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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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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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SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

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Kelby D. Fletcher  
WSBA No. 5623  
1501 4<sup>th</sup> Ave., Suite 2800  
Seattle, WA 98101  
(206) 624-6800

Bryan P. Harnetiaux  
WSBA No. 5169  
517 E. 17<sup>th</sup> Avenue  
Spokane, WA 99203  
(509) 624-3890

Sarah C. Schreck  
WSBA No. 39417  
828 W. Cliff Dr., #1  
Spokane, WA 99204  
(509) 475-4462

On Behalf of 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.

WSTLA Foundation appeared as amicus curiae before the Court of Appeals in this case and filed an amicus curiae brief. See Brief Of Amicus Curiae Washington State Trial Lawyers Association Foundation (C.A. #56736-5-I).<sup>1</sup> This Court has allowed WSTLA Foundation to file this brief, supplementing its brief at the Court of Appeals.

## II. INTRODUCTION AND STATEMENT OF THE CASE

The underlying facts are set forth in the WSTLA Fdn. Am. Br. at 1-3, and in the Court of Appeals opinion in this case, Miller v. Campbell, 137 Wn.App. 762, 155 P.3d 154 (2007), *review granted*, 162 Wn.2d 1005 (2008).

Subsequent to the grant of review, plaintiff/respondent Michael Miller (Miller) moved this Court to substitute Virginia Burdette

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<sup>1</sup> The Court of Appeals amicus curiae brief, including a February 7, 2007 correction revising one citation, is referred to in this brief as "WSTLA Fdn. Am. Br."

Debra Stephens was co-counsel for WSTLA Foundation in this case at the Court of Appeals (Division I), but withdrew shortly before her appointment to the Court of Appeals (Division III). See "Notice of Intent to Withdraw," dated May 7, 2007 (C.A. #56736-5-I). Now a member of this Court. Justice Stephens has recused in this matter. See Order (March 5, 2008).

(Burdette), Chapter 7 Trustee in the Miller bankruptcy, as real party in interest, pursuant to RAP 3.2(a). See Motion For Substitution Of Real Party In Interest And Request For Emergency Hearing (March 21, 2008). The defendant/petitioner Charles Campbell, as Personal Representative of the Estate of Patrick Campbell (Campbell), filed an answer to the motion for substitution on April 7, 2008. See Answer Of Petitioner Charles W. Campbell To Motion For Substitution Of Real Party In Interest. At this writing, the Court has not ruled upon the motion for substitution.<sup>2</sup>

At the time this case was heard at the Court of Appeals, Miller was viewed as the real party in interest regarding his tort claim for childhood sexual abuse. See Miller Br. at 8-10; Campbell Br. at 1-2; WSTLA Fdn. Am. Br. at 9-19, & n.3.<sup>3</sup> Subsequent to the Court of Appeals opinion in Miller, this Court decided Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 541, 160 P.3d 13 (2007), holding that a bankruptcy trustee is the real party in interest in a civil action based upon a claim not scheduled as an asset by the debtor in a prior Chapter 7 bankruptcy proceeding. Miller's motion to substitute Burdette as the plaintiff/respondent real party in interest is apparently based upon this decision. See Motion for Substitution at 2-3. If this motion is granted, it is anticipated Burdette will argue Campbell's

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<sup>2</sup> The motion for substitution will be considered by the Court en banc on May 1, 2008, subsequent to the deadline for this brief. See Letter of Deputy Clerk Susan L. Carlson to Counsel (April 24, 2008).

<sup>3</sup> Campbell raised the issue of Miller's "legal capacity to pursue an unscheduled claim" in the petition for review, apparently resulting in Miller's unsuccessful attempt to supplement the record in his answer to the petition. See Campbell Pet. for Rev. at 19; Miller Ans. to Pet. for Rev. at 11-12 & Appendix. This Court granted Campbell's motion to strike part of the answer in conjunction with its grant of review. See Order (March 5, 2008). The pending motion for substitution followed.

claim of judicial estoppel cannot be asserted against Burdette, as trustee in bankruptcy. Id.

In the superior court, Campbell made two motions for summary judgment, one based upon the statute of limitations, RCW 4.16.340, and the other based upon the doctrine of judicial estoppel.<sup>4</sup> The superior court denied the first summary judgment motion, concluding it is not possible to determine as a matter of law, under RCW 4.16.340(1)(c), that more than three years had elapsed from the time Miller discovered the injury for which he seeks damages. See Miller, 137 Wn.App. at 767. However, the superior court granted Campbell's motion for summary judgment based upon the doctrine of judicial estoppel, concluding that Miller had previously acted inconsistently because he was aware of the potential childhood sexual abuse tort claim at the time of his bankruptcy but did not schedule it, as required by federal law. See id. at 768.

Miller appealed the dismissal based upon judicial estoppel to the Court of Appeals, Division I, which reversed. The court concluded that the superior court erred in not taking into account the unique nature of childhood sexual abuse and RCW 4.16.340(1)(c), permitting tolling of the limitation period regarding a claim for injuries not previously understood by the plaintiff. Id. at 772-74. The judicial estoppel analysis focused on Washington law governing childhood sexual abuse tort claims, concluding

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<sup>4</sup> The full text of the current version of RCW 4.16.340, together with the legislatively enacted statement of intent that accompanied the 1991 amendment to the statute, 1991 Laws Ch. 212 § 1, is reproduced in the Appendix to this supplemental brief.

that the requirements of federal bankruptcy law regarding the scheduling of potential claims were not determinative. See id.

Campbell sought review before this Court, raising the following issue:

Should this Court accept review of the decision of the Court of Appeals reversing the trial court's dismissal of Miller's claims under the doctrine of judicial estoppel where this decision conflicts with other decisions of the appellate courts pursuant to RAP 13.4(b)(1) and (2) and involves issues of substantial public interest pursuant to RAP 13.4(b)(4)?

See Campbell Pet. for Rev. at 1. This Court granted review.

### III. ISSUES PRESENTED

- 1.) To what extent, if any, does the doctrine of judicial estoppel remain relevant to this case if the trustee in bankruptcy is substituted as plaintiff/respondent?
- 2.) Did the Court of Appeals properly construe the childhood sexual abuse statute of limitations, RCW 4.16.340, in concluding that judicial estoppel did not apply against the bankrupt debtor for failure to schedule his childhood sexual abuse tort claim in the Chapter 7 bankruptcy?

### IV. SUMMARY OF ARGUMENT

#### *Re: Judicial Estoppel*

If bankruptcy trustee Burdette is substituted for plaintiff/respondent Miller as real party in interest in this civil action, then under this Court's decision in Arkison v. Ethan Allen, Inc., Burdette is not subject to the doctrine of judicial estoppel based upon any alleged inconsistent position taken by Miller.

*Re: RCW 4.16.340*

To the extent the Court of Appeals' explication of RCW 4.16.340 remains subject to review, that court properly construed and applied the statute under the circumstances in a manner consistent with prior case law. Given the unique nature of the disabilities resulting from childhood sexual abuse, RCW 4.16.340(1)(c) allows recovery for previously unrecognized injuries, if pursued within three years of actual discovery, regardless of a victim's prior knowledge of the sexual abuse and other injuries sustained as a result of the abuse. The Court of Appeals was also correct in concluding that questions surrounding what Miller knew, and when, should be resolved at trial, in the context of Campbell's statute of limitations defense.

## V. ARGUMENT

As indicated, supra at 2, at this writing this Court has not ruled on the pending motion to substitute bankruptcy trustee Burdette for Miller as real party in interest. The argument below has been framed with this uncertainty in mind.<sup>5</sup>

### A. **Judicial Estoppel Cannot Be Applied Against A Chapter 7 Bankruptcy Trustee For Inconsistent Positions Taken By The Judgment Debtor Not Involving The Trustee.**

Subsequent to the Court of Appeals opinion in this case, this Court decided Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 541, 160 P.3d 13

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<sup>5</sup> The supplemental brief deadline for the parties is May 2, 2008. As a consequence, at this writing WSTLA Foundation only has the benefit of Campbell's petition for review, along with the answer to Miller's motion for substitution of real party in interest

(2007), holding that “a trial court may not generally apply the doctrine of judicial estoppel to bar a bankruptcy trustee standing as the real party from pursuing a debtor’s legal claim not listed as an asset during bankruptcy proceedings.” A Chapter 7 bankruptcy trustee is not subject to judicial estoppel “[a]bsent some inconsistency on the part of the trustee.” Id.<sup>6</sup>

The only issue explicitly raised on review before this Court is whether the Court of Appeals erred in reversing the superior court’s application of judicial estoppel to plaintiff-judgment debtor Miller. See Campbell Pet. for Rev. at 1. If, as requested, this Court substitutes bankruptcy trustee Burdette for Miller, then judicial estoppel should not apply to the trustee when based solely upon Miller’s conduct in failing to schedule the sexual abuse claim in the bankruptcy. See Arkison, 160 Wn.2d at 541. In this event, it would seem no issue remains to be decided by the Court.<sup>7</sup>

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(Campbell Ans. to Mot. for Substitution), in preparing this supplemental amicus curiae brief.

<sup>6</sup> Arkison also addressed whether judicial estoppel would be applied to the judgment debtor under these circumstances, with respect to any potential recovery of proceeds left over from the civil action, after payment of all bankruptcy debts. See 160 Wn.2d at 541-42 n.2. The Court indicated this was a question for the trial court on remand, or for the bankruptcy court. Id. In so doing, the Court appears to call into question the determination in Bartley-Williams v. Kendall, 134 Wn.App. 95, 102, 138 P.3d 1103 (2006), that when a bankruptcy trustee is the real party in interest the appellate court may nonetheless apply judicial estoppel as to the judgment debtor. See Arkison at 540-42.

<sup>7</sup> As the Court of Appeals noted, the issue of the extent of Miller’s awareness of his childhood sexual abuse claim and resulting injuries will be litigated at trial, in the context of Campbell’s statute of limitations defense. See Miller, 137 Wn.App. at 773. As the court recognized, “the statute of limitations is closely intertwined with the equities of applying judicial estoppel to a claim of childhood sexual abuse.” Id. WSTLA Foundation argued below that, because of this interrelationship between the fact questions regarding the statute of limitations and judicial estoppel, the appellate court should refrain from deciding the judicial estoppel issue pending resolution at trial of the statute of limitations defense. See WSTLA Fdn. Am. Br. at 17-19.

**B. RCW 4.16.340(1)(c) Allows Recovery For Previously Unrecognized Injuries Resulting From Childhood Sexual Abuse If Pursued Within Three Years Of Discovery, Notwithstanding Prior Knowledge Of The Abuse And Other Injuries.**

Although the issue framed before this Court on review is ostensibly limited to the application of the doctrine of judicial estoppel, Campbell's argument in support of review involves several broad challenges to the Court of Appeals construction and application of RCW 4.16.340(1)(c) under these circumstances. See e.g. Campbell Pet. for Rev. at 10, 11, & 16. These challenges require comment.

The Court of Appeals properly construed the childhood sexual abuse statute of limitations, and did so in a manner consistent with prior case law. It recognized that RCW 4.16.340(1)(c) permits tolling of the limitation period regarding claims for sexual abuse not previously understood by the plaintiff. See Hollmann v. Corcoran, 89 Wn.App. 323, 949 P.2d 386 (1997); Cloud v. Summers, 98 Wn.App. 724, 991 P.2d 1169 (1999); Korst v. McMahon, 136 Wn.App. 202, 148 P.3d 1081 (2006); see generally C.J.C. v. Corp. of Catholic Bishop, 138 Wn.2d 699, 985 P.2d 232 (1999).

Nonetheless, Campbell seems fundamentally unwilling to accept the notion that RCW 4.16.340(1)(c), rather than federal bankruptcy law, is the touchstone for determining whether judicial estoppel applies, when contrasting Miller's position in the federal bankruptcy court with his

position in this litigation. See Miller at 772. Instead, Campbell invokes res judicata and the rule against claim splitting, which have no application to this unique type of claim. See Campbell Pet. for Rev. at 11, 15-18. Similarly, Campbell argues that Miller's assertion - that he did not understand until recently, post-bankruptcy, the nature of the injuries for which he now seeks recovery - is not credible. See id. at 6-8 (characterizing Miller as opportunistic and manipulative). To the extent that this argument is a general challenge to the premise of RCW 4.16.340(1)(c), it must be rejected as inconsistent with the statutory language, related legislative findings, and prior case law. Otherwise, the argument represents a fact-based challenge regarding an issue that will be fully ventilated at trial, as the same facts that relate to judicial estoppel are equally relevant to the statute of limitations defense. The superior court has previously ruled that trial is required on this issue. See Miller at 773-74.

Campbell is also incorrect in suggesting that the Court of Appeals below imposed a bad faith or intentionality requirement in resolving the judicial estoppel issue. See Campbell Pet. for Rev. at 6. The Court of Appeals recognized that bad faith is not essential, while noting that it is not uncommon for a court to refer to intentionality when imposing judicial estoppel. See Miller at 772. The court applied the proper test, ultimately asking whether Miller's pursuit of this civil claim is "clearly inconsistent"

with his failure to schedule the childhood sexual abuse claim in the bankruptcy. Id. at 771-73. It correctly found there was no clear inconsistency in the face of (disputed) evidence that Miller did not consciously understand, at the time of the bankruptcy proceedings, the connection between the abuse and the injury for which he would seek recovery in this action. See id. at 773-74; see also WSTLA Fdn. Am. Br. at 15-16.

Lastly, Campbell argues that had Miller scheduled the known childhood sexual abuse claim in the bankruptcy, then he likely would have been referred to a psychologist and the unknown injuries would have been discovered. See Campbell Pet. for Rev. at 10. This argument also ranges far afield of the principal inquiry here - whether Miller has been “clearly inconsistent” in his submission to the two tribunals. Under judicial estoppel, a state court cannot punish Miller for non-compliance with federal law, in the absence of proof of a clear inconsistency. See Arkison at 538 (requiring clearly inconsistent positions); In re Coastal Plains, Inc., 179 F.3d 197, 213 (5<sup>th</sup> Cir. 1999) (recognizing “the purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or protect litigants”).<sup>8</sup>

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<sup>8</sup> Some of these same arguments surface in Campbell’s response to the motion for substitution regarding whether the bankruptcy trustee is the real party in interest. See Ans. to Mot. for Substitution at 3, 6, 8-9 & 13. In the response, Campbell further argues that the statute of limitations has run on any claim by the bankruptcy trustee as real party in interest. See id. at 14-15. Again, this issue is far removed from the issue on review, whether judicial estoppel applies in this instance.

VI. CONCLUSION

To the extent relevant, this Court should adopt the arguments advanced in WSTLA Foundation's Court of Appeals amicus curiae brief, as supplemented here, and resolve this case accordingly.

DATED this 28<sup>th</sup> day of April, 2008.

Kelby D. Fletcher \*  
KELBY D. FLETCHER

Bryan P. Harnetiaux \*  
BRYAN P. HARNETIAUX

Sarah C. Schreck \*  
SARAH C. SCHRECK

On behalf of WSTLA Foundation

\*Brief transmitted for filing by e-mail; signed original retained by counsel.

# **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]