint on March 30, 2015, and Kiwanis, KVH, LCYE, Kiwanis of Tumwater, and Kiwanis of Pe

Ell answered on April 21. CP 8-16, 17-22. The parties later stipulated that R.N. could amend the Complaint to add plaintiffs J.W. and S.C. CP 23-33. Plaintiffs amended the Complaint on August 31, the State answered on September 2, and Kiwanis, KVH, LCYE, Kiwanis of Tumwater, and Kiwanis of Pe Ell answered on September 29. CP 34-41, 42-50, 51-58.

**F. The trial court dismissed all Defendants on summary judgment, holding that Washington's corporate dissolution survival of remedy statute, RCW 23B.14.340, barred all Plaintiffs' claims.**

LCYE moved for summary judgment on February 7, 2017, arguing that Washington's corporate dissolution "survival of remedy after dissolution" statute, RCW 23B.14.340 ("survival statute"), barred Plaintiffs' claims. CP 59-64, 871-74. Plaintiffs objected, arguing that the court should either apply RCW 4.16.340, codifying the discovery rule for childhood sex-abuse victims ("childhood-sex-abuse statute"), or harmonize the statutes. CP 65-77. After oral argument, the court granted summary judgment and dismissed LCYE on April 7, 2017. CP 875-77; 4/7/17 RP 1-9.

Plaintiffs again amended their Complaint on July 23, 2018: (1) adding individual defendants Charles McCarthy, Guy Cornwell, Lee Coumbs, Sam Morehead, Edward Hopkins, Lewis Patton,

Henry Meister, Dale Shannon; (2) adding Kiwanis entities (Kiwanis Pacific Northwest District, Kiwanis of Centralia-Chehalis, Kiwanis of Centralia, Kiwanis of Chehalis, Kiwanis of Grand-Mound Rochester, Kiwanis of Grand-Mound, Kiwanis of Rochester); (3) clarifying its negligence claims; and (3) adding claims for agency, outrage, and negligent and intentional infliction of emotional distress. CP 1707-17. During the relevant timeframe (1989-1991) McCarthy was director at KVH and allegedly on the board of directors for LCYE. CP 1711, 1734. Cornwell was Director of Youth Care at KVH and an executive director. CP 1711, 1911. Coumbs was on the board of directors for LCYE, and allegedly a founding corporate officer, director, and longtime employee at KVH. CP 1711, 1770. Morehead, Hopkins, and Patton were all on the board of directors for LCYE. CP 1711, 1746, 1758-59, 1782. Meister was allegedly on the board of directors for KVH. CP 1711, 1923. Shannon was a lieutenant governor of Kiwanis Pacific Northwest District and allegedly on the board of directors for KVH. CP 1711-12, 1933.

Kiwanis International, Kiwanis Pacific Northwest District, Kiwanis of Tumwater, Kiwanis of Chehalis, Kiwanis of Grand-Mound Rochester, Kiwanis of Centralia, and Kiwanis of Centralia-Chehalis answered the Second Amended Complaint on July 25. CP

1718-30. Their answer states that Kiwanis of Pe Ell, Kiwanis of Grand-Mound Rochester, Kiwanis of Grand-Mound, Kiwanis of Rochester, and Kiwanis of Centralia do not exist and that Kiwanis of Chehalis has been renamed as Kiwanis of Centralia-Chehalis. CP 1720. McCarthy, Morehead, Patton, Coumbs, and Hopkins separately answered on August 8, and Cornwell, Meister, and Shannon separately answered on October 5. CP 1731-42, 1743-54, 1755-66, 1767-78, 1779-90, 1908-18, 1919-28, 1929-39.

Patton moved for summary judgment on September 4, 2018, arguing that survival statute barred Plaintiffs' claims. CP 1803-13, 1986-95. Plaintiffs objected, arguing that the survival statute does not apply to personal negligence, and again arguing that the court should either apply the childhood-sex-abuse statute, or harmonize the statutes. CP 1961-71.

Plaintiffs moved to amend their Complaint a third time on October 4, 2018, seeking to clarify liability allegations against individual defendants. CP 1904-07, 1979-83. Patton, Morehead, and Hopkins objected, arguing Plaintiffs knew about the theories of liability for years. CP 1972-78. The court denied the motion on October 12. CP 1984-85; 10/12/18 RP 1-15. One week later, the

court granted summary judgment and dismissed Patton on October 19, 2018. CP 1996-98; 10/19/18 RP 1-18.

Hopkins and Morehead separately moved for summary judgment on January 31, 2019, like Patton, arguing that the survival statute barred Plaintiffs' claims against them. CP 1999-2011, 2238-50, 2510-20, 2521-32. Plaintiffs objected, again arguing that the survival statute does not apply to personal negligence and again arguing that the court should either apply the childhood-sex-abuse statute, or harmonize the statutes. CP 2345-57, 2331-44. The court granted summary judgment, dismissing Hopkins and Morehead on March 15. CP 2533-37, 2538-42; 3/15/19 RP 1-22.

While the parties briefed these summary judgment motions, on February 5, 2019, they stipulated to dismiss Meister and Shannon in light of the court's prior rulings. CP 2251-62. Plaintiffs reserved the right to appeal. CP 2252.

McCarthy and Coumb's moved for summary judgment in May 2019, raising the same arguments as their co-defendants. The court granted summary judgment, dismissing McCarthy, Coumb's, and Cornwell on June 7, 2019. CP 4079-82, 4083-85, 4086-88; 6/7/19 RP 1-22.

Plaintiffs timely appealed on October 28, 2019. CP 4089-96.

## ARGUMENT

**A. This Court's reviews *de novo* orders on summary judgment and questions of statutory interpretation.**

This Court reviews *de novo* trial court orders granting summary judgment, viewing “the facts and all reasonable inferences in the light most favorable to the nonmoving parties.” ***Bank of Am., NA v. Owens***, 173 Wn.2d 40, 48-49, 266 P.3d 211 (2011). This Court also reviews *de novo* the “proper interpretation of a statute.” ***Bank of Am.***, 173 Wn.2d at 49. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 173 Wn.2d at 49; CR 56(c).

Negligence is generally a question of fact to be decided at trial. ***Owen v. Burlington N. Santa Fe R.R. Co.***, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). The failure to protect children from foreseeable dangers is also typically a jury question. ***Christen v. Lee***, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

**B. The trial court erred in dismissing Plaintiffs' claims under the corporate dissolution survival of remedy statute, rather than applying the childhood-sex-abuse statute codifying the discovery rule.**

The trial court erroneously dismissed Plaintiffs' claims as a matter of law, declining to apply the discovery rule codified in the

childhood-sex-abuse statute. The court should have harmonized the survival statute and the childhood-sex-abuse statute by applying the discovery rule, where doing so effectuates the intent of the survival statute, and is the *only way* to effectuate the intent of the childhood-sex-abuse statute. Otherwise, the court should have applied the childhood-sex-abuse statute, as it is far more specific in that it was adopted to save the exact claims Plaintiffs bring. This Court should hold that the discovery rule applies, and reverse the trial court's summary judgment rulings.

- 1. This Court should harmonize the apparent conflict between the survival statute and the childhood-sex-abuse statute by applying the discovery rule to Plaintiffs' claims.**

When interpreting a statute, “the court’s objective is to determine the legislature’s intent.” ***State v. Ervin***, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting ***State v. Jacobs***, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). “The surest indication of legislative intent is the language enacted by the legislature,” so if the statute’s meaning is plain on its face, this Court gives effect to that plain meaning. ***Ervin***, 169 Wn.2d at 820. (citing ***Dep’t of Ecology v. Campbell & Gwinn, LLC***, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). In determining the statute’s plain meaning, the Court considers the

ordinary meaning of the text in question, giving undefined terms their ordinary meaning, and considers too “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Ervin*, 169 Wn.2d at 820 (quoting *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998)); *Bank of Am.*, 173 Wn.2d at 53 (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). If the statute is susceptible to more than one reasonable interpretation after this inquiry, the Court will resort to legislative history and case law to determine legislative intent. *Ervin*, 169 Wn.2d at 820 (citing *Christensen*, 162 Wn.2d 373).

While courts must harmonize conflicting statutes, it is important to note that the childhood-sex-abuse statute and the survival statute are harmonious in numerous regards. In 1965, the Washington Legislature adopted a survival statute as part of the Washington Business Corporation Act, allowing plaintiffs to bring suit against a dissolved corporation for claims existing prior to dissolution, provided they did so within two years. *Ballard Sq. Condo. Owners Assoc. v. Dynasty Const. Co.*, 158 Wn.2d 603, 609, 146 P.3d 914 (2006) (citing former RCW 23A.28.250). This “modified” the common law that “when a corporation dissolved it

ceased to exist for all purposes and therefore could not sue or be sued.” **Ballard**, 158 Wn.2d at 609. When the Legislature replaced Former Title 23A with Title 23B in 1989, it included a new survival statute that mirrors the prior one. 158 Wn.2d at 609. When the Legislature amended the Title 23B survival statute in 2006, it added language including claims that arise after dissolution, and extended the limitations period to three years for claims against corporations dissolving on or after June 7, 2006:

The dissolution of a corporation either (1) by the filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

*Id.* at 615-16; RCW 23B.14.340.

In short, the survival statute replaces the common law rule that a dissolved corporation cannot be sued, with a statutory rule that a dissolved corporation can be sued. *Id.* Since the survival

statute is in derogation of the common law, it must be strictly construed. **Potter v. Wash. State Patrol**, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008).

The Washington State Legislature enacted the childhood-sex-abuse statute in 1988, codifying “a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse,” decades after first adopting Title 23A, but just before replacing it with Title 23B. **C.J.C. v. Corp. of Catholic Bishops of Yakima**, 138 Wn.2d 699, 712, 985 P.2d 262 (1999). Under the discovery rule, a cause of action does not accrue until the plaintiff knows, “or in the exercise of due diligence should have known,” all the essential elements of their claim. **Funkhouser v. Wilson**, 89 Wn. App. 644, 666, 950 P.2d 501 (1998) (quoting **Estates of Hibbard**, 118 Wn.2d 737, 752, 826 P.2d 690 (1992) (applying the RCW 4.16.340 discovery rule). The childhood-sex-abuse statute is the Legislature’s response to the holding in **Tyson v. Tyson**, 107 Wn.2d 72, 727 P.2d 226 (1986), declining to apply the common law discovery rule in childhood-sex-abuse cases. **C.J.C.**, 138 Wn.2d at 712, 749-50 (Madsen and Durham, dissenting).

In 1991, two years after adopting Title 23B, the Legislature amended the childhood-sex-abuse statute to add the following “findings and intent,” clarifying that “its primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation”:

(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, supra*.

138 Wn.2d at 712 (citing LAWS OF 1991, ch. 212, §1). Further demonstrating its intent to provide a “broad and generous application of the discovery rule,” the Legislature broadened the

statute to make clear that discovering less serious injuries did not commence the limitations period, and superseded cases strictly applying the discovery rule. **C.J.C.**, 138 Wn.2d at 712.

In many ways, the survival statute and childhood-sex-abuse statute “may stand side by side and fulfill their respective purposes.” **O.S.T. v. Regence BlueShield**, 181 Wn.2d 691, 701-02, 335 P.3d 416 (2014) (finding no conflict between two statutes). Both share the same core purpose of allowing claims to move forward to a decision on the merits, the survival statute by allowing claims that were previously barred, and the childhood-sex-abuse statute by guaranteeing a full three-year limitations period to claims that were previously often time-barred. Since KVH dissolved in 2010, both share a three-year limitations period.

But while the childhood-sex-abuse statute codifies the discovery rule, the survival statute is silent on that score. The trial court erroneously declined to harmonize this apparent conflict. See 6/7/19 RP 21.

Washington courts must make “every effort” to harmonize statutes in apparent conflict. **State v. Lessley**, 118 Wn.2d 773, 781, 827 P.2d 996 (1992); **Bank of Am.**, 173 Wn.2d at 53; **Estate of Kerr**, 134 Wn.2d 328, 335, 949 P.2d 810 (1995) (“[i]t is the duty

of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used” (quoting **State v. Board of Yakima Cnty. Comm’rs**, 123 Wn.2d 451, 459-60, 869 P.2d 56 (1994) (further citation omitted)). In doing so, the court must consider “all that the legislature has said on the subject, and attempt[] to create a unified whole.” **Diaz v. State**, 175 Wn.2d 457, 466, 285 P.3d 873 (2012).

Legislative intent is not merely apparent from the childhood-sex-abuse statute’s plain language. Rather, the Legislature expressly recognized a pervasive and insidious problem, and offered a solution. The problem is that it is the very nature of child sex abuse that victims may not connect the abuse to the resulting injury for many years after the abuse occurs, long after the statute of limitations has run. RCW 4.16.340; LAWS OF 1991, ch. 212, §1. Too many victims lost their right to seek legal redress. The solution is codifying the discovery rule to provide “a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation.” **C.J.C.**, 138 Wn.2d at 712.

Were there any doubt about the childhood-sex-abuse statute’s reach, our State Supreme Court answered it in **C.J.C.**,

holding that church leaders who were not accused of perpetrating the child sex abuse at issue were nonetheless subject to the “broad” limitations period in the childhood-sex-abuse statute for claims based on their negligent failure to protect children in their care. 138 Wn.2d at 711. The Court held that the statute does not limit “who may sue or be sued ... limiting only the specific predicate sexual *conduct* upon which all claims or causes of action must be based.” *Id.* at 711-12. Legislative intent is clear – every victim of childhood sex abuse must get the full three-year limitations period.

The childhood-sex-abuse statute can serve its specific purpose only if the discovery rule codified in the statute applies regardless of the defendant. Where, as here, Plaintiffs’ claims are timely under the childhood-sex-abuse statute, they must remain timely even though one or more defendants is a dissolved corporation. Refusing to apply the discovery rule undermines the childhood-sex-abuse statute, depriving plaintiffs of the protections the Legislature intended.

Applying the discovery rule does not frustrate the core purpose of the survival statute. Indeed, applying the discovery rule is consistent with the survival statute’s core purpose: remediating the harsh effects of the common law by allowing claims against

dissolved corporations. **Ballard**, 158 Wn.2d at 611. That is, applying the discovery rule here, even though some defendants happen to be corporations rather than individual persons, furthers legislative intent underpinning both statutes.

Harmonizing the statutes by applying the discovery rule here is also consistent with the rule that the “essence of the claim” determines the applicable limitations period. See **Martin v. Patent Scaffolding**, 37 Wn. App. 37, 39, 678 P.2d 362 (1994); see also **C.J.C.**, 130 Wn.2d at 709 (holding that negligence claims were governed by RCW 4.16.340, where sex abuse was the “gravamen” of the claim). There, appellant Ted Martin was injured when he fell from a scaffold, and brought a products liability suit, also alleging a breach of warranty by the manufacturer. **Martin**, 37 Wn. App. at 38-40. In rejecting his argument to apply the 4-year U.C.C. limitations period, the appellate court held that the “essence of the claim is product liability,” that the warranty claim did not change that, and that the “essence of the case” controls the statute of limitations. 37 Wn. App. at 39.

Here too, the essence of Plaintiffs’ claims controls the applicable limitations period. The essence of Plaintiffs’ claims is the negligent creation of an environment wherein they were physically

and sexually abused and exploited, mistreated, and neglected. That does not change because some of their claims are against the corporate entity that allowed this abuse to occur through its negligent hiring, supervision, and oversight, or because some individual defendants served on the KVH board.

**2. If this Court concludes that it cannot harmonize the statutes, then the childhood-sex-abuse statute must control, as it is the more specific statute.**

If this Court concludes that the statutes conflict to such an extent that they cannot be harmonized, then the more specific statute controls. **O.S.T.**, 181 Wn.2d at 701. This is so even when the Legislature enacts a general statute after a specific one, in which case this Court “construe[s] ‘the original specific statute as an exception to the general statute, unless expressly repealed.’” 181 Wn.2d at 701 (quoting **Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council**, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008)). Here, although the Legislature enacted RCW Title 23B after first adopting the childhood-sex-abuse statute, it enacted Title 23A long before adopting the childhood-sex-abuse statute, and amended the childhood-sex-abuse statute after adopting Title 23B, adding findings documenting the Legislature’s intent to provide “a broad

and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse.” **C.J.C.**, 138 Wn.2d at 712. Regardless, the result is the same – the specific statute is interpreted as an exception to, or qualification of, the general statute, whether passed before or after it:

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.

**Residents**, 165 Wn.2d 309 (quoting **Wark v. Wash. Nat’l Guard**, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)).

The childhood-sex-abuse statute is found in Chapter 4, governing civil actions, and Title 16, governing “limitations of actions.” It applies to “all claims or causes of action” arising out of injuries resulting from childhood sex abuse, giving plaintiffs “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.

RCW 4.16.340(1). In the 1991 Amendments, the Legislature added six enumerated findings of intent, clarifying that the statute applies the “discovery rule” to “childhood sexual abuse cases.” LAWS OF 1991, ch. 212, §1. The Legislature clarified too that it was “reversing” the *Tyson* decision declining to apply the discovery rule to childhood-sex-abuse cases, and the line of cases holding that discovering any injury whatsoever commenced the statute of limitations. *Id.* In short, the Legislature made repeatedly and abundantly clear that the discovery rule codified in the childhood-sex-abuse statute applies broadly and generously. **C.J.C.**, 138 Wn.2d at 712-13.

The survival statute is found in the dissolution chapter of the Washington Business Corporation Act. It is not a statute of limitations, but a survival statute that replaces the common law rule barring claims against dissolved corporations. **Ballard**, 158 Wn.2d at 603. It is not specific to child sexual abuse claims – or any specific claim – and does not address whether the discovery rule applies to claims against dissolved corporations.

The survival statute's plain language underscores that it is the more general statute. The survival statute applies to "any remedy available" for any claim "existing" before the corporate dissolution, or "arising" after it. RCW 23B.14.340. This language, which is more encompassing than the model act, "replac[es] the common law rule in its entirety." **Ballard**, 158 Wn.2d at 610.

As broad as it is, childhood-sex-abuse claims do not neatly fit within the survival statute's construct, particularly because they are, as the Legislature recognized, often difficult to discover. RCW 4.16.340; LAWS OF 1991, ch. 212, §1. That is, while these claims may "arise" when the sexual abuse is perpetrated, they do not "exist" until a victim discovers them. See discussions at CP 72-75, 1966-69, 3023-26. And yet it is precisely because these claims are so difficult to discover (and so deserving of redress) that the Legislature adopted the childhood-sex-abuse statute, further underscoring that it is the more specific statute. *Id.*

In short, while the survival statute deals generally with claims against dissolved corporations, the childhood-sex-abuse statute deals specifically with childhood-sex-abuse claims, ensuring that each child has the full benefit of the three-year limitations period. The only way to abide Legislative intent is to apply that discovery

rule even where, as here, some defendants are dissolved corporations.

In sum, the trial court plainly erred in declining to apply the discovery rule. This Court should hold that the discovery rule applies, reverse the trial court's erroneous summary judgment rulings, and remand for trial.

**C. The survival statute does not apply to Plaintiffs' negligence claims against Defendants in their personal capacity.**

Since the survival statute does not mention claims against corporate directors or officers in their personal capacity, strict construction demands that it does not time-bar such claims.<sup>1</sup> This Court should reverse on this basis as well.

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<sup>1</sup> This Court should be aware that on May 20, 2020, Commissioner Bearse issued a decision denying interlocutory review in the related case **L.W. v. McCarthy**, No. 54147-5-II, involving the same nucleus of operative facts and Defendant Charles McCarthy. Attached as App. A. The Commissioner ruled that the trial court did not commit an obvious error in denying McCarthy's summary judgment motion to dismiss claims against him as time-barred under the survival of remedy statute. No. 54147-5-II at 6-11. Her decision addresses claims that the survival statute does not apply to claims against corporate officers and directors for acts in their personal capacity, or to claims against employees. *Id.* at 7-11.

Plaintiffs brought suit against Patton, Morehead, Hopkins, Coumbs, and McCarthy,<sup>2</sup> arguing that they are personally liable for their negligent acts and omissions injuring Plaintiffs. CP 1964-66 (Patton), 2337-38 (Hopkins), 2349-51 (Morehead), 3028-31 (McCarthy and Coumbs).<sup>3</sup> CP 1711-12. The survival statute does not mention claims against corporate actors in their personal capacity. RCW 23B.14.340. Such claims are unrelated to the existence of a corporate entity, the legal underpinning of the survival statute. Applying strict construction, that silence does not permit reading such claims into the statute. See **Potter**, 165 Wn.2d at 76-77. And doing so would be inconsistent with the survival statute's purpose and legal underpinnings.

The survival statute rests on the common law notion that “when a corporation dissolved it ceased to exist for all purposes and therefore could not sue or be sued.” **Ballard**, 158 Wn.2d at 709. That notion does not apply to suits against corporate actors in

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<sup>2</sup> Although Plaintiffs also sued Cornwell in his personal capacity, he is not expressly addressed in their response to McCarthy and Coumbs' joint motion for summary judgment, having joined in that motion after-the-fact. CP 2986-89.

<sup>3</sup> While that was always Plaintiffs' intent, they sought leave to amend their Complaint to the extent their intent was unclear. CP 1905. As addressed below, the trial court erred in denying Plaintiffs' motion to amend. *Infra*, Argument § E.

their personal capacity. Unlike a corporation, or a seat on the board, a corporate actor exists before and after the corporation dissolves. A suit that existed against him personally survives corporate dissolution because *he* survives corporate dissolution. His existence, and therefore, his ability to be subjected to suit, is independent of the corporation's existence. The survival statute simply does not apply.

Declining to apply the survival statute here is consistent with the rule that the corporate form does not protect corporate actors from personal liability for their torts. ***Johnson v. Harrigan-Peach Land Dev. Co.***, 79 Wn.2d 745, 752-53, 489 P.2d 923 (1971). Rather, corporate actors will be personally liable, without piercing the corporate veil, for committing a tort within the scope of their duties. ***Dodson v. Econ. Equip. Co.***, 188 Wash. 340, 343, 62 P.2d 708 (1936).

The business judgment rule also does not protect corporate actors from personal liability for their torts. Stemming from the notion that courts are reluctant to interfere with corporate management, the business judgment rule immunizes corporate actors from liability for actions within corporate power and management authority, made in good faith, and meeting the

standard of care. **Nursing Home Bldg. Corp. v. DeHart**, 13 Wn. App. 489, 498-99, 535 P.2d 137 (1975); **Shinn v. Thrust Iv**, 56 Wn. App. 827, 833-35, 786 P.2d 285 (1990); **Para-Medical Leasing v. Hangen**, 48 Wn. App. 389, 393-95, 739 P.2d 717 (1987). But the business judgment rule does not apply where the defendant failed to “exercise proper care, skill and diligence.” **Shinn**, 56 Wn. App. at 834 (citing **Seafirst Corp. v. Jenkins**, 644 F. Supp. 1152, 1159 (W.D. Wash 1986), discussing **Schwarzman v. Ass’n of Apt. Owners**, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982)). In **Shinn**, for example, the appellate court held that the business judgement rule did not apply to the failure to use reasonable care in selecting and supervising subcontractors. 56 Wn. App. at 836. And in **Durand v. HIMC Corp.**, this Court declined to protect defendants who wrongfully withheld wages, a misdemeanor. 151 Wn. App. 818, 836, 214 P.3d 189 (2009). In short, the business judgment rule would not immunize defendants from their tortious conduct.

Declining to apply the survival statute here is also consistent with well-established Washington law that a corporation is not liable for an employee’s intentional torts even where the employment provided the opportunity for the wrongful conduct. **Snyder v.**

**Medical Serv. Corp. of E. Wash.**, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001). Rather, employees are personally liable for their torts committed within the scope of their employment. **Annechino v. Worthy**, 175 Wn.2d 630, 637-38, 290 P.3d 126 (2012). Indeed, it is black letter law that intentional torts – particularly the sexual abuse of children – are done for personal gratification, so are not within the scope of one’s employment. The appellate courts have held, for example, that a teacher’s sexual relationship with a minor student was “solely to gratify his personal objectives and desires,” so did not further his employer’s interests, and similarly that a medical clinic was not vicariously liable for a doctor’s sexual assault of patients that “emanated from ... wholly personal motives for sexual gratification,” so did not further the clinic’s business. **Bratton v. Calkins**, 73 Wn. App. 492, 498-501, 870 P.2d 981 (1994); **Thompson v. Everett Clinic**, 71 Wn. App. 548, 553-54, 860 P.2d 1054 (1993); see also **Robel v. Roundup, Corp.**, 148 Wn.2d 35, 54, 59 P.3d 611 (2002) (“where an employee’s acts are directed toward personal sexual gratification, the employee’s conduct falls outside the scope of his or her employment”); **C.J.C.**, 138 Wn.2d at 718-20 (sexual assault within church was outside the scope of employment); **Niece v. Elmview Group Home**, 131 Wn.2d 39, 48-

49, 929 P.2d 420 (1997) (no respondeat superior or strict liability for sexual misconduct in group home for vulnerable adults); **Smith v. Sacred Heart Med. Ctr.**, 144 Wn. App. 537, 543, 184 P.3d 646 (2008) (same in hospital). Simply stated, an individual Defendant who committed an intentional tort acted solely in his personal interest, so the survival statute simply does not apply.

This Court should reverse and remand for trial.

**D. The survival of remedy statute does not apply to individual Defendants sued in their capacity as employees, who are not mentioned in the statute.**

The survival statute does not protect McCarthy, Coumbs, Cornwell, and Hopkins (or any other KVH employee) for the additional reason that the statute omits the term “employee.” CP 1711, 2370, 3059, 3112, 3269. Plaintiffs, as masters of their complaint, had the right to sue these individuals both as officers and directors, but also as employees. See **Brown v. Spokane Cnty. Fire Prot. Dist. No. 1**, 21 Wn. App. 886, 586 P.2d 1207 (1978). Since Plaintiffs sued these individuals as employees, and since the survival statute does not apply to employees, the trial court plainly erred in dismissing these claims.

McCarthy was responsible for hiring and supervising other KVH employees who abused Plaintiffs and others. *Supra*,

Statement of the Case A-D. He hired and maintained staff who were, at best wholly unqualified, and at worst physically and sexually abusive. *Supra, Id.* He gave unvetted and unsupervised adults unfettered access to boys off-site and overnight. *Id.* He failed to report, and directly attempted to cover up, reports of abuse. *Id.*

During Coumbs' five years as the "head teacher" at KVH, only two or three residents graduated with a high school diploma. CP 3271. Coumbs routinely assaulted students, grabbing them around the neck, pushing them onto the floor or up against the wall, and hitting, pinching, and slapping them. CP 3296-99, 3780-81, 4010-13, 4015-16.

Hopkins was employed as a janitor at KVH, and also volunteered as the school principal, though he lacked the required education and experience. CP 2370, 2372. Though KVH records indicate he was also employed as a counselor, Hopkins admits that is false. CP 2374. His relationship with KVH began when he used his role as a rehabilitation counselor to provide KVH injured workers from the Department of Labor and Industries KVH would supposedly retrain in exchange for free labor. CP 2367, 2369, 2376-78, 2380-81, 2383, 2389. His career at KVH ended when he was arrested in 1990 for conspiracy to commit murder. CP 2371.

Cornwell was an assistant executive director and director of KVH for a short period. CP 1711, 1911. He was employed as KVH's "Director of Youth Care" between 1986 and 1991. CP 1911.

The survival statute applies to a corporation's "directors, officers, or shareholders," but does not mention employees. RCW 23B.14.340. This omission is significant, where employees are distinct under Title 23B. While "employee" "includes an officer," it does not necessarily include a director, who may accept duties that also make him an employee. RCW 23B.01.400(12); *see also Evans v. Thompson*, 124 Wn.2d 435, 445-46, 879 P.2d 938 (1994) (rejecting the argument that corporate officers and directors are necessarily employees under the Industrial Insurance Act). No court may read this omitted word into the statute. *See Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Simply stated, employees are different, and they are omitted from the survival statute. At the very least, a jury should have decided liability for KVH employees. This Court should reverse and remand for trial.

**E. The court erroneously denied Plaintiffs' motion to amend.**

Trial courts must “freely” allow plaintiffs to amend their complaints, the goal being to facilitate decisions on the merits, not on some procedural hurdle. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987); *Quackenbush v. State*, 72 Wn.2d 670, 672, 434 P.2d 736 (1967). Most Defendants did not even attempt to show prejudice, merely piggy-backing on Patton's claims that his summary judgment motion was pending. That alleged prejudice was insufficient, where Plaintiffs asserted no new claims, but only sought to clarify facts already known to Defendants. This Court should reverse the trial court's erroneous ruling denying Plaintiffs' motion to amend.

Plaintiffs moved to amend their Complaint on October 4, 2018, seeking to clarify liability allegations against individual defendants. CP 1904-07, 1979-83. The Complaint already made clear that Plaintiffs were asserting negligence claims against Patton, Morehead, Hopkins, Cornwell, Shannon, and Meister. CP 1711-12. Plaintiffs sought to add factual support for negligence claims against the same individuals in their individual capacities, rather than as KVH board members. CP 1904-07, 1979-83.

Patton, Morehead, and Hopkins objected, arguing principally that they were sued only as board members, brought their summary judgment motions as board members, and would be prejudiced by the amended complaint, where it might alter the outcome of the pending summary judgment motion, upon which they expected to prevail. 10/12/18 RP 7-12. Cornwell, Shannon, and Meister opposed, but admitted their written opposition was untimely, adding only that the motion to amend was an effort to circumvent prior rulings that Title 23B controls. *Id.* at 12-14. The trial court denied the motion to amend as “late in the game” in light of the pending summary judgment motion. *Id.* at 15.

The court plainly erred as to Morehead, Hopkins, Cornwell, Shannon, and Meister, as none had summary judgment motions pending. CP 1999-2011 (Morehead filed 1/31/19); 2238-50 (Hopkins filed 1/31/19); 2251-62 (Stipulation to Dismiss Shannon and Meister filed 2/5/19); 2986-89 (Cornwell joined in McCarthy’s and Coumbs’ motions filed 5/10/19). As such, none could join in Patton’s argument, or the court’s logic, that it was too late to amend the complaint in light of Patton’s pending summary judgment motion. 10/12/18 RP 14-15.

Any prejudice to Patton was minimal because Plaintiffs did not seek to add new causes of action, simply clarify that Patton was negligent (as alleged in the prior amended complaint), in his individual capacity, not as a member of the KVH board. CP 1981. That is, the amended complaint asserted the same claims, based on the same facts, along with some additional facts already known to Patton. *Id.*

Defendants simply failed to meet their burden of demonstrating prejudice. ***Wilson v. Horsley***, 137 Wn.2d 500, 513, 974 P.2d 316 (1999). As there was no prejudice, the timing of Plaintiffs' motion to amend is immaterial. ***Tagliani v. Colwell***, 10 Wn. App. 227, 233-34, 517 P.2d 207 (1973). The trial court plainly erred. This Court should reverse and remand, allowing Plaintiffs to file their amended complaint.

## CONCLUSION

The trial court erroneously failed to apply the childhood-sex-abuse statute, the far more specific statute that plainly governs Plaintiffs' claims. This Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of May 2020.

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# **APPENDIX A**

May 20, 2020

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

L.W., an individual; R.S., an individual;  
K.C., an individual; E.R., an individual;  
H.Z., an individual; E.R., an individual;  
D.C., an individual; J.L., an individual;  
B.L., an individual; E.J., an individual;  
D.F., an individual; W.F., an individual;  
S.N., an individual,

Respondents,

v.

CHARLES McCARTHY, an individual,

Petitioner,

KIWANIS INTERNATIONAL, a non-profit corporation; KIWANIS PACIFIC NORTHWEST DISTRICT, a non-profit entity; KIWANIS OF TUMWATER, a non-profit corporation; KIWANIS OF PE ELL, a non-profit entity; KIWANIS OF CHEHALIS, a non-profit entity; KIWANIS OF GRAND-MOUND-ROCHESTER, a non-profit entity; KIWANIS OF ROCHESTER, a non-profit entity; KIWANIS OF CENTRALIA, a non-profit entity; KIWANIS OF CENTRALIA-CHEHALIS, a non-profit entity; SAM C. MOREHEAD, an individual;

No. 54147-5-II

RULING DENYING REVIEW

EDWARD J. HOPKINS, an individual;  
LEWIS PATTON, an individual;  
STATE OF WASHINGTON; STATE  
OF WASHINGTON, DEPARTMENT  
OF SOCIAL AND HEALTH  
SERVICES, DEPARTMENT OF  
CHILDREN, YOUTH, AND FAMILY  
SERVICES, CHILD PROTECTIVE  
SERVICES,

Defendants Below.

Respondents, L.W., R.S., K.C., E.R., H.Z., E.R., D.C., J.L., B.L., E.J., D.F., W.F., and S.N., sued Charles McCarthy for alleged sexual abuse they endured while residing at the Kiwanis Vocational Home (KVH) between 1979 and 1991. McCarthy seeks discretionary review of the superior court's denial of his motion for summary judgment, which hinged on an interpretation of RCW 23B.14.340. This statute time bars lawsuits against corporate officers and directors filed more than three years after their corporation dissolves. This court considered McCarthy's appeal under RAP 2.3(b)(1) and denies review.

## FACTS

McCarthy served as the Executive Director at the Kiwanis Vocational Home for Youth (KVH) from 1979 until 1991. He was also a member of the board of directors for Lewis County Youth Enterprises, Inc. (LCYE), the company that owned and controlled KVH.<sup>1</sup> LCYE dissolved on June 1, 2010.

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<sup>1</sup> In the superior court, McCarthy represented that he was the Executive Director for LCYE, not KVH, because the vocational home simply "operated under the fictitious name

Respondents sued McCarthy in 2017, alleging negligence, outrage, and intentional infliction of emotional distress for sexually abusing Respondent D.C.,<sup>2</sup> misappropriating money from the State, “storing children in a shanty, trailer-park like environment[,]” encouraging physical and sexual abuse, hiring incompetent supervisors, hiring people without diligently checking their backgrounds, and “failing to provide State-mandated sexual abuse therapy to children in need.” Resp. to Mot. for Disc. Rev., Appendix C at 22; Reply to Resp. to Mot. for Disc. Rev., Appendix at 507. The alleged incidents occurred between 1979 and 1991.<sup>3</sup> McCarthy moved for summary judgment, arguing that respondents’ claims were time-barred by the three-year statute of limitations in RCW 23B.14.340. The superior court denied his motion.

#### ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only “in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010), *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied*

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Kiwanis Vocational Home.” Reply to Resp. to Mot. for Disc. Rev., Appendix at 16. And an entirely separate corporation, Kiwanis Vocational Homes for Youth Advisory Board, Inc., was a holding company that managed the physical KVH property.

<sup>2</sup> D.C.’s matter will be tried separately but has not been assigned its own superior court docket number.

<sup>3</sup> RCW 4.16.340 governs statutes of limitations in child sex abuse cases.

*sub nom., Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). McCarthy seeks discretionary review under RAP 2.3(b)(1).<sup>4</sup>

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.” *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). “The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

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<sup>4</sup> In his reply, McCarthy also relies on RAP 2.3(b)(2). But this court will not consider arguments raised for the first time in a reply brief. RAP 10.3(c); *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). In addition, because McCarthy cannot show that the superior court’s decision has any effect outside the courtroom, he cannot rely on RAP 2.3(b)(2). *State v. Howland*, 180 Wn. App. 196, 205-06, 321 P.3d 303 (2014), *discretionary review denied*, 182 Wn.2d 1008 (2015).

“The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating material fact. Summary judgment is appropriate if the nonmoving party fails to do so.” *Walston*, 181 Wn.2d at 395-96 (citations omitted). “A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation’s outcome.” *Youker v. Douglas Cnty.*, 178 Wn. App. 793, 796, 327 P.3d 1243, review denied, 180 Wn.2d 1011 (2014). This court reviews summary judgment decisions de novo. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016). Similarly, statutory construction is a question of law subject to de novo review. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013).

#### Adequacy of the Record

McCarthy seeks discretionary review of the superior court’s order denying his motion for summary judgment. But McCarthy neglected to submit a sufficient record to review the superior court’s order. The motion for discretionary review only includes the superior court’s order. It does not append the evidence considered by that court.

Generally “[a]n insufficient record on appeal precludes review of the alleged errors.” *Bulzomi v. Department of Labor and Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994); see also RAP 6.2(c) (appendix to motion for discretionary review); RAP 17.3(b)(8) (appendix to motion); RAP 9.12 (summary judgment appellate record must include all “documents and other evidence called to the attention of the trial court.”). That said, this court interprets the rules of appellate procedure liberally “to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Because this motion for discretionary review centers on a legal issue, and because respondents, and McCarthy in his reply,

have provided an adequate record for discretionary review, this court exercises its discretion to reach the merits of McCarthy's motion.

RCW 23B.14.340

RCW 23B.14.340<sup>5</sup> states that a plaintiff must commence an action against officers and directors of a corporation within three years after the corporation dissolves.<sup>6</sup> So McCarthy argues that the language of RCW 23B.14.340 time bars respondents' claims because they did not file their action within three years after the 2010 dissolution of LCYE. He asserts, therefore, that the superior court misinterpreted the time bar statute and obviously erred by denying his motion for summary judgment.<sup>7</sup>

Statutory interpretation is a question of law reviewed de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). To uphold its "fundamental objective . . . to

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<sup>5</sup> RCW 23B.14.340 states:

The dissolution of a corporation . . . shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within . . . three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

<sup>6</sup> This statute has an interesting history. "At common law, when a corporation dissolved it ceased to exist for all purposes and therefore could not sue or be sued." *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 609, 146 P.3d 914 (2006). But in 1965, the legislature enacted a statute that "provided that a corporation's dissolution did not 'take away' or 'impair' lawsuits based on claims that existed prior to dissolution, provided the plaintiff sued within two years." *Ballard Square*, 158 Wn.2d at 609 (citing former RCW 23A.28.250). In 1989, the legislature enacted former RCW 23B.14.340, which resembles the present statute (adopted in 2006) but had only a two-year limitations period. *Ballard Square*, 158 Wn.2d at 610.

<sup>7</sup> McCarthy acknowledges his case presents an issue of first impression.

ascertain and carry out the Legislature's intent[,]" a court must give effect to the plain language of a statute. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the plain language requires construction or is "subject to more than one reasonable interpretation[,]" then the statute is ambiguous and a court may consider outside sources. *Jametsky*, 179 Wn.2d at 762 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009)). Such sources may include "statutory construction, legislative history, and relevant case law." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Here, McCarthy wore two hats. He was both on the LCYE board of directors and worked as the KVH executive director. He claims that suits against him in both capacities are barred because (1) the time bar statute explicitly references suits against corporate directors, and (2) even though the statute does not reference "employees," employees are included in the time bar.

#### Suits Against Corporate Directors

Respondents argue that RCW 23B.14.340 does not apply to "employees who abuse children [because they] are not acting in their capacity as 'officers' or 'directors' furthering a corporation's business[.]" Resp. to Mot. for Disc. Rev. at 6. They state that the evidence, at a minimum, "raises genuine issues of material fact that McCarthy committed intentional acts giving rise to [their] claims that were not in furtherance of KVH's purposes and, thus, were outside the scope of his capacity as a corporate officer or director." Resp. to Mot. for Disc. Rev. at 9; see also Reply to Resp. to Mot. for Disc. Rev., Appendix at 507-08 (listing alleged intentional torts).

In our state, corporations are not liable for an employee’s intentionally tortious acts that are not in the furtherance of the business, “even if the employment situation provided the opportunity or means for the employee’s wrongful acts.” *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001) (quoting *Niece v. Elmview Group Home*, 79 Wn. App. 660, 664, 904 P.2d 784 (1995), *affirmed*, 131 Wn.2d 39 (1997)). This is because an employee acting for a “wholly personal motive” does not act for the corporation. *Thompson v. The Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994). McCarthy acknowledges this long-standing liability doctrine<sup>8</sup> but counters that the language of the time bar statute—with its explicit reference to “directors” and “officers”—does not support its application here. Reply to Resp. to Mot. for Disc. Rev. at 7.

The arguments on both sides have support. RCW 23B.14.340 bars suits against corporate directors. But it does not address whether this time bar covers only suits

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<sup>8</sup> A similar but not identical liability doctrine applies to lawsuits against corporate directors by fiduciaries (often shareholders). A director has the duty to act in good faith, with ordinary care, and in the best interests of the corporation. RCW 23B.08.300 (standard of care for board members); *see also Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975) (“The ‘business judgment rule’ immunizes management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith.”), *review denied*, 86 Wn.2d 1005 (1975).

A director who follows these requirements “is not liable for any action taken as a director, or any failure to take any action.” RCW 23B.08.300(4). Conversely, corporate directors who do not act with sufficient care or act outside the corporation’s interests are not immune from personal liability. *See generally Mantra Band, LLC v. Circoli, Inc.*, No. 8:19-cv-00464-JLS-ADS, 2019 WL 8108728, at \*2-3 (C.D. Cal. Sept. 30, 2019) (citing *FDIC v. Castetter*, 184 F.3d 1040, 1044 (9th Cir. 1999), and *In re Baird*, 114 B.R. 198, 205 (B.A.P. 9th Cir. 1990)).

against board members for actions taken in their official capacity or whether it extends to suits against board members who either act for a “wholly personal motive” or against corporate interests. The statutory history arguably supports McCarthy’s argument, in that at common law, any ability to sue a corporation (or its representative) simply evaporated upon dissolution. *See supra* n.6. And the survival statute and time bar are, therefore, a narrow exception to the common law rule. Nevertheless, present-day liability rules that distinguish between actions taken to further a corporation’s interest and actions that do not, support respondents’ position. In light of this analysis and because this is an issue of first impression, this court cannot say the superior court committed obvious error.

#### Officer/Director/Employee Categories Under the WCBA

McCarthy also contends that he can no longer be sued as a former employee. But respondents contend that “employee” is not included in the list of persons protected by the time bar.

McCarthy first relies on *Cameron v. Murray* to argue that the time bar includes officers, directors, *and* employees of a dissolved corporation. 151 Wn. App. 646, 650, 214 P.3d 150 (2009), *review denied*, 168 Wn.2d 1018 (2010). In *Cameron*, Division One affirmed the superior court’s grant of summary judgment to officers, directors, and employees of a dissolved corporation under RCW 23B.14.340’s time bar. 151 Wn. App. at 650; Mot. for Disc. Rev. at 5; *see also* Reply to Resp. to Mot. for Disc. Rev., Appendix at 13 (contending that “[t]he corporate dissolution statute applies to former employees to the same extent it applies to former board members and the corporation”). But *Cameron* was affirmed on other grounds and the discussion of RCW 23B.14.340 was limited to a one-sentence recitation of the facts.

McCarthy next argues that because under the Washington Business Corporation Act (WCBA), all corporate officers are employees, RCW 23B.14.340 necessarily extends to employees. He posits, “[w]ere the legislature to include ‘officers’ in the corporate dissolution statute even though officers were never shielded by the time bar, that word would be meaningless.” Reply to Resp. to Mot. for Disc. Rev. at 6-7.

The WBCA’s definition of “[e]mployee” states that it “includes an officer but not a director.”<sup>9</sup> RCW 23B.01.400(12). But “[a] director may accept duties that make the director also an employee.” RCW 23B.01.400(12); see also RCW 23B.08.010 (duties of corporate board of directors); RCW 23B.08.400 (describing corporate officers); RCW 23B.08.410 (duties of corporate officers).

RCW 23B.14.340 does not explicitly include a dissolved corporation’s “employees” within the categories of persons protected by its time bar. So it is hard to conclude the superior court made an obvious error that the time bar does extend to suits against employees. *Campbell & Gwinn*, 146 Wn.2d at 9-10 (a court must give effect to a statute’s plain language); see also *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (“[A] court must not add words where the legislature has chosen not to include them.”). And the WBCA appears not to subsume “employees” in its reference to “corporations,” at least to the extent that plaintiffs allege McCarthy was not acting to advance the corporation’s interests. *Snyder*, 145 Wn.2d at 242. It also does not likely

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<sup>9</sup> *But see* RCW 50.04.165 (excluding officers from the definition of employee for unemployment insurance coverage); *Evans v. Thompson*, 124 Wn.2d 435, 445, 879 P.2d 938 (1994) (rejecting argument that under the Industrial Instance Act, “officers and directors are by definition corporate employees”).

automatically include *all* employees in the time bar by reference to “officer” and “directors,” simply because other WCBA statutes define “employee” and set out the roles of officers and directors. Moreover, even assuming suits against employees are included in the time bar, the issue remains whether suits against any party—whether an officer, director, *or* employee—who acts in their own self-interest are also time barred.

This is not to say that McCarthy’s argument that because officers are employees, employees must be included within the statute is meritless. But again, in light of these competing arguments and lack of binding authority, this court concludes that the superior court did not commit obvious error. RAP 2.3(b)(1).

#### Rendering Further Proceedings Useless

Because McCarthy fails to show obvious error, this court will not analyze whether he shows that the superior court’s decision renders further proceedings useless.

#### CONCLUSION

McCarthy fails to prove review is appropriate under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that McCarthy’s motion for discretionary review is denied.

  
\_\_\_\_\_  
Aurora R. Bearse  
Court Commissioner

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Hon. Bryan Chushcoff

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I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANTS** on the 27<sup>th</sup> day of May 2020 as follows:

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## Transmittal Information

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