

FILED
Court of Appeals
Division II
State of Washington
10/9/2020 3:35 PM
No. 53957-8

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

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.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The childhood-sex-abuse statute leaves no doubt about legislative intent: every victim of childhood sex abuse will have the full benefit of the limitations period from the point they discover their claims. This is due to the insidious nature of childhood sex abuse: it is so horrendous that victims block it out, or fail to fully realize its devastating effects. Thus, the question on appeal is simple: what matters more – protecting victims of childhood-sex-abuse by applying the discovery rule codified to protect them, or cutting off corporate liability at a fixed time?

The trial court erred in refusing to apply the childhood-sex-abuse statute's codification of the discovery rule. Applying the discovery rule here is the only way to effectuate the childhood-sex-abuse statute, whose core purpose is to codify the discovery rule. This does not offend the survival statute, whose core purpose is to permit a lawsuit against a dissolved corporation. Simply stated, it is consistent with both statutes to permit Plaintiffs to move forward to resolution on the merits.

This Court should reverse and remand for trial.

REPLY ARGUMENT

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

The parties¹ agree that review is *de novo*, both because this Court is reviewing a summary judgment order and because the basis of that order is statutory interpretation, a question of law. BA 18; MSC BR 4-5; see *also* LCYE BR 4-5. Yet Respondents forget the trial court resolved on summary judgment only the application of the corporate dissolution survival statute, RCW 23B.14.340: (1) Patton sought summary judgment that the survival statute barred Plaintiffs' claims as a matter of law (CP 1803-13); (2) the trial court granted Patton's motion, "based on the corporate dissolution statute codified in RCW 23B.14.340" (CP 1996-98); (3) Hopkins and Morehead separately sought summary judgment on the same basis (CP 1999-2011, 2238-50); the trial court granted those motions too (CP 2533-37, 2538-42)); (4) per the parties' agreement, the court dismissed Meister and Shannon on the same basis (CP 2251-62); and (5) the court subsequently dismissed

¹ This brief replies to both response briefs, referring to the brief filed by LCYE, Patton, Morehead, Hopkins, Coumbs, and McCarthy as "LCYE BR," and to the brief filed by Meister, Shannon, and Cornwell, as "MSC BR." Where appropriate, this brief refers collectively to "Respondents."

claims against McCarthy, Coumbs, and Cornwell on the same basis. CP 4079-82, 4083-85, 4086-88; 6/7/19 RP 1-22.

These orders dealt with a single question: does RCW 23B.14.340 bar Plaintiffs' claims? They do not, as Respondents suggest, resolve factual disputes about the nature of Plaintiffs' claims and whether they involve actions falling within or without the scope of employment, or both.

B. Plaintiffs' claims should be tolled under the discovery rule codified in the childhood-sex-abuse statute.

1. The only way to harmonize the conflicting statutes is to apply the discovery rule to Plaintiffs' claims.

Respondents agree that our courts must, if possible, give a statute its plain and ordinary meaning consistent with Legislative intent, but must harmonize apparently contradictory statutes. ***Bank of Am., NA v. Owens***, 173 Wn.2d 40, 53, 266 P.3d 211 (2011); BA 19-20; MSC BR 4-5, 7-8; see also LYCE BR 4-5. Respondents also agree that the survival statute replaced the common law (dissolved corporations may not be sued) with a statutory rule (they may be sued for three years after dissolution). BA 20-22 (discussing ***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)); MSC BR 10-11; LCYE BR 4-5. And MSC agrees the

express purpose of the childhood-sex-abuse statute is to codify the discovery rule to remedy the all-too-common reality that victims repress memories of their abuse or fail to connect the abuse to their injuries, so lose their claims to the statute of limitations. RCW 4.16.340 Notes; MSC BR 7; BA 22-26.

In short, the very nature of childhood-sex-abuse is that its victims may not realize what has happened to them, or realize the devastating effects, until it is too late to seek legal redress. The solution is codifying the discovery rule. RCW 4.16.340(1).

The Legislature has repeatedly demonstrated its 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. v. Corp. of Catholic Bishops of Yakima**, 138 Wn.2d 699, 712, 985 P.2d 262 (1999) (church leaders subject to the “broad” limitations period in the childhood-sex-abuse statute for claims based on negligent failure to protect children in their care). The Legislature adopted the childhood-sex-abuse statute to overrule **Tyson v. Tyson**, 107 Wn.2d 72, 727 P.2d 226 (1986), refusing 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, J. dissenting). Three years later, the Legislature amended the

childhood-sex-abuse statute to clarify 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.” 138 Wn.2d at 712 (citing LAWS OF 1991, ch. 212, §1). The Legislature took two additional steps to ensure a “broad and generous application of the discovery rule”: broadening the statute to clarify that less serious injuries did not commence the litigation period, and superseding cases strictly applying the discovery rule. *Id.* at 712-13.

Respondents’ disagreement begins with what issue is actually before this Court and whether the survival statute and childhood-sex-abuse statute actually conflict. Contrary to LYCE’s misstatement of the issue on appeal, while Plaintiffs “concede” they did not file their claims within the time prescribed by the survival statute, they do not concede they “failed” to do so. LYCE BR 4. Rather, they could not do so because they had repressed the memories of their abuse. BA 14. That is common. RCW 4.16.340 Notes. It is also exactly why the Legislature adopted the childhood-sexual-abuse statute. *Id.*

MSC leads with the assertion that statutes do not conflict “if both can be given effect without distortion of the language used in

either.” MSC BR 8 (citing ***SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found.***, 5 Wn. App. 496, 509, 427 P.3d 688 (2018), *rev. denied sub nom.*, 192 Wn.2d 1025 (2019) (citing ***State v. Fagalde***, 85 Wn.2d 730, 736, 539 P.2d 86 (1975))). That is not what these cases hold.

SEIU holds that the Uniform Trade Secrets Act did not preempt a replevin claim because “relief under the replevin statute ‘is not based upon misappropriation of a trade secret.’” 5 Wn. App. at 509. ***SEIU*** and ***Fagalde*** both make clear that courts must give effect to both apparently conflicting statutes when it can do so without distorting their language:

It 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.

SEIU, 5 Wn. App. at 503 (citing ***Fagalde***, 85 Wn.2d at 736). This does not determine when a conflict exists, but provides how courts must proceed when a conflict is *apparent*: reconcile the apparent conflict without distorting statutory language. ***SEIU***, 5 Wn.2d at 503. If that is impossible, then this Court moves on to canons of statutory construction that might prefer one statute over another. *Id.*

The conflict here is indeed “apparent.” The Legislature plainly intended to guarantee every victim of childhood-sex-abuse three years from the point of discovery to seek remedy. It took the rare step of codifying the discovery rule. See *Tyson*, 107 Wn.2d 90-92 (Pearson dissenting); RCW 4.16.340 Notes. The assertion that the survival statute denies childhood-sex-abuse victims their day in court due to the passage of time plainly conflicts with the Legislature’s clear intent.

But MSC argues there is no conflict where each statute “pertains to a completely different subject matter: the existence of a corporate entity to be sued, and the timeliness of a claim of childhood sexual abuse.” MSC BR 10. It describes the survival statute as a “legislative extension of corporate existence that is unrelated to the viability of any particular claim,” contrasting that to the statute of limitations, which “applies to limit the time in which to bring particular claims.” MSC BR 11. It concludes: the survival statute “does not say anything about the statute of limitations on any claim.” MSC BR 11-13.

LCYE takes a similar approach, stating Plaintiffs’ argument as: “the Statute of Repose does not bar their claims because RCW 4.16.340, the statute of limitations applicable to claims of child

abuse (the “Statute of Limitations”), does not bar their claims.” LYCE BR 5. It then continues like MSC, arguing the distinctions between statutes of repose and limitations. LYCE BR 5-10.

That is, Respondents would have this Court take away with the survival statute what the Legislature gave with the childhood-sex-abuse statute, arguing “the survival statute [does] not extinguish the children’s claim, it simply left the children without an entity to bring that claim against.” MSC BR 14 (quoting *M.S. v. Dinkytown Daycare Ctr. Inc.*, 485 N.W.2d 587 (S.D. 1992)); LYCE BR 4-5. This ignores the express legislative policies underpinning the childhood-sexual-abuse statute in favor of tidy categorical distinctions: statutes of repose versus statutes of limitations, claims versus defendants. MSC BR 12; LYCE BR 5-10. These distinctions are academic at best.

The conflict here is whether the legislative purpose underlying the child-sex-abuse statute will be destroyed by applying the frankly irrelevant survival statute. The latter nullifies the childhood-sexual-abuse statute. If the passage of time denies Plaintiffs a remedy, then the legislative intent to preserve their cause of action is defeated.

The Legislature has already struck the balance between Plaintiffs' right to seek redress and guarding against stale claims. When our Court adopted the discovery rule in *Ruth v. Dight*, it explained that deciding whether it is unfair to automatically foreclose a plaintiff's lawsuit under the statute of limitations requires a court to balance "the harm of being deprived of a remedy versus the harm of being sued." 75 Wn.2d 660, 665, 453 P.2d 631 (1969).² Here, the Legislature struck that balance in favor of childhood-sex-abuse victims, unequivocally concluding that being "deprived of a remedy" outweighs the "harm of being sued." *Ruth*, 75 Wn.2d at 665. That is so even for claims that are quite "stale," where the very nature of childhood-sex-abuse is that young children might repress the memories of their abuse well into adulthood. The Legislature's balancing does not shift because the accused is not an individual, but a corporation, or its officer, director, or employee.

In short, there is little doubt that declining to apply the discovery rule here undermines the childhood-sex-abuse statute by denying Plaintiffs their day in court merely because they discovered

² The common law discovery rule announced in *Ruth* was later replaced by RCW 4.16.350, codifying the discovery rule for actions for injuries caused by healthcare or related services. *Winburn v. Moore*, 143 Wn.2d 206, 214 n.3, 18 P.3d 576 (2001).

their claims more than three years after the defendant corporation dissolved. Applying the discovery rule here is consistent with the legislative balancing that prioritizes providing a “remedy versus the harm of being sued.” *Ruth*, 75 Wn.2d at 665. It is consistent with the purpose of the survival statute to remediate the harsh effects of the common law by permitting claims against dissolved corporations. *Ballard*, 158 Wn.2d at 611. It is consistent too with the rule that the “essence of the claim” [here childhood sex abuse] 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.*, 138 Wn.2d at 709 (holding that negligence claims were governed by RCW 4.16.340, where sex abuse was the “gravamen” of the claim).

MSC argues that if a conflict exists, then the only way to harmonize the survival statute and childhood-sex-abuse statute is to limit Plaintiffs’ claims to any entities that still exist to be sued. MSC BR 16. This argument proves too much. Again, according to Respondents, there are no entities that exist to be sued because the survival statute prevents RN from suing LYCE and its officers, directors, and employees. MSC BR 17-18; LCYE BR 4-5, 9, 10-15. That is, there is no doubt that Plaintiffs’ claims would be timely if

they sued parties who did not have the benefit of previously being or working for a dissolved corporation.

Finally, MSC cautions against ignoring “the legal rule that non-existent entities cannot be sued.” MSC BR 16-17. The survival statute already does that, effectively ignoring that legal fiction for a three-year period. There is no “rule” that non-existent entities cannot be sued – they can be sued for three years post-dissolution. Thus, the only question is whether that period should be longer when Plaintiffs’ claims are tolled by the discovery rule codified in the childhood-sex-abuse statute. The answer must be yes, or the express purpose of the statute is gutted in favor of a legal fiction.

2. If this Court disagrees, then the childhood-sex-abuse statute must control.

If this Court concludes these statutes conflict but cannot be harmonized, it must apply the discovery rule here. Otherwise, the passage of time denies victims their day in court, undermining clear legislative intent underpinning the childhood-sex-abuse statute.

C. The survival statute does not bar claims against Respondents in their personal capacity.

Plaintiffs sued Patton, Morehead, Hopkins, Coumbs, and McCarthy personally. CP 1964-66 (Patton), 2337-38 (Hopkins), 2351-52 (Morehead), 3028-31 (McCarthy and Coumbs). CP1711-

12. While the survival statute applies to directors, officers, and shareholders (though not to employees), it does not mention claims against corporate actors in their personal capacity, much less bar claims against those individuals. RCW 23B.14.340. Applying strict construction, that silence does not permit reading such a broad bar into the statute. See *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008).

Barring claims against individual actors in their personal capacity would make no sense, where the common law notion underpinning the corporate survival statute – that “when a corporation dissolved it ceased to exist [so] could not sue or be sued” – does not apply to suits against corporate actors in their personal capacity. *Ballard*, 158 Wn.2d at 709. They, as individuals, exist before and after corporate dissolution. Their existence, and therefore their ability to be subjected to suit, is independent of the corporation’s existence. The survival statute simply does not apply.

The law in this area recognizes the distinction between a corporation and its agents acting in their personal capacity:

- 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).

- 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. See **Shinn v. Thrust Iv**, 56 Wn. App. 827, 833-35, 786 P.2d 285 (1990); **Durand v. HIMC Corp.**, 151 Wn. App. 818, 836, 214 P.3d 189 (2009).

This Court should not read the survival statute to protect corporate actors from personal liability when neither the corporate form, nor the business judgment provide such an expansive shield.

And the survival statute cannot reasonably be read to bar claims against individuals for intentional torts. It is beyond dispute that employers are not vicariously liable in tort for an employee's sexual abuse of a child. BA 35-37 (collecting cases). Since an employee is personally liable for such torts, he cannot enjoy the survival statute time-bar afforded to his employer, and to his status as an officer, director, or shareholder.

MSC principally responds that the survival statute includes corporate directors, officers, and shareholders, such that it bars claims against Meister and Shannon for negligent acts undertaken in their "corporate capacities."³ MSC BR 18-20. It argues that since

³ This does not protect Cornwell, an employee. See, *infra* Argument § D.

the statute protects such individuals in their corporate capacities, it must also protect them in their personal capacities, or the survival statute “becomes superfluous and absurd.” *Id.* at 19-20.

This ignores Plaintiffs’ arguments. And far from being absurd, the survival statute still serves its core purpose – ameliorating the harsh effect of the common law by providing some time to sue a dissolved corporation and its officers and directors. Allowing time to hold corporate actors personally accountable does not offend the survival statute, and is the only way to uphold the childhood-sex-abuse statute. Again, these tortfeasors exist before and after the corporation dissolves – only their title ceases to exist.

MSC’s remaining arguments are not properly before this Court, where the issue of individual liability for acts taken on behalf of a corporation was not before the trial court. MSC BR 20-22. This Court should not reach that question. See ***Bldg. Indus. Ass’n of Wash v. McCarthy***, 152 Wn. App. 720 733-34, 218 P.3d 196 (2009) (appellate review of summary judgment orders is limited “to the evidence and issues presented to the trial court”).

MSC is incorrect in any event. MSC essentially claims that to hold Meister and Shannon individually liable, Plaintiffs must prove knowing or intentional acts, not negligence. MSC BR 18-20.

Plaintiffs did plead intentional acts, including outrage and intentional infliction of emotional distress. CP 1715-16.

MSC misplaces reliance on **Annechino v. Worthy**, which addresses two types of personal liability related to conduct within the scope of the tortfeasor's employment. MSC BR 21-22 (citing 175 Wn.2d 630, 637-39, 290 P.3d 126 (2012)). Under the first, a corporate actor may be personally liable for breaching a duty the corporation owes, but only if they "knowingly committed wrongful acts or directed others to do so knowing the wrongful nature of the requested acts." 175 Wn.2d at 637. Under the second, a corporate actor may be liable as an employee or agent, where an "employee or agent is personally liable to a third party injured by his or her tortious conduct, even if that conduct occurs within the scope of employment or agency." **Annechino**, 175 Wn.2d. at 638 (citing **Eastwood v. Horse Harbor Found., Inc.**, 170 Wn.2d 380, 400, 241 P.3d 1256 (2010); RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006)). The latter plainly states the actor remains personally liable:

Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.

The Annechinos sued individual bank officers, asserting breach of quasi-fiduciary duty, when they learned they lost funds in a forced bank takeover, despite having been assured their deposits would be FDIC insured. **Annechino** 175 Wn.2d at 634-35. This occurred either because bank employee misunderstood FDIC charts, or because a bank employee transferred the wrong account. 175 Wn.2d at 634-45. At issue on appeal was whether the bank officers owed the Annechinos a quasi-fiduciary duty. *Id.* at 635.

The Court assumed the bank owed a duty, but held the bank officers could not be personally liable for breaching it, where there was no indication they knowingly conveyed incorrect coverage information to the Annechinos. *Id.* at 637-38. The Court held too that bank officers could not be personally liable as employees or agents, where nothing indicated they owed an independent duty to the Annechinos, or knowingly made misrepresentations. *Id.* at 638.

This matter bears no resemblance to **Annechino**. Plaintiffs do not claim an agent or employee negligently conveyed information on a principal's behalf. They claim the individual defendants knew about, allowed to exist, and even facilitated physical and sexual abuse perpetrated by KVH staff and residents,

as well as a toxic mix of failing to provide the most basic food, shelter, and educational services owed to KVH boys. CP 1712-14.

MSC's reliance on *Keodalah v. Allstate Ins. Co.* is equally misplaced. MSC BR 20, 21-22 (citing 194 Wn.2d 339, 330-52, 449 P.3d 1040 (2019)). The principal holding in *Keodalah* is that RCW 48.01.030, providing that the "business of insurance [requires] that all persons be actuated by good faith," does not provide an express or implied private right of action for insurance bad faith against an individual adjuster. 194 Wn.2d at 346-49. The Court also rejected Keodalah's CPA claim, holding an insured has a CPA claim for insurance bad faith against the insurer only. 194 Wn.2d at 349-50.

Respondents do not disagree that Plaintiffs may bring tort claims against corporate actors. *Keodalah* is inapposite.

LCYE claims Plaintiffs' vicarious liability claims are inconsistent with its personal liability claims. LCYE BR 10-13. But again, the sole basis of the summary judgment is that the survival statute bars Plaintiffs' claims, so the only issue before this Court is whether that statute bars claims against individuals in their personal capacity. LCYE does not answer that question, so this Court need not entertain its "response."

LCYE is also incorrect in contending that it necessarily follows from asserting vicarious liability that the individual's acts fall within the scope of their employment. LYCE BR 10-11. It incorrectly claims too that Plaintiffs may pursue claims against the individuals only if "they acted outside the scope of employment." LCYE BR 12. "[M]erely because they say it is so does not make it so." LCYE BR 10. An actor "remains subject to liability" even if he acts within the scope of his employment. *Eastwood*, 170 Wn.2d at 400; RESTATEMENT, *supra*, § 7.01.

In sum, the survival statute does not mention personal claims and construing it to bar them would be inconsistent with strict construction and with tort principles subjecting corporate actors to personal liability.

D. The survival statute does not apply to employees.

The survival statute omits "employee," a defined term in Title 23B. Compare RCWs 23B.01.400(15) with 23B.14.340. This omission is significant, where employees are distinct from officers, directors, and shareholders, included in the survival statute. *Id.* While "employee" "includes an officer," it does not necessarily include a director. RCW 23B.01.400(15). Simply stated, employees are different, and they are omitted from the survival statute, which

must be strictly construed. **Potter**, 165 Wn.2d at 76-77. The survival statute does not protect KVH employees. CP 1711, 2371, 3059, 3112, 3269.

While no court may read this omitted term into the survival statute, that is what LCYE seeks. Compare **Rest. Dev., Inc. v. Cananwill, Inc.**, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) with LYCE BR 13-15. LCYE first argues that the survival statute must apply to the individuals because they are directors or officers. LYCE BR 13. Ignoring the question does not answer it. They are all also employees, who are omitted from the statute, so the question remains whether they can be sued as employees. Simply calling upon this Court to enforce the “plain and unambiguous words” “officer” and “director” does not answer the question.

LYCE next relies on **Cameron v. Murray**, asserting that the trial court dismissed employees under RCW 23B.14.340 and the appellate court “did not criticize the trial court for including employees in the dismissal.” LYCE BR 14 (citing 151 Wn. App. 646, 214 P.3d 150 (2009)). The issue was not raised in **Cameron**. Rather, the opinion states only that the plaintiffs sued the corporation and its officers, directors, and employees, that all were dismissed under the survival statute, and that the dissolved

corporation's successor remained in the case. **Cameron**, 151 Wn. App. at 649. Whether plaintiff there could sue employees of the dissolved corporation was not before the appellate court, which did not overreach by needlessly "criticizing" the trial court on a point it was not reviewing.

Finally, LCYE effectively argues that if an employee of the dissolved corporation is also an officer or a director, the survival statute must apply. LCYE BR 14-15. Of course, this does not answer whether the survival statute applies to employees who are not officers or directors, nor does it answer pursuing claims for acts carried out in the scope of employment, not in one's capacity as an officer or director. Nor does it answer the simple fact that the survival statute omits employees.

MSC argues that there is no difference between naming an employee and naming the dissolved corporation, or at least that allowing suits against employees would "subject a corporation to a claim under the principle of *respondeat superior*." MSC BR 23-25. This response mistakenly assumes an argument Plaintiffs never made: that the ability to sue an employee past the three-year period revives the expired claim against the corporation. *Id.* This Court need not consider this strawman.

And suing an employee is not “the same” as suing a corporation. MSC BR 24. Again, an employee may be sued in his personal capacity for torts committed in the course of his employment. **Eastwood**, 170 Wn.2d at 400; RESTATEMENT, *supra*, § 7.01. This Court is not required to “revive the dead corporate body to allow [said] suit to proceed.” MSC BR 24.

MSC’s remaining argument is wrong on the law and assumes unresolved facts. MSC BR 25. MSC suggests that former employee Cornwell would be liable only for intentional or knowing acts. *Id.* (without argument or authority). While there are instances in which liability for corporate officers and directors is limited to their intentional and knowing acts, the same is not true for employees, who are liable for injury-causing torts, even if undertaken in the scope of their employment. *Supra*, Argument § C; **Eastwood**, 170 Wn.2d at 400; RESTATEMENT, *supra*, § 7.01.

But in any event, MSC admits Plaintiffs alleged outrage and intentional infliction of emotional distress. MSC BR 25 n.10. While MSC claims Plaintiffs have not demonstrated intent, that was not the basis of the summary judgment motions or ruling, and is not properly before this Court.

This Court should not read “employee” into the statute, but should permit Plaintiffs’ to proceed against the employees.

E. The trial court erroneously denied Plaintiffs’ motion to amend.

Respondents argue that Plaintiffs “misapprehend the standard of review,” and focus myopically on prejudice. LYCE BR 15-16; MSC BR 26-27. Plaintiffs focused on prejudice, or the lack thereof, because that is what matters. To be clear: the “touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.” **Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters, Etc.**, 100 Wn.2d 343, 350, 670 P.2d 240 (1983) (citing **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 401 U.S. 321, 330-31, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)). Indeed, the very design of CR 15(a) and its federal corollary is to “facilitate the amendment of pleadings except where prejudice to the opposing party would result.” **Caruso**, 100 Wn.2d at 349 (quoting **United States v. Hougham**, 364 U.S. 310, 316, 5 L. Ed. 2d 8, 81 S. Ct. 13 (1960)). That is, the rule is supposed to “facilitate” amendments unless they are prejudicial. *Id.*

LYCE principally argues that Plaintiffs’ “delay” warranted denying their motion to amend, and MSC addresses its supposed

untimeliness. LYCE BR 16-17; MSC BR 28-29. MSC mistakenly relies on ***Doyle v. Planned Parenthood of Seattle–King County, Inc.***, arguing that a motion to amend made after an adverse summary judgment ruling can be disruptive to the proceedings. MSC BR 26 (citing 31 Wn. App. 126, 131, 639 P.2d 240 (1982)). Plaintiffs did not move to amend “after an adverse summary judgment ruling,” but moved on October 4, 2018, when Patton’s summary judgment motion was pending, and when no other party had moved for summary judgment. CP 1999-2011, 2238-50, 2251-62, 2986-89.

In any event, absent prejudice, “undue delay” is insufficient:

We have held that undue delay on the part of the movant in proposing the amendment constitutes grounds to deny a motion to amend only “where such delay works undue hardship or prejudice upon the opposing party”. ***Appliance Buyers Credit Corp. v. Upton***, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). This holding is in accord with the holding of many courts that delay, excusable or not, in and of itself is not sufficient reason to deny the motion.

Caruso, 100 Wn.2d at 349 (collecting cases). Indeed, undue delay is only one factor in determining whether the nonmoving party is sufficiently prejudiced to warrant denying a motion to amend – the others are “unfair surprise, and jury confusion.” ***Wilson v. Horsley***,

137 Wn.2d 500, 505-06, 974 P.2d 316 (1999). Neither Respondents nor the trial court address these two factors.

There is no “unfair surprise,” where Respondents fault Plaintiffs for proposing amendments based on facts they already knew. LCYE BR 16-17; MSC BR 28-29. Respondents knew the facts too. Nor is there any reason to believe a jury would be confused by amendments made long before trial.

As for prejudice, LYCE does not address it, and MSC repeats the trial court’s ruling that “the motion is, for lack of a legal term, late in the game. It is prejudicial to the defendants at issue in light of the case schedule and in light of the summary judgment motion that is pending....” 10/12/18 RP 15; LYCE BR 16-18; MSC BR 28-29. The only identified prejudice is “delay,” but seeking to amend before the court has even ruled on summary judgment is not undue delay, and does not address either of the remaining inquiries. It is, simply put, insufficient.

Any prejudice to Patton was minimal because Plaintiffs did not seek to add new causes of action, but asserted Patton (and others) could be individually liable based on the same facts asserted. CP 1981; *contrast Doyle, supra*. Others did not even have their motions pending when Plaintiffs sought leave to amend.

Allowing Plaintiffs to amend would not have been futile for the same reasons discussed above. *Supra*, Argument § C. Plaintiffs assert intentional torts. CP 1715-16. Corporate officers and directors may be personally liable for knowing torts, and corporate employees and agents are liable for tortious conduct within the scope of their employment or agency. **Annechino**, 175 Wn.2d at 637. The trial court did not decide these questions. This Court should decline to do so for the first time on appeal.

In sum, it is manifestly unreasonable to deny Plaintiffs' motion to amend based on facts known to all parties, simply because one individual had already moved for summary judgment.

CONCLUSION

This Court should give effect to the clear intent of the childhood-sex-abuse statute and reverse and remand for trial.

RESPECTFULLY SUBMITTED this 9th day of October 2020.

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October 09, 2020 - 3:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53957-8
Appellate Court Case Title: R.N., J.W., & S.C., Appellants v. Kiwanis International et al., Respondents
Superior Court Case Number: 15-2-00383-3

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