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NO. 101477-5

SUPREME COURT OF THE STATE OF WASHINGTON

BRUCE A. WOLF, as Personal Representative of the Estate of TIMOTHY JONES, deceased,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW 2

III. COUNTERSTATEMENT OF THE CASE 3

A. Family Friend Nick Miller Began to Abuse Timothy Jones in 1998, Years Before the State's Involvement in Jones's Care 3

B. Mr. Jones Sued Mr. Miller for the Injuries Resulting From Miller's Sexual Abuse 4

C. In 2017, Mr. Jones Allegedly Began to Wonder, After Seeing a News Story About a Childhood Sexual Abuse Lawsuit Against the State, if He Might Also Have a Legal Claim Against the State 5

D. Mr. Jones's Estate Files Suit Against the State Nearly Two Years After his Death 5

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED 10

A. The Court of Appeals' Decision Adheres to Precedent 11

1. The Court of Appeals followed the plain meaning – and the only logical reading – of the words in RCW 4.16.340(1)(c) 12

2. The Court of Appeals' interpretation of RCW 4.16.340(c) is consistent with the legislative intent of the statute and this Court's precedent 16

3. The Court of Appeals' interpretation of RCW 4.16.340 is not inconsistent with any other published opinions of that court................ 19

B. The Court of Appeals' Decision is Based Upon a Unique Set of Facts Unlikely to be Replicated and Therefore does not Concern a Matter of Substantial Public Interest 22

V. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

C.J.C. v. Corp. of Catholic Bishop of Yakima,
138 Wn.2d 699, 985 P.2d 262 (1999),
as amended (Sept. 8, 1999)........................... 11, 12, 16, 17, 25

K.C. v. State,
10 Wn. App. 2d 1038, 2019 WL 4942457 (Oct. 8, 2019),
as *amended on denial of reconsideration*
(Mar. 17, 2020) 20

Kirchoff v. City of Kelso,
190 Wn. App. 1032, 2015 WL 5923455 (Oct. 12, 2015)
(unpublished) 21

Kitsap County v. Allstate Ins. Co.,
136 Wn.2d 567, 964 P.2d 1173 (1998)................................. 14

Ohnemus v. State,
195 Wn. App. 135, 379 P.3d 142, 146 (2016)...................... 19

P.L. v. Wash. State Dep't of Soc. & Health Servs.,
184 Wn. App. 1010, 2014 WL 5340007 (Oct. 20, 2014)
(unpublished) 20

State v. Engel,
166 Wn.2d 572, 210 P.3d 1007 (2009)................................. 13

Wolf v. State,
-- Wn. App. 2d --, 519 P.3d 608 (2022)
....9, 10, 14-16, 18, 21, 23, 24

Statutes

Laws of 1991, ch. 212 § 1 22

RCW 2.16.340 18

RCW 4.16.340 .... 1, 11, 12

RCW 4.16.340(1) 8, 11, 12, 13

RCW 4.16.340(1)(c) 2, 9, 12-15, 19, 25

RCW 4.16.340(c) 16

RCW 4.20.010 6

RCW 4.20.020 6

RCW 4.20.060 6

Rules

GR 14.1 20

GR 14.1(a) 21

RAP 13.4 10

RAP 13.4(b) 2, 10, 19, 22, 25

RAP 13.4(b)(1) 10, 22

RAP 13.4(b)(2) 10, 19, 21, 22

RAP 13.4(b)(3) 11

RAP 13.4(b)(4) 11, 22, 24

Other Authorities

Act, *Black's Law Dictionary* (11th ed. 2019) 14

H.B. 1618, 67th Leg., Reg. Sess. (Wash. 2023) 18

Restatement (Second) of Torts § 282 (1965)............................ 15

I. INTRODUCTION

Timothy Jones' Estate brought the lawsuit upon which this petition is based many years past the running of the applicable statute of limitations found in RCW 4.16.340. Because of this, the Court of Appeals rightfully affirmed dismissal of the Estate's Complaint. The plain meaning of RCW 4.16.340 provides that the limitations period is tolled – in pertinent part – until a victim of childhood sexual abuse makes the connection between an "act" of abuse and the resulting "injury." The explicit intent of the legislature was to preserve a cause of action based on childhood sexual abuse until a Plaintiff has the opportunity to fully realize the nexus between their alleged abuse and the injuries sustained therefrom. The legislature specifically identified that such victims often have a difficult time connecting the abuse they have suffered with their attendant injuries. Petitioner can point to no statute or case law that would support reading RCW 4.16.340 beyond the bounds of the plain meaning of the words it contains.

The Court of Appeals' ruling is consistent with the statutory language, consistent with Supreme Court cases that interpret the statute, and is not in conflict with *any* published Court of Appeals opinions. Furthermore, because of the distinctive facts of this case, it cannot be said that the Court of Appeals' decision is one of significant public interest. Based on this, review is inappropriate under RAP 13.4(b), and this Court should deny the petition.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Should Courts interpret RCW 4.16.340(1)(c) in accordance with the plain meaning of the words in the statute and determine that the statutory period begins to run when a Plaintiff makes the connection between the "act" of intentional childhood sexual abuse and their damages, or should Courts expand on the plain meaning of legislature's use of the word "act" to include all acts - and non-acts - that fall within the legal definition of "negligence?"

III. COUNTERSTATEMENT OF THE CASE

A. Family Friend Nick Miller Began to Abuse Timothy Jones in 1998, Years Before the State's Involvement in Jones's Care

Timothy Jones was born to Jacqueline Jones on July 20, 1990. Clerk's Papers (CP) 230. In or around May 2003, Jacqueline lost her home to foreclosure. CP 231. Mr. Jones moved in with family friend Nick Price Miller, Jr., while Jacqueline sought new housing. *Id*. In June 2003, the Washington Department Social and Health Services (DSHS) investigated a report that Miller was paying excessive attention to children who were not his own. *Id*. DSHS removed Jones from the Miller home due to Miller's inappropriate behavior. *Id*. Jones returned to his mother's care later in the year, after she found housing. *Id*. This was DSHS's first involvement with Mr. Jones. CP 2.

In November 2003, Jones was removed from his mother's home by law enforcement due to suspected neglect and placed in foster care. CP 231. DSHS filed a petition in

Pierce County Superior Court alleging Jones was a dependent child. CP 231. In February 2006, Jones was again returned to his mother's home after his dependency case was dismissed. CP 233.

In May 2006, at age 15, Mr. Jones disclosed to his support counselor that he had regularly suffered sexual, physical, and emotional abuse at the hands of Miller, from approximately 1998 to the spring of 2006. CP 233. Mr. Jones's counselor reported the abuse to law enforcement and Miller was arrested. *Id*. In 2008, Miller pleaded guilty to one count of rape of a child in the second degree (related to his abuse of Jones) and one count of child molestation in the second degree (related to his abuse of another child), and the court sentenced him to 119 months-to-life in prison. CP 233.

B. Mr. Jones Sued Mr. Miller for the Injuries Resulting From Miller's Sexual Abuse

In 2007 or 2008, Timothy Jones, through his mother, Jacqueline, sued Nick Miller for damages resulting from Miller's abuse of Jones. CP 12, 43, 46. The Estate contends that

Mr. Jones's attorney never advised him that he might have a legal claim for negligence against the State. CP 12, 43.

C. In 2017, Mr. Jones Allegedly Began to Wonder, After Seeing a News Story About a Childhood Sexual Abuse Lawsuit Against the State, if He Might Also Have a Legal Claim Against the State

Mr. Jones became romantically involved with Jimmy Acevedo in 2012. CP 45. In late 2017, Acevedo claims that Jones saw a news story about a childhood sexual abuse case brought against the State, which caused Jones to wonder "whether he might have a case" against the State. CP 45, 112. Acevedo recommended that Jones consult a lawyer to learn about his legal rights. CP 45. According to Acevedo, Jones followed his advice and contacted a law firm to investigate whether he "still had a viable claim" against the State. CP 46. Mr. Jones subsequently died by suicide on June 2, 2018. CP 45.

D. Mr. Jones's Estate Files Suit Against the State Nearly Two Years After his Death

After Mr. Jones's death, Jacqueline Jones was appointed the personal representative of his estate. CP 1. The Estate filed

this action in the Pierce County Superior Court in March 2020, again seeking to recover the damages Mr. Jones suffered as the result of his childhood sexual abuse. CP 1-6. The Estate asserted claims for negligence, negligent investigation, and wrongful death against the State under RCW 4.20.010, .020 (wrongful death actions), and .060 (survival actions). CP 1-6. Bruce Wolf was later appointed the successor personal representative, and the Estate filed an Amended Complaint substituting Wolf for Jacqueline Jones. CP 13-14. The State asserted as an affirmative defense that the Estate's claims were barred by the statute of limitations. CP 227, 241.

The Estate filed a motion for partial summary judgment on the issue of statute of limitations, arguing no evidence established "that Timothy 'actually discovered' his claim against the State prior to his death." CP 15-16. In support of its motion, the Estate submitted sworn declarations from three witnesses who were close to Mr. Jones: his mother, Jacqueline

Jones; his partner, Jimmy Acevedo; and his half-brother, Seth Jones. CP 43-48.

None of the declarations indicate that Mr. Jones failed to make the connection between Mr. Miller's acts of sexual abuse and his damages. In her declaration, Jacqueline Jones averred that she had "never heard Timothy express anger toward the State of Washington for its failure to protect him from the abuse. Nor did Tim ever indicate to me that he believed he might have a legal claim against the State of Washington related to the abuse he suffered." CP 44. Seth Jones made an identical claim in his declaration. CP 48. Acevedo offered similar observations, stating that, before Mr. Jones's consultation with a lawyer, he had never told Acevedo "that he believed or even thought about the possibility that the State of Washington might be liable for the abuse he suffered at the hands of Miller." CP 46. Mr. Jones and Acevedo had previously discussed the abuse Miller committed against Jones as a minor and the lawsuit he had filed against Miller. CP 46.

The State responded to the Estate's motion for partial summary judgment with a cross-motion for summary judgment on the statute of limitations defense. CP 51. In its cross-motion, the State argued that (a) the Estate's claims are untimely under RCW 4.16.340(1), the childhood sexual abuse statute of limitations, because they were not filed within three years of Mr. Jones's 18th birthday, and (b) the Estate had failed to establish a genuine issue of material fact by showing that an exception granted by RCW 4.16.340(1) applies. CP 57. In support of its cross-motion, the State pointed to the earlier suit against Miller and offered the Pierce County Sheriff Incident Report, detailing the information Mr. Jones provided to investigators at the age of 15 concerning the abuse he had suffered at the hands of Miller. CP 65-72.

In opposition to the State's cross-motion, the Estate submitted the declaration of Gilbert Kliman, M.D. CP 111-14. Dr. Kliman was retained by the Estate to conduct a review of documents provided by the Estate's attorneys to opine about

whether Mr. Jones comprehended "facts which would lead to his making a legal complaint that the State of Washington had negligently contributed to his psychological damages." CP 111.

The trial court denied the Estate's motion and granted summary judgment to the State, ruling that the Estate bears the burden of production to establish the applicability of the tolling exception set forth in RCW 4.16.340(1)(c), and that it had not satisfied its burden. Verbatim Report of Proceedings (RP) at 18-19; CP 202. The Estate appealed the trial court's rulings on the cross motions for summary judgment. CP 214-15.

The Court of Appeals affirmed the trial court's dismissal of the Estate's Complaint. The Court of Appeals held that "[b]ased on the plain language of RCW 4.16.340(1)(c), the statute of limitations as to all claims arising from childhood sexual abuse begins to run when a victim discovers the causal connection between the intentional act of sexual abuse and their injuries." *Wolf v. State*, -- Wn. App. 2d --, 519 P.3d 608, 619-20 (2022). It further noted that: "[h]ere, the record shows

that no genuine issue of material fact exists that Timothy connected Miller's sexual abuse to his injuries by 2008. The Estate does not argue that Timothy failed to connect Miller's sexual abuse to Timothy's alleged injuries." *Id.* at 620. Mr. Jones now seeks review of that decision from this Court.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Review of the Court of Appeals' opinion is inappropriate in this case because the Estate cannot demonstrate that any of the conditions set forth in RAP 13.4 are met. "A petition for review will be accepted…*only*" in the circumstances contained in RAP 13.4(b), and none apply to the Court of Appeals' decision in this case. RAP 13.4(b) (emphasis added). The Estate fails to establish that the Court of Appeals' decision conflicts with any Supreme Court cases. RAP 13.4(b)(1). The Estate can point to no *published* decisions of the Court of Appeals that this decision is in conflict with. RAP 13.4(b)(2). And finally, the limited application of the Court of Appeals' decision – which is based on a very specific set of factual circumstances unique to

this case – does not create an issue of *substantial* public interest that should be determined by this Court. RAP 13.4(b)(4).[1] Because this case does not fall under any of the prongs for review of a Court of Appeals opinion, the Court should decline to exercise review.

A. The Court of Appeals' Decision Adheres to Precedent

This Court has considered the application of RCW 4.16.340 to negligence actions before in *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), *as amended* (Sept. 8, 1999). The *C.J.C.* Court looked to the plain meaning of RCW 4.16.340(1), as well as the legislative findings that were incident to the statute. In doing so, the *C.J.C.* court concluded that the legislature intended to apply RCW 4.16.340 to negligence causes of action against individuals who were not the perpetrators of childhood sexual abuse, so long as the action was "based on" such abuse. *Id.* at 710. That Court's conclusions, based on the application of the

[1] The Estate does not contend that this case warrants review under RAP 13.4(b)(3), nor could it.

plain meaning of RCW 4.16.340 and the legislative intent, are wholly consistent with the Court of Appeals' decision in this case.

1. The Court of Appeals followed the plain meaning – and the only logical reading – of the words in RCW 4.16.340(1)(c)

The only logical reading of the word "act" in RCW 4.16.340(1)(c) is as a reference to an intentional act of child sexual abuse. This is clear for two central reasons. First, the statutory structure makes clear that the relevant "act" is the "intentional conduct," RCW 4.16.340(1), or, as this Court described it in *C.J.C.*, the "predicate" "intentional sexual abuse," *C.J.C.,* 138 Wn.2d at 709. Second, the Estate's interpretation would define "act" to include *inaction*, an interpretation inconsistent with the plain meaning of the term.

"The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."

State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). Each aspect of the plain language analysis supports the Court of Appeals' interpretation.

Statutory context makes clear that the term "act" refers to the "intentional conduct." The term "act" appears in subsections of RCW 4.16.340(1) and, in context, refers to the term "intentional conduct" that precedes it:

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

RCW 4.16.340(1) (emphasis added). In addition, the language "the act caused the injury" is simply the reverse of the previous language "injury suffered as a result of childhood sexual abuse." RCW 4.16.340(1)(c). In context, the relevant "act" is clearly the "intentional conduct" (i.e., the "childhood sexual

abuse”). The Court of Appeals correctly observed that “[t]here is no language in the statute that suggests that a different ‘act’ other than the childhood sexual abuse that caused the injuries may form the basis for calculating the running of the statute of limitations.” *Wolf*, 519 P.3d at 618-19.

The ordinary meaning of the word “act” also leads to the same conclusion. The word “act” is defined as “[s]omething done or performed, esp. voluntarily; a deed.” Act, *Black’s Law Dictionary* (11th ed. 2019); *see also Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 587, 964 P.2d 1173 (1998) (citing *Black’s Law Dictionary* to “determine the plain, ordinary, and popular meanings of the terms”).

Here, the Estate argues – as it did unsuccessfully at the Court of Appeals – that the word “act” as it appears in RCW 4.16.340(1)(c) should be read to include things that are explicitly *not* acts. The Estate asks this Court to entertain review for the purpose of equating the word “act” with the word “negligence.” *See* Pet. for Review at 14. However, “negligence”

includes numerous transgressions that are not acts. The *Restatement (Second) of Torts explicitly* confirms as much: "Negligent conduct may consist *either of an act, or an omission to act* when there is a duty to do so." *Restatement (Second) of Torts* § 282 (1965) (emphasis added). The reading of the word the legislature chose to use – "act" – to include its antonym – "omission" – does not make logical, linguistic, or legal sense.

The plain meaning of the words within RCW 4.16.340(1)(c) support the Court of Appeals' holding that "negligence claims based on childhood sexual abuse accrue once the victim discovers the causal connection between *the intentional act* of sexual abuse and their injuries." *Wolf*, 519 P.3d at 618 (emphasis in original). This holding is also consistent with the legislature's intent and the decisions of this Court.

2. The Court of Appeals' interpretation of RCW 4.16.340(c) is consistent with the legislative intent of the statute and this Court's precedent

In addition to the plain language the legislature used in RCW 4.16.340(c), the Court of Appeals' holding is entirely consistent with the purposes expressed in the legislative intent, and is consistent with this Court's decision in *C.J.C.*, 138 Wn.2d at 985. As the Court of Appeals noted, the legislature provided its intent clearly: "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." *Wolf*, 519 P.3d at 616 (citing Laws of 1991, ch. 212 § 1) (emphasis added). The *C.J.C.* court also recognized this underpinning of legislative intent: "childhood sexual abuse is a pervasive problem and causes long lasting damage; … victims of childhood sexual abuse may repress the memory of *the abuse* or be unable to connect *the abuse* to any injury until the statute of limitations has run; … victims may be unable to understand or make the

connection between *the abuse* and the emotional damages it causes." *C.J.C.*, 138 Wn.2d at 712-13 (citing Laws of 1991, ch. 212, § 1) (emphasis added). This express purpose of the law directly undercuts the Estate's position, as it is clearly discussing the ability of a victim of child sexual abuse to make the connection between *his abuse* and *his damages*.

The Estate, on the other hand, is arguing that the limitations period only begins to run once a plaintiff comes to the legal conclusion that a specific individual or entity may be liable. However, nowhere in the intent or purpose sections of the statute, nor within the cases interpreting it, is there a discussion of any specific difficulty of understanding the legal claims that are present within a negligence action, whether based on childhood sexual abuse, adult sexual abuse, or other transgressions. Nowhere does it express a desire to protect this class of individuals from retaining attorneys unfamiliar with tort law, and the basic concepts of liability. Nowhere does any precedent discuss any special or unique challenges posed by an

individual who has made the connection between their damages and acts of intentional childhood sexual abuse in determining applicable tortfeasors under the law. Because that is not what the statute – in the express and plain words used by the legislature – is about. Any expansion of the scope of the statute should come from the legislature. *See, e.g.,* H.B. 1618, 67th Leg., Reg. Sess. (Wash. 2023).

The facts of this case are useful to illustrate what falls within the intent of the statute and what does not. Here, "by 2006, while Timothy [Jones] was still a minor, Timothy had made the causal connection between Miller's sexual abuse and his injuries." *Wolf*, 519 P.3d at 620. The legislative findings and the plain language of RCW 2.16.340 make it clear that *this* is the connection – and the difficulty of making it – that compelled legislative action to preserve cognizable claims of child sexual abuse and provide victims a remedy after making it. Because of this, when read as a whole the only logical

reading of the entire statute comports with the Court of Appeals' decision here.

3. The Court of Appeals' interpretation of RCW 4.16.340 is not inconsistent with any other published opinions of that court

Additionally, Petitioner can point to no published Court of Appeals case that conflicts with the Court of Appeals' opinion here. RAP 13.4(b) specifies that review is only appropriate "[i]f the decision of the Court of Appeals is in conflict with a *published* decision of the Court of Appeals." RAP 13.4(b)(2) (emphasis added). In addition to being unpublished, the majority of cases that Petitioner cites in support of his RAP 13.4(b)(2) argument do not interpret or analyze the specific question at issue in this case, and most in fact *support* the Court of Appeals' interpretation of RCW 4.16.340(1)(c). *See Ohnemus v. State*, 195 Wn. App. 135, 143, 379 P.3d 142, 146 (2016) (unpublished in part) ("We also hold that Ohnemus's claim under RCW 4.16.340(1)(c) was properly dismissed because the record does not support an

inference that she suffered an injury qualitatively different from other *harms connected to the abuse*, nor does the record support an inference that Ohnemus failed to make a causal connection between the defendant's conduct and the injuries she sustained." (Emphasis added.)); *P.L. v. Wash. State Dep't of Soc. & Health Servs.*, 184 Wn. App. 1010, 2014 WL 5340007 (Oct. 20, 2014) (unpublished)[2] ("[T]he record does not conclusively establish that they knew, until recently, that their emotional injuries were caused *by the acts of abuse* they experienced in foster care." (Emphasis added.)); *K.C. v. State*, 10 Wn. App. 2d 1038, 2019 WL 4942457 (Oct. 8, 2019), a*s amended on denial of reconsideration* (Mar. 17, 2020) (unpublished) ("Here, KC claims that she did not associate her lifelong symptoms of depression, anxiety, and suicidal thoughts *with her childhood sexual abuse* until 2012, when she was diagnosed with PTSD." (Emphasis added.)).

[2] Pursuant to GR 14.1, these decisions have no precedential value, are not binding on any court, and are cited only for such persuasive value as this Court deems appropriate.

However, even the one case that is at odds with the Court of Appeals' decision here is an unpublished opinion that fails to conduct any statutory analysis: *Kirchoff v. City of Kelso*, 190 Wn. App. 1032, 2015 WL 5923455 (Oct. 12, 2015) (unpublished). The Court of Appeals' decision here specifically discussed the lack of analysis in *Kirchoff*. *Wolf,* 519 P.3d at 620 n.9 (noting that *Kirchoff* "did not engage in a statutory analysis"). Further, unpublished cases such as *Kirchoff* "have no precedential value and are not binding on any court." GR 14.1(a). In acknowledgement of this rule, deviating from an unpublished opinion of the Court of Appeals is *not* a basis upon which review is appropriate. RAP 13.4(b)(2) (providing for review only "[i]f the decision of the Court of Appeals is in conflict with a *published* decision of the Court of Appeals." (Emphasis added)). Because the Court of Appeals' decision here is not in conflict with another *published* Court of Appeals decision, review under RAP 13.4(b)(2) is not appropriate.

B. The Court of Appeals' Decision is Based Upon a Unique Set of Facts Unlikely to be Replicated and Therefore does not Concern a Matter of Substantial Public Interest

In addition to being inappropriate under RAP 13.4(b)(1) and (2), review is also inappropriate under the only other sub-section of RAP 13.4(b) that Petitioner cites or that could possibly be applicable: Review is appropriate "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). A substantial public interest is not implicated by this case because of the unique factual circumstances required to reach the issue at hand. This is emphasized by the fact that this case represents the *first* published Court of Appeals opinion that specifically addresses this issue despite the applicable law having been in place for more than 30 years. *See* Laws of 1991, ch. 212 § 1.

This dearth of case law is understandable given the unique confluence of events that were required to reach this specific question. First, Timothy Jones was abused by a family friend, and that abuse allegedly overlapped – at least temporally

in some nominal way – with DSHS being involved in Mr. Jones's care. CP 231. Second, Mr. Jones sued his abuser, through his mother, in 2008. CP 12, 43, 46. This led the Court of Appeals to determine that "no genuine issue of material fact exists that Mr. Jones connected Miller's sexual abuse to his injuries by 2008." *Wolf*, 519 P.3d at 620. Third, and possibly most importantly, Mr. Jones died on June 2, 2018, before the commencement of this lawsuit and before any discovery on the lawsuit was conducted. CP 45. Because of this, the parties are left with only the information and evidence available at the time of his death, and further exploration of the contours of any cause of action is impossible.

In holding that the expanded statute of limitations does not apply to Mr. Jones' lawsuit, the Court of Appeals relied on the only admissible evidence available to it: Mr. Jones spoke with law enforcement investigators and filed a lawsuit based on these same injuries against Mr. Miller in 2008. *Wolf*, 519 P.3d at 620; CP 12, 43, 46. And, in fact, the Court of Appeals noted

that the Estate does not dispute this fact. *Wolf*, 519 P.3d at 620 ("The Estate does not argue that Timothy failed to connect Miller's sexual abuse to Timothy's alleged injuries."). There is no issue of material fact in part because Mr. Jones is no longer available to speak to what he knew, when he knew it, and what connections he had made about the abuse he experienced. Instead, Plaintiff attempts to have three people who were ostensibly close to Mr. Jones state that they never heard him talk about any anger toward the State, which is not competent evidence of Mr. Jones' thoughts or the connections he made and when. Other cases are unlikely to present such a peculiar confluence of events. Thus, the Court of Appeals' decision in this case analyzed a set of facts and specific issues unlikely to be repeated. Review under RAP 13.4(b)(4) is not appropriate.

V. CONCLUSION

There is no issue of material fact that Timothy Jones made the connection between his abuse at the hands of a family friend and his damages resulting therefrom in 2008 when he

sued his abuser. Based on the plain meaning of the words contained in RCW 4.16.340(1)(c), the childhood sexual abuse statute of limitations, this knowledge triggered the running of the statute of limitations. This statute of limitations would have applied equally to his suit against Mr. Miller – the perpetrator – as well as any allegedly negligent actor. The Court of Appeals' decision upholding the trial court's application of this plain language is consistent with the precedent set by this Court in *C.J.C.*, does not conflict with any published opinions of the Court of Appeals, and arises under a set of facts unlikely to be repeated. Because Mr. Jones cannot meet any of the criteria for review under RAP 13.4(b), this Court should deny his petition for review.

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RESPECTFULLY SUBMITTED this 3rd day of February 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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/s Beverly Cox
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ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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