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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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MICHAEL JAMES MILLER,

Plaintiff/Appellant,

v.

CHARLES CAMPBELL, as Personal Representative of the Estate of  
PATRICK W. CAMPBELL,

Defendant/Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress in the civil justice system.

## II. STATEMENT OF THE CASE

The underlying facts of this case are set forth in the parties' briefing. See Miller Br. at 2-10; Campbell Br. at 2-14; Miller Reply Br. at 1-5. For purposes of this amicus curiae brief, the following facts are relevant:

Michael Miller (Miller) brought this tort action based upon childhood sexual abuse against the estate of his late stepfather, Patrick W. Campbell (Campbell), alleging sexual abuse between 1975 and 1984, beginning when Miller was 10 or 11 years old. Miller Br. at 2, 7-8; Campbell Br. at 2. Campbell died on November 17, 2002, and Miller filed a claim against his estate on March 28, 2003, which was rejected on July 11, 2003. Miller Br. at 3, 7. Miller brought this action on August 8, 2003. Id. at 7-8.

Five years earlier, in July 1998, Miller had filed a voluntary petition for Chapter 7 bankruptcy. Id. at 7; Campbell Br. at 2. In his

schedule of personal property, Miller disclosed assets including “a possible claim against Ford under lemon law – max recovery \$3,500.00.” Campbell Br. at 7. Miller did not list any potential claim arising out of Campbell’s alleged sexual abuse. Id.; Miller Br. at 7. The bankruptcy court issued a Discharge of Debtor on November 24, 1998, concluding Miller had no assets available for distribution to the scheduled creditors. Miller Br. at 7; Campbell Br. at 2, 7-8.

In March 2004, Campbell moved for summary judgment dismissal of Miller’s tort action based on the applicable statute of limitations, RCW 4.16.340, arguing that Miller knew the elements of his claim more than three years prior to bringing suit in 2003. Miller Br. at 8.<sup>1</sup> In response, Miller offered evidence that, while he knew for many years that some abuse had occurred and that it was hurtful, he did not know the connection between the sexual abuse and later-occurring injuries, including Post Traumatic Stress Disorder, until after Patrick Campbell’s death, and that some instances of abuse were remembered for the first time after Campbell’s death. Id. at 8, 23. The superior court denied Campbell’s motion for summary judgment.

On November 19, 2004, Miller moved for partial summary judgment as to liability. Miller Br. at 8. This motion was denied. Id. at 9.

Subsequently, in June 2005, Campbell moved to dismiss Miller’s tort action on the basis of judicial estoppel. Campbell contended Miller’s

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<sup>1</sup> The full text of RCW 4.16.340, together with the legislatively enacted statement of intent that accompanied the 1991 amendments to the statute, is reproduced in the Appendix to this amicus curiae brief, for the convenience of the Court.

failure to schedule a potential claim for sexual abuse as an asset in his 1998 Chapter 7 bankruptcy proceeding barred him from pursuing the present action. Miller Br. at 10; Campbell Br. at 8. The trial court made findings relating to judicial estoppel and granted Campbell's motion. See Campbell Br. at 11. It concluded:

The plaintiff, in this case, the Court determines, knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured. He may not have known the full extent of those injuries. But he had an obligation to list the above as a potential asset, and it is not for us to look back and say would the trustee have done this, would the trustee have done that, when we wouldn't have to do that at all had the plaintiff listed what he knew: That he had been sexually abused and injured. Plaintiff was legally required to list this potential claim and he didn't.

Campbell Br. at 11-12 (quoting VRP 25-26). Miller moved unsuccessfully for reconsideration. Campbell Br. at 12-14; Miller Br. at 10. This appeal followed. Miller Br. at 10.

### **III. ISSUE PRESENTED**

In light of Washington public policy underlying RCW 4.16.340, the childhood sexual abuse statute of limitations, does judicial estoppel bar a victim of abuse from pursuing a tort action based on later-developing injuries and/or later-acquired knowledge, because he had some knowledge of abuse at the time he filed bankruptcy and did not list a possible claim for childhood sexual abuse as an asset in the bankruptcy proceeding?

### **IV. SUMMARY OF ARGUMENT**

Judicial estoppel is an equitable doctrine designed to protect the integrity of the courts, by precluding a party from asserting one position in a court proceeding then seeking an advantage by taking a *clearly inconsistent* position in a later proceeding. It is not a technical defense

available to adversaries for their own purposes, but a means for courts to assure respect for the judicial system without resort to the perjury statutes.

State law, not federal bankruptcy law, provides the touchstone for determining whether a party has asserted clearly inconsistent positions supporting judicial estoppel of a state tort action. Under Washington's childhood sexual abuse statute of limitations, RCW 4.16.340, and the public policy animating this statute, it is not inconsistent for a victim of abuse to be aware since childhood that he has been abused, yet not have sufficient knowledge of the potential tort claim against his abuser. By permitting a claim to be pursued many years after the abuse, based on latent injuries and/or later acquired knowledge, RCW 4.16.340 allows a meaningful remedy to victims for the unique harm that flows from childhood sexual abuse. Accordingly, a victim's mere omission of a possible claim for childhood sexual abuse in a bankruptcy proceeding that predates awareness of latent injuries or additional knowledge about the traumatic experience is not enough to bar pursuit of a tort action for the later-discovered injuries, under judicial estoppel.

The broad definition of "claim" for purposes of scheduling assets and liabilities in a bankruptcy proceeding should not control in this context. For purposes of determining whether judicial estoppel will be applied by a Washington court, a party's failure to list a possible claim in bankruptcy is not clearly inconsistent with the later assertion of a related claim unless it was based on a conscious choice.

If a question of fact exists as to the timeliness of a claim under RCW 4.16.340, based on the victim's knowledge – including knowledge at the time of bankruptcy - then determination of whether he is asserting a clearly inconsistent position should be deferred pending trial of the underlying claim and resolution of the statute of limitations defense.

## V. ARGUMENT

### A. Background Regarding The Equitable Doctrine of Judicial Estoppel In Washington, And Its Application In The Bankruptcy Context.

Judicial estoppel is a longstanding equitable doctrine designed to protect the integrity of the judicial process and prevent manipulation of the courts by litigants. See Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 906-09, 28 P.3d 832 (2001) (discussing Washington doctrine of judicial estoppel); see also In re Coastal Plains, Inc., 179 F.3d 197, 205-06 (5<sup>th</sup> Cir. 1999) (discussing federal doctrine of judicial estoppel, in context of bankruptcy proceeding). The doctrine's primary purposes are to preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes, and to avoid inconsistency, duplicity and the waste of time. See Johnson, 107 Wn. App. at 906; First Nat'l Bank v. Marshall, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982). It applies where a party asserts a position to his advantage in one court proceeding and then seeks an advantage by asserting a clearly inconsistent position in a later proceeding. See Cunningham v. Reliable Concrete, 126 Wn. App. 222, 224, 108 P.3d 147 (2005); see also Sprague v. Sysco Corp., 97 Wn. App. 169, 180 n.4,

982 P.2d 1202 (1999) (noting generally judicial estoppel prevents party from taking factually inconsistent positions in separate proceedings). In short, judicial estoppel prevents litigants from “playing fast and loose with the courts.” Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9<sup>th</sup> Cir. 2001) (quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990)).

Because the doctrine is equitable in character, it is responsive to the needs of specific circumstances. Id., 270 F.3d at 783. It does not establish inflexible prerequisites, nor provide a technical defense to be wielded by an adversary. Id.; see also Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3<sup>rd</sup> Cir. 1996). The application of judicial estoppel to particular circumstances is reviewed under the deferential abuse of discretion standard. See Cunningham, 126 Wn. App. at 227. However, an abuse of discretion will be found where the superior court’s exercise of discretion was based on a misapprehension of the law or a clearly erroneous assessment of the facts. See In re Coastal Plains, Inc., 179 F.3d at 205; cf. Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (holding erroneous view of the law constitutes abuse of discretion).

While the purposes of judicial estoppel are clear, the elements of the doctrine as developed in Washington are somewhat cloudy. In part this may be due to case law discussing both judicial estoppel and equitable or collateral estoppel, and seemingly conflating the elements of each. See

Johnson at 906-08. For example, in Markley v. Markley, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948), the Supreme Court adopted a six-part test for judicial estoppel: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

This test has been criticized as importing considerations that pertain to traditional estoppel, which focuses on the dealings between the *parties*, but are irrelevant when the goal is to protect the *court system*, not individual litigants. See 14 Lewis H. Orland & Karl B. Tegland, Wash. Prac: Trial Prac. §382 (5th ed. 1996). In particular, proof of privity, detrimental reliance and a judgment on the merits should not be necessary to the application of judicial estoppel, and Division III of this Court has largely disregarded these elements. See Johnson at 907-08 (accepting view of majority of courts that such elements are not germane to judicial estoppel).<sup>2</sup> Subsequently, Division II applied a three-factor test based on federal jurisprudence, requiring (1) assertion of a later position that “clearly conflicts” with the party’s earlier position; (2) judicial acceptance of the earlier position; and (3) an unfair advantage to the inconsistent

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<sup>2</sup> However, a later case from Division III describes all six elements as “nonexclusive factors,” while noting that “[t]he focus is upon the inconsistent position.” DeAtley v. Barnett, 127 Wn. App. 478, 483-84, 112 P.3d 540 (2005) (citations omitted).

party, or unfair detriment to an opposing party. Garrett v. Morgan, 127 Wn. App. 375, 378, 112 P.3d 531 (2005) (applying analysis of New Hampshire v. Maine, 532 U.S. 742 (2001)).

This analysis is in accord with the general notion that judicial estoppel requires some acceptance of a position by the court, suggesting that a party is seeking to gain an advantage or prejudice an opponent by taking inconsistent positions. See Johnson at 908-09; Cunningham at 227-33 (recognizing judicial estoppel based on party's inconsistent positions, acceptance by court, and fact that party received benefit of prior position by obtaining discharge in bankruptcy); see also Witzel v. Tena, 48 Wn.2d 628, 633, 295 P.2d 1115 (1956) (finding judicial estoppel where party's prior inconsistent position was relied upon by court and parties in prior proceeding). The party's conduct must demonstrate an attempt to abuse the judicial process through his inconsistent positions. See Ryan Operations, G.P., 81 F.3d at 361 (noting judicial estoppel prevents the bad faith assertion of inconsistent positions).

Given the undercurrent of calculated abusive conduct that supports judicial estoppel in various contexts, it stands to reason that the doctrine requires a showing that contradictory positions advanced by the party to be estopped are *clearly inconsistent*. "Judicial estoppel is not invoked to address relatively minor inconsistencies in a plaintiff's arguments ... ." Dawson v. J.G. Wentworth & Co., Inc., 946 F.Supp. 394, (E.D.Pa. 1996) (citation omitted). Nor should it be applied when apparently inconsistent

positions are the result of mere inadvertence or mistake. See Envirodyne Indus. v. Viskase Corp., 183 B.R. 812, 823 (Bankr. N.D.Ill. 1995); Cunningham at 234.

This does not mean that judicial estoppel requires direct proof of a party's *intent to mislead the court*. See Cunningham at 233-34. While evidence of intent may be relevant under some circumstances, this Court in Cunningham refused to require it as a necessary element for judicial estoppel in all settings, recognizing that deliberate or intentional manipulation of the court system may be inferred when a party with knowledge of the facts giving rise to his inconsistent positions makes a conscious choice to pursue them for his own purposes. Id. at 234. In contrast, where differing positions are taken based, not on a conscious choice, but mere mistake, inadvertence or lack of knowledge, judicial estoppel should not be invoked to work an injustice or create a windfall for an adversary. See id.; see also Envirodyne, 183 B.R. at 825.

All three Divisions of this Court have recognized that judicial estoppel may, in appropriate circumstances, bar a claim that a party failed to disclose in a prior bankruptcy proceeding. See Johnson at 909-10; Cunningham at 226-34; Garrett at 380-81. This arises where a bankruptcy debtor has knowledge of a potential claim before filing a bankruptcy petition, but does not list it as an asset, as required under 11 U.S.C. §521 (1) and Fed. R. Bankr. P. 1007 (h). See Johnson at 910. In so doing, the debtor keeps for himself an asset that may have created a dividend for

certain creditors, while gaining the advantage of a discharge of debts based on disposition of his bankruptcy as a “no asset” case. See id. at 909; Cunningham at 232-33. The clear inconsistency in this strategy has resulted in judicial estoppel of a later-asserted tort claim by the debtor, even where the bankruptcy discharge was vacated. See Cunningham at 232-33; see also Bartley-Williams v. Kendall, \_\_\_ Wn.App. \_\_\_, 138 P.3d 1103, 1106-07 (2006) (noting judicial estoppel against debtor does not preclude bankruptcy trustee from pursuing pre-petition claim for benefit of creditors).<sup>3</sup>

The question of whether judicial estoppel was appropriately applied in this case turns on whether Miller’s assertion of a tort claim for childhood sexual abuse in 2003 was “clearly inconsistent” with his omission of such a claim from his bankruptcy schedules in 1998. Washington law and public policy regarding the nature of Miller’s claim, and the procedures for pursuing it, necessarily guide this inquiry. These considerations are discussed in Section B.

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<sup>3</sup> The Court in Bartley-Williams disagreed with Division II’s analysis in Garrett, supra, which applied judicial estoppel to bar pursuit of claims by the bankruptcy trustee. The Court noted that considerations of fairness and equity generally support allowing the bankruptcy trustee to reopen proceedings, schedule a pre-petition claim that the debtor had failed to disclose, and pursue the claim on behalf of the bankrupt estate. See 138 P.3d at 1107 (citing Cheng v. K&S Diversified Invs., Inc., 308 B.R. 448; 459-60 (B.A.P. 9<sup>th</sup> Cir. 2004)).

**B. Under The Doctrine Of Judicial Estoppel The Timely Assertion Of A Tort Claim For Childhood Sexual Abuse Is Not “Clearly Inconsistent” With The Mere Failure To List A Possible Claim Arising From Such Abuse In Bankruptcy, Where The Tort Claim Is Based On Latent Injuries And/Or After-Acquired Knowledge.**

While judicial estoppel involves the exercise of discretion, it must be applied in view of the underlying law, here Washington law governing tort claims for childhood sexual abuse. The superior court below applied judicial estoppel on the ground that Miller’s assertion of a childhood sexual abuse claim in 2003 was inconsistent with his position in a bankruptcy proceeding five years earlier. See Campbell Br. at 11-12 (quoting VRP 25-26). In particular, the court concluded that because Miller knew of some acts of abuse since childhood and was aware that these acts were hurtful, he had a duty to list a possible abuse claim as an asset in the bankruptcy. Id.; see also supra text at 3. This analysis appears to disregard Washington law regarding the nature of childhood sexual abuse. Under RCW 4.16.340 and the public policy animating this statute, Miller’s mere failure to schedule a possible abuse claim in 1998 was not necessarily inconsistent with his later discovery and pursuit of a tort action.

Washington’s childhood sexual abuse statute of limitations reflects a strong public policy to provide remedies to victims of childhood sexual abuse. See RCW 4.16.340; see also C.J.C. v. Corp. of Catholic Bishop, 138 Wn.2d 699, 706-14, 985 P.2d 262 (1999) (discussing purposes of RCW 4.16.340). At the time the Legislature substantially amended the

statute in 1991, it took the unusual step of enacting a statement of intent, which recognizes that childhood sexual abuse is a pervasive problem, causing long-lasting damage. See Laws of 1991, ch. 212 §1 (paragraphs (1) & (2)). One characteristic of the harm flowing from childhood sexual abuse is that the victim may repress memories of abuse or may not be able to connect known acts of abuse to harm until years after the abuse has occurred. See id. (paragraphs (3) & (4)). Further, even though the victim may be aware of some harm resulting from abuse, more serious injuries may not be discovered until many years later. See id. (paragraph (5)). “This is because of the insidious nature of childhood sexual abuse – it is a traumatic experience causing long-lasting damage.” Cloud ex rel. Cloud v. Summers, 98 Wn. App. 724, 733, 991 P.2d 1169 (1999).

As this Court has recognized, one hallmark of childhood sexual abuse is that such abuse “by its very nature, may render the victim *unable* to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later.” Id., 98 Wn. App. at 735; see also Hollmann v. Corcoran, 89 Wn. App. 323, 949 P.2d 386 (1997) (reversing dismissal of childhood sexual abuse claim based on evidence victim did not make connection between known abuse and injuries until undergoing extensive counseling years later). The victim is in effect under a “disability,” and will not be held to discover and pursue a cause of action until that disability is lifted. See Cloud at 735. Accordingly, under RCW 4.16.340 (1)(c), the statute of limitations is

tolled until the victim *actually* discovers that “the act caused the injury for which the claim is brought.” See Hollmann, 89 Wn. App. at 334.<sup>4</sup>

The superior court’s application of judicial estoppel in this case appears to disregard the nature of childhood sexual abuse as recognized in RCW 4.16.340 and the legislative findings. The court relied on undisputed evidence that Miller knew of some abuse and had some awareness that it was hurtful at the time of his bankruptcy. See Campbell Br. at 11-12; Miller Br. at 10, 23. Yet, the Legislature’s statement of intent in enacting RCW 4.16.340 makes clear that it rejected prior case law holding that knowledge of some harm flowing from abuse put the victim on notice to inquire as to the validity of a tort claim. See Laws of 1991, ch. 212 §1 (paragraph (6)); see also Raymond v. Ingram, 47 Wn. App. 781, 737 P.2d 314, *review denied*, 108 Wn.2d 1031 (1987) (pre-RCW 4.16.340 case, holding discovery of some injury caused by abuse commenced running of statute of limitations). Now, under RCW 4.16.340, Miller’s earlier knowledge of some abuse and that it was hurtful does not equate to the knowledge necessary to identify and pursue a tort claim.<sup>5</sup>

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<sup>4</sup> In contrast, RCW 4.16.340 (1)(b) addresses claims involving repressed memories of abuse, and requires that they be brought within three years of the time the victim knew or should have known his injuries were caused by such abuse. See Hollmann at 334.

<sup>5</sup> In this regard, childhood sexual abuse is not unlike other tort claims involving latent injuries, where customary notions governing the limitation of actions are altered to account for the plaintiff’s lack of knowledge. See e.g. Ruth v. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969). The difference may be that the victim’s inability to know his injury and/or its cause in this context is less intuitive to a layperson than in other settings, such as in Ruth, where a surgical sponge was left

The superior court appears to have been persuaded by Campbell's reliance on federal bankruptcy law as controlling Miller's obligation to disclose a potential claim. See Campbell Br. at 11-12 (citing VRP 25-26), & 16-25. Bankruptcy law required Miller to schedule potential and contingent claims, see 11 U.S.C. §521, and broadly defined "claim," see 11 U.S.C. §101.<sup>6</sup> Campbell argues that, whatever the "leeway given claimants under a [sic] RCW 4.16.340," Miller was required to disclose his childhood sexual abuse claim in his Chapter 7 schedules. Miller Br. at 25. To the extent this argument suggests that federal bankruptcy law controls the application of judicial estoppel, this is incorrect. Judicial estoppel is an equitable doctrine, and its use to protect the integrity of the judicial system in Washington is governed by Washington law. See Johnson, 107 Wn. App. at 906; cf. In re Coastal Plains, Inc., 179 F.3d at 205 (noting, "[f]ederal law governs the application of judicial estoppel in federal courts;" quoting Johnson v. Oregon Dept. of Hum. Res., 141 F.3d 1361 (9<sup>th</sup> Cir. 1998)).

The relevant question under Washington law is not whether Miller had an obligation in bankruptcy court to disclose a potential sexual abuse claim, but whether bringing this action is "clearly inconsistent" with his

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in the plaintiff's body. It would seem obvious that judicial estoppel would not bar a tort claim based on injuries resulting from a sponge negligently left in a surgical site, which was not disclosed in a bankruptcy, when the plaintiff had no knowledge of this until long after the bankruptcy. What RCW 4.16.340 makes clear is that victims of childhood sexual abuse often suffer from a similar lack of knowledge.

<sup>6</sup> As Miller notes, the referenced sections are those that were in effect in 1998. See Miller Reply Br. at 17 n.10.

prior position in bankruptcy court. See Johnson at 906. The bankruptcy statutes provide little guidance in answering this question. The broad scope of “claims” dealt with in bankruptcy furthers the purpose of bankruptcy proceedings to comprehensively settle the affairs of the debtor and creditors. See In re A.H. Robins Co., Inc., 63 B.R. 986, 992-94 (Bankr. E.D.Va. 1986). When the debtor is a potential tortfeasor facing protracted piecemeal litigation arising out of pre-petition conduct, it may make sense that contingent or unmatured claims *known to the debtor* be included under the plan, in order to compensate all creditors on an equitable basis and allow the debtor a “fresh start.” Id. at 993.<sup>7</sup> Similarly, when the debtor is a potential plaintiff, disclosure of contingent or unmatured pre-petition claims *known to the debtor* fulfills his obligation to bring forward all possible assets for the satisfaction of creditors, in exchange for getting a fresh start. See Johnson at 909.

In either situation, the bankruptcy disclosure requirements presuppose that the debtor had sufficient knowledge to be able to identify and assert a possible claim in his bankruptcy petition. The equities are entirely different if he did not, and the requirements of bankruptcy law should not serve as the basis for judicial estoppel in such circumstances. Judicial estoppel is only appropriate where a party has made a *conscious*

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<sup>7</sup> Even in this context, the bankruptcy rules do not require inclusion of all contingent claims against the debtor, as “courts seek to balance the competing interests of the debtor’s fresh start with the creditor’s right to compensation.” In re Hassanally, 208 B.R. 46, 53 n.9 (B.A.P. 9<sup>th</sup> Cir. 1997). Bankruptcy courts often do not include future or latent claims against the debtor, guided by concerns of assuring fundamental fairness to future claimants. See id. at 52-53 & n.9

*choice* with respect to the position taken that is the basis for invoking the doctrine. See Cunningham at 234.

Under Washington law, it cannot be said that a victim of childhood sexual abuse makes a conscious choice to withhold a claim, merely because he has some knowledge that abuse occurred and was hurtful. To allow judicial estoppel on this basis would amount to restoring the view rejected by the Legislature in RCW 4.16.340, in effect imposing a burden on the victim to overcome his disability and realize he has a possible claim. This would undermine the strong public policy recognized in RCW 4.16.340. Consistent with this statute and its purpose, a victim's mere omission of a possible claim for childhood sexual abuse in a bankruptcy proceeding that predates awareness of latent injuries or additional knowledge about the traumatic experience is not enough to bar pursuit of a later-discovered claim under judicial estoppel, absent proof that this was the result of a conscious choice.

Under the foregoing analysis, if the superior court did not apply the doctrine of judicial estoppel in light of the unique nature of childhood sexual abuse and the public policy reflected in RCW 4.16.340, then reversal is required. An error of law regarding the basis for applying judicial estoppel constitutes an abuse of discretion. However, there is another aspect of this case, not discussed in the parties' briefing, that requires discussion if a remand is required: may the superior court resolve disputed facts related to whether judicial estoppel applies if those same

facts are at issue in the underlying tort claim? This issue is addressed in Section C.

**C. Where Questions Of Fact Regarding The Plaintiff's Knowledge Of A Claim, Including At The Time Of A Prior Bankruptcy Proceeding, Bear On Both The Application Of Judicial Estoppel And A Statute Of Limitations Defense, The Court Should Defer Ruling on Judicial Estoppel Until Trial Of The Underlying Claim.**

The superior court denied Campbell's motion for summary judgment based upon the statute of limitations, finding that the issue of when Miller discovered his claim must be resolved at trial. See Miller Br. at 8. Necessarily, this inquiry is intertwined with any assessment of whether Miller should be judicially estopped from pursuing his tort claim, based on his failure to disclose a possible claim during bankruptcy proceedings in 1998. See Campbell Br. at 14 (recounting superior court determination that Miller's claimed lack of knowledge at the time of bankruptcy was "not credible"), & 37 (contending that "a central question at trial would have been why Miller did not tell his bankruptcy trustee about his sex abuse claim ..."). Campbell argues that the facts supporting judicial estoppel would also allow the jury to reject Miller's claim on the merits. See id. Given the inter-relationship of the factual disputes at the heart of both the statute of limitations defense and the judicial estoppel inquiry, it was inappropriate for the superior court to dismiss Miller's

claim based on judicial estoppel prior to determination of the disputed facts at trial.<sup>8</sup>

As discussed, supra Section A, judicial estoppel requires a showing that the party to be estopped has taken clearly inconsistent positions. Whether a plaintiff's assertion of a claim contradicts a prior failure to identify the claim turns largely on what he knew and when he knew it. These same issues govern whether an action is timely commenced. Thus, a determination of whether judicial estoppel applies should not be undertaken before the factual issues regarding Miller's knowledge are resolved with respect to the statute of limitations defense. To do so would alter the traditional fact-finding process. Cf. Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co., 111 B.R. 457, 462 (Bankr. S.D.N.Y. 1990) (holding question of fact regarding whether potential cause of action was concealed from plaintiff by defendant prevented pre-trial dismissal based on judicial estoppel).

In this case, if the jury determines under RCW 4.16.340 that Miller had sufficient knowledge to bring his sexual abuse claim more than three years prior to filing this action, then a verdict for Campbell would follow, and the question of judicial estoppel would be moot.<sup>9</sup> On the other hand,

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<sup>8</sup> The superior court's dismissal is especially troubling if, as Campbell asserts, in applying judicial estoppel the court made factual determinations, on what appears to be a documentary record, regarding the credibility of Miller's testimony that he lacked knowledge to schedule his sexual abuse claim in the 1998 bankruptcy. See Campbell Br. at 14.

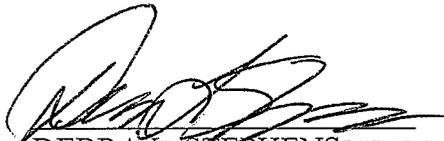
<sup>9</sup> This result would not follow in all cases. For example, where a bankruptcy proceeding takes place *within* the three-year limitation period under RCW 4.16.340, an action that is otherwise timely may nonetheless be barred under the

if Campbell's statute of limitations defense is rejected and Miller prevails on the merits, it would seem that resolution of the judicial estoppel issue would abide this determination.<sup>10</sup>

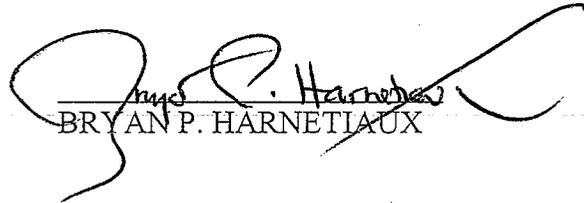
## VI. CONCLUSION

This Court should adopt the reasoning advanced in this brief and resolve this case accordingly.

DATED this 30<sup>th</sup> day of August, 2006.



DEBRA L. STEPHENS



BRYAN P. HARNETIAUX

On Behalf of WSTLA Foundation

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doctrine of judicial estoppel, if the plaintiff had sufficient knowledge to disclose the claim at the time of the bankruptcy and failed to do so.

<sup>10</sup> There is a second issue raised by Miller in this appeal, regarding denial of his motion for summary judgment on liability. See Miller Br. at 1-2, 31-34; Campbell Br. at 35-38; Miller Reply Br. at 18-22; supra text at 2. WSTLA Foundation does not address this issue. However, if Miller prevails on this issue, this also would seem to moot the question of judicial estoppel.

## APPENDIX

### **RCW 4.16.340 Actions based on childhood sexual abuse**

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

(a) Within three years of the act alleged to have caused the injury or condition;

(b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or

(c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

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

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

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

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

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

[1991 c 212 § 2; 1989 c 317 § 2; 1988 c 144 § 1.]

**Finding--Intent—1991 c 212:** "The legislature finds that:

(1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.

(2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.

(3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.

(4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.

(5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.

(6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986).

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

[1991 c212 §1]