

56736-5

56736-5

80276-9

No. 56736-5

---

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

---

MICHAEL MILLER,

Appellant,

vs.

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

Respondent.

---

Appeal from the Superior Court for Snohomish County  
The Honorable Michael T. Downes

---

REPLY BRIEF OF APPELLANT

---

Attorney for Appellant:

Jo-Hanna Read, Esq., WSNB: 6938  
LAW OFFICE OF JO-HANNA READ  
2200 Sixth Avenue, Suite 1250  
Seattle, WA 98121  
(206) 441-1980

2006 APR 28 PM 4:23  
COURT OF APPEALS  
DIVISION I  
#1

ORIGINAL

**TABLE OF CONTENTS**

**I. ADDITIONAL STATEMENT OF FACTS.....1**

**A. Response to the Estate’s “Facts Relevant to Motion .....1**

**B. Additional Procedural History .....5**

**II. ARGUMENT.....5**

**A. Judicial Estoppel.....5**

        1. Washington law.....5

        2. Public Policy Issues.....7

        3. Federal bankruptcy law.....8

        4. Bankruptcy Courts take the most stringent view as to what  
           constitutes a “claim” in cases involving third party claims against  
           a debtor.....15

**B. Summary Judgment as to Liability Should Have Been  
       Granted.....18**

**C. This Is Not a Frivolous Appeal.....23**

**III. CONCLUSION.....24**

## TABLE OF AUTHORITIES

### Cases

<u>Burnes v. Pemco Aeroplex, Inc.</u> , 291 F.3d 1282 (11th Cir. 2002).....	8, 12
<u>Butner v. United States</u> , 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) .....	18
<u>Cary v. Allstate Ins. Co.</u> , 78 Wn. App. 434, 897 P.2d 409 (1995), <u>affd.</u> , 130 Wn.2d 335, 922 P.2d 1335 (1996).....	24
<u>Chaveriat v. Williams Pipe Line Co.</u> , 11 F.3d 1420 (7th Cir. 1993).....	13
<u>Cunningham v. Reliable Concrete Pumping</u> , 126 Wn.App. 222, 108 P.3d 147 (2005).....	5, 6
<u>Grady v. A.H. Robins Co., Inc.</u> , 839 F.2d 198 (4th Cir. 1988) .....	15
<u>Halvorsen v. Ferguson</u> , 46 Wn. App. 708, 735 P.2d 675 (1986) .....	20
<u>In re A.H Robins Co.</u> , 63 B.R. 986 (Bankr. E.D.Va. 1986) .....	15, 16
<u>In re An-Tze Cheng</u> , 308 B.R. 448 (B.A.P. 9th Cir., 2004) .....	14
<u>In re Corey</u> , 892 F.2d 829 (9th Cir. 1989) .....	12
<u>In re Envirodyne Indus. v. Viskase Corp.</u> , 183 B.R. 812, 823, (Bankr. N.D. Ill. 1995) .....	10
<u>In re Hassanally</u> , 208 B.R. 46 (Bankr. 9th Cir., 1997) .....	16, 17
<u>In re Haynes</u> , 97 B.R. 1007 (Bankr. 9th Cir., 1989).....	12
<u>In re Piper Aircraft Corp.</u> , 168 B.R. 434 (Bankr. S.D.Fla., 1994).....	16
<u>In re Waterman S.S. Corp.</u> , 141 B.R. 552 (Bankr. S.D.N.Y., 1992) .....	16
<u>In re Ziemski</u> , No. 05-6060 EA, p. 4, (Fed. 8th Cir. 3/10/2006) .....	18

<u>Johnson v. State Of Oregon</u> , 141 F.3d 1361 (9th Cir. 1998).....	12
<u>Levinson v. U.S.</u> , 969 F.2d 260 (7th Cir. 1992) .....	14
<u>Mahoney v. Shinpoch</u> , 107 Wn.2d 679, 732 P.2d 510 (1987) .....	23
<u>Markley v. Markley</u> , 31 Wn.2d 605, 198 P.2d 486 (1948).....	5, 6
<u>Olson v. City of Bellevue</u> , 93 Wn. App. 154, 968 P.2d 894 (1998).....	24
<u>Ryan Operations G.P. v. Santiam-Midwest Lumber Co.</u> , 81 F.3d 355 (3d Cir. 1996).....	12
<u>Ryan Operations G.P. v. Santiam-Midwest Lumber Co.</u> , 81 F.3d 355 (C.A.3 (Pa.), 1996) .....	12, 14
<u>Salomon Smith Barney, Inc. v. Harvey, M.D.</u> , 260 F.3d 1302 (11th Cir. 2001).....	8
<u>Streater v. White</u> , 26 Wn. App. 430, 613 P.2d 187, <u>rev. denied</u> , 94 Wn.2d 1014 (1980).....	23
<u>White v. Solaegui</u> , 62 Wn. App. 632, 815 P.2d 784 (1991).....	22

**Statutes**

11 U.S.C. §521(1).....	17
11 U.S.C. §541.....	18
11 U.S.C. §727(b).....	18
RCW 11.40.051 .....	4
RCW 4.16.340 .....	3, 7

**Treatises**

19 Am. Jur. 709, Estoppel, § 73 .....	6
---------------------------------------	---

Moore's Federal Practice § 134.30.....8

## I. ADDITIONAL STATEMENT OF FACTS

### A. Response to the Estate's "Facts Relevant to Motion"

Although the Estate correctly notes that this Court must place itself in the position of the trial court and consider the facts in a light most favorable to Michael Miller, (Response, pp. 15-16) it has largely ignored this standard in its own statement of facts. This is an appeal of a trial court's application of judicial estoppel. This court must consider the facts in the light most favorable to the Appellant (the party against whom the dismissal motion was entered) and decide whether the trial court abused its discretion given the facts before it considered in that light.

Instead of presenting the facts in this matter in the light most favorable to Michael Miller, the Estate instead paints a picture strongly biased against Michael, using phrases such as "having previously *opted not* to disclose the claim under penalty of perjury" [emphasis added] in referring to the fact that he had not listed any potential claim against Patrick Campbell as an asset in his bankruptcy. Response, p. 8. Having first conceded that the trial judge explicitly stated he had not "factored that in my decision," the Estate repeatedly mentions in its response a finding in an unrelated proceeding in 1999 that Michael had been untruthful in his testimony. Response, pp. 8-9, 32, 37. The response is peppered with

argumentative illustrations of “contradictions” in the evidence presented by Michael Miller.<sup>1</sup> Evidence in the record is exaggerated and mischaracterized to bolster points the Estate is trying to make.<sup>2</sup> Portions of passages quoted in the motion are strategically omitted.<sup>3</sup>

---

<sup>1</sup> See, for example, pages 12-14 of the Response, in which the Estate goes to great pains to impeach Michael Miller’s testimony with isolated statements taken from a report by his expert, Jon Conte, Ph.D.

<sup>2</sup> For example: “Miller testified that, ever since the alleged abuse, he has had nightmares and slept with a flashlight.” Response, p. 5. Michael actually testified that his mother had been talking about Patrick Campbell’s illness in 2002 and he became more and more upset and had a lot of nightmares, slept with a flashlight, and left a light on in the house so he could see. “The more she’s talked about him, the worse I felt, the more upset I became.” More memories came up about the abuse. CP 414.

Another example: the Estate claims “Miller testified that since age twenty he was unable to have sex because he would think about the abuse by Campbell.” Response, p. 6. When asked if he had been incapable of “completing the sexual act” in relationships over the years, he actually replied: “Sometimes. I’ve been accused of being distant sometimes, unemotional sometimes.” CP 416.

A third example: “Miller also testified that his second marriage, to Lonnia Cox between 1996 and 1997 and before his 1998 bankruptcy, became strained due to deteriorating sexual relations and plaintiff’s ‘fears [he has] in [his] head’ and feelings ‘about Pat Campbell and the things he did to me.’” This is followed by a portion of testimony from Michael Miller’s deposition. Response, p. 6-7. The Estate omits the immediately following section of the deposition (CP 417):

Q What caused the divorce and separation with Miss Cox?

A Lots of drinking. I couldn’t function at times. Not sexually, perhaps, but more of a -- as a partner kind of way.

Q What do you mean by in a partner kind of way?

A The way people are supposed to share the load. I became her babysitter at some point. I had to do everything. It was too much for me with my own issues I have in my head that I felt bad about, concerned about that she not know. She began to drink quite a bit. I ended up cooking, cleaning, having a full-time job, going to school at night twice a week, doing all my homework, working on weekends to make extra money. It became too much.

The Estate asserts that “[i]n his opposition papers, Miller conceded for the first time that part of his claim was no longer viable, and asserted that he sought recovery only for the injuries diagnosed by Dr. Adriance...” Response, p. 8. In fact, Michael Miller’s counsel said in Plaintiff’s Response to Defendant’s Motion for Summary Judgment filed in April, 2004:

RCW 4.16.340 provides that the statute of limitations does not begin to run until the victim “discovered or reasonably should have discovered that the injury or condition was caused by said act” or “discovered that the act caused the injury for which the claim is brought.” It is clear from the language of the statute that the legislature at all times intended that discovery of some injury stemming from some act of sexual abuse would not trigger the statute of limitations as to other injuries or injuries caused by other

---

<sup>3</sup> For example, on page 3 there is a two part quote from CP 331. The omitted portion of the quote changes the thrust of the quoted portions, reading as follows:

Over the course of treatment, he acknowledged symptoms of depressed mood, inability to experience pleasure, poor concentration, low self-esteem, diminished activity, hopelessness, anger and guilt. He also reported high anxiety with hypervigilance, detachment from others, dissociation, isolation, hyperstartle response, flashbacks, intrusive memories, and nightmares in addition to other disturbing psychological experiences. Mr. Miller met DSM IV-R criteria for a diagnosis of Major Depressive Disorder and Posttraumatic Stress Disorder. He had not had any prior treatment for these mental health problems.

I saw Mr. Miller eight times during this treatment episode. These sessions were focused on establishing a therapeutic relationship between Mr. Miller and myself in which he would feel safe and supported. It is essential that this type of relationship develop prior to addressing a history of trauma. Due to his extreme shame, fearfulness, and the overwhelming nature of his symptoms, treatment needed to progress very slowly. In addition to fostering the development of the treatment relationship, I provided Mr. Miller with basic psycho-education regarding his symptoms.

acts of abuse. In the present case, Mr. Miller had memories of the abuse since the time it occurred. He also knew this was hurtful and a bad thing. However he has clearly stated, as has Dr. Adriance, that he did not understand that various of his conditions and injuries were caused by the childhood sexual abuse.

Attachment 1, pp. 7-8.<sup>4</sup>

The Estate makes much of the fact that Michael Miller filed a creditor's claim in the probate immediately before seeing Dr. Adriance for the first time. The fact that he discovered more about his injuries after filing the creditor's claim but before filing suit is a complete red herring. The estate was opened on December 19, 2002. (See Petition for Probate of Will, Attachment 2.) A Notice to Creditors was also filed on that date. In light of the time strictures of RCW 11.40.051, the prudent course for Michael Miller was to file a creditor's claim within 120 days. He had experienced strong emotional reactions and remembered previously forgotten episodes of abuse beginning in 2002. He spoke of the abuse for the very first time in 2002, to his mother and his brother. CP 334. The creditor's claim was filed in late March, 2003. Michael simply learned more about the consequences of the sexual abuse after he began treating with Dr. Adriance.

---

<sup>4</sup> This document appears as Attachment 1 hereto and has been designated in Appellants' Third Supplemental Designation of Clerk's Papers filed on April 28, 2005.

## **B. Additional Procedural History**

On December 22, 2005, the Estate brought a Motion on the Merits to Affirm. Michael Miller's Response was filed on January 30, 2003. The motion was denied on February 6, 2006.

## **II. ARGUMENT**

### **A. Judicial Estoppel**

#### **1. Washington law.**

The Estate invokes the doctrine of judicial estoppel. Washington courts have long accepted and applied this equitable doctrine. See, for example, Markley v. Markley, 31 Wn.2d 605, 614-615, 198 P.2d 486 (1948). Courts examine the factual context in each reported case in which the issue has been raised and determine whether the factual situation merits application of this obviously harsh doctrine. Although Washington courts have said that "intent to mislead is not an element of judicial estoppel," Cunningham v. Reliable Concrete Pumping, 126 Wn.App. 222, 234, 108 P.3d 147 (2005), in every Washington case invoking the doctrine the facts include obvious deception by the party against whom judicial estoppel is applied.<sup>5</sup> In addition, "to give rise to an estoppel, the positions

---

<sup>5</sup> For example, in Cunningham, *supra*, at 223, the debtors "filed their petition in bankruptcy under Chapter 7 of the Bankruptcy Code, but failed to list in their schedules a third-party personal injury claim arising out of a workplace injury. Following receipt of a discharge and closing of their bankruptcy as a no-asset case, Cunningham sued Reliable Concrete Pumping, Inc. and its division, Reliable Hardware & Equipment, Inc.

must be not merely different, but so inconsistent that one necessarily excludes the other.” Markley, *supra*, at 614 (quoting 19 Am. Jur. 709, Estoppel, § 73).

Judicial estoppel due to failure to list a potential claim as an asset in a prior bankruptcy case requires knowledge of the potential claim on the part of the debtor. (“[T]he failure to schedule claims *about which the debtor had knowledge* ‘is sufficient acceptance to provide a basis for judicial estoppel,’” Cunningham, *supra*, 126 Wn.App. at 232 [citations omitted and emphasis added]).

When he filed bankruptcy, Michael Miller knew some of the facts which would later give rise to his present claims. He knew he had been sexually abused during his childhood by Patrick Campbell. However, the facts he knew at that time (in 1998) would not have sustained a viable claim against Campbell. At that time he had been aware for years of some general impacts of the sexual abuse such as nightmares, disgust with himself, and some sexual difficulties. Any lawsuit premised on what he knew in 1998 would have been dismissed based on the statute of limitations. He had no potential claim to report in the bankruptcy.

---

(collectively "Reliable") for this workplace injury.” The personal injury action was commenced eleven days after the bankruptcy discharge. All elements of the claim were known to the Cunninghams before the bankruptcy petition was filed.

## 2. Public Policy Issues

The Washington legislature has articulated a strong public policy as to claims of victims of childhood sexual abuse, as evidenced by the 1991 Finding of Intent as to RCW 4.16.340, Actions Based on Childhood Sexual Abuse. See Appellant's Brief pp. 12-14

The Estate suggests in its Response that Michael Miller in his opening brief in this appeal has misapprehended the import of Roman Catholic Archbishop of Portland in Oregon, 2005 WL 148775 (Bankr. D. Or. 2005) because the bankruptcy court in that case recognized that claims of unknown claimants whose claims would be based on pre-petition sexual abuse by Catholic clergy should be represented in a bankruptcy proceeding on the part of a Catholic archdiocese. The Estate has missed the point. In Roman Catholic Archbishop of Portland in Oregon, the bankruptcy court found as follows:

As I discussed above, the appointment of a FCR is appropriate, given that the tortious conduct at issue in this case does not consistently produce injury, and that when injury does result, it can take many years for it to become manifest. In addition, childhood sexual abuse can result in cognitive and psychological injuries making the injured person incapable of currently recognizing that he or she has been injured or of identifying the causal connection between the abuse and the injury.

The court recognized how difficult it often is to make the causal connection between childhood sexual abuse and particular injuries and the

public policy in favor of protecting the rights of such victims. For these reasons, the court set up a mechanism to protect victims who were unable to come forward until some future time. In the same vein, judicial estoppel should not apply in Michael Miller's case because of the strong policy in favor of preserving the rights of childhood sexual abuse victims.

### **3. Federal bankruptcy law.**

Washington courts look to federal bankruptcy law for guidance in determining whether a potential claim should have been listed in bankruptcy court, thus estopping a state court claim. In this context, as in any other, "[j]udicial estoppel is an equitable concept intended to prevent the perversion of the judicial process." Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002), quoting 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000). "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." Burnes, *supra*, at 1285, quoting Salomon Smith Barney, Inc. v. Harvey, M.D., 260 F.3d 1302, 1308 (11th Cir. 2001).

The 9<sup>th</sup> Circuit provides the following guidelines:

The United States Supreme Court recently listed three factors that courts may consider in determining whether to apply the doctrine of judicial estoppel:

[S]everal factors typically inform the decision whether to apply the doctrine in a particular case:

First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled". Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus no threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001) [internal citations omitted].

None of the three Hamilton factors apply in this case. First, Michael Miller's position in this case is not "clearly inconsistent" with his not listing any potential claim against Patrick Campbell as an asset in his bankruptcy case in 1998. The present claims are based upon recently discovered injuries and recently remembered incidents of abuse. In 1998 he could not have brought a claim for the post traumatic stress disorder or

dissociation caused by the childhood sexual abuse perpetrated by Patrick Campbell because he had no idea he suffered from those conditions. He could not have brought a claim for memories of acts of abuse that he for the first time remembered in 2002 or thereafter. There is nothing inconsistent about not listing in bankruptcy filings in 1998 claims he did not and could not know he had and bringing a lawsuit in 2003 based upon those formerly unknown claims.

As the court observed in In re Envirodyne Indus. v. Viskase Corp., 183 B.R. 812, 823, (Bankr. N.D. Ill. 1995):

[T]he subsequent position must be intentionally inconsistent with the prior position. Cassidy, 892 F.2d at 641. The grounds supporting invocation of judicial estoppel have been characterized “in terms redolent of intentional wrongdoing.” Chaveriat, 11 F.3d at 1428.20 However, although judicial estoppel “is to be applied where ‘intentional self-contradiction is being used as a means of obtaining unfair advantage,’” it should not be applied “where it would work an injustice, such as where the former position was the product of inadvertence or mistake. ...” Cassidy, 892 F.2d at 641-42 (quoting Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir.1953)) (all other citations omitted) (emphasis supplied).

The Envirodyne court held that mere silence in the bankruptcy context is not equivalent to an acknowledgment or assertion that no claim exists, and that a later assertion of a cause of action “is not clearly inconsistent with a prior position because there is no prior position.” Envirodyne, *supra*, at 825.

Second, there is no basis to find that judicial acceptance of Michael Miller's position in the present matter (that he first learned of particular injuries and first remembered particular incidents of abuse no earlier than 2002) creates a perception that either the 1998 bankruptcy court or the state court in this matter has been misled.

Third, allowing Michael Miller to go forward with claims against the Estate does not allow him to "derive an unfair advantage," nor does it "impose an unfair detriment" on the Estate. Ironically, the Estate had acquired a substantial advantage by the time this case was filed in 2003. Patrick Campbell died in 2002. The Estate could have invoked the protection of the Dead Man Statute, RCW 5.60.030, in which case Michael Miller would not have been allowed to testify to the incidents of abuse and would not have been able to present his claims. The case would have been dismissed for lack of admissible evidence. The Estate chose instead to present Michael Miller's deposition testimony to the court in support of an unsuccessful motion for summary judgment, thus waiving the protections of the Dead Man Statute. CP 470.

The Ninth Circuit provides further guidance as to whether a potential claim should have been listed in bankruptcy court, thus estopping a state court claim:

Judicial estoppel applies when a party's position is "tantamount to a knowing misrepresentation to or even fraud on the court." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362-63 (3d Cir. 1996) (citations and internal quotations omitted). If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply. See In re Corey, 892 F.2d 829, 836 (9th Cir. 1989) (citations omitted).

Johnson v. State Of Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998).

Application of the doctrine of judicial estoppel "depends upon the particular facts and circumstances of each case." In re Haynes, 97 B.R. 1007, 1011 (Bankr. 9th Cir., 1989). "[C]ourts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002).

Looking at the particular facts of this case in the light most favorable to Michael Miller there is no evidence that he knowingly misrepresented anything to or perpetrated fraud on the bankruptcy court in 1998. At the time of the bankruptcy Michael Miller knew that Patrick Campbell had sexually and physically abused him during his childhood some 15 to 20 years before. Michael was 32 years old when he filed bankruptcy. He knew, as he had since the time he was abused, that the sexual abuse was hurtful. He knew that thoughts of the abuse sometimes intruded in his mind, and that he felt bad when they did. Michael knew

that he was angry with Patrick Campbell because of the abuse and that he felt deep shame when he thought of the abuse. (CP 335). If this court finds as the trial court did that he should have told the bankruptcy trustee in 1998 that he had been sexually abused 15 to 20 years earlier, it should also find that his failure to do so was clearly a matter of inadvertence or mistake, and thus judicial estoppel does not apply.

“Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms redolent of intentional wrongdoing.” Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993) (internal citations omitted).

There is general agreement that “judicial estoppel is an equitable doctrine invoked by a court at its discretion.” New Hampshire, 532 U.S. at 750, 121 S.Ct. 1808, quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990); Hamilton, 270 F.3d at 782, 18B Wright, Miller & Cooper § 4477, at p. 558; 18 James Wm. Moore et al., Moore's Federal Practice § 134.31 (3d ed.2003); 28 Am. Jur. 2d Estoppel & Waiver, § 75 (“equitable concept”).

“Equitable” in this context refers more to fairness and discretion than to the technical distinction between law and equity. 18B Wright, Miller & Cooper § 4477, at p. 558. It follows that the fashioning of a remedy to implement a judicial estoppel must be grounded on notions of fairness and preventing injustice. Thus, regardless of whether technical equitable rules and distinctions are controlling, the rich lore of equitable principles cannot be ignored.

Preventing injustice and furthering notions of fairness are entrenched equitable principles that need to be taken into

account whenever fashioning a remedy in the nature of estoppel.

It is a maxim of equity that a court of equity seeks to do justice and not injustice. It will not do "inequity in the name of equity." 27A AM. JUR. Equity § 110 (1996). Nor will it do "unjust or inequitable things." 30A C.J.S. Equity § 94 (1992).

These maxims of equity apply equally in the context of judicial estoppel.

In re An-Tze Cheng , 308 B.R. 448, 459 (B.A.P. 9th Cir., 2004).

Dismissing Michael Miller's claims pursuant to judicial estoppel under the facts of this case constitutes a great injustice, flying in the face of the equitable principles set forth in An-Tze Cheng. Judicial estoppel "is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." Levinson v. U.S., 969 F.2d 260, 264 (7th Cir. 1992). "It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to 'secure substantial equity.'" Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (C.A.3 (Pa.), 1996).<sup>6</sup>

---

<sup>6</sup> Further, Ryan at 562:

Asserting inconsistent positions does not trigger the application of

**4. Bankruptcy Courts take the most stringent view as to what constitutes a “claim” in cases involving third party claims against a debtor.**

The majority of the federal bankruptcy cases cited by the Estate as to very broad definitions of the term “claim” for bankruptcy purposes involve issues as to the extent of protection a bankruptcy petitioner has against potential future claims against him or her.

As the court in Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 202 (4th Cir. 1988), pointed out:

In the case of a claim ... the legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court. Also, that history tells us that the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws.

The overriding goal of providing the broadest possible relief for the bankrupt debtor is cited in nine of the fourteen bankruptcy cases cited by the Estate on this issue.<sup>7</sup> For example, In re A.H Robins Co., 63 B.R. 986, 989-990 (Bankr. E.D.Va. 1986):

---

judicial estoppel unless "intentional self-contradiction is ... used as a means of obtaining unfair advantage." Scarano, 203 F.2d at 513. Thus, the doctrine of judicial estoppel does not apply "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C.Cir.1980). An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.

<sup>7</sup> Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573 (11<sup>th</sup> Cir. 1995) [cited by the Estate as In re Piper Aircraft]; Grady v. A.H.

The legislative history of the Code supports a broad definition of the term “claim.” It states:

The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured ... By this broadest possible definition and by the use of the term throughout the Title 11, especially in subchapter I of Chapter 5, *the Bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the Bankruptcy Court.* [emphasis added].

See also In re Piper Aircraft Corp., 168 B.R. 434, 436, (Bankr. S.D.Fla., 1994), and In re Waterman S.S. Corp., 141 B.R. 552, 555, (Bankr. S.D.N.Y., 1992).

The “prepetition conduct plus” test urged by the Estate originates in cases pertaining to protection of debtors from third party creditors. This is in part because, as articulated in In re Hassanally, 208 B.R. 46, 54, (Bankr. 9th Cir., 1997): “There is a policy in bankruptcy to deal with any

---

Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988); In re A.H Robins Co., 63 B.R. 986 (Bankr. E.D.Va. 1986); In re Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986); In re Hassanally, 208 B.R. 46 (Bankr. 9th Cir., 1997); In re Jensen, 995 F.2d 925 (9<sup>th</sup> Cir. 1993); In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D.Fla., 1994); In re Waterman S.S. Corp., 141 B.R. 552 (Bankr. S.D.N.Y., 1992); and Roman Catholic Archbishop of Portland in Oregon, 2005 WL 148775 (Bankr. D. Or. 2005).

and all claims in the bankruptcy proceeding and to give the debtor a fresh start.”<sup>8</sup>

The remaining bankruptcy cases cited by the Estate all involve fact situations where the debtor knew at the time of the bankruptcy filing of the third party defendant's conduct, its own injury and, most importantly, the causal connection between the two.<sup>9</sup>

In the present case, Michael Miller filed for bankruptcy protection in 1998. He was required pursuant to 11 U.S.C. §521(1)<sup>10</sup> to “file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor’s financial affairs.” In contrast to 11 U.S.C.

---

<sup>8</sup> In Hassanally the court noted that the third party claimant “ha[d] not identified any countervailing policy calling for a departure from the conduct test implied from the Code's fresh start policy.” Hassanally, *supra*, at 54. In the present case not only is there no applicable “fresh start policy” but also there is a strong countervailing policy to foster claims by survivors of childhood sexual abuse, as discussed above.

<sup>9</sup> Hamilton v. State Farm Fire & Casualty Company, 270 F.3d 778 (9th Cir. 2001) (debtor's attorneys had written defendant letters asserting claims prepetition); Hay v. First Interstate Bank of Kalispell, 978 F.2d 555 (9th Cir. 1992) (prepetition bank advised debtor to hire costly loan application preparer at a time when preparer was deeply indebted to bank and bank subsequently rejected debtor's loan application); In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999) (lawsuit filed one week after petition filed); ; In re Envirodyne Indus. v. Viskase Corp., 183 B.R. 812 (Bankr. N.D. Ill. 1995) (debtor asserted claims for amounts due relating to environmental cleanup which debtor had completed prepetition); and In re Heritage Hotel Partnership I, 160 B.R. 374 (9th Cir. BAP 1993) (lender liability action arising out of prepetition lending relationship).

<sup>10</sup> The referenced sections of the bankruptcy code are those which were in effect in 1998.

§727(b), pertaining to debts discharged, the word “claim” does not appear in §521(a)(1). All of Michael Miller’s assets became property of the bankruptcy estate during the pendency of the bankruptcy. 11 U.S.C. §541. Under longstanding federal bankruptcy law, “the Bankruptcy Act generally leaves the determination of property rights in the assets of a bankrupt’s estate to state law.” Butner v. United States, 440 U.S. 48, 48-49, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), cited in In re Ziemski, No. 05-6060 EA, p. 4, (Fed. 8th Cir. 3/10/2006).

Under Washington law, Michael Miller could not have successfully brought a claim against Patrick Campbell in 1998. The claim brought in the present case against Campbell’s estate is premised on events which had not yet occurred in 1998. Therefore the “potential claim” was nonexistent and Michael Miller had no obligation to list it as an asset in his bankruptcy schedules filed in 1998.<sup>11</sup>

**B. Summary Judgment as to Liability Should Have Been Granted.**

In considering whether a trial court abused its discretion by denying a motion for summary judgment, the appellate court is confined to the record before the trial court. In his Brief of Respondent, the Estate

---

<sup>11</sup> The bankruptcy schedules filed by Michael Miller were 14 pages long, preprinted, (CP 295-308) and the question pertaining to “contingent and unliquidated claims of every nature” gives no definition or explanation other than “including tax refunds, counter claims of the debtor, and the rights to setoff claims.” CP 297.

repeatedly cites evidence which was not before the trial court at the time of the motion. For example, the Estate relies on the possible impeachment value of Michael Miller's "failure" to list a potential claim against his former stepfather in his bankruptcy in 1998. There was absolutely no evidence of this before the trial court at the time of the summary judgment motion heard on June 24, 2005. The Estate further cites "[t]he trial court's finding that Miller previously lied under oath in his divorce matter," another "fact" which was not before the court at the time of the summary judgment hearing.

The trial court's Order on Motions for Summary Judgment indicates that the following documents were considered by the court:

1. Plaintiff's Motion for Partial Summary Judgment.
2. Declaration of Jo-Hanna Read with Attachments.
4. Declaration of Michael Miller<sup>12</sup>
5. Declaration of Lisa Adriance, Ph.D.
6. Defendant's Motion for Summary Judgment.
7. Declaration of Cindy Flynn with Attachments (11/23/04).
8. Plaintiff's Response to Defendant's Second Motion for Summary Judgment.
9. Defendant's Motion to Strike (12/10/04).

---

<sup>12</sup> The number "3" is omitted in the original.

10. Defendant's Response in Opposition to Plaintiff's Motion.
11. Defendant's Motion to Shorten Time and Strike (12/15/04).
12. Declaration of Cindy Flynn (12/15/04).
13. Plaintiff's Reply to Defendant's Motion for Summary Judgment.
14. Declaration of Jo-Hanna Read in Support of Plaintiff's Reply.
15. Reply in Support of Defendant's Summary Judgment Motion.
16. Plaintiff's Response to Defendant's Motion to Shorten Time and Motions to Strike.
17. Reply in Support of Defendant's Motion to Strike.
18. Declaration of Cindy Flynn (12/20/04).

CP 469-470.

A party responding to a summary judgment motion must assert actual facts sufficient to show a genuine issue of material fact. A nonmoving party attempting to resist a summary judgment may not rely on speculation, argumentative assertions that unresolved factual matters remain, or in having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Zobrist v. Culp, 18 Wn. App. 622, 637-38, 570 P.2d 147 (1977).

Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

Michael Miller submitted explicit descriptions of sexual assaults occurring over several years, evidence as to how he was severely affected by the news of his former stepfather's illness and then death and how that led to his making a claim against the Estate of Campbell and seeking professional help, and evidence as to his discovery of specific harm caused by the abuse. The only evidence submitted to the court by the Estate consisted of brief extracts from Miller's deposition:<sup>13</sup>

Q Why did you wait until recently to file the lawsuit?

A It was after he had died; I was expecting a daughter. It felt more appropriate to bring it up because his name was everywhere suddenly. I didn't feel threatened any more. I wasn't afraid of him any more.

...

A I wanted to make it hurt for him.

Q I'm sorry. I missed that last part.

A I wanted to make it hurt for him, Pat Campbell. Not junior, senior.

Q How does filing a lawsuit after he died make it hurt for him?

A Because of the people that know him. Maybe he won't be seen as quite the normal guy any more. Apparently,

See Attachment 3 hereto.

Q Who referred you to Dr. Adriance?

---

<sup>13</sup> These submissions were actually submitted in support of the Estate's concurrently heard motion for summary judgment (which was denied), and the Estate's motion to strike (which was denied for the most part).

A I got a referral from here.

Q From your attorney?

A Yes.

CP 477.

These two fragments of Michael Miller's deposition testimony do no more than fuel speculation and "argumentative assertions that unresolved factual matters remain" and thus are not sufficient to withstand Miller's motion. See White v. Solaegui, 62 Wn. App. 632, 636-637, 815 P.2d 784 (1991).

The trial court did not deny Miller's Motion for Partial Summary Judgment based on there being a showing of genuine issues of material fact. The court instead ruled: "The Court finds that Defendant is unable to procure opposing affidavit evidence because the decedent is unavailable, and thus pursuant to CR 56(f) the Court is denying the Plaintiff's motion." CP 471. The Estate concedes that "no amount of continuances would have cured the problem of Campbell's unavailability." Brief of Respondent, p. 36. Therefore, the court should have simply granted Miller's motion for partial summary judgment as to liability.<sup>14</sup>

---

<sup>14</sup> The Estate's reliance on Johnson v. Rothstein, 52 Wn. App. 303, 759 P.2d 471 (1988) is a complete red herring. Johnson stands for the proposition that "a denial of summary judgment cannot be appealed following trial if the denial was based on a determination that material facts are in dispute and must be resolved by the trier of fact." Johnson, *id.*, at

**C. This Is Not a Frivolous Appeal.**

The Estate asks this court to find that Michael Miller's appeal is frivolous and award attorney fees pursuant to RAP 18.9, despite the standards set out in its own brief for such a finding and award: "An appeal is frivolous when 'there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.' Mahoney v. Shinpoch, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987)." Brief of Respondent, p. 38. As outlined above and in the Brief of Appellant, there are certainly debatable issues upon which reasonable minds can differ in this matter. The trial court judge characterized his decision as to judicial estoppel "a close call." CP 11.

In determining whether an appeal is frivolous, "[t]he record should be examined as a whole, and doubts should be resolved in favor of the appellant." Mahoney v. Shinpoch, *id.*, at 692 (citations omitted).

The following guidelines were articulated by this court in Streater v. White, 26 Wn. App. 430, 434-435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980):

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are

---

304. The denial in this case was not based on there being material facts in dispute. In addition, there has been no trial.

guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See Jordan, Imposition of Terms and Compensatory Damages in Frivolous Appeals, Wash. St. B. News, May 1980, at 46.

If this court rejects Michael Miller's arguments in this matter, there will be no basis for finding this appeal frivolous. This is a case of first impression. "Cases of first impression are not frivolous if they present debatable issues of substantial public importance." Cary v. Allstate Ins. Co., 78 Wn. App. 434, 440-41, 897 P.2d 409 (1995), aff'd, 130 Wn.2d 335, 922 P.2d 1335 (1996). The Commissioner's decision denying the Estate's motion on the merits is ample evidence that reasonable minds can differ as to the issues raised in this case. See Olson v. City of Bellevue, 93 Wn. App. 154, 165, 968 P.2d 894 (1998).

### **III. CONCLUSION.**

The trial court in this matter failed to consider the public policy implications favoring preservation of claims on behalf of childhood sexual abuse, did not weigh appropriate equitable factors as to the issue of judicial estoppel, and failed to consider whether Michael Miller's "failure"

to list a claim for childhood sexual abuse on his 1998 bankruptcy schedules was intentional or merely inadvertent. The trial court was incorrect in its holding that a claim existed at the time of the bankruptcy filing. The order dismissing this matter should be reversed and the case should be remanded for trial.

The trial court erred in denying Michael Miller's motion for summary judgment as to liability where no evidence was presented in opposition to the motion and no showing was made that additional time was needed to obtain relevant evidence.

The Estate's motion for fees and costs on the basis that this appeal is frivolous should be denied.

DATED this 28 April 2006.

LAW OFFICE OF JO-HANNA READ

By   
JO-HANNA READ, WSNB: 6938  
Attorney for Appellants

# Attachment - 1

To Reply Brief of Appellant

Plaintiff's Response to Defendant's Motion for Summary Judgment

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

COPY RECEIVED  
04 APR - 2 AM 9:28  
SNOHOMISH COUNTY  
SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH  
APR - 2 2004

MICHAEL MILLER,  
  
Plaintiff,  
  
vs.  
  
CHARLES CAMPBELL, as Personal  
Representative of the Estate of PATRICK W.  
CAMPBELL,  
  
Defendant.

PAUL L. DANIELS  
SNOHOMISH NO. 03-2-09818-1  
EX OFFICIO CLERK OF COURT

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**I. RELIEF REQUESTED**

Plaintiff requests that this court deny the motion of Defendant Charles Campbell for summary judgment herein.

**II. STATEMENT OF FACTS**

As this is a summary judgment motion, the following is a summary of the facts pertinent to the motion, construed in the light most favorable to the Plaintiff (as the non-moving party):

Patrick W. Campbell married Michael Miller's mother when Michael was eleven years of age. Patrick Campbell sexually abused Michael Miller on many occasions during the period of time Michael was eleven through seventeen years old. Miller dec., p. 1. Campbell touched and fondled Michael Miller's genitals, rubbed his groin against Michael, exposed his own genitals to Michael and urinated in Michael's bath water. Miller dec., p. 1. Campbell was also physically abusive toward Michael Miller. Miller dec. p. 1.

1 Michael Miller never told anyone about Campbell's sexual abuse until 2002, when he  
2 spoke obliquely about it to his mother. His mother had been discussing Campbell's health  
3 problems with Michael, and he became increasingly upset at the mention of Campbell's name.  
4 Finally, he told his mother that Campbell had "done more than just beat" him. Miller dec., p. 2. At  
5 this time, Miller began suffering from more of the nightmares that had plagued him for years,  
6 remembering more incidents of sexual abuse, and experiencing overwhelming feelings of  
7 worthlessness. Miller dec., p. 2.

8 Michael Miller contacted his half-brother Erik Campbell, the son of Patrick Campbell, and  
9 found that Erik had also been sexually abused by Patrick Campbell. Patrick Campbell died on  
10 November 17, 2002. Erik and Michael discussed possible claims against his estate for the damage  
11 caused by his abuse. Michael filed a claim against the estate, which was denied. This lawsuit  
12 ensued. Miller dec., p. 2.

13 Michael Miller always remembered at least some of the sexual abuse. He lived in fear of  
14 Patrick Campbell from the time he was 11 years old. He had nightmares about him and had  
15 problems sleeping. Michael felt guilty and ashamed much of the time. He had few friends and felt  
16 worthless. He knew that the sexual touching had been wrong, and thought of himself as a bad  
17 person because he had somehow allowed it to happen. When his claim against the Campbell  
18 estate was filed, Michael was terrified. During that same year a friend of Michael's was murdered,  
19 his dog died, and his first child was born. Overwhelmed by all of these events, Michael Miller  
20 sought professional counseling for the first time in March, 2003. Miller dec., p. 2.

21 Lisa Adriance, Ph.D., treated Michael from March 28, 2003, until June 13, 2003. Dr.  
22 Adriance reports:

23 Mr. Miller presented for treatment reporting that he had experienced severe and  
24 prolonged physical, sexual, and emotional abuse throughout his childhood. He  
25 was very angry about and disturbed by these experiences. He felt extreme shame  
26 and had a great deal of difficulty talking about his history, his symptoms, and his  
27 goals for treatment. Over the course of treatment, he acknowledged symptoms of  
28 depressed mood, inability to experience pleasure, poor concentration, low self-  
esteem, diminished activity, hopelessness, anger and guilt. He also reported high  
anxiety with hypervigilance, detachment from others, dissociation, isolation,  
hyperstartle response, flashbacks, intrusive memories, and nightmares in addition  
to other disturbing psychological experiences. Mr. Miller met DSM IV-R criteria  
for a diagnosis of Major Depressive Disorder and Posttraumatic Stress Disorder.

1 He had not had any prior treatment for these mental health problems.

2 Adriance dec., p. 1.

3 Michael describes his emotional state at the time he began seeing Dr. Adriance as  
4 follows:

5 I was emotionally drained. I couldn't sleep, and went to bed each night with a  
6 flashlight by my side and a chair jammed up against the bedroom door. I was  
7 avoiding work because I was afraid of what the other employees would think of  
8 me if they found out about the sexual abuse. At times I was overwhelmed by fear  
9 and dread. I kept remembering more and more incidents of abuse.

9 Miller dec., p. 2.

10 Dr. Adriance helped Michael understand the relationship between the feelings he  
11 recognized all along (fear, sleep problems, nightmares, etc.) and the sexual abuse. She provided  
12 him with information through therapy and recommended readings that helped him comprehend  
13 other symptoms that he was suffering but hadn't recognized, such as dissociation and flashbacks.  
14 Before entering therapy with Dr. Adriance, Michael Miller had no idea he was suffering from Post  
15 Traumatic Stress Disorder and Major Depression as a result of the abuse. Miller dec., p. 3. One  
16 aspect of Dr. Adriance's treatment was to help Michael to see "his psychological process,  
17 emotional distress and coping behaviors as a normal response to an abnormal, overwhelming and  
18 devastating situation." Adriance dec., p. 2. This was all news to Michael, who experienced a  
19 measure of relief as a result of this knowledge.

### 20 III. STATEMENT OF ISSUES

21 Whether the statute of limitations as to injuries caused by sexual abuse by Patrick  
22 Campbell had expired prior to filing of the complaint herein.

### 23 IV. EVIDENCE RELIED UPON

- 24 1. Plaintiff's Response to Defendant's Motion for Summary Judgment.
- 25 2. Declaration of Michael Miller.
- 26 3. Declaration of Lisa Adriance, Ph.D.

4. Declaration of Jo-Hanna Read with attachment.
5. All materials submitted by Defendant.

## V. AUTHORITY

### A. Summary Judgment Standards.

A summary judgment motion may be granted under CR 56(c) under the following circumstances:

[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

The court must consider the evidence presented in the light most favorable to the nonmoving party. If material issues of fact on any issue are in dispute, summary judgment is improper. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Spurrell v. Block, 40 Wn. App. 854, 860, 701 P.2d 529 (1985), rev. denied, 104 Wn.2d 1014 (1985). Summary judgment exists to examine the sufficiency of legal claims and to narrow issues, not as a substitute for trial. Babcock v. State, 116 Wn.2d 596, 598-599, 809 P.2d 143 (1991).

Summary judgment is inappropriate if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. Selberg v. United Pac. Ins., 45 Wn. App. 469, 474, 726 P.2d 468 (1986), rev. denied, 107 Wn. 2d 1017 (1986); White v. Kent Medical Center, 61 Wn. App. 163, 175, 810 P.2d 4 (1991). It is not sufficient for the moving party to simply make a bald assertion that the nonmoving party's claims are unsupported by factual evidence. The absence of any issue of material fact as to every essential element of the nonmoving party's claims must be affirmatively demonstrated. Weatherbee v. Gustafson, 64 Wn. App. 128, 132, 134, 822 P.2d 1257 (1992).

1           **B.     The Applicable Statute Of Limitations To Plaintiff's Claims Is RCW**  
2           **4.16.340.**

3           Plaintiff's claims are governed by RCW 4.16.340, and are timely pursuant to its  
4 application. RCW 4.16.340, the Childhood Sexual Abuse Act, sets out the applicable statute of  
5 limitations for claims based upon childhood sexual abuse. It provides as follows:

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

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

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

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

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

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

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

27          (4)     For purposes of this section, "child" means a person under the age of  
28          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.

1 The purpose of this statute is to toll the statute of limitations until the survivor of  
2 childhood abuse discovers the true cause and extent of injuries. Without such a statute, abusers  
3 would escape responsibility for the damage they cause long before most survivors could file suit.

4 The legislature made its intent explicit in the findings which accompany the statute.

5 The legislature finds that:

- 6 (1) Childhood sexual abuse is a pervasive problem that affects the safety  
7 and well-being of many of our citizens.
- 8 (2) Childhood sexual abuse is a traumatic experience for the victim  
9 causing long-lasting damage.
- 10 (3) The victim of childhood sexual abuse may repress the memory of the  
11 abuse or be unable to connect the abuse to any injury until after the  
12 statute of limitations has run.
- 13 (4) The victim of childhood sexual abuse may be unable to understand or  
14 make the connection between childhood sexual abuse and emotional  
15 harm or damage until many years after the abuse occurs.
- 16 (5) Even though victims may be aware of injuries related to the  
17 childhood sexual abuse, more serious injuries may be discovered  
18 many years later.
- 19 (6) The legislature enacted RCW 4.16.340 to clarify the application of  
20 the discovery rule to childhood sexual abuse cases. At that time the  
21 legislature intended to reverse the Washington supreme court decision  
22 in Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986).

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

Laws of 1991, chapter 212, section 1.

The legislature may expand, contract or eliminate statutes of limitations entirely. In Ruth  
v. Dight, 75 Wn.2d 660, 666, 453 P.2d 631 (1969) the Supreme Court concluded:

1 [The] legislature possesses the constitutional power to strike the  
2 balance one way or the other and by establishing a clear line of  
3 demarcation to fix a time certain beyond which no remedy will be  
4 available. Nor do we question that the legislature may resolve the  
5 doubts be enacting that all cases on one side of a precise point will  
6 be barred and all those on the other may be maintained.

7 Furthermore, the Supreme Court has recognized that the legislature may simply eliminate  
8 the statute of limitations as a defense. Bellevue School District No. 405 v. Brazier Construction  
9 Co., 100 Wn.2d 776, 781, 675 P.2d 232, reconsideration granted 680 P.2d 40 adhered to 103  
10 Wn.2d 111, 691 P.2d 178 (1984).

11 The legislature acted well within its authority when it enacted RCW 4.16.340, a statute  
12 which clarifies the requirements for discovery of a cause of action. Even if the Legislature had  
13 entirely eliminated the limitations period, Defendant Campbell would have no grounds to  
14 invalidate this legislative decision.

15 Michael Miller was a victim of childhood sexual abuse. His complaint is for damages  
16 resulting from the repeated sexual abuse perpetrated by Patrick Campbell. Thus RCW 4.16.340  
17 applies. Pursuant to the statute, accrual of his cause of action was tolled until his 18th birthday.  
18 It was thereafter further tolled until he discovered that the injuries for which he is making claim  
19 were caused by the sexual abuse.

20 **1. The Actions of Patrick Campbell Constitute Childhood Sexual Abuse.**

21 During the pertinent time period, 1975-1984, Patrick Campbell's actions as outlined by  
22 Michael Miller in his declaration and his deposition constituted at least the crime of Indecent  
23 Liberties (RCW 9A.44.100, formerly RCW 9A.88.100). Thus RCW 4.16.340 sets forth the  
24 applicable statute of limitations for this matter.

25 **2. The Date Of Discovery That Mr. Miller's Injuries Were Caused By**  
26 **The Acts Of Childhood Sexual Abuse Was After March, 2003;**  
27 **Therefore The Statute Did Not Begin To Run Until Then.**

28 RCW 4.16.340 provides that the statute of limitations does not begin to run until the  
victim "discovered or reasonably should have discovered that the injury or condition was caused  
by said act" or "discovered that the act caused the injury for which the claim is brought." It is

1 clear from the language of the statute that the legislature at all times intended that discovery of  
2 some injury stemming from some act of sexual abuse would not trigger the statute of limitations  
3 as to other injuries or injuries caused by other acts of abuse. In the present case, Mr. Miller had  
4 memories of the abuse since the time it occurred. He also knew this was hurtful and a bad thing.  
5 However he has clearly stated, as has Dr. Adriance, that he did not understand that various of his  
6 conditions and injuries were caused by the childhood sexual abuse.

7 RCW 4.16.340 provides that the discovery rule applies to such cases. Division One of  
8 the Washington Court of Appeals considered and construed RCW 4.16.340 in Oostra v. Holstine,  
9 86 Wn. App. 536, 543, 937 P.2d 195 (1997), as follows:

10 We note that it was properly a question for the trier of fact to determine whether  
11 Oostra had timely filed this action. The trial court instructed the jury that  
12 Holstine had the burden of proving that Oostra "knew, or should have known, on  
13 or before March 29, 1991 [three years before she commenced her action], that the  
14 intentional sexual abuse by [Holstine] proximately caused the injury to [Oostra]  
15 for which the claim is brought." That instruction comports with the limitations  
16 set forth in RCW 4.16.340(1)(b) and (c) regarding a claimant's discovery of the  
17 nexus between acts of childhood sexual abuse and resulting injuries. The trial  
18 court did not err by so instructing the jury and rejecting Holstine's argument that  
19 the action was time-barred as a matter of law.

20 The facts in Oostra are instructive in the present case. The plaintiff, Karen Oostra, was  
21 sexually abused by her step-father from 1977 (when she was eight years old) until she moved out  
22 of the household in 1987 at age 18. Oostra had some rather extreme psychological difficulties  
23 during her teenage years, including an attempted suicide and a severe drinking problem. She  
24 never forgot the abuse itself. She entered into therapy in 1993 and, during the course of therapy,  
25 began to work specifically with issues pertaining to the sexual abuse. She was then able to  
26 connect the difficulties she was having to the childhood sexual abuse. She brought suit in 1994.  
27 The court held that the statute of limitations under RCW 4.16.340 did not begin to run until the  
28 plaintiff discovered the nexus between the acts of childhood sexual abuse and her claimed injury.

Oostra, Id., at 6.

Similarly, Division Three of the Court of Appeals held in Hollmann v. Corcoran, 89  
Wn. App. 323, 325, 949 P.2d 386 (1997):

RCW 4.16.340(1)(c) refers to the discovery of the causal connection between a

1 known act and subsequent injuries, including injuries that develop years later. For  
2 that reason, the statute of limitations is tolled until the victim of childhood sexual  
3 abuse in fact discovers the causal connection between the defendant's acts and  
4 the injuries for which the claim is brought.

5 The plaintiff in Hollman had been sexually abused during his childhood by the defendant.  
6 He participated in counseling beginning in 1989, when he was about 24 years old. His counselor  
7 (Ms. Battello) diagnosed him as suffering from PTSD as a result of the sexual abuse. She  
8 conveyed the diagnosis but not the cause of the condition. Her treatment focused on practical  
9 issues of maintaining sobriety and his family relationships. Subsequently, in 1994, in the course  
10 of treatment for a back injury, Hollman was seen by a psychologist (Dr. Frese) and in the course  
11 of that therapy began to understand the actual nature of the sexual abuse and the injuries he had  
12 suffered as a result. The court found:

13 The statute of limitations is tolled until the victim of childhood sexual abuse in  
14 fact discovers the causal connection between the defendant's act and the injuries  
15 for which the claim is brought. In this case, a jury could find Mr. Hollmann did  
16 not discover the connection between his sexual abuse and his injuries until he  
17 began treating with Dr. Frese in 1993. While Ms. Battello made an initial  
18 diagnosis of PTSD as early as 1989, a jury could find Mr. Hollmann did not relate  
19 this diagnosis to Mr. Corcoran's abuse.

20 Hollman, 89 Wn.App. at 334.

21 The purpose of RCW 4.16.340 was recognized by the Washington Supreme Court in  
22 C.J.C. v. Corp of Catholic Bishop, 138 Wn.2d 699, 712-713, 985 P.2d 262 (1999) to be as  
23 follows:

24 The Legislature adopted "findings and intent," which make clear that its primary  
25 concern was to provide a broad avenue of redress for victims of childhood sexual  
26 abuse who too often were left without a remedy under previous statutes of  
27 limitation.

28 ...

Significantly, in 1991, the statute was broadened in order to make clear that the  
discovery of less serious injuries did not commence the period of limitations. In  
addition, the Legislature specifically superseded a line of cases that had strictly  
applied the discovery rule in cases involving childhood sexual abuse.

1 Discovery rules have been applied by the judiciary to an increasingly wide class of cases,  
2 mainly involving professional malpractice of one type or another. There is abundant case law  
3 construing the judicially applied rules. However, in the present case there is a specific statute  
4 addressing the statute of limitations for childhood sexual abuse and creating a specific discovery  
5 rule.

6 As the court stated in Cannavina v. Poston, 13 Wn.2d 182, 188 (1942):

7 While we have long recognized the rule in this state that a plea of the statute of  
8 limitations is not an unconscionable defense, we have also recognized and so  
9 stated that it is "not such a meritorious defense that either the law or the facts  
10 should be strained in aid of it." [citations omitted].

11 If it is questionable which of two statutes of limitations apply, the rule has long been that  
12 the statute applying the longest period is generally used. Shew v. Coon Bay Loafers Inc., 76  
13 Wn.2d 40 (1969).

14 Until recently, Michael Miller was unaware of most of his injuries resulting from the  
15 sexual abuse by his stepfather. He did not know that his dissociative disorders and severe  
16 depression were causally related to the sexual abuse he suffered as a child at the hands of Patrick  
17 Campbell. It was only after he began therapy in 2003 that these specific injuries and the causal  
18 connection to all of his injuries became apparent to him. To say that Mr. Miller knew the cause of  
19 all of his injuries prior to 2003 is contrary to the his testimony and that of Dr. Adriance that only  
20 through therapy was he able to remember the full extent of abuse and to realize that the conduct of  
21 the Defendant was the cause of his various symptoms.

22 **3. The Date of Discovery of the Last Act of Abuse Was After 2003;**  
23 **Therefore, Plaintiff's Cause Of Action Did Not Accrue Until Then.**

24 Michael Miller had no conscious memory of some of the acts of sexual abuse until after  
25 2003. The Defendant has not presented any evidence which disputes this fact.

26 Under RCW 4.16.340 (2), the discovery rule, as it applies in sexual abuse cases, operates  
27 to toll the statute of limitations until the victim discovers the "last act" of abuse by the abuser.  
28 Michael Miller did remember some sexual abuse incidents involving his stepfather since his  
childhood. However, beginning in 2002 he began recalling additional episodes of abuse.

1 Therefore, according to RCW 4.16.340 (2), the statute of limitations on Mr. Miller's claims had  
2 not run out at the time the case was filed in 2003.

3  
4 **IV. CONCLUSION**

5 Pursuant to RCW 4.16.340, Plaintiff has made a prima facie showing sufficient to  
6 withstand Defendant's arguments that the statute of limitations has expired as to his claims.  
7 Defendant's motion for summary judgment should be denied.

8 DATED this 1 April 2004.

9  
10 ENDRISS & READ PLLC

11   
12 \_\_\_\_\_  
13 JO-HANNA READ, WSNB: 6938  
14 Attorney for Plaintiff Michael Miller

Attachment - 2

To Reply Brief of Appellant  
Application for Probate of Will

02 DEC 19 AM 9:10

PAUL DANIELS  
COUNTY CLERK  
SNOHOMISH CO. WASH.

PAUL DANIELS  
SNOHOMISH COUNTY CLERK  
EVERETT WA

02-4-01499-8

Rcpt. Date 12/19/2002 Acct. Date 12/19/2002

Receipt/Item # 2002-02-20391/01 Tran-Code 1200 Doc \$F  
Cashier: SNM

Paid By: BENNETT, ET AL  
Transaction Amount:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

NO. **02 4 01499 8**

In the Matter of the Estate of  
PATRICK W. CAMPBELL,  
Deceased.

APPLICATION FOR PROBATE OF  
WILL (BOND WAIVED)  
RCW 11.20.020, 11.28.185

1. **Jurisdiction.** PATRICK W. CAMPBELL, a resident of Snohomish County, Washington, died on November 17, 2002, leaving an estate subject to the jurisdiction of the court (see copy of Death Certificate attached hereto).

2. **Property; Claims.** Decedent left property subject to the jurisdiction of the Court as follows:

	Estimated Value	Estimated Annual Income
Mobile Home	\$ 46,500.00	N/A
Bank and Investment Accounts	\$315,200.00	N/A
Miscellaneous	\$180,000.00	N/A
Vehicle	\$ 24,000.00	N/A
Total	\$565,700.00	N/A

The estimated administrative expenses and anticipated claims against the estate for funeral, last illness and household expenses and other debts will be approximately \$30,000 or less.

Application for Probate of Will  
(Bond Waived) -1-  
wmr/Probate/Campbell/application/11/26/02

**ORIGINAL**

**BENNETT & BENNETT**  
ATTORNEYS AT LAW  
400 DAYTON, SUITE A  
EDMONDS, WASHINGTON 98020  
(425) 776-0139

A. I have or may have executed a written list pursuant to RCW 11.12.255, which list shall be signed and dated and incorporated herein by this reference and which list shall direct the disposition of various items of my tangible personal property, but which list I may change from time to time, as allowed by RCW 11.12.260. I hereby give and bequeath to those persons so listed, such items of tangible personal property as I have or may have specified on said list, and if the person named to receive such personal property in such written list predeceases me, then unless otherwise provided, that gift of tangible property shall fail and lapse, and shall pass, in its entirety, as residue, as hereinafter provided in Article III, Paragraph B.

B. The rest and residue of my estate as follows:

i. ~~Eight percent (8%) to my son, PATRICK W. CAMPBELL, JR.~~ In the event that PATRICK W. CAMPBELL, JR. and I should die in a common disaster, or in the event that he should predecease me, then in either such event, this gift shall not fail or lapse, but shall pass, in its entirety, to his children, MARIAH CAMPBELL and AMANDA CAMPBELL, in equal shares, share and share alike, PROVIDED, HOWEVER, that each of the said children shall have attained the age of twenty-five (25) years at the time of my death. In the event that each of the said surviving children shall not have attained the age of ~~twenty-five (25) years~~ at the time of my death, this gift shall fail and lapse, and shall pass, in its entirety, as hereinafter provided in Article IV.

ii. ~~Seventeen percent (17%) to my two granddaughters, MARIAH CAMPBELL and AMANDA CAMPBELL,~~ (daughters of my son, PATRICK W. CAMPBELL, JR.) in equal shares, share and share alike, PROVIDED, HOWEVER, that each of the said grandchildren shall have attained the age of twenty-five (25) years at the time of my death. In the event that each of the said surviving grandchildren shall not have attained the age of ~~twenty-five (25) years~~ at the time of my death, this gift shall fail and lapse, and shall pass, in its entirety, as hereinafter provided in Article IV.

iii. ~~Twenty-five percent (25%) to my son, CHARLES W. CAMPBELL~~ In the event that CHARLES W. CAMPBELL and I should die in a common disaster, or in the event that he should predecease me, then in either such event, this gift shall not fail or lapse, but shall pass in its entirety, to his surviving children, in equal shares, share and share alike, or if none be then living, then this gift shall fail and lapse, and shall pass in a pro rata fashion to the remaining residual beneficiaries named under this Article III, Paragraph B(i)(ii)(iv) and/or (v).

iv. ~~Twenty-five percent (25%) to my two granddaughters, EMILY CAMPBELL and MADISON CAMPBELL,~~ (daughters of my son, ERIK M. CAMPBELL); PROVIDED, HOWEVER, that each of the said grandchildren shall have attained the age of ~~thirty (30) years~~ at the time of my death. In the event that each of the said surviving grandchildren shall not have attained the age of thirty (30) years at the time of my death, this gift shall fail and lapse, and shall pass, in its entirety, as hereinafter provided in Article V.

v. ~~Twenty five percent (25%) to my companion, DIANNA DAHL~~ In the event that DIANNA DAHL and I should die in a common disaster, or in the event that she should predecease me, then in either such event, this gift shall fail and lapse, and pass in a pro rata fashion to the remaining residual beneficiaries named under this Article III, Paragraph B(i)(ii)(iii) and/or (iv).

In making the above mentioned bequests listed in Article III, Paragraph B(i)(iii) and (v), it is my specific desire that should any beneficiary listed therein wish to take my 2002 Chevrolet Trailblazer as a part of their distributive share, that they may do so at the wholesale value. In the event more than one of the said 3 beneficiaries desires to opt for the automobile, I hereby direct my personal representative to come up with a reasonable, fair method to use as a tiebreaker.

#### IV

##### Mariah and Amanda Campbell Trust

All property directed to be disposed of pursuant to the provisions of this Article IV shall be distributed, in trust, to my son, CHARLES W. CAMPBELL, as trustee, to be held and invested until such time as the youngest surviving grandchild named in this trust attains the age of twenty-five (25) years. At which time, the trustee is directed to distribute the entire trust estate to MARIAH CAMPBELL and AMANDA CAMPBELL, in equal shares, share and share alike. Upon such final distribution being made, this trust shall terminate, and the trustee shall be discharged from all further duty to the trust estate. At no time during the Pendency of this trust shall my trustee make any distributions of income and/or principal to or for the benefit of either beneficiary.

If either MARIAH CAMPBELL or AMANDA CAMPBELL should die before or after the effective date of this trust estate, such grandchild's share shall be distributed to such grandchild's then living children, in equal shares, share and share alike, or if none be then living, then to the survivor of MARIAH CAMPBELL or AMANDA CAMPBELL.

#### V

##### Emily and Madison Campbell Trust

All property directed to be disposed of pursuant to the provisions of this Article V shall be distributed, in trust, to my son, CHARLES W. CAMPBELL, as trustee, to be held and invested until such time as the youngest surviving grandchild named in this trust attains the age of thirty (30) years. At which time, the trustee is directed to distribute the entire trust estate EMILY CAMPBELL and MADISON CAMPBELL, in equal shares, share and share alike. Upon such final distribution being made, this trust shall terminate, and the trustee shall be discharged from all further duty to the trust estate.

## Attachment - 3

To Reply Brief of Appellant

Excerpts from the Deposition of Michael Miller

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY

MICHAEL MILLER, )  
Plaintiff, ) NO. 03-2-09818-1  
vs. )  
CHARLES W. CAMPBELL, as )  
personal representative of the )  
Estate of PATRICK W. CAMPBELL, )  
Defendants. )

Deposition Upon Oral Examination  
MICHAEL MILLER

January 27, 2004.  
2200 6th Avenue  
Seattle, Washington

REDACTED

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

For the Plaintiff: JO-HANNA READ  
ENDRISS & READ  
2200 Sixth Avenue, #1250  
Seattle, Washington 98121  
For the Defendant: CINDY FLYNN  
CARNEY, BADLEY, SMITH &  
SPELLMAN  
701 Fifth Avenue, #2200  
Seattle, Washington 98104

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

21 Q Why did you wait until recently to file the lawsuit?

22 A It was after he had died; I was expecting a daughter.

23 It felt more appropriate to bring it up because his

24 name was everywhere suddenly. I didn't feel

25 threatened any more. I wasn't afraid of him any more.

REDACTED

11 A I wanted to make it hurt for him.  
 12 Q I'm sorry. I missed that last part.  
 13 A I wanted to make it hurt for him, Pat Campbell. Not  
 14 Junior, senior.  
 15 Q How does filing a lawsuit after he died make it hurt  
 16 for him?  
 17 A Because of the people that know him. Maybe he won't  
 18 be seen as quite the normal guy any more. Apparently,

REDACTED

REDACTED

C E R T I F I C A T E

1  
 2 STATE OF WASHINGTON)  
 3 COUNTY OF KING )

I, Susan Cookman, Notary Public,

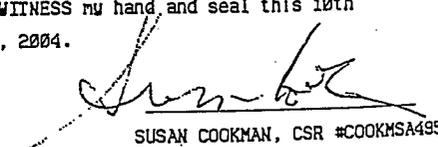
do hereby certify:

6 That the foregoing deposition, transcription  
 7 of which is hereto attached, was given before me at the time  
 8 and place stated therein; that the witness, before  
 9 examination, was duly sworn to testify the truth, the whole  
 10 truth and nothing but the truth; that the testimony given by  
 11 the witness was by me stenographically recorded and later  
 12 transcribed under my personal supervision;

13 That the foregoing transcript contains a full  
 14 and accurate record of all the testimony and proceedings  
 15 given at the time and place of said testimony to  
 16 the best of my ability.

17 I do further testify that I am not related to  
 18 any party to the matter, nor to any of counsel, nor do I  
 19 have any interest in the matter.

20 WITNESS my hand and seal this 10th  
 21 day of February, 2004.

22  
 23   
 24 SUSAN COOKMAN, CSR #COOKMSA49504  
 25

DEPOSITION CORRECTIONS/CHANGES

1  
 2 DEPOSITION OF MICHAEL MILLER  
 3 TAKEN ON JANUARY 27, 2004  
 4 CASE: MILLER V ESTATE OF PATRICK CAMPBELL  
 5  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

GROSHONG-QUAINTANCE  
1111 FAWCETT AVE., SUITE 106  
TACOMA, WASHINGTON, 98402

NOTICE OF SIGNATURE FOR DEPOSITION

1  
 2  
 3  
 4  
 5  
 6 February 10, 2004  
 7 Re: Miller v Estate of P. Campbell  
 8 Dear Ms. Read,  
 9  
 10 In compliance with your client's desire to read and sign the  
 11 deposition, I am enclosing a Correction/Change sheet and  
 12 an Affidavit of Signature Page. Have the witness make  
 13 any changes, referring to page and line number, on the  
 14 correction page. The witness's signature should then be  
 15 notarized on the Affidavit of Signature page.  
 16 Please return the Correction/Change sheet and the Affidavit  
 17 of Signature to:  
 18 CINDY FLYNN  
 19 CARNEY, BADLEY, SMITH &  
 20 SPELLMAN  
 21 701 Fifth Avenue, #2200  
 22 Seattle, Washington 98104  
 23 Thank you for your cooperation. If you have any questions,  
 24 please call 253-838-1282 or 253-627-7129.  
 25  
 Yours truly,  
 Susan Cookman, Court Reporter

AFFIDAVIT OF WITNESS

1  
 2  
 3 I, Michael Miller, have  
 4 read my testimony as transcribed herein, and the same  
 5 is true and accurate save and except for the changes,  
 6 additions, or corrections as indicated by me on the  
 7 CORRECTION PAGE hereof.  
 8  
 9  
 10  
 11 SUBSCRIBED AND SWORN TO before me this  
 12 \_\_\_\_\_ day of \_\_\_\_\_, 2004.  
 13  
 14  
 15 Notary Public for the State  
 16 of Washington, residing  
 17 at \_\_\_\_\_.  
 18 Commission expires \_\_\_\_\_.  
 19  
 20  
 21  
 22  
 23  
 24  
 25

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASH.  
2006 APR 28 PM 4:23

No. 56736-5

---

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

---

MICHAEL MILLER,

Appellant,

vs.

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

Respondent.

---

Appeal from the Superior Court for Snohomish County  
The Honorable Michael T. Downes

---

CERTIFICATE OF SERVICE

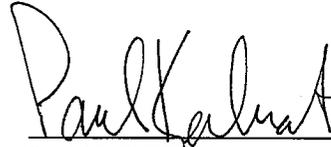
---

Paul Kerbrat certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served by legal messenger, a copy of Reply Brief of Appellant, and this Certificate of Service on the following individual:

ORIGINAL

Patricia Buchanan  
Lee Smart Cook Martin & Patterson  
701 Pike St., #1800  
Seattle, WA 98101  
Attorney for Defendant

DATED this 28<sup>th</sup> day of April, 2006, at Seattle, Washington.

  
\_\_\_\_\_  
PAUL KERBRAT