No. 93519-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 46944-8-II

TASHA OHNEMUS,

Petitioner/Plaintiff,

v.

STATE OF WASHINGTON,

Respondent/Defendant.

PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Tasha Ohnemus (Tasha) asks this Court to accept review of the Court of Appeals' decision in *Ohnemus v. State,* No. 46944-8-II, slip opinion (Appendix A). The decision conflicts with applicable precedent to reach the conclusions that: Tasha's essentially-undisputed child sexual abuse claims against the State are barred by the special statute of limitations for such claims; her negligent investigation claims are time-barred under the general tort statute of limitations because she "fail[ed] to exercise due diligence" to timely investigate them; and the State cannot be liable to her under the Sexual Exploitation of Children Act.[1] The Court of Appeals violated this Court's precedent, as well as the strong legislative intent and policy regarding child sexual abuse victims, when it took the highly fact-sensitive limitations issues away from the jury.

Inexplicably, the decision completely ignores and directly conflicts with an onpoint published opinion of the Court of Appeals holding that whether a child sexual abuse victim suffered new, more serious and qualitatively different injuries causally connected to earlier harms is a question of fact for the jury, not the court. *Ohnemus* similarly fails to address precisely-applicable Oregon precedent, in accord with Washington law, providing it is a question of fact for the jury whether a sexual abuse

[1] RCW Chapter 9.68A.

victim was duly diligent in discovering their claim against a third party nonperpetrator.

The effect of the Court of Appeals' holding is that, to bring a claim for injuries against an entity other than the perpetrator, a child who has been seriously abused, resulting in incapacitating mental health injuries, must demonstrate to the court that within 3 years of bringing suit, they looked beyond the perpetrator's conduct to investigate whether a responsible third party was at fault for all manifestations of that harm. Neither Washington courts nor the Legislature intended such a result.

Finally, the published portion of *Ohnemus* offers a premature advisory opinion, sua sponte, that the State cannot be liable to child sexual abuse victims under RCW 9.68A.100 and .130. The second and third issues are matters of first impression in Washington.

The State did not dispute that Tasha was horrifically sexually, physically and emotionally abused by her stepfather Steven Quiles from the time she was five years of age (1992) until she was 14 (2002), when Quiles was arrested, convicted and imprisoned. On two separate occasions in 1996 and 1997, the State was notified of the abuse, and failed to intervene and protect her. As a result Quiles continued to sexually and physically assault Tasha for another five years, causing irreparable harm.

Tasha discovered the State's 1996 and 1997 negligence and failure to protect her in 2011. She filed this lawsuit the following year. After learning about the State's culpability, Tasha experienced an increase in the symptoms attendant to the trauma inflicted on her. She also learned that the damage done to her was more extensive than previously known.

Because Tasha did not discover the State's tortious conduct that occurred in 1996 and 1997 until 2011, and because Tasha only recently discovered the full extent of harm caused by the profound abuse she endured, an issue of material fact exists as to when the statute of limitations in this matter began to run. Tasha therefore respectfully asks this Court to accept review of the Court of Appeals' decision.

All of these matters are questions of substantial public interest which this Court should address to provide guidance to childhood sexual abuse victims, the State and other entities responsible for children.

II. IDENTITY OF PETITIONER

Petitioner Tasha Ohnemus—plaintiff in the Superior Court, respondent/cross-appellant in the Court of Appeals--asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part III.

III. COURT OF APPEALS DECISION

Tasha requests review of the Court of Appeals' decision, *Ohnemus v. State of Washington,* No. 46944-8-II (slip op., July 19, 2016) (published in part). A copy of the decision is at Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review to resolve a conflict between the *Ohnemus* decision and a published Court of Appeals opinion, and to address a question of substantial public interest: may a court take from the jury the fact-sensitive inquiry whether the special statute of limitations in RCW 4.16.340(1)(c) bars a child sexual abuse victim's claims, and dismiss the claim as a matter of law when the facts are vigorously disputed? RAP 13.4(b)(2), (4).

2. Should this Court accept review to address a question of substantial public interest and an issue of first impression in Washington—whether, as a matter of law and undisputed fact, a sexual abuse victim exercised due diligence in discovering the basis for her negligence claims, to toll the 3-year general statute of limitations against an entity other than the perpetrator? RAP 13.4(b)(4). Should the Court accept review of this question when the decision misapplies conflicting precedent on the discovery rule from this Court and the Court of Appeals? RAP 13.4(b)(1), (2).

3. Should this Court accept review of the Court of Appeals' unnecessary yet published advisory opinion prematurely dismissing an unripe claim the parties agreed not to certify, and on which the appellant did not properly seek discretionary review? RAP 13.4(b)(1), (2), (4).

V. STATEMENT OF THE CASE

Tasha brought this action against the State in August 2012, alleging Child Protective Services (CPS) was negligent in investigating her claims that her stepfather, Steven Quiles, sexually abused her, and for failing to remove her from the abusive environment after CPS's 1996 and 1997 investigations. Without explaining its reasons for dismissal, the superior court granted the State's summary judgment motion to dismiss the negligence claims. CP 609-11;[2] CP 652-54.[3]

On a joint motion, the court then entered a partial final judgment under CR 54(b) and certified the statute of limitations questions only, ruling that Tasha "violated RCW 4.16.080(2)", the 3-year general tort statute of limitations, warranting dismissal of her "physical abuse" (negligent investigation) claims against the State. CP 663, ¶3. The court concluded the child sexual abuse claims were barred by the applicable special statute of limitations, RCW 4.16.340(1)(c). *Id.* The court certified

[2] Sept. 12, 2014 Order on Defendant's Motion for Summary Judgment.
[3] Oct. 6, 2014 Order on parties' Motions for Partial Reconsideration.

this matter for appellate review under RAP 2.3(b)(4). CP 661-64;[4] slip op., at 1.

The court denied the State's motion for summary judgment dismissal of Tasha's claim under RCW 9.68A.100 (commercial sexual abuse of a minor). CP 610, 653. Without moving for discretionary review or seeking certification of the matter, on November 17, 2014, the State improperly appealed the denial of its summary judgment motion to dismiss the claim under RCW 9.68A.100. Slip op., at 1-2, n.1; CP 665-67. Tasha appealed on November 20, 2014, on the statute of limitations issues. CP 691-93.[5]

The Court of Appeals sua sponte granted discretionary review of the question regarding RCW Chapter 9.68A, citing RAP 1.2(a). The Court then applied a literalistic construction of RCW Chapter 9.68A, holding the State cannot be liable for commercial sexual abuse of a minor because it cannot "engage in sexual conduct." On that basis, the Court concluded Tasha could never recover her attorneys' fees and costs under RCW 9.68A.130. Slip op., at 4-8.

On Tasha's cross-appeal, the Court of Appeals abandoned the very summary judgment principles it purported to cite. The Court concluded,

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[4] *See also* CP 662.

[5] At the parties' request, the Court set a briefing schedule providing that Tasha would file the initial brief on the limitations issues, followed by the State's brief on RCW 9.68A.100.

as a matter of law resolving undisputed facts, that the statute of limitations expired when Tasha discovered or should have discovered the State's negligent investigation of reports of abuse in ***1996*** and ***1997***, and that she recognized or should have recognized the harm she is suing for – permanent and severe mental illness –before August 2009 (3 years before 2012). The Court held the only State involvement Tasha could have been referring to in her 2003[6] and 2007[7] counseling sessions was the 1996 and 1997 investigations, and "[n]either medical note could be referencing the State's involvement in 2001 nor 2002." Slip op., at 23-24 (citing CP 584 (2003), CP 300 (2007); *id.* at 25.

This analysis cherry-picks hearsay out of the disputed facts, viewing it against Tasha, and confuses the fundamental difference between Tasha's knowledge of the elements of a claim against Quiles as

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[6] A 2003 therapist's note reflects Tasha, age 16, was "very angry" at CPS, "hating" them for not believing her allegations and allowing the abuse to continue "so much longer." It does not indicate when she formed this hate, nor when they did not believe her. There were multiple interactions with DSHS workers in 2001-02, when the workers blamed Tasha for family problems, did not believe abuse was occurring and left her in Quiles' home for months. Being angry and blaming them does not, as a matter of law, constitute factual knowledge necessary to trigger the statute. The 2003 entry strikingly resembles the letter in *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081 (2006): "Presumably, victims of childhood sexual abuse know that they have been hurt, but RCW 4.16.340 makes it clear that a plaintiff's cause of action does not accrue until she knows that the sexual abuse has caused her more serious injuries. ... This letter ... does not prove that Korst knew her father's sexual abuse had caused her more serious physical and emotional symptoms." *Id.* at 210.

[7] In Oct. 2007, at age 20, Tasha told her counselor she was abused between ages 4-15, and "she tried to tell CPS and social workers about [Quiles] sexual abuse." This does not resolve any factual dispute; it does not say she told CPS and they negligently investigated her reports; it has no probative value on Tasha's alleged factual knowledge of CPS's 1996 and 1997 negligent investigations, and could apply to 2001-02 interactions.

opposed to her knowledge of a claim against DSHS, and improperly conflates knowledge of CPS's involvement with knowledge that they violated the standard of care. *See* Section B (*e.g., Ohler v. Tacoma General Hospital,* 92 Wn.2d 507, 598 P.2d 1358 (1979); *Green v. A.P.C.,* 136 Wn. 2d 87, 100 960 P.2d 912 (1998) (plaintiff knew in 1981 she was a "DES daughter" but did not know it would impact reproductive capabilities until 1994); *Lo v. Honda Motor Co.,* 73 Wn. App. 448, 459, 869 P.2d 1114 (1994) (declining to hold as a matter of law that the fact of a traumatic medical event and knowledge of its immediate cause equates with notice that the injury was caused by negligence).

The State failed to meet its burden of eliminating any question of fact that the two hearsay entries related to DSHS/CPS conduct in 1996 and 1997, rather than what occurred in 2001 or 2002.[8] Tasha produced substantial evidence that she did not discover CPS's negligence until 2011. This then led to her recognition of more significant and serious injuries. In 2011, at the urging of her counselor, and for purposes of extending Crime Victim Compensation coverage for her therapy, Tasha obtained the Mason County Police reports from her 2002 criminal case. In reading those reports, she first discovered the CPS investigations in 1996

[8] *Clare v. Saberhagen Holdings, Inc.,* 129 Wn. App. 599, 123 P.3d 465 (2005), relied on by the Court, is factually distinguishable and cannot turn disputed factual questions into undisputed facts in this case.

and 1997. She had not remembered any interviews at school when she was 8 and 9 years old. She had no other interaction with those caseworkers at that time, and therefore there is no other way she would have known of the 1996 or 1997 investigations.[9] The investigations in 1996 and 1997, all but conceded by the State to have been negligently conducted, resulted in her remaining in the abusive environment five to six additional years. *E.g.,* CP 474, 481, 482, 484-85, 489, 506.

It is beyond dispute that Tasha was horrifically sexually and physically abused for many years by her stepfather, Steven Quiles. The State also virtually conceded the CPS investigations of reports of abuse in 1996 and 1997 were far below the standard of care and resulted in Tasha being left in a violent household with Quiles until 2002. The State did not contest and in fact emphasized the profound negative impact that the

[9] Included were documents revealing that CPS had received the 1996 and 1997 reports regarding Quiles's conduct. Before reading them, Tasha (age 8 and 9 at the time of the reports) was unaware that CPS knew about the abuse or that they decided not to act to protect her, and CPS contact with her was minimal. CP 474, 481. Tasha was devastated to learn CPS had betrayed her, and the information exacerbated her existing emotional injuries. CP 481. Her mental health treatment coordinator/case manager at the time observed Tasha needed intensive treatment as a result of the new information and was unaware of the extent of her injuries. Dr. Steve Tutty who first saw her in December 2011, CP 484-85, determined the realization in 2011 that CPS failed to intervene and protect Tasha was very impacting for her and subsequently compounded her emotional injuries. CP 489, 506. In 2013, Tasha's treatment was expanded to include anti-psychotic psychotropic medication, signifyihng an escalation in symptoms. *See also* CP 489, 482.

abuse had on Tasha's mental health and well-being.[10] The State withdrew its expert witness on liability. CP 470-71. The only defense the State chose to make was that Tasha should have known about her claim earlier.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Decision Directly Conflicts With Court of Appeals Precedent Holding The Accrual Of The Special Child Sexual Abuse Limitations Statute Is A Question Of Fact.

The Court of Appeals held, under RCW 4.16. 340(1)(c),[11] Tasha's claim was time-barred because, as a matter of law based on undisputed fact, she did not show she suffered an injury "qualitatively different" from previous harms she had alleged, and she did not demonstrate she could not have connected the child abuse to her current injuries until after August 2009. Slip op., at 28-35. The Court concluded no reasonable juror could find otherwise.

It is astonishing that the Court ignored the directly on point decision of *B.R. v. Horsley*. *B.R.* holds that a new injury to a child sexual abuse victim (not necessarily a new diagnosis) can be more serious and qualitatively different than previous claims. Especially given *Ohnemus's* conflict with *B.R.*, the decision raises an issue of substantial public interest for victims of child sexual abuse because it takes a highly fact-sensitive

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[10] The State's own social workers admitted their inexperience and lack of training caused them to inadequately investigate the 1996 and 1997 referrals. CP 393-94, pp. 11-14; CP 395, pp. 20-21; CP 397, pp. 30-31; CP 400, p. 46; CP 420-21, pp. 60-64.

[11] RCW 4.16.340(1)(c) (the Childhood Sexual Abuse Statute of Limitations), App. B.

issue away from the jury, improperly cutting off child sexual abuse victims' right to a jury trial.

B.R. applies the identical statute of limitations in similar circumstances to hold that there is virtually always a genuine issue of material fact as to whether a child sexual abuse victim's injuries are qualitatively different or more serious to start this special limitations period, and as to when such a victim connects the abuse to their claimed injuries. Here, as in *B.R.*, whether Tasha knew or should have known about her new injuries and the causal connection between them and the abuse is a question only for the jury.

While Tasha (like B.R.) long suffered the full range of negative sequelae associated with such abuse, she brought claims against the State based on new illnesses of psychosis, permanent harm, and betrayal by her alleged protectors at CPS/DSHS. She only came to identify these impacts after August 2009, well within the three years before filing her suit in August 2012. At a minimum, as in *B.R.*, this is a question for the jury, not the court. In dismissing Tasha's claims as barred by RCW 4.16.340(1)(c), the Court of Appeals violated all principles of summary judgment by viewing the facts and reasonable inferences against Tasha and in favor of the State. RAP 13.4(b)(1), (2).

Contrary to the *Ohnemus* Court's misconstruction, "'this special statute of limitations is unique in that it does not begin running when the victim discovers an injury.'" *Id.* at 299 (quoting *Korst,* at 208).

> Instead, it specifically focuses on when a victim of sexual abuse discovers the causal link between the abuse and the injury for which the suit is brought." ... This is because "[t]he legislature specifically anticipated that victims may know they are suffering emotional harm or damage but not be able to understand the connection between those symptoms and the abuse."[12]

In *B.R.,* after the victim's marriage broke up in her early twenties, she realized the abuse impacted her life more than she had known. The court reversed the summary judgment dismissal of her new claims:

> **B.R. presented evidence that [her] injuries are new or more serious because she did not understand how her sexual abuse would affect these parts of her life until she actually had these experiences and entered into sexual abuse counseling with Dr. Dietzen in 2011.** This evidence, together with Horsley's contrary evidence and viewed in a light most favorable to B.R., demonstrates that material facts are in dispute.

Id., at 306 (emphasis added). "Like Korst, B.R. did not understand the full effect of the childhood sexual abuse until she entered counseling as an adult." *Id.* at 301. The evidence demonstrated "the existence of a genuine dispute of material fact regarding when B.R. connected the sexual abuse to her claimed injuries." *Id.* B.R.'s problems with sexual dysfunction and

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[12] *B.R.* harmonizes the cases cited by the *Ohnemus* court: – *Carollo v. Dahl,* 157 Wn.App. 796, 240 P.3d 1172 (2010), and *Korst. See also Hollman v. Corcoran,* 89 Wn. App. 323, 949 P.2d 386 (1997) (cited in slip op., at 29).

testimony that B.R. had not experienced these problems before demonstrated a triable question existed regarding whether she experienced a new injury:

> **These injuries are precisely the type of injuries for which the legislature intended to provide a remedy when it considered the 1991 amendment to RCW 4.16.340.** ...[T]he legislature recognized that these are the types of injuries that **a victim may not fully understand until later in life: "Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later."**

Id. at 302-03 (emphasis added).

B. The Decision Raises An Issue of Substantial Public Interest Meriting Review On Application of the Discovery Rule Tolling RCW 4.16.080(2).

The Court of Appeals' dismissed Tasha's negligent investigation claims as a matter of law and undisputed fact because it found she was not duly diligent in discovering her negligent investigation claims after August 2009, to learn that the State had failed to protect her from her stepfather's abuse despite repeated notice and investigation. Again, the Court of Appeals took this highly fact-sensitive inquiry from the jury. Slip op., 8, 21-28. The holding conflicts with closely analogous Washington law and rules on a question of first impression without any discussion of onpoint authority from Oregon to the contrary.

As this Court has repeatedly declared, "[t]he question of when a plaintiff should have discovered the elements of a cause of action so as to

begin the running of the statute of limitation is ordinarily a question of fact" on which the State, as the moving party, had the initial burden. *Green v. A.P.C.,* 136 Wn. 2d 87, 100, 960 P.2d 912 (1998) (reversing summary judgment); *Haslund v. City of Seattle,* 86 Wn.2d 607, 620–21, 547 P.2d 1221 (1976).[13] [14]

It is a serious misapplication of Washington law to hold, as a matter of law based on disputed facts erroneously viewed against her and resolved by the Court of Appeals, a 16-year-old, reeling from years of rape by her stepfather, was not duly diligent because she should have obtained her CPS or police records[15] to assess whether the agency responsible for protecting her had utterly failed in its responsibility. *Ohnemus* further conflicts with the legislative intent to allow victims recourse against those who are charged with protecting them. *See, e.g., C.J.C. v. Corporation of the Catholic Bishop of Yakima,* 138 Wn.2d 699, 707-08, 985 P.2d 262 (1999) (acknowledging Legislature's strong public policy of providing abuse victims full access to courts).

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[13] "The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact. Since the statute of limitations is an affirmative defense, CR 8(c), the burden was on appellant to prove those facts which established the defense." *Id.*

[14] *Clare v. Saberhagen,* 129 Wn. App. at 603, is at a minimum distinguishable, as it involved adults making medical malpractice claims, not minors with mental illness conditions caused by persistent, insidious childhood sexual abuse.

[15] The fact that a hearing had to occur before the State would release the records to counsel, and only under protection order, demonstrates that no child abuse victim (pro se) or their attorney could have obtained information before as the State argued below.

The Court never addressed the precisely onpoint recent Oregon cases applying the same discovery rule in the circumstances of a childhood sexual abuse victim. These cases – *T.R. v. Boy Scouts of America,* 344 Or. 282, 181 P.3d 758 (2008); *Johnson v. Multnomah Cty. Dept. of Community Justice,* 344 Or. 111, 178 P.3d 210 (2008); *Doe 1 v. Lake Oswego Sch. Dist.*, 353 Or. 321, 297 P.3d 1287 (2013)--are in complete accord with this Court's standards and reasoning, to hold that a childhoold sexual abuse victim defeats summary judgment on the statute of limitations when they show disputed facts as to whether they knew or should have known about the third party's involvement ***and*** breach of duty.

All three involved childhood sexual abuse. In each case, as here, the victim knew they had been sexually abused by the perpetrator and knew the abuse had caused harm. In each case, the Oregon court concluded there was an issue of fact. *Doe 1* held:

> **[D]efendant mistakenly conflates the question of whether Johnson's alleged conduct was in fact offensive with the question whether plaintiffs, as fifth-graders subjected to Johnson's grooming tactics, recognized or must be deemed to have recognized that fact when the touching occurred.** ...[T]he facts that a plaintiff must have discovered or be deemed to have discovered include not only the conduct of the defendant, but also ... the tortious nature of that conduct.
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> In *Gaston,* ... ... [t]he court held that whether the plaintiff's failure to comprehend the nature of the defendant's conduct was

> reasonable was a question of fact that must be determined by the trier of fact.[16]

Id. at 331–32. In *Johnson,* the court aptly noted:

> A duty to inquire must arise from circumstances stronger than the mere drifting possibility that something of interest might come to light. ... We reject defendant's theory that, as a matter of law, the record on summary judgment establishes that, by July 2003 at the latest, a reasonable person in plaintiff's circumstances would have made inquiries that would have led to the knowledge that defendant's supervision of Stephens in 1997 might have been deficient

Johnson, 178 P.3d at 215.

The same is true in Washington. *Ohler v. Tacoma General Hospital,* 92 Wn.2d 507, 598 P.2d 1358 (1979) (plaintiff knew blindness resulted from too much oxygen, but believed treatment was properly and necessarily administered; at age 21, she learned of hospital's and incubator manufacturer's possible negligence; reversing summary judgment for factual issue whether she knew or should have known the result was caused by a breach of the hospital's duty); *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 322-28, 759 P.2d 405 (1988) (plane crash in 1974 attributed to pilot errors; plaintiff learned in 1984 of potential aircraft defect and timely filed in 1986; court rejected defendant's

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[16] "Whether a reasonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact that depends upon the nature of the harm suffered, the nature of the medical procedure, and other relevant circumstances.... A reasonable person that experiences symptoms that are incidental to a particular medical procedure may not be aware that he or she has been a victim of tortious conduct ...." *Id.* (citation omitted).

contention that knowledge should be imputed as a matter of law from the known happening of the traumatic event; what plaintiff knew or should have known about the cause of harm was an unresolved issue of fact); *Green*, 136 Wn.2d at 87 (plaintiff knew in 1981 she was a "DES daughter" but did not know it would impact reproductive capabilities until 1994); *Lo,* 73 Wn. App. at 459.

Tasha knew she had been physically and sexually abused by her stepfather, knew she had been harmed, but had no recollection or appreciation of any CPS involvement in 1996-97, let alone that they had performed substandard investigations, until her 2011 discovery.

Doe I clarifies that reasonable diligence is evaluated from the perspective of a reasonable person in the plaintiff's circumstances.

> [K]nowledge that an actor committed an act that resulted in harm is not always sufficient to establish that a plaintiff also knew that the act was tortious. And ... **whether a plaintiff knew or should have known the elements of a legally cognizable claim, including the tortious nature of a defendant's act, is generally a question of fact determined by an objective standard**....
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> ... In applying that standard, **a court must consider the facts from the perspective of a reasonable person in the circumstances of the plaintiff.** ... Those circumstances include, but are not limited to, plaintiff's status as a minor, ... the relationship between the parties, ..., and the nature of the harm suffered. ... A court cannot decide that question as a matter of law unless the only conclusion that a reasonable trier of fact could reach is that the plaintiff knew or should have known the critical facts at a specified time.

Id. at 332-33 (citations omitted; emphasis added).

This Court should accept review to confirm that victims like Tasha have the right to present to the jury their claim against negligent entities other than the perpetrator.

C. The Published Portion of *Ohnemus* Is An Unnecessary Advisory Opinion On A Claim That Was Not Ripe.

The Court of Appeals, sua sponte, reached beyond the issues presented by the parties or certified by the trial court to hold by published opinion that the State cannot violate RCW 9.68A.100 because it cannot commit intercourse, and therefore cannot be liable to a child abuse victim for costs and fees under RCW 9.68A.130. Slip op., at 2-8. This is completely contrary to procedural and substantive law and violates the prohibition against advisory opinions. The Court should accept review to rectify this conflict and provide guidance on an issue of substantial public interest. RAP 13.4(b)(1), (2), (4).

The Court of Appeals should not have reached any of these issues. The decision violates this Court's "long settled rule that we decide only those questions that 'are necessary for a determination of the case presented for consideration, and will not render decisions in advance of such necessity, particularly when the question ... involves the construction of a statute.'" *Bird v. Best Plumbing Grp., LLC,* 175 Wn.2d 756, 775, 287

P.3d 551, 561 (2012). Absent finality of primarily legal issues that do not require further factual development, the court "steps into the prohibited area of advisory opinions." *Walker v. Munro,* 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).

The Court of Appeals' holding violates procedural and substantive law on ripeness and mootness and unnecessarily resolves a question that does not materially advance the litigation. *Cf.* slip op., at 4, n.4 (citing RAP 1.2). The superior court made no final decision on Tasha's claim for costs and fees; it was a potential claim for fees in the event that the dismissal on statute of limitations grounds is reversed and Tasha ultimately prevails at trial.

Tasha's SECA claim was thus not "ripe" until after a decision on the underlying claims. *Kuhn v. Schnall,* 155 Wn. App. 560, 228 P.3d 828 (2010). A court cannot decide an issue that is not ripe. *Lewis County v. State,* 178 Wn. App. 431, 440, 315 P.3d 550 (2013), *review denied,* 180 Wn.2d 1010 (2014). The proper procedure would have been to dismiss the State's appeal as moot. RAP 18.9(c); *Lewis County,* at 440; *City of Seattle v. Johnson,* 58 Wn.App. 64, 66–67, 791 P.2d 266 (1990).

The Court of Appeals also reached the wrong result on the issue. Under RCW 9.68A.130, a minor "prevailing in a civil action arising from **violation** of this chapter is entitled to recover the costs of the suit,

including an award of reasonable attorneys' fees." No criminal conviction is required. RCW 9.68A.100 prohibits communication with a minor for immoral purposes. "Communication" for immoral purposes has been broadly defined as "any spoken word **or course of conduct** with a minor **for purpose of sexual misconduct**." *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 715-16, 714, 985 P.2d 262 (1999) (emphasis added). By its plain language, RCW 9.68A.130 applies because Tasha's claims arise from the sexual abuse by her stepfather, which triggered her claims.

VII. CONCLUSION

The Court should accept review of this case to address questions of significant public interest, resolve the conflict with *B.R.* and allow disputed factual issues regarding limitations to go the jury as is every child sexual abuse victim's right. Review is justified to address the issue of first impression whether the jury should decide the highly factual issue as to when an abuse victim is duly diligent in discovering that an entity other than the perpetrator breached the duty of care owed to the child. The Court should review and reverse the advisory opinion on RCW 9.68A.

RESPECTFULLY SUBMITTED this 18th day of August, 2016.

SCHROETER, GOLDMARK & BENDER

s/Rebecca J. Roe
REBECCA J. ROE, WSBA #7560
Counsel for Petitioner Tasha Ohnemus

CERTIFICATE OF SERVICE

On the 18th day of August, 2016, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Joseph M. Diaz Assistant Attorney General Office of the Attorney General P.O. Box 40126 Olympia, WA 98504 Attorneys for the State of Washington	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email

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

DATED at Seattle, Washington, this 18th day of August, 2016.

Darla Moran, Legal Assistant

APPENDICES

Appendix A -	*Ohnemus v. State of Washington,* No. 46944-8-II (slip op., July 19, 2016).
Appendix B -	RCW 4.16.340(1)(c).
Appendix C -	Trial Court Order dated September 12, 2014 Trial Court Order dated October 6, 2014 Trial Court Order dated October 24, 2014
Appendix D -	*Doe 1 v. Lake Oswego Sch. Dist.*, 353 Or. 321, 297 P.3d 1287 (2013) *Johnson v. Multnomah Cty. Dept. of Community Justice,* 344 Or. 111, 178 P.3d 210 (2008) *T.R. v. Boy Scouts of America,* 344 Or. 282, 181 P.3d 758 (2008)
Appendix E -	RCW 9.68.100, .130

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TASH OHNEMUS, Respondent/ Cross-Appellant, v. STATE OF WASHINGTON, Appellant/ Cross-Respondent.	No. 46944-8-II PUBLISHED IN PART OPINION

LEE, J. — Tasha Ohnemus filed suit against the State alleging, among other things, that the State was liable for Child Protective Services's (CPS) negligent investigations into allegations that her stepfather physically and sexually abused her and for her sexual exploitation by the State under RCW 9.68A.100. The superior court granted the State's summary judgment motion for dismissal of the negligence claims, but denied the State's summary judgment dismissal of the chapter 9.68A RCW claims.

The State challenges the denial of its summary judgment motion to dismiss Ohnemus's claim under RCW 9.68A.100,[1] arguing that the State cannot violate the statute and, even if it could,

[1] The superior court denied the State's summary judgment motion on this issue, so there remained an issue to be tried in this case and the parties did not have an appeal as a matter of right. Additionally, no motion for discretionary review of this issue was ever made to this court and no order accepting discretionary review of this issue was ever entered by this court.

RAP 2.3 states:

(b) . . . discretionary review may be accepted only in the following circumstances:

that no facts exist to support such a claim. Ohnemus challenges the dismissal of her negligence actions, arguing that an issue of material fact exists as to whether the discovery rule acted to toll the RCW 4.16.080(2) statute of limitations and that she is alleging "more serious" injuries such that she should still be able to bring a claim under RCW 4.16.340.

In the published portion of this opinion, we address the superior court's denial of summary judgment on Ohnemus's claims under chapter 9.68A RCW. We hold as a matter of law, under the facts of this case, that the State cannot violate RCW 9.68A.100, and therefore, the State is not liable to Ohnemus for costs and fees under RCW 9.68A.130. In the unpublished portion of this opinion, we affirm the superior court's summary judgment dismissal of Ohnemus's negligence claims against the State. Therefore, we reverse the superior court's denial of summary judgment dismissal on Ohnemus's chapter 9.68A RCW claims and affirm the superior court's grant of summary judgment dismissal to the State on Ohnemus's negligence claims.

. . . .

> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Here, the superior court did not certify that the issue involves a controlling question of law as to which there is substantial ground for a difference of opinion or that immediate review of the order denying summary judgment may materially advance the ultimate determination of the litigation. Therefore, under RAP 2.3(b)(4), without a motion for discretionary review, a proper certification from the superior court, or an order accepting discretionary review, this issue is not properly before us. Nonetheless, we grant discretionary review of this issue sua sponte as it involves a controlling issue of law that will materially advance the ultimate termination of the litigation. RAP 1.2(a).

FACTS

In August 2012, Ohnemus filed suit against the State, alleging that the State, through CPS, was negligent in its investigation of allegations that Ohnemus's stepfather, Steven Quiles, sexually abused her and for failing to remove her from the abuse after its 1996 and 1997 investigations. One of Ohnemus's causes of action was based on her claim that the State violated RCW 9.68A.100.[2]

In August 2014, the State filed a motion for summary judgment and sought dismissal of Ohnemus's claims. The superior court granted the State's motion to dismiss Ohnemus's negligence claims, but denied the State's motion to dismiss Ohnemus's RCW 9.68A.100 claim.

On October 24, and on a joint motion by the parties, the superior court entered a partial final judgment dismissing Ohnemus's negligence claims with prejudice for purposes of CR 54(b),[3]

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[2] RCW 9.68A.100. Commercial sexual abuse of a minor.

[3] CR 54(b) states:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

and certified the case for appellate review under RAP 2.3(b)(4).[4] On review, the State challenges the superior court's denial of its motion for summary judgment to dismiss Ohnemus's cause of action under RCW 9.68A.100.

ANALYSIS

A. STANDARD OF REVIEW FROM SUMMARY JUDGMENT

We review summary judgment orders de novo, performing the same inquiry as the trial court. *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Summary judgment is proper where "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); *Green*, 136 Wn.2d at 94. We draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). We may affirm the trial court's order on any basis that the record supports. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

B. CHAPTER 9.68A RCW

The State challenges the trial court's denial of the State's summary judgment motion to dismiss Ohnemus's claims under chapter 9.68A RCW, the Sexual Exploitation of Children Act (SECA). Specifically, the State argues that dismissal is proper because the State is incapable of violating RCW 9.68A.100. We agree.

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[4] As noted above, the superior court's certification did not comply with RAP 2.3(b)(4). However, because the controlling legal issues will materially advance the ultimate termination of the litigation, we grant discretionary review. RAP 1.2(a).

1. The State Cannot Violate RCW 9.68A.100

The State argues that it cannot violate RCW 9.68A.100. To date, no court has considered this issue. We agree that as a matter of law, under the facts of this case, the State cannot violate RCW 9.68A.100.

Consideration of this issue requires review of RCW 9.68A.100 to determine the legislative intent. We review issues of statutory interpretation de novo. *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 768, 134 P.3d 234 (2006). First, we attempt to determine legislative intent by examining the statute's plain language. *Id.* Only if the plain language is ambiguous do we consider other sources of statutory interpretation, such as legislative history. *Id.* In doing so, we avoid interpretations that create an absurd result. *Id.*

RCW 9.68A.100 is titled, "**Commercial sexual abuse of a minor—Penalties—Consent of minor does not constitute defense,**" and states:

> (1) A person is guilty of commercial sexual abuse of a minor if:
>
> (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;
>
> (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
>
> (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.
>
> (2) Commercial sexual abuse of a minor is a class B felony punishable under chapter 9A.20 RCW.
>
> (3) In addition to any other penalty provided under chapter 9A.20 RCW, a person guilty of commercial sexual abuse of a minor is subject to the provisions under RCW 9A.88.130 and 9A.88.140.

> (4) Consent of a minor to the sexual conduct does not constitute a defense to any offense listed in this section.
>
> (5) For purposes of this section, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

In order to violate this statute, the State would need to have either "engaged in sexual conduct" with a minor, or negotiated for or solicited to "engage in sexual conduct with a minor." RCW 9.68A.100. Thus, to violate the statute, the State would have to be able to "engage in sexual conduct." RCW 9.68A.100.

The statute defines "sexual conduct" as "sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW." RCW 9.68A.100(5). RCW 9A.44.010 states that "sexual intercourse":

> (1) . . . (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
>
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(2) states that "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

Based on the plain language of the statute, the State cannot engage in "sexual intercourse" or "sexual contact" because the State is incapable of "penetration," the State does not have "sex organs," nor anything that could "contact" another's "sex organs," nor could anyone be "the same

or opposite sex" as the State. RCW 9A.44.010(1)(a)-(c), (2). Being incapable of "sexual intercourse" or "sexual contact," the State is thereby incapable of "engag[ing] in sexual conduct." RCW 9.68A.100; RCW 9A.44.010(1), (2).[5]

Because "having engaged in," or the intent to "engage in," "sexual conduct with a minor," is a requisite to being found guilty under RCW 9.68A.100, and the State is incapable of such conduct, we hold that, under the facts of this case, the State cannot violate RCW 9.68A.100. Therefore, the State is entitled to dismissal of Ohnemus's causes of action brought under RCW 9.68A.100 as a matter of law.[6]

2. Ohnemus Not Entitled To Costs And Fees

The State argues that Ohnemus is not entitled to the costs and fees under RCW 9.68A.130 because her cause of action brought under RCW 9.68A.100 fails as a matter of law. We agree.

RCW 9.68A.130 states, "A minor prevailing in a civil action arising from violation of this chapter is entitled to recover the costs of the suit, including an award of reasonable attorneys' fees." Because the only violation of the chapter that Ohnemus alleges is a violation of RCW 9.68A.100 and we hold as a matter of law that the State cannot violate RCW 9.68A.100, Ohnemus is not entitled to costs and fees under RCW 9.68A.130.

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[5] We do not render an opinion as to whether the State could be held liable as an accomplice under RCW 9.68A.100.

[6] The State also argues that it cannot violate RCW 9.68A.100 because it is not a "person" and it is incapable of forming criminal intent. Given our holding that the State cannot engage in sexual conduct with a minor, and therefore the State cannot violate RCW 9.68A.100, we do not reach these arguments.

Under the facts of this case, the State cannot violate RCW 9.68A.100 as a matter of law. Therefore, we reverse the superior court's denial of summary judgment dismissal on Ohnemus's chapter 9.68A RCW claims.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the following unpublished portion of this opinion, we address Ohnemus's cross-appeal of the trial court's dismissal of her negligence claims. We hold that the discovery rule does not toll the statute of limitations because Ohnemus knew, or should have known through the exercise of due diligence, the factual basis for her current cause of action against the State more than three years prior to the August 2012 filing. 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. Therefore, we affirm the superior court's summary judgment dismissal of Ohnemus's negligence claims.

ADDITIONAL FACTS

A. FACTUAL HISTORY

1. 1996 Investigation

On April 24, 1996, when Tasha Ohnemus was eight years old and in the third grade, three of her friends told their school counselor that Ohnemus's stepfather, Steven Quiles, was physically and sexually abusing Ohnemus. The school counselor reported this information to Child Protective Services (CPS), which is an agency within the Department of Social and Health Services (DSHS). The CPS report summarized the complaint as stating that three fifth grade girls reported to the counselor that Ohnemus, then eight years old, "was being both sexually and physically abused." Clerk's Papers (CP) at 86. The girls reported seeing bruises on Ohnemus's "'arms, legs and back' area," and that her stepfather, Steven Quiles, would hit Ohnemus "'with a bat or whip'" if she was late getting home. CP at 86. The girls also reported that Quiles showed Ohnemus explicit magazines and required her to perform oral sex on him. The counselor stated to CPS that Ohnemus had been suspected of telling lies in the past, but the explicit nature of the allegations and her young age made it a "delicate" situation. CP at 87. The CPS report concluded by noting that a copy was sent to the Mason County Sheriff's Office.

On April 26, CPS worker Karen Thompson interviewed Ohnemus at school with the school counselor. Thompson noted that Ohnemus was clean, dressed appropriately, and willing to talk. Ohnemus told Thompson that Quiles was "mean to her, won't let her talk on the phone," and gave her long spankings with a "'stick' or 'pipe'." CP at 402. Ohnemus also told Thompson that "she had found 'disgusting' magazines in" Quiles's closet, that he "'watches disgusting movies'," and she described him masturbating. CP at 402. However, Ohnemus said Quiles "had never touched

her 'private parts' or made her touch his." CP at 402. Finally, Ohnemus told Thompson that while she had no fear of returning home, she wanted to be taken away from Quiles because he yelled and restricted her contact with friends.

Thompson called Ohnemus's mother later that day and informed her of the interview, what was said, and that CPS would be willing to provide for Ohnemus's day care until the end of the school year. Thompson subsequently left messages at the Quiles's family home on April 30, and on May 1, regarding DSHS's willingness to pay for day care arrangements. On May 2, Ohnemus's mother called Thompson to say day care had been arranged and the family was not interested in receiving financial assistance.

On May 29, Thompson and a detective with the Mason County Sheriff's Office interviewed Ohnemus. Ohnemus told them that Quiles had burned the magazines and cut up the videotape. She disclosed nothing else during the interview. The same day Thompson made an unannounced visit to the Quiles's home. She told them of that day's interview with Ohnemus, told them that law enforcement would not be pursuing the case further, told them to call if they needed further services, and cautioned Quiles to close his door when he was involved in private matters. Quiles and Ohnemus's mother told Thompson that the girls would be in day care over the summer and the next school year.

CPS closed the investigation, finding the case "unfounded according to [the] child." CP at 410. In her deposition for the present action, Ohnemus said she did not recall if the school counselor and a social worker interviewed her, nor did she remember if a social worker and a law enforcement officer interviewed her.

2. 1997 Investigation

On April 24, 1997—a year later, to the day—the same school counselor reported an allegation that Quiles had physically abused one of Ohnemus's sisters, Elizabeth, using a board with nails in it. The counselor asked Ohnemus and Ohnemus's younger sister, Kayla, about the incident; both confirmed that Quiles had punished their sister Elizabeth using a board with nails in it. Elizabeth told the counselor that her "dad never hit anybody." CP at 426. There were no allegations of sexual abuse. In her report, the counselor noted that the Quiles family had been reported the year before.

On May 1, a different CPS worker, Robert Kyler, met individually with Elizabeth and Ohnemus. Elizabeth denied any abuse, and said time out was the only form of punishment she received. Ohnemus told Kyler that she was punished with time out, but all the other kids got spanked. She also told Kyler that Elizabeth got spanked with a metal pipe with nails in it, and that Elizabeth was afraid of Quiles. Ohnemus gave no indications that any physical or sexual abuse was directed towards her.

On May 6, Kyler interviewed Ohnemus's mother to discuss the allegation of Quiles physically abusing Elizabeth. Ohnemus's mother supported Ohnemus's story, except Ohnemus's mother contended that Quiles's use of a pipe was accidental. Ohnemus's mother stated she was not concerned about her daughters being around Quiles, and that she was interested in family counseling services but was concerned about what Quiles's response would be.

Family Preservation Services (FPS) initiated in-home counseling shortly thereafter. From FPS, Kyler later learned that the children had been enrolled in counseling and a day care program, and that the children would be going to New York to stay with Quiles's parents.

3. 2001 Request for Services

In June 2001, Ohnemus's mother contacted DSHS and asked for Family Reconciliation Services (FRS) because Ohnemus, who was 14 years old at the time, was not following house rules and was antagonizing the other children. CPS was not involved in this request and the records from this request do not reference the 1996 or 1997 CPS investigations. The case was closed in September 2001.

4. 2002 Request for Services

On April 23, 2002, Ohnemus's mother contacted DSHS again and asked for a Youth-at-Risk assessment of Ohnemus. Her mother complained that Ohnemus had been returned by sheriff's deputies after running away from home over the weekend and continued to not follow family rules. Ohnemus's mother wanted the DSHS worker to make the assessment using the notes from the family counseling sessions conducted in 2001. The DSHS worker told Ohnemus's mother that he would need to conduct a visit with them and would prefer to have a family counseling session before creating a Youth-at-Risk assessment. CPS was similarly not involved in this request, and the records from this request do not reference the 1996 or 1997 CPS investigations; but, the 2001 request is discussed. Ohnemus's mother refused a meeting between the family and the DSHS worker. The case was closed in April 2002.

5. 2002 Disclosure of Abuse

On May 9, 2002, Ohnemus, almost 15 years old and in the 9th grade, and her sister disclosed to another school counselor that they had been sexually molested and exploited by Quiles. CPS was notified the same day, and CPS then notified the Mason County Sheriff's Office.

CPS removed all of the girls from the house and placed them with Division of Children and Family Services (DCFS).

Ohnemus was interviewed by a Mason County Sheriff's detective and a CPS worker on May 16, 2002. During the interview, Ohnemus described Quiles groping Ohnemus, requiring her to perform oral sex on him, and recording her naked for child pornography trades on the internet. She also described Quiles's nonsexual physical abuse of her. Ohnemus told the police and CPS that the abuse had been going on since she was in fourth or fifth grade.

Quiles was arrested and pleaded guilty to third degree rape of a child, two counts of first degree incest, second decree child molestation, possession of depictions of a minor engaged in sexually explicit conduct, and sexual exploitation of a minor. He was sentenced to 10 years in prison.

6. July 2002 Inpatient Care

In July 2002, Ohnemus voluntarily entered an inpatient treatment facility. She was suffering from persistent suicidal thoughts, "recurrent and intrusive recollections and flashbacks" of Quiles's abuse, post-traumatic stress disorder (PTSD), and major depression "without psychotic features." CP at 193-94. Five days after being admitted, Ohnemus was discharged and "was noted to be quite improved and felt ready to be discharged home." CP at 186-87.

7. March-April 2003 Inpatient Care

On March 24, 2003, Ohnemus was admitted to the Adolescent Treatment Unit at Kitsap Mental Health Services for expressing suicidal thoughts. Her depression decreased during her stay, and on April 15, 2003, Ohnemus was "deemed stable for discharge" as a least restrictive

alternative. CP at 273. Ohnemus's discharge diagnosis included chronic PTSD and depressive disorder not otherwise specified.

8. August 2003 Inpatient Care

On August 1, 2003, Ohnemus was detained during her outpatient therapy session for not following the rules of her least restrictive alternative program. She was subsequently admitted for the second time to the Adolescent Treatment Unit, and as her intake paperwork noted, this was her third inpatient admission for psychiatric problems. There, Ohnemus reported that she was re-experiencing the past trauma of her father's sexual abuse in the form of "recurrent nightmares" and "distressing, recurrent, intrusive thoughts, images, and recollection of her past abuse," which "caused [her] to experience intense psychologic and physiologic reactivity." CP at 267.

On August 7, 2003, Ohnemus had a one-on-one session with a professional at the Adult Treatment Unit. The handwritten notes from that session contained the following:

> CT [Ohnemus] did talk about the abuse she's experienced starting in the 2nd grade. Also talked about being "very angry" @ CPS and "hating" them for not believing her allegations and allowing the abuse to continue "so much longer." She reported they told her she was "just trying to get attention."

CP at 584. On August 8, Ohnemus was discharged.

9. May 2005 Ohnemus turns 18

Ohnemus was born on May 24, 1987. On May 24, 2005, Ohnemus turned 18 years old.

10. March 2006 Counseling

On March 16, 2006, Ohnemus sought counseling through Kitsap Mental Health Services. Ohnemus reported that she suffered from PTSD and was having extended periods of deep depression that were followed by periods of increased energy and money spending.

11. October 2007 Doctor Visit

In early October 2007, Ohnemus consulted a doctor complaining of, among other ailments, insomnia and stress from going through a recent divorce. She told the doctor that she suffered from PTSD and bipolar disorder, that she had been sexually abused, and that she had "been tried on 17 different psychotropic medications" with minimal effect. CP at 279.

By the end of October, she was presenting with "significant flashbacks of the sexual abuse, anxiety in social situations, nightmares, difficulty with sleep, isolated, weepy affect easily, mood swings, decreased energy level and interest in activities, using marijuana for pain management and helping her appetite increase." CP at 301; *see also* CP at 286 (presenting concerns of "[s]ignificant flashbacks of previous trauma, anxiety in social situations, nightmares, difficulty with sleep and appetite, weepy affect at times, mood swings, decreased energy level or interest in activities, physical pain impacting performance and mood"). The doctor's progress notes from October 31, 2007, state that Ohnemus "reports that she tried to tell CPS and social workers about [Quiles's] sexual abuse. [Quiles] was finally caught and prosecuted .... [Ohnemus] had to testify in court." CP at 300.

12. November 2007 through September 2008

From the beginning of November 2007 through the end of September 2008, Ohnemus had eight doctor visits to monitor the progression of, among other things, her PTSD and bipolar disorder. She self-reported having had approximately 10 inpatient stays. She also continued to suffer from severe flashbacks, mania, paranoia, and nightmares. During this time, on May 24, 2008, Ohnemus turned 21.

13. Sporadic Counseling and Treatment from 2009 through 2013

Ohnemus received counseling sporadically at Kitsap Mental Health and Harrison Medical Center from 2009 through 2013.

a. 2009 and 2010

In July 2009, Ohnemus sought inpatient care, citing thoughts of suicide, flashbacks to the years of sexual abuse, and suffering from PTSD and bipolar disorder. Ohnemus told the social workers at the inpatient care facility that "she was sexually abused from ages 5-15 y/o and has PTSD because of this." CP at 175. In January 2010, Ohnemus told her counselor that she was molested by Quiles "from age 6-15," and she told the counselor that:

> I had an abortion 2 months after [Quiles's] trial because it was his . . . . [M]y friends gave me my yearbook and everything that people wrote was about what had happened . . . and I didn't want to deal with it . . . I think I have been in survivor mode since then.

CP at 207.

b. 2011

Ohnemus brought Social Security forms to counseling sessions in 2011, and the counselor helped her complete the forms. During a June 2011 counseling session, Ohnemus reported to her counselor that she had retained a new lawyer to help her file a crime victim's claim for the abuse she suffered from Quiles.

i. Social Security Administration Claim

Ohnemus filed her claims for Social Security Disability benefits on April 28, 2011 and on May 5, 2011. On the Social Security Disability forms, Ohnemus identified bipolar disorder, PTSD, personality disorder, and anxiety as the physical or mental conditions that limited her ability to

work. Ohnemus stated on the forms that she had been to the emergency room at Harrison Medical Center "at least once a year for PTSD, anxiety, [and] suicidal thoughts." CP at 338 (some capitalization omitted). She said that Harrison Medical Center treated her with psychotherapy medication, and referred her to Kitsap Mental Health. Ohnemus reported that she had received more than one inpatient stay for PTSD at Kitsap Mental Health and was currently being seen there for her PTSD and bipolar disorder. On the form, Ohnemus added:

> [I] had PTSD due to being raped and molested by my stepdad from age 5 to 15. It is very [h]ard to deal with because he video taped me naked and put it on the computer so [a] lot of people I grew up with have seen me on the computer. He was arrested on 6 [c]ounts of sexual felonies in 2002. After everything came out into the open was when [I] was first admitted into inpatient treatment at KMH [Kitsap Mental Health].

CP at 341 (some capitalization omitted). The Social Security Administration disapproved her claim on October 25, 2011, noting, among other things, that Ohnemus was "being treated for a mood disorder and PTSD, with notes showing an improvement in symptoms with medication." CP at 328.

ii. Crime Victim's Claim

By August of 2011, Ohnemus reported to her counselor that she had learned that she could receive "about $150k in crime victim benefits" and "because of this [Ohnemus] got a huge amount of information about her step father [sic]." CP at 213. Ohnemus's declaration in support of the present action states that in the summer of 2011 she "obtained [Quiles's] criminal/police investigation file from 2002 regarding his conduct with me and my sister." CP at 481. She said she obtained this file as part of her crime victim's claim application. In her declaration, she described the file as follows:

> It contained a lot of information I had not seen or known about, including the 1996 and 1997 intakes by CPS; witness statements, together with the interview transcripts from me and my sister; the statement by my mother identifying me in some of the photos from my father's computer; and the pages of information about his computer.

CP at 481. Ohnemus's declaration also states that she told her counselor at Kitsap Mental Health that the discovery of this new information was causing her to feel overcome by despair.

The counselor's notes do not reflect that Ohnemus reported any change in her emotions, or any new distresses, attributed to reopening her crime victim's claim. However, the counselor submitted a declaration stating that Ohnemus was affected by the information she obtained such that "she needed intensive treatment," and that "[s]he was unaware of the extent of her injuries." CP at 485. In her own declaration, Ohnemus stated that she has "just started to realize and come to terms with the notion that I might never fully recover from my injuries." CP at 482.

c. 2012 and 2013

Days before her 25th birthday in May 2012, Ohnemus went to Harrison Medical Center and requested inpatient care, again complaining of severe flashbacks and anxiety. At that time, she described her condition as "very anxious with chest pain[,] having flashbacks to when she was sexually molested from ages 5-15 and having thoughts of wanting to hurt herself." CP at 164-65. Harrison Medical Center contacted Kitsap Mental Health, who sent a mental health professional to meet with Ohnemus. The notes from this meeting state that Ohnemus "has a history of severe childhood sexual abuse by her step father [sic] . . . [and] is overwhelmed with frequent flashbacks and nightmares related to childhood trauma." CP at 231. Further, Ohnemus reported that "she's 'just overwhelmed and needs to be taken care of.'" CP at 231. In August 2012, Ohnemus filed the present action against the State.

Ohnemus returned to Harrison Medical Center in April 2013, complaining of flashbacks "related to a lawsuit against CPS for reported sexual abuse that happened during her childhood." CP at 162. Harrison Medical Center contacted Kitsap Mental Health and arranged an appointment for Ohnemus at Kitsap Mental Health for the next morning. No record of a visit to Kitsap Mental Health the following morning exists in the record on appeal.

Ohnemus's attorneys retained clinical psychologist Steve Tutty as an expert witness in this case. Tutty submitted a declaration stating that in 2013 Ohnemus's treatment began to include an "anti-psychotic psychotropic medication," which, he said, indicates Ohnemus is receiving "more significant and long term medical care than previously received." CP at 489. He concluded, "It appears Ms. Ohnemus is only now aware of the full extent of her injuries." CP at 489.

B. PROCEDURAL HISTORY

Ohnemus's August 2012 suit alleged that the State through CPS, was negligent in its investigation and for failing to remove her from the abuse after its 1996 and 1997 investigations. It also alleged claims under 18 U.S.C. § 2252,[7] 18 U.S.C. § 2255.[8] In August 2014, the State filed a motion for summary judgment, asserting that Ohnemus's negligence claims were barred by the statute of limitations and that she failed to state a claim under 18 U.S.C. § 2252 and § 2255.

On September 12, 2014, the superior court granted the State's motion for summary judgment as to Ohnemus's "childhood sexual abuse claims" and her "claim under 18 U.S.C.

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[7] 18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors.

[8] 18 U.S.C. § 2255. Civil remedy for personal injuries.

§ 2252 and § 2255."[9] CP at 610. Ohnemus challenges the superior court's dismissal of her negligence claims related to her childhood sexual and physical abuse.

ANALYSIS

A. STATUTE OF LIMITATIONS—CLAIMS DISMISSED ON SUMMARY JUDGMENT[10]

Ohnemus argues the superior court erred in dismissing her negligence claims relating to her sexual and physical abuse because issues of material fact remain. Specifically, Ohnemus argues that issues of fact exist as to when she discovered, or should have discovered, her claims for the State's 1996 and 1997 investigations, and as to when she discovered "more serious injuries" ostensibly attributable to the State's investigations. Br. of Resp't/Cross-Appellant at 2.

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[9] The September 12 order did not address the superior court's decision on Ohnemus's physical abuse claims. After reconsideration, the superior court clarified its September 12 order to grant summary judgment dismissal of Ohnemus's negligence claims related to her childhood sexual and physical abuse.

[10] The superior court's partial final judgment granting summary judgment dismissal of Ohnemus's negligence claims related to her sexual and physical abuse are properly before us pursuant to RAP 2.2(d). Under RAP 2.2(d):

> In any case with multiple parties or multiple claims for relief, . . . an appeal may be taken from a final judgment that does not dispose of all the claims . . . as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. . . . In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims . . . or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, . . . rights, and liabilities of all the parties.

Here, the superior court found that there is no just reason for delay in entering final judgment and that "the statute of limitations question . . . involve[s] [a] controlling question of law to which there is substantial ground for a difference of opinion." CP 679-80. Thus, under RAP 2.2(d), the order on partial final judgment permits Ohnemus to appeal the superior court's summary judgment dismissal of her negligence claims.

First, we hold that Ohnemus's failure to exercise due diligence when she knew or should have known the factual basis for her cause of action is fatal to her assertion that the discovery rule tolled her claim until 2011. Second, we 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.

1. RCW 4.16.080(2) and the Discovery Rule

Ohnemus contends that her August 2012 complaint is not time-barred by RCW 4.16.080(2)'s three year statute of limitations because, under Washington's "discovery rule," her cause of action did not accrue until 2011 when she obtained the 2002 investigation file on Quiles's arrest. Br. of Resp't/Cross-Appellant at 21-22. We disagree and hold that Ohnemus's negligence claims are barred by the three year statute of limitations in RCW 4.16.080(2).

a. Legal Standard

RCW 4.16.080(2) places a three year limit on a person's ability to file a claim for injuries. *Green*, 136 Wn.2d at 95. Generally, the statute of limitations begins to run "at the time the act or omission causing the tort injury occurs." *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 602, 123 P.3d 465, *review denied*, 155 Wn.2d 1012 (2005). However, under RCW 4.16.190(1), if the person entitled to bring an action under RCW 4.16.080 is under the age of 18 at the time his or her cause of action would otherwise accrue, the statute of limitations would not begin running until the person reaches the age of 18.

Another mechanism for tolling the accrual of a cause of action and its attendant statute of limitations is the "discovery rule." "Under Washington's discovery rule, a cause of action does not accrue until a party knows or reasonably should have known the essential elements of the possible cause of action." *Clare*, 129 Wn. App. at 602; *see also Green*, 136 Wn.2d at 95 (stating the same). The "should have known" language under Washington's discovery rule requires the prospective plaintiff to exercise "due diligence in discovering the basis for the cause of action" after he or she is "'placed on notice.'" *Clare*, 129 Wn. App. at 603 (quoting *Green*, 136 Wn.2d at 96); *see also Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) ("The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action.").

The discovery rule does not require the plaintiff to understand all of the legal consequences of his or her cause of action. *Green*, 136 Wn.2d at 95. Thus, the cause of action accrues and the attendant statute of limitations begins to run "when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Allen*, 118 Wn.2d at 758.

A due diligence inquiry means "[t]he plaintiff is charged with what a reasonable inquiry would have discovered." *Green*, 136 Wn.2d at 96; *Clare*, 129 Wn. App. at 603. Whether due diligence has been exercised is normally a question of fact, but can be determined as a matter of law when reasonable minds could reach only one conclusion. *Clare*, 129 Wn. App. at 603. "The plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Id.*; *see accord Allen*, 118 Wn.2d at 760.

In short, once Ohnemus suffered ""some appreciable harm'" allegedly caused by the State's negligence, the discovery rule only tolls the statute of limitations until Ohnemus discovered, or "through the exercise of due diligence, should have discovered, the basis for the cause of action" against the State. *Clare*, 129 Wn. App. at 603 (quoting *Green*, 136 Wn.2d at 96). Thus, we must determine if Ohnemus, viewing all inferences in a light most favorable to her, has established a question of fact as to whether she did not discover, and could not have discovered through the exercise of due diligence, the facts giving rise to her negligence claims more than three years before she filed her complaint on August 15, 2012. *See Hisle*, 151 Wn.2d at 860; *Clare*, 129 Wn. App. at 603. We hold that summary judgment dismissal of Ohnemus's negligence claims was proper because reasonable minds could not differ in concluding that she knew or should have known the factual basis for her current cause of action against the State more than three years prior to the August 2012 filing of this lawsuit.

b. Statute of limitations not tolled by discovery rule

Ohnemus claims that the State conducted negligent investigations in 1996 and 1997, and she suffered harm therefrom. Because Ohnemus was under 18 years old in 1996 and 1997, the statute of limitations on that claim was tolled until her 18th birthday in May 2005. RCW 4.16.190(1); *Clare*, Wn. App. at 602. For the limitations period to be tolled further requires application of the discovery rule. *Green*, 136 Wn.2d at 95.

Ohnemus points out that the State and various social workers were involved in 1996, 1997, 2001, and 2002, and the medical notes from 2003 and 2007, do not indicate which involvement or involvements Ohnemus was referring to in her 2003 or 2007 counseling sessions. However, even when the facts are viewed in a light most favorable to Ohnemus, the record demonstrates that the

only State involvement that Ohnemus could have been referencing in her 2003 and 2007 counseling sessions were the 1996 and 1997 investigations.

The 2003 medical note was recorded while Ohnemus was going through inpatient care in the Adolescent Treatment Unit at Kitsap Mental Health Services, and on the progress note her counselor wrote:

> CT [Ohnemus] did talk about the abuse she's experienced starting in the 2nd grade. Also talked about being "very angry" @ CPS and "hating" them for not believing her allegations and allowing the abuse to continue "so much longer." She reported they told her she was "just trying to get attention."

CP at 584. Then, in a progress note made in October 2007, her therapist noted that that Ohnemus "reports that she tried to tell CPS and social workers about [Quiles's] sexual abuse. [Quiles] was finally caught and prosecuted . . . . [Ohnemus] had to testify in court." CP at 300.

Neither medical note could be referencing the State's involvement in 2001 nor 2002. The State's involvement in 2001 consisted of Family Reconciliation Services at the request of Ohnemus's mother because Ohnemus was being "assaultive towards her sisters" and not following the house rules. CP at 593. At that time, Ohnemus told the social worker that she did fight with her sisters, she attended school regularly and did well, had no criminal history, and "doesn't feel that there is a big problem at home." CP at 591. The social worker noted that the "[f]amily members were guarded during all sessions and participation was very limited by both adults and children," but that Ohnemus "did attempt to participate during some of the sessions," asking to be closer to her mother to talk about personal and emotional issues. CP at 596. There is no indication that Ohnemus made, or attempted to make, any allegation of abuse by Quiles to the State during the 2001 involvement for which she could later be angry at the State for not acting upon.

Similarly, the State's involvement in April 2002 was a response to Ohnemus's mother requesting Family Reconciliation Services. However, this time the State did not meet with Ohnemus or anyone else in the family because Ohnemus's mother refused to allow the social worker to meet with the family or ask questions.[11] Thus, Ohnemus could not be referring to the State's involvement in 2002 as a time when she tried to tell CPS about Quiles's abuse because she never had any interaction with the State at the time, nor is there anything in the record to indicate she knew the State had been contacted by her mother.

Ohnemus attempts to discredit the medical notes from 2003 and 2007 by calling them "hearsay entries" that Ohnemus did not write nor endorse. Reply Br. of Resp't/Cross-Appellant at 4. But Washington courts have affirmed a summary judgment dismissal of a RCW 4.16.080(2) claim based entirely on a single isolated entry in a medical record. *Clare*, 129 Wn. App. at 604. Also, even if the medical notes are "hearsay," they are admissible as statements for purposes of medical diagnosis or treatment. ER 803(a)(4).

Ohnemus argues that she had no reason to inquire into whether the State caused her harm because Quiles's abuse was another "facially logical explanation" for her damages. Reply Br. of Resp't/Cross-Appellant at 6-7. Ohnemus is correct that where a plaintiff knows of another "facially logical explanation" for her injuries, she is not required as a matter of law to seek out additional causes of her suffering. *Lo v. Honda Motor Co.*, 73 Wn. App. 448, 456, 869 P.2d 1114 (1994); *Winbun v. Moore*, 143 Wn.2d 206, 219, 18 P.3d 576 (2001).

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[11] The next 2002 involvement was in May of 2002, where Ohnemus and her sister disclosed the abuse and were taken into protective custody.

However, the record here shows that at least by her doctor's visit on October 31, 2007, more than three years before filing the instant action, Ohnemus knew that the State had a duty to protect her from Quiles, that she believed the State breached that duty by not protecting her, and that she suffered his abuse "'so much longer'" because of the State's failure to protect her. CP at 584. Thus, while she clearly understood that one facially logical explanation for the harm she suffered was Quiles's abuse, the record is also clear that she had formulated a second facially logical explanation that the reason she suffered more of the abuse was because the State allegedly failed to protect her. Her failure to investigate the validity of the second explanation renders her claim barred by expiration of the statute of limitations.

Ohnemus next argues that a plaintiff must have a factual basis for a claim before the statute of limitations is triggered. Again, Ohnemus correctly states the law, but is incorrect in how it applies to her case.

Ohnemus cites *Webb v. Neuroeducation, Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (2004). There, a father sued a psychologist for malpractice and the issue was when the father should have known of the psychologist's alleged malpractice. *Id.* at 344. The father had submitted a declaration in 1998 stating that he "'believe[d]'" or "'strongly believe[d]'" that his son had been coached into fearing him by the mother and psychologist. *Id.* at 340-41. On appeal, the court held that Webb did not "have a factual basis for his opinions and grounds for his complaint" until he received the Guardian ad Litem report in 1999, and that his "belief allegations" in his 1998 declaration were "necessarily speculative" as they were "guess[es] at things he clearly could not know" because the psychologist refused to speak to him. *Id.* at 344.

Here, in contrast, Ohnemus's belief that the State had breached its duty to her was based on facts she clearly could, and did, know. Specifically, that she had tried to tell CPS about Quiles's abuse, and that she was angry at CPS for not believing her and allowing the abuse to continue "so much longer." CP at 584. Thus, the reasoning that preserved the plaintiff's claim in *Webb* does not preserve Ohnemus's claim.[12]

The record shows Ohnemus actually knew of the State's 1996 and 1997 involvement, and shows that in 2003 and 2007 she was frustrated by CPS's failure to remove her from the abuse pursuant to the 1996 and 1997 investigations. Therefore, she then knew, or through the exercise of due diligence should have known, all of "the essential elements of the possible cause of action" more than three years prior to filing this action. *Clare*, 129 Wn. App. at 602.

The essential elements for a tort claim are duty, breach, causation, and damages. *Green*, 136 Wn.2d at 95. Ohnemus's statements in 2003 and 2007 establish that she recognized the State had a duty to protect her, that she believed the State breached that duty, that she believed the State's breach caused the abuse to continue; and that she recognized the continued abuse caused her damage. A due diligent pursuit of her belief that the State had breached its duty to protect her would have included her obtaining Quiles's investigation file and the subsequent information in which her current claim is rooted. *Green*, 136 Wn.2d at 96 ("The plaintiff is charged with what a

[12] Ohnemus asserted in her deposition that she did not remember the interviews with the school counselor and social worker that occurred in 1996 and in 1997. This, however, does not create an issue of material fact because: (1) self-serving testimony need not be taken at face value when reviewing summary judgment; but more importantly, (2) she remembered CPS's involvement, and her attempts to tell them of the abuse in 2003, when she 16, and in 2007, when she was 20. Thus, she was on inquiry notice at least in 2007 to investigate why CPS had not intervened and if they had been negligent in failing to intervene.

reasonable inquiry would have discovered."). We hold that Ohnemus's failure to exercise due diligence when she knew or should have known the factual basis for her cause of action is fatal to her assertion that her negligence action did not accrue until 2011 based on the discovery rule.

2. RCW 4.16.340(1)(c)

Ohnemus assigns error to the trial court's summary judgment dismissal of her claims brought under RCW 4.16.340.[13] Ohnemus argues that a genuine issue of material fact exists as to whether she "recently discovered injuries that are significantly more serious than she previously knew." Br. of Resp't/Cross-Appellant at 42. We affirm the trial court's dismissal of Ohnemus's claim under RCW 4.16.340(1)(c) 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.

The State argues that RCW 4.16.340 does not apply to the State because the State did not perpetrate any acts of childhood sexual abuse against Ohnemus. But RCW 4.16.340 encompasses

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[13] RCW 4.16.340 provides that:

> (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 . . .
>
> . . . .
>
> (c) . . . three years of the time the victim discovered that the act caused the injury for which the claim is brought:
>
> PROVIDED, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

causes of action sounding in negligence against parties who did not themselves perpetrate acts of childhood sexual abuse but who failed to protect child victims or otherwise prevent the abuse. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). Here, Ohnemus claims the State was negligent in failing to protect her against further sexual abuse by Quiles. Thus, the State's assertion that RCW 4.16.340 does not apply to the State fails.

Under RCW 4.16.340, a claim based on childhood sexual abuse may be brought within three years of the time the victim discovers the causal connection between the wrongful act and her injury. At issue in this appeal is subsection (1)(c). This subsection applies where the victim is aware of the abuse and aware that she suffered harm as a result, but discovers a new and qualitatively different injury attributable to the abuse. *Carollo v. Dahl*, 157 Wn. App. 796, 801, 240 P.3d 1172 (2010). It also applies where the victim is aware of the abuse and aware of her injury, but discovers a causal connection, of which she was previously unaware, between the wrongful act and her harm. *Id.*; *Hollmann v. Corcoran*, 89 Wn. App. 323, 325, 949 P.2d 386 (1997).

Ohnemus contends that the issue of material fact is "whether [she] has recently discovered injuries that are significantly more serious than she previously knew." Br. of Resp't/Cross-Appellant at 42. Therefore, it appears that she is arguing that her claim falls into the first application, by claiming she has discovered new injuries and arguing to this court that it should not follow the *Carollo* court's precedent. *See Carollo*, 157 Wn. App. at 801. However, we address both applications of subsection (1)(c).

a. "Qualitatively Different" Injury

A claim of childhood sexual abuse may be brought within three years of the time that the victim discovers an injury that is "qualitatively different from other harms connected to the abuse which the plaintiff had experienced previously." *Id.* "[M]ore severe manifestations of a prior injury" are not qualitatively different and are not within the purview of subsection (1)(c). *Id.* at 803.

In *Carollo*, 157 Wn. App. at 798, the plaintiff was molested as a teenager by a camp counselor. In 1988, he sought counseling for the emotional difficulties he was having. *Id.* Through that counseling, he learned that his childhood sexual abuse was likely the source of his difficulties. *Id.* He received counseling again in 1995, at which time he was diagnosed with post-traumatic stress disorder resulting from the molestation. *Id.* He also suffered from depression, flashbacks, and nightmares. *Id.* at 798-99. In 2008, he filed suit after his symptoms became "much worse" and he became unable to function at his job. *Id.* at 799. The new symptoms included regular nightmares, memory loss, dissociative periods, panic disorder, major anxiety, major depressive disorder, and agoraphobia. *Id.* His counselor said the new symptoms were related to the childhood sexual abuse and that it "is not common or expected that new symptoms will occur or to see increases in symptoms like those exhibited by" the plaintiff. *Id.*. Division Three of this court held that Carollo was merely "claiming that the severity of his most recent symptoms should entitle him to the more lenient provisions of the discovery of harm provision in the statute" not that he had only recently connected his emotional harm to childhood sex abuse. *Id.* at 802. Therefore, the court dismissed the suit as time barred. *Id.* at 803.

Ohnemus asks us to disregard Division Three's holding in *Carollo* because she argues that it alters the legislature's intent. We decline her request.

Carollo does not alter the legislative intent in looking for a different injury attributable to the abuse. In fact, the *Carollo* court noted the legislative findings of intent attached to RCW 4.16.340 and addressed the argument that Ohnemus now makes to this court.

In revising RCW 4.16.340, the legislature attached six findings of intent, of which Ohnemus highlights findings (4) and (5). LAWS OF 1991, ch. 212, § 1.. Findings (4) and (5) state:

> (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.
>
> (5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.

LAWS OF 1991, ch. 212, § 1. Ohnemus highlights findings (4) and (5) as evidence that the legislature did not intend for the injuries that are "more serious" than the injuries that the victim was aware of before be "qualitatively different" injuries. Br. of Resp't/Cross-Appellant at 37, 41-42. The plaintiff in *Carollo* made the same argument, and Division Three addressed that argument as follows:

> While Mr. Carollo is correct that the Legislature sought to liberalize the statute of limitations in favor of victims of childhood abuse, it did impose limits. Adopting his interpretation of the statute would be a substantial expansion, if not an outright repeal, of those limits. The proper body to make such changes is the Legislature. Although legislative finding number five, concerning later discovery of harm, might be read to support the contention that new symptoms related to a prior PTSD diagnosis result in a new cause of action, a more reasonable reading of the finding is that the Legislature sought to give causes of action for *different* injuries discovered at different times rather than applying to more severe manifestations of a prior injury. In any event, legislative findings are not operative law and cannot be used in jury instructions. *In re Det. of R.W.*, 98 Wn. App. 140, 145, 988 P.2d 1034 (1999). A jury faced with the question of whether, prior to 2005, Carollo

> connected his psychological difficulties with the abuse by Dahl could reach only one conclusion: he did. Thus, summary judgment was appropriately granted.

Carollo, 157 Wn. App. at 803.

Here, Ohnemus states in her declaration that she has "just started to realized and come to terms with the notion that I might never fully recover from my injuries." CP at 482. Her therapist states that since Ohnemus obtained the 2002 report on Quiles, Ohnemus "needed intensive treatment" because Ohnemus had been "unaware of the extent of her injuries." CP at 485. And, the psychologist Ohnemus's attorneys retained to examine Ohnemus determined that the "anti-psychotic psychotropic medication" Ohnemus began taking in 2013 indicated that she was receiving "more significant and long term medical care than previously received," and that it appeared "Ohnemus is only now aware of the full extent of her injuries." CP at 489.

None of these statements alleges or indicates that Ohnemus is suffering from an injury that is different from the injuries she has suffered for many years. Moreover, her medical records show that she has suffered from PTSD, bipolar disorder, depression, anxiety, flashbacks, and various other conditions since at least 2002, and that by October 2007 she had already "been on a variety of psychotropic medications." CP at 301; *see also* CP at 193-94 (2002), 267 (2003), 272-73 (2003), 205 (2006), 279 (2007), 286 (2007), 296 (2007), 300-01 (2007), 303-10 (2007-2008), 176-75 (2009-2010). Thus, the record does not support an inference that Ohnemus suffered an injury "qualitatively different from other harms connected to the abuse" from which she previously suffered. *Carollo*, 157 Wn. App. at 801. Accordingly, we affirm the summary judgment dismissal of Ohnemus's negligence claims under RCW 4.16.340.

b. "Causal Connection" to a Previously Known Injury

RCW 4.16.340(1)(c) also applies when a victim discovers the causal link between the wrongful act and her injury. *Carollo*, 157 Wn. App. at 803; *Hollmann*, 89 Wn. App. at 325. When the victim discovers the causal link is a subjective determination.[14] *Korst v. McMahon*, 136 Wn. App. 202, 207-08, 148 P.3d 1081 (2006); *Hollmann*, 89 Wn. App. at 325; *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 734, 991 P.2d 1169 (1999).

In *Hollmann*, 89 Wn. App. 323, Division Three of this court reversed the dismissal of the plaintiff's claim as time-barred. When he was a child, the plaintiff had been abused by an adult. *Id.* at 328. He had not repressed memories of the abuse, but did not realize how the abuse was related to his injuries until he was an adult. *Id.* The plaintiff had blamed himself for the abuse and perceived himself as a willing participant in the relationship he had with his adult abuser. *Id.* As an adult, the plaintiff had received counseling for PTSD, depression, and self-image problems, but his counselor testified that he did not understand the connection between his symptoms and the abuse. *Id.* It was not until the plaintiff entered therapy again years later that he realized that he had been victimized by his abuser and he understood that his injuries of PTSD and depression

[14] RCW 4.16.340(1)(b) begins to run when the victim "discovered or reasonably should have discovered that the injury or condition was caused by said act." However, RCW 4.16.340(1)(c) omits the phrase "or should have discovered." This omission is consistent with the legislature's finding of intent that 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." LAWS OF 1991, ch. 212, § 1. Thus, RCW 4.16.340(1)(c) does not impose the duty of discovery upon the plaintiff, like RCW 4.16.080 does. *Korst*, 136 Wn. App. at 207-08; *Hollmann*, 89 Wn. App. at 334.

were causally connected to the abuse. *Id.* at 329. Thus, Division Three held that the statute of limitations was tolled.

In *Korst*, 136 Wn. App. 202, the plaintiff sued her parents for damages caused by sexual abuse by her father. In 1995, the plaintiff wrote her father a letter acknowledging his mistreatment of her. *Id.* at 204. Seven years later, the plaintiff began counseling and learned that being abused by her father was probably the cause of her problems. *Id.* at 204-05. A clinical psychologist diagnosed her with PTSD due to her father's sexual abuse of her. *Id.* She filed suit and the trial court granted the defense's motion for directed verdict, reasoning that the letter she wrote to her father in 1995 showed that she must have connected her abuse with her injuries at that time. *Id.* at 205. This court reversed, stating, "The letter simply indicates that she resented her father for sexually abusing her, not that [the plaintiff] understood the effects of that abuse." *Id.* at 209.

Here, the record shows that in 2003 and in 2007, Ohnemus expressed resentment towards the State for its failure to remove her from the abuse. The record also shows that Ohnemus believed that the abuse continued "so much longer" because of the State's failure to act on the allegations. CP at 584. The record further shows that Ohnemus connected the abuse she was subjected to as a child to the injuries she currently suffers from more than three years prior to filing the current suit against the State. Thus, unlike the plaintiffs in *Hollmann* and in *Korst*, Ohnemus understood that her injuries were caused by the abuse she suffered. Ohnemus further understood that she suffered more abuse because the State did not remove her from Quiles's home. Therefore, we hold that Ohnemus had made "the causal connection between the defendant's act," in this case the State's alleged negligent investigation, "and the injuries for which the claim is brought."

Hollmann, 89 Wn. App. at 334. Accordingly, we affirm the trial court's summary judgment dismissal of Ohnemus's claims for sexual and physical abuse as time-barred.

We reverse the superior court's denial of summary judgment dismissal of Ohnemus's claims under RCW 9.68A, and we affirm the superior court's summary judgment dismissal of Ohnemus's negligence claims.

Lee, J.

We concur:

Worswick, P.J.

Johanson, J.

APPENDIX B

RCW 4.16.340

Actions based on childhood sexual abuse.

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

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

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

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

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

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

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

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

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

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

NOTES:

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

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

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

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

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

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

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

It is still the legislature's intention that *Tyson v. Tyson,* 107 Wn.2d 72, 727 P.2d 226 (1986) be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations.

The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later." [**1991 c 212 § 1.**]

Intent—1989 c 317: "(1) The legislature finds that possible confusion may exist in interpreting the statute of limitations provisions for child sexual abuse civil actions in RCW **4.16.190** and **4.16.340** regarding the accrual of a cause of action for a person under age eighteen. The legislature finds that amending RCW **4.16.340** will clarify that the time limit for commencement of an action under RCW **4.16.340** is tolled until the child reaches age eighteen. The 1989 amendment to RCW **4.16.340** is intended as a clarification of existing law and is not intended to be a change in the law.

(2) The legislature further finds that the enactment of chapter 145, Laws of 1988, which deleted specific reference to RCW **9A.44.070**, **9A.44.080**, and **9A.44.100**(1)(b) from RCW **9A.04.080** and also deleted those specific referenced provisions from the laws of Washington, did not intend to change the statute of limitations governing those offenses from seven to three years." [**1989 c 317 § 1.**]

Application—1988 c 144: "Sections 1 and 2 of this act apply to all causes of action commenced on or after June 9, 1988, regardless of when the cause of action may have arisen. To this extent, sections 1 and 2 of this act apply retrospectively." [**1988 c 144 § 3.**]

APPENDIX C

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

TASHA OHNEMUS, Plaintiff, vs. STATE OF WASHINGTON, Defendant.	No. 12-2-01797-4 ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court upon Defendant's Motion for Summary Judgment ("Motion"). In ruling on the Motion, the Court has considered the following:

1. Defendant's Motion For Summary Judgment;
2. Declaration of Joseph M. Diaz in Support of Defendant's Motion for Summary Judgment;
3. Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
4. Declaration of Kathryn Goater In Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
5. Declaration of Steve Tutty, PH.D., In Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
6. Declaration of Kate Wright in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;

JUDGE JAY B. ROOF
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

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7. Declaration of Tasha Ohnemus in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;
8. Defendant's Rebuttal Memorandum in Support of Summary Judgment;
9. Rebuttal Declaration of Joseph M. Diaz in Support of Defendant's Motion for Summary Judgment;
10. Declaration of Avram Mack, MD, In Support of Defendant's Motion for Summary Judgment and in Rebuttal to Plaintiff's Opposition to Summary Judgment;
11. Declaration of Rebecca Roe With Supplemental Documents Rebutting Defendant's Motion for Summary Judgment;
12. The pleadings and filings in this matter; and
13. Oral argument of the parties.

Having considered the foregoing material, it is hereby **ORDERED, ADJUDGED AND DECREED** that:

Defendant's Motion is

GRANTED in **PART** as to Plaintiff's childhood sexual abuse claims;

GRANTED in **PART** as to Plaintiff's claim under 18 U.S.C. §§ 2252 and §2255;

DENIED in **PART** as to Plaintiff's claims under RCW 9.68A.100.

September 12, 2014

JUDGE ROOF

JUDGE JAY B. ROOF
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

CERTIFICATE OF SERVICE

I, Molly Barker, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today I caused a copy of the foregoing document to be served in the manner noted on the following:

Rebecca Roe Schroeter Goldmark Bender 810 3rd Ave Ste 500 Seattle, WA 98104-1657	☒ Via U.S. Mail
Kathryn Goater Schroeter Goldmark Bender 810 3rd Ave Ste 500 Seattle, WA 98104-1657	☒ Via U.S. Mail
Joseph Diaz Attorney General of Washington PO Box 40126 Olympia, WA 98504-0126	☒ Via U.S. Mail

DATED September 12, 2014, at Port Orchard, Washington.

Molly Barker
Judicial Law Clerk

000652

FILED
KITSAP COUNTY CLERK
2014 OCT -6 PM 3:36
DAVID W. PETERSON

SUPERIOR COURT OF WASHINGTON IN AND FOR KITSAP COUNTY

TASHA OHNEMUS,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

NO. 12-2-01797-4

ORDER ON (1) DEFENDANT'S MOTION TO THE COURT FOR FILING OF THE DEFENDANT'S MOTION FOR PARTIAL RECONSIDERATION, (2) DEFENDANT'S MOTION FOR PARTIAL RECONSIDERATION OF ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND (3) PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION OF COURT'S SUMMARY JUDGMENT ORDER

THIS MATTER comes before the Court upon

1. Defendant's Motion to the Court for Filing of the Defendant's Motion for Partial Reconsideration ("Motion For Filing"), noted to be heard for October 17, 2014,
2. Defendant's Motion for Partial Reconsideration of Order on Defendant's Motion for Summary Judgment ("Defendant's Motion for Reconsideration"), noted to be heard for October 17, 2014, and
3. Plaintiff's Motion For Partial Reconsideration of Court's Summary Judgment Order (Plaintiff's Motion for Reconsideration").

In considering these motions, the Court has reviewed the file and records therein. The Court finds

The Defendant has stated a sufficient basis for filing its original Motion for Reconsideration under CR 5(e),

The Plaintiff's Motion for Reconsideration was untimely filed under KCLCR 59(b) and states an insufficient bases for reconsideration under CR 59(a),

The Defendant's Motion for Reconsideration states an insufficient basis for reconsideration under CR 59(a), but does state a sufficient basis to warrant clarification of this Court's September 12, 2014 Order.

It is hereby **ORDERED**

The Defendant's Motion For Filing is **GRANTED,**

The Plaintiff's Motion for Reconsideration is **DENIED,**

The Defendant's Motion for Reconsideration is **DENIED** on the issue of Plaintiff's Claim Under RCW 9.68A.100. On the issue of Plaintiff's non-sexual physical abuse claims, this Court **CLARIFIES** that it **GRANTS** Defendant's Motion for Summary on both (1) Plaintiff's childhood sex abuse claims and (2) Plaintiff's non-sexual physical abuse claims.

The hearing on the above matters noted for October 17, 2014 is **STRICKEN.**

DATED this 6th day of October, 2014.

JUDGE ROOF

CERTIFICATE OF SERVICE

I, Molly Barker, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On October 6, 2014, I caused a copy of the foregoing document to be served in the manner noted on the following:

Rebecca Roe Schroeter Goldmark Bender 810 3rd Ave Ste 500 Seattle, WA 98104-1657	☒ ☐ ☐ ☐	Via U.S. Mail Via Fax: Via Hand Delivery Via E-mail:
Kathryn Goater Schroeter Goldmark Bender 810 3rd Ave Ste 500 Seattle, WA 98104-1657	☒ ☐ ☐ ☐	Via U.S. Mail Via Fax: Via Hand Delivery Via E-mail:
Joseph Diaz Attorney General of Washington PO Box 40126 Olympia, WA 98504-0126	☒ ☐ ☐ ☐	Via U.S. Mail Via Fax: Via Hand Delivery Via E-mail:

DATED this 9 day of October, 2014, at Port Orchard, Washington.

Molly Barker
Judicial Law Clerk

Honorable Jay B. Roof

RECEIVED AND FILED
IN OPEN COURT
OCT 24 2014
DAVID W. PETERSON
KITSAP COUNTY CLERK

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

TASHA OHNEMUS, Plaintiff, v. STATE OF WASHINGTON, Defendant.	NO. 12-2-01797-4 ORDER FOR PARTIAL FINAL JUDGMENT PURSUANT TO CR 54(b) AND CERTIFICATION PURSUANT TO RAP 2.3(B)(4) ~~[PROPOSED]~~

This matter came before the Court on the parties joint motion for an order certifying this matter for appeal pursuant to RAP 2.3(b)(4), and also directing that a partial final judgment be entered which provided the following relief:

1. Dismissal with prejudice the Plaintiff's claim of childhood sex abuse against the Defendant State of Washington;

2. Dismissal with prejudice the Plaintiff's claim of physical abuse against the Defendant State of Washington; and

3. Dismissal with prejudice the Plaintiff's claim under 18 U.S.C. §§ 2252 and §2255 against the Defendant State of Washington.

The motion was made pursuant to CR 54(b) and RAP 2.3(b)(4).

53

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
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ORIGINAL

The Court heard the oral argument of counsel for Defendant State of Washington, Joseph M. Diaz, Assistant Attorney General, and counsel for the Plaintiff, Rebecca Roe.

The Court considered the pleadings filed in this action and the following evidence:

1. Declaration of Joseph M. Diaz in Support of Defendant's Motion for Summary Judgment, and Exhibits A-K thereto;

2. Rebuttal Declaration of Joseph M. Diaz in Support of Defendant's Motion for Summary Judgment, and Exhibit L thereto;

3. Declaration of Avram Mack, MD, in Support of Defendant's Motion for Summary Judgment and in Rebuttal to Plaintiff's Opposition to Summary Judgment, and Exhibits 1 and 2 thereto;

4. Declaration of Kathryn Goater in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment, and Exhibits 1-17 thereto;

5. Declaration of Tasha Ohnemus in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment;

6. Declaration of Kate Wright in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment; and

7. Declaration of Steve Tutty, Ph.D. in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment, and Exhibits 1 and 2 thereto.

Based on the argument of counsel, the pleadings and evidence presented, the Court finds:

1. Defendant State of Washington is entitled to partial final judgment on the claims of physical and sexual abuse for Plaintiff's violation of the applicable statute of limitations under RCW 4.16.190(1), RCW 4.16.080(2), and RCW 4.16.340 where the Plaintiff had discovered the alleged acts that caused her injury prior to her eighteenth birthday on May 24, 2005 and she did not file her action before her twenty-first birthday on May 24, 2008 but filed her lawsuit on August 15, 2012.

2. The Court further finds that the Plaintiff conceded dismissal of her 18 U.S.C. §§ 2252 and 2255 claims in her opposition brief in response to the Defendant's Motion for Summary Judgment.

3. The Court concludes that the Plaintiff violated RCW 4.16.080(2), the statute of limitation applicable on her physical abuse claim, and RCW 4.16.340, the statute of limitation applicable on her childhood sex abuse claims.

4. The Court further concludes that the Plaintiff conceded dismissal of the 18 U.S.C. §§ 2252 and 2255 claims against the Defendant State of Washington.

5. The Defendant State of Washington is entitled to entry of a partial final judgment dismissing Plaintiff's claims of physical abuse, childhood sexual abuse, and the claims for violation of 18 U.S.C. § 2252 and relief under 18 U.S.C. § 2255.

6. The remaining claim of Plaintiff under RCW 9.68A.100 is related to her allegations of childhood sex abuse which are barred by the applicable statute of limitation leaving trial on this sole claim a cost the parties believe is not a reasonable use of time or resources. The parties now desire and stipulate that appellate review of the Court's Order on Summary Judgment and also on the Order on the Defendant's Motion for Reconsideration is warranted and the Court now concludes that there is no just reason for delay in entering the partial final judgment or certifying this case for appellate review.

7. There is no just reason for delay in entering a partial final judgment for Defendant State of Washington on the Plaintiff's claims of physical abuse, childhood sexual abuse, and pursuant to 18 U.S.C. §§ 2252 and 2255.

8. That the parties stipulation for certification under RAP 2.3(b)(4) of the Court's Order on Summary Judgment in regards to the statute of limitation question and the applicability of RCW 9.68A.100 involve controlling question of law to which there is

substantial ground for a difference of opinion and that immediate review of the Order may materially advance the ultimate termination of the litigation.

Based on the above findings, It Is Ordered as follows:

1. Plaintiff's claims of physical abuse, childhood sexual abuse, and her claims pursuant to 18 U.S.C. §§ 2252 and 2255 against the Defendant State of Washington shall be dismissed with prejudice;

2. A partial final judgment shall be entered for Defendant State of Washington on the Plaintiff's claims of physical abuse, childhood sexual abuse, and pursuant to 18 U.S.C. §§ 2252 and 2255;

3. That entry of this Order is a final judgment for purposes of CR 54(b); and

4. That this case is certified for appellate review pursuant to RAP 2.3(b)(4).

DATED this 7th day of October, 2014.

HONORABLE JAY B. ROOF

PRESENTED BY:

ROBERT W. FERGUSON
Attorney General

JOSEPH M. DIAZ, WSBA #16170
ELIZABETH A. BAKER, WSBA #31364
Assistant Attorney Generals
Attorneys for Defendant.

SCHROETER GOLDMARK & BENDER.

REBECCA J. ROE, WSBA #7530
KATHRYN GOATER, WSBA #9648
Attorneys for Plaintiffs

APPENDIX D

353 Or. 321
Supreme Court of Oregon.

Jack DOE 1, an individual proceeding under a fictitious name; Jack Doe 2, an individual proceeding under a fictitious name; Jack Doe 3, an individual proceeding under a fictitious name; Jack Doe 4, an individual proceeding under a fictitious name; Jack Doe 5, an individual proceeding under a fictitious name; Jack Doe 6, an individual proceeding under a fictitious name; and Jack Doe 7, an individual proceeding under a fictitious name, Plaintiffs–Appellants, Petitioners on Review,

v.

LAKE OSWEGO SCHOOL DISTRICT, an Oregon public school district, authorized and chartered by the laws of the State of Oregon, Defendant–Respondent, Respondent on Review,

and

Judd Johnson, an individual, Defendant–Respondent.

(CC CV–0802–0740; CA A140979; SC S059589).

Argued and Submitted Sept. 20, 2012.

Resubmitted Jan. 7, 2013.

Decided March 7, 2013.

Synopsis

Background: Sexual abuse complainants, seven adult males, brought action against school district as the employer of their alleged abuser, a fifth-grade teacher, seeking damages pursuant to Oregon Tort Claims Act (OTCA) on theory of respondeat superior liability for sexual battery. The Circuit Court, Clackamas County, James C. Tait, J., granted district's motion to dismiss and entered limited judgment in its favor. The Court of Appeals affirmed, 242 Or.App. 605, 259 P.3d 27. Complainants' petition for review was granted.

Holdings: The Supreme Court, Walters, J., held that:

[1] factual dispute as to when complainants should have recognized alleged conduct of teacher as offensive precluded summary judgment on limitations grounds, and

[2] statute of limitations governing sexual abuse by private actors did not evince legislative intent to preclude application of discovery rule in instant action.

Reversed and remanded.

West Headnotes (14)

[1] **Limitation of Actions** ⬰ Injuries to the Person
Education ⬰ Service or presentation;timeliness

Oregon Tort Claims Act's (OTCA) 270-day period within which a child victim of sexual abuse is to present written notice of claim of loss or injury to the public body and accompanying two-year limitations period for commencing the action do not begin to run until victim has a reasonable opportunity to discover his injury and the identity of the party responsible for that injury; this avoids the mockery that would follow if the law were to say to one who had been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy." West's Or.Rev. Stat. Ann. § 30.275.

3 Cases that cite this headnote

[2] **Limitation of Actions** ⬰ Injuries to the Person

Education ⬰ Service or presentation;timeliness

For purposes of applying Oregon Tort Claims Act's (OTCA) 270-day period within which a child victim of sexual abuse is to present written notice of claim of loss or injury to the public body and its accompanying two-year limitations period for commencing the action, the "discovery rule" recognizes that an "injury" is discovered, and the limitations periods begin to run, when the victim knows or should have known of the existence of three elements: (1) harm; (2) causation; and (3) tortious conduct. West's Or.Rev. Stat. Ann. § 30.275.

11 Cases that cite this headnote

[3] **Assault and Battery** ⬰ Nature and Elements of Assault and Battery

To be a tortious battery, a defendant's physical contact must be harmful or offensive in nature.

3 Cases that cite this headnote

[4] **Limitation of Actions** ⬰ Injuries to the Person

Education ⬰ Service or presentation;timeliness

For purposes of applying Oregon Tort Claims Act's (OTCA) 270-day period within which a child victim of sexual abuse is to present written notice of claim of loss or injury to the public body and its accompanying two-year limitations period for commencing the action, even though the facts that give rise to a claim have occurred, the applicable limitations periods do not begin to run until the plaintiff discovers or should have discovered those facts; and the facts that a plaintiff must have discovered or be deemed to have discovered include not only the conduct of the defendant, but also the tortious nature of that conduct. West's Or.Rev. Stat. Ann. § 30.275.

10 Cases that cite this headnote

[5] **Limitation of Actions** ⬰ Questions for Jury

For purposes of applying discovery rule and determining accrual date of limitations period, whether a plaintiff knew or should have known the elements of a legally cognizable claim, including the tortious nature of a defendant's act, is generally a question of fact determined by an objective standard.

Cases that cite this headnote

[6] **Limitation of Actions** ⬰ In general;what constitutes discovery

The discovery rule used to determine accrual date of limitations period applies an objective standard, considering how a reasonable person of ordinary prudence would have acted in the same or a similar situation.

Cases that cite this headnote

[7] **Limitation of Actions** ⬰ In general;what constitutes discovery

The discovery rule used to determine accrual date of limitations period requires either actual knowledge or mere suspicion; and thus, the limitations period begins to run when the plaintiff knows or, in the exercise of reasonable care, should have known facts that would make a reasonable person aware of a substantial possibility that each of the elements of a claim exists.

4 Cases that cite this headnote

[8] **Limitation of Actions** ⬰ In general;what constitutes discovery

In applying the discovery rule and its objective standard when determining the accrual date of a limitations period, a court must consider the facts from the perspective of a reasonable person in the circumstances of the plaintiff; those circumstances include, but are not limited to, plaintiff's status as a minor, the relationship between the parties, and the nature of the harm suffered.

2 Cases that cite this headnote

[9] **Limitation of Actions** ⬰ In general;what constitutes discovery

For purposes of determining accrual date of a limitations period, a court cannot decide as a matter of law when a reasonable person in the circumstances of the plaintiff knew or, in the exercise of reasonable care, should have known of a claim, unless the only conclusion that a reasonable trier of fact could reach is that the plaintiff knew or should have known the critical facts at a specified time.

7 Cases that cite this headnote

[10] **Assault and Battery** ⬰ Nature and Elements of Assault and Battery

The relationship of the parties, the customs prevailing in the particular community, and the attitude of the actor in the circumstances are important in determining whether a particular contact is a battery; persons on close and intimate terms will engage in conduct toward one another that would be intolerable between strangers.

Cases that cite this headnote

[11] **Assault and Battery** ⬰ Consent

Frequently the question of battery or no battery will turn on the issue of implied consent; familiarities not justified by the peculiar association of the parties must conform to the usages of the community and contacts not thus sanctioned may be actionable batteries.

1 Cases that cite this headnote

[12] **Assault and Battery** ⬰ Nature and Elements of Assault and Battery

Although the state of mind of the actor may make offensive contact not otherwise so and, conversely, make inoffensive acts that, if done in anger, would be highly objectionable, nevertheless even well-intentioned acts, such as practical jokes or horseplay, may be actionable as a battery if they exceed the bounds of tolerable taste; thus, a pat or similar display of affection by a sincere and even passionate lover may be highly offensive to an

unresponsive woman who has not consented thereto, and an elephantine sense of humor may be responsible for contacts that are offensive to one with a more delicate sensitivity.

1 Cases that cite this headnote

[13] **Limitation of Actions** ⬰ Motion

Motion to dismiss adult males' complaint against school district alleging that their teacher had sexually abused them when they were fifth-graders did not show that action had not been timely commenced; fifth-graders could not be deemed to have known that a trusted teacher who had touched them in socially acceptable ways and whom they had been conditioned to respect and obey had crossed a line and touched them in a new way that society abhorred. West's Or.Rev. Stat. Ann. § 30.275; Rules Civ.Proc., Rule 21.

Cases that cite this headnote

[14] **Limitation of Actions** ⬰ Injuries to the Person

Statute of limitations for child abuse claims brought against private actors, permitting plaintiffs to assert actions for damages until they reach the age 40 or within five years from the date they discovered or should have discovered the causal connection between the injury and the child abuse, did not evince a legislative intent to preclude application of discovery rule in action involving seven sexual abuse complainants who, many years after alleged abuse, asserted claims against school district as the employer of their alleged abuser, a fifth-grade teacher, seeking damages pursuant to Oregon Tort Claims Act (OTCA) on theory of respondeat superior liability; the statute of limitations for child abuse claims brought against private actors did not explicitly address child abuse committed by public actors nor preclude application of the discovery rule in battery claims against public actors. West's Or.Rev. Stat. Ann. §§ 12.117, 30.275.

3 Cases that cite this headnote

**1289 On review from the Court of Appeals. *

Attorneys and Law Firms

Kelly Clark, O'Donnell Clark & Crew LLP, Portland, argued the cause for petitioners on review. Kathryn H. Clarke, Portland, **1290 filed the brief for petitioners on review. With her on the brief were Kelly Clark and Kristian Roggendorf.

Timothy R. Volpert, Davis Wright Tremaine LLP, Portland, argued the cause and filed the brief for respondent on review. With him on the brief was David A. Ernst.

Erin K. Olson, Portland, filed the brief for amici curiae Survivor's Network of those Abused by Priests, National Center for Victims of Crime, Cardozo Advocates for Kids, Oregon Abuse Advocates and Survivors in Service, Crime Victims United, KidSafe Foundation, Survivors for Justice, Coalition of Jewish Advocates for Children, Jewish Parents for Safe Yeshivas, National Black Church Initiative, Child Victims Voice, Stop the Silence: Stop Child Sexual Abuse, Inc., Jewish Board of Advocates for Children, and National Child Protection Training Center.

Lisa T. Hunt, Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association.

Before BALMER, Chief Justice, and KISTLER, WALTERS, LINDER, BREWER, and BALDWIN, Justices. **

Opinion

WALTERS, J.

***323** At issue in this civil action is a trial court's order dismissing as untimely plaintiffs' claims against a public school district. Plaintiffs alleged that when they were in the fifth grade, a teacher who worked for the district sexually abused them, but that they did not know that their teacher's touching was abusive when it occurred. For the reasons that follow, we conclude that the trial court erred in granting the school district's ORCP 21 motion to dismiss plaintiffs' claims. We reverse the contrary decision of the Court of Appeals and the limited judgment of the trial court, and we remand for further proceedings.

The facts relevant to our decision are those set forth in plaintiffs' Third Amended Complaint. [1] Plaintiffs have not proved those facts to be true but, for purposes of deciding whether the trial court erred in granting defendant's ORCP 21 motion to dismiss, we assume their veracity. *See Juarez v. Windsor Rock Products, Inc.*, 341 Or. 160, 163, 144 P.3d 211 (2006) (on review of motion to dismiss, court assumes the truth of well-pleaded facts).

Plaintiffs are seven adult men who were born between 1957 and 1970. Between 1968 and 1984, each plaintiff was a fifth-grade student in a class taught by Johnson. During that time period, Johnson was employed by the Lake Oswego School District (defendant), a governmental entity. [2] While serving as plaintiffs' teacher, Johnson engaged in a "grooming process" that involved befriending plaintiffs, gaining their trust, admiration and obedience, and conditioning them to respect Johnson as a person of authority. As part of that "grooming process," Johnson also befriended plaintiffs' families and gained their trust, their permission to spend substantial periods of time with plaintiffs, and the benefit of their instruction to their sons to respect and comply ***324** with Johnson's authority and requests. Through use of the grooming process, Johnson intentionally engaged in the following conduct:

> "fondling [Jack Doe 1's] genitals inside his clothing while in the classroom in front of other students"; "fondling [Jack Doe 2 and 3's] genitals and buttock[s] [while they] stood in the classroom in front of other students"; "fondling [Jack Doe 4's] genitals outside of his clothing while in the classroom in front of other students"; "fondling [Jack Doe 5's] genitals inside his clothing and 'assisting' [Jack Doe 5] in urinating on several occasions"; and "fondling [Jack Doe 6 and 7's] genitals[.]" [3]

****1291** Plaintiffs alleged that those acts constituted harmful or offensive touching that caused them to suffer debilitating physical, mental, and emotional injury. However, plaintiffs alleged, they did not discover their injuries at the time of Johnson's touching. At that time, plaintiffs alleged, they did not

> "comprehend the abusive nature—and therefore could not perceive the harm—of Johnson's touching due to the obedience, admiration, respect, and esteem which [plaintiffs] had for Johnson * * *. [Plaintiffs were] unable to recognize that [they] had been harmed at the time of the abuse, because the touching * * * was similar enough to the non-tortious touching by Johnson that occurred during and was part of the grooming process that, as * * * young boy [s, they were] confused by it and unable to discern at the time that the touching was inappropriate or harmful."

Plaintiffs alleged that the earliest date that any one of them discovered his injuries was in November 2006; the latest was in March 2008.

Plaintiffs commenced this action in February 2008. Plaintiffs labeled some of their claims as claims for "Sexual Abuse of a Child" and others as claims for "Intentional ***325** Infliction of Emotional Distress." [4] Plaintiffs brought those claims under the Oregon Tort Claims Act (OTCA) and sought to hold defendant vicariously liable for Johnson's acts. One plaintiff, Jack Doe 6, also sought to hold defendant liable for its own allegedly negligent acts. Plaintiff Jack Doe 6

alleged that, in 1982 or 1983, defendant became aware that Johnson had molested a boy away from school grounds and thereafter was negligent in failing to terminate or supervise Johnson. Plaintiff Jack Doe 6 alleged that he reasonably did not discover defendant's alleged negligence until March 2008.

Defendant filed a motion under ORCP 21 [5] to dismiss plaintiffs' claims, asserting that plaintiffs had failed provide notice of claim or to commence their action within the time provided by ORS 30.275. [6] Defendant argued ***326** that it appeared from the face of plaintiffs' complaint that the latest that Johnson's touching had occurred was in 1984, and that plaintiffs' claims necessarily accrued at that time. Therefore, defendant contended, because plaintiffs concededly had not given notice of claim or filed their action within the requisite period thereafter, their claims were ****1292** untimely and should be dismissed. Plaintiffs countered that they had pleaded facts from which a jury could find that they reasonably had not discovered the abusive or harmful nature of Johnson's conduct at the time it occurred. Therefore, plaintiffs argued, they had alleged facts from which a jury could find that their claims accrued on the dates that they alleged they had discovered their injuries, not on the date of Johnson's alleged touching. Plaintiffs also argued that the OTCA was unconstitutional if it precluded their claims. [7]

The trial court ultimately agreed with defendant that plaintiffs must be deemed to have discovered the facts necessary to their claims at the time of the touching. The court concluded, "I am completely ruling, as a matter of law * * * that there is no 10–to 13–year–old child, other than one, perhaps, that's mentally retarded * * * who would not understand that this kind of touching is wrong." The trial court also rejected plaintiffs' argument that the OTCA was unconstitutional as applied to them. The trial court granted defendant's ORCP 21 motion to dismiss and entered a limited judgment in its favor. [8]

Plaintiffs appealed, and the Court of Appeals affirmed. *Doe v. Lake Oswego School District,* 242 Or.App. 605, 259 P.3d 27 (2011). The court held:

> "Where, as here, a plaintiff seeking damages for sexual abuse under the OTCA knew that the sexual touching occurred as well as who did the touching, there is no basis to say that the plaintiff did not know of or could not reasonably ***327** have discovered the injury—that is, the legally cognizable harm. Accordingly, we conclude that the trial court correctly determined that the allegations in plaintiffs' complaint are insufficient to prevent the application of the OTCA's time limitations with respect to the sexual battery and IIED claims and those claims were properly dismissed."

Id. at 616, 259 P.3d 27 (footnote omitted). As to Jack Doe 6's negligence claim, the court held that plaintiff had failed to raise a distinct argument regarding the timeliness of that claim, and the court therefore declined to address it on appeal. *Id.* at 616–18, 259 P.3d 27. The court also rejected without discussion plaintiffs' challenge to the constitutionality of the OTCA as applied. [9] Plaintiffs sought, and we allowed, review.

[1] To meet the requirements of the OTCA, a plaintiff who is a minor at the time of an alleged loss or injury must give notice of claim within 270 days and must commence the action within two years following the "alleged loss or injury." [10] ORS 30.275. *In Adams v. Oregon State Police,* 289 Or. 233, 239, 611 P.2d 1153 (1980), this court construed those terms and held that the limitations period for an OTCA claim for "alleged loss or injury" does not begin to run until a "plaintiff has a reasonable opportunity to *discover his injury* and the identity of the party responsible for that injury." (Emphasis added.) That rule, the court explained, avoids the mockery that would follow if the law were to say to one who had been wronged, "[y]ou had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy." ****1293** *Id.* at 238, 611 P.2d 1153 (quoting *Berry v. Branner,* 245 Or. 307, 312, 421 P.2d 996 (1966)).

[2] In *Gaston v. Parsons,* 318 Or. 247, 252–56, 864 P.2d 1319 (1994), this court considered the meaning of the ***328** word "injury" in the context of a different statute—ORS 12.110(4)—which provides that a medical malpractice action

must be commenced within two years from the date that an "injury" is or should have been discovered. [11] The court concluded that the legislature had used the word "injury" to mean "what formed the basis for an action, *i.e.*, legally cognizable harm," and that "harm is legally cognizable if it is the result of tortious conduct." 318 Or. at 254–55, 864 P.2d 1319. Thus, the court explained, as used in ORS 12.110(4), an "injury" is discovered when a plaintiff knows or should have known of the existence of three elements: (1) harm; (2) causation; and (3) tortious conduct. 318 Or. at 255, 864 P.2d 1319. The word "injury" has the same meaning in claims brought under the OTCA. *Johnson v. Mult. Co. Dept. Community Justice,* 344 Or. 111, 118, 178 P.3d 210 (2008) (so stating). [12]

In this case, defendant acknowledges the applicability of the discovery rule and contends that the trial court correctly followed that rule in dismissing plaintiffs' claims. According to defendant, plaintiffs necessarily discovered the facts that gave rise to legally cognizable claims for the intentional tort of battery no later than 1984, the last date on which Johnson touched any one of them.

Although plaintiffs did not expressly label any of their claims as claims for battery, they agree that the facts that they alleged in the claims that they labeled as claims for "Sexual Abuse of a Child" may properly be considered as stating claims for that intentional tort. [13] Plaintiffs argue, however, that they did not necessarily discover the facts ***329** necessary to that tort by 1984. At the time that Johnson touched them, plaintiffs assert, they reasonably did not recognize that his touching was abusive. In *Gaston* terms, plaintiffs argue that, by 1984, they reasonably had not discovered the tortious nature of Johnson's conduct.

The parties' arguments confine the scope of our analysis; the legal question for our consideration on review is whether plaintiffs' allegations that Johnson fondled their genitals in and before 1984 require the conclusion that their battery claims accrued by that date. Defendant does not contend that plaintiffs' battery claims necessarily accrued at some date after 1984 or challenge plaintiffs' allegations that they did not discover their injuries until 2006 at the earliest. Rather, defendant argues that, because plaintiffs alleged that Johnson's touching occurred in or before 1984, plaintiffs also knew or should have known the facts that give rise to a battery claim by that date. We therefore begin our analysis by considering the elements of such a claim.

In *Bakker v. Baza'r, Inc.*, 275 Or. 245, 249, 551 P.2d 1269 (1976), this court set out the elements of a battery claim:

> "To constitute liability for a battery, the conduct which brings about the harm must be an act of volition on the actor's part, and the actor must have intended to bring about a harmful or offensive contact or put the other party in apprehension thereof. 1 Harper & James, *The Law of Torts* 215–17, § 3.3 (1956). It is not necessary that the contact do actual physical harm—it is sufficient if the contact is offensive or insulting. Prosser, *Law of Torts* 36, § 9 (4th ed. 1971)."

As discussed in *Harper, James and Gray on Torts,* battery redresses injury both to an ****1294** individual's physical integrity and to an individual's dignitary interests:

> "Involved in the tort of battery are two interests of personality: first, the interest in the physical integrity of the body, that it be free from harmful contacts; second, the purely dignitary interest in the body that it be free from offensive contact."

***330** Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 1 *Harper, James and Gray on Torts* § 3.2, 307 (3d ed 2006). Prosser explains the reason:

> "The original purpose of the courts in providing the action for battery undoubtedly was to keep the peace by affording a substitute for private retribution. The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for

> contacts which do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting."

W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 9, 41 (5th ed 1984) (footnotes omitted).

[3] The *Restatement (Second) of Torts* § 18(1) (1965) also recognizes that battery may be either (or both) of two types—battery that causes "harmful contact" or battery that causes "offensive contact." As used in the *Restatement,* "harmful contact" includes physical impairment, physical pain, or illness. *Restatement* § 15. "Offensive contact" is defined as contact that offends a reasonable sense of personal dignity. *Restatement* § 19. Thus, to be tortious, a defendant's physical contact must be harmful or offensive in nature. In this case, defendant does not argue that plaintiff necessarily suffered physical impairment, physical pain, or illness by 1984; defendant argues that plaintiff necessarily suffered offensive contact by that date. Therefore, we address the "offensive contact" element of a claim for battery.

Defendant argues that plaintiffs had to have known that Johnson's touching was offensive at the time that it occurred: "Reaching under a fifth grader's clothing and fondling his genitals in front of a class of students is offensive to a reasonable sense of personal dignity as a matter of law." Further, defendant argues, the "[f]ailure of a child to apprehend the offensive nature of the contact does not change the fact that society, and therefore the law, considers the contact inherently harmful. What plaintiffs' teacher allegedly did was offensive and immediately caused cognizable harm." Therefore, in defendant's view, plaintiffs' battery claims were legally cognizable, and the OTCA limitations periods began to run, when Johnson's touching occurred—by 1984 at the latest.

***331** Plaintiffs accept that intentional action that results in offensive contact gives rise to a battery claim, but respond that they reasonably did not recognize Johnson's conduct as offensive when they were fifth-graders in his classroom. Plaintiffs argue that defendant fails to separately analyze the facts that give rise to a battery claim and the different question of when plaintiffs knew or should have known those facts. According to plaintiffs, the question here is not whether plaintiffs pleaded facts sufficient to state a claim for relief, but whether plaintiffs discovered or must be deemed to have discovered those facts when Johnson's conduct occurred. Plaintiffs contend that, although Johnson's conduct was indeed offensive, they did not recognize it as such by 1984. They contend that they did not comprehend "the abusive nature" of Johnson's touching due to the "obedience, admiration, respect, and esteem" that they had for Johnson. In addition, they contend that, because the touching was "similar enough to the non-tortious touching by Johnson that occurred during and as part of the grooming process," they, as young boys, were confused by it and were unable to discern at the time that the touching was "inappropriate or harmful." Plaintiffs argue that, under those alleged circumstances, it was error for the trial court to dismiss their claims as untimely.

[4] We agree with plaintiffs that defendant mistakenly conflates the question of whether Johnson's alleged conduct was in fact offensive with the question whether plaintiffs, as fifth-graders subjected to Johnson's grooming tactics, recognized or must be deemed to have recognized that fact when the touching occurred. Even though the facts that give rise to a claim have occurred, the applicable limitations period does not begin ****1295** to run until the plaintiff discovers or should have discovered those facts. And the facts that a plaintiff must have discovered or be deemed to have discovered include not only the conduct of the defendant, but also, under *Gaston,* the tortious nature of that conduct.

In *Gaston,* the facts that gave rise to the plaintiff's negligence claim had occurred when the defendant completed the plaintiff's surgery. The defendant had operated, committed alleged negligence, and caused the plaintiff harm. However, the limitations period did not begin to run ***332** until the plaintiff knew or should have known those facts. The plaintiff contended that, even though his left arm was numb and did not function after surgery, he reasonably did not know that there was a substantial possibility that the defendant had acted tortiously. The court held that whether the plaintiff's failure to comprehend the nature of the defendant's conduct was reasonable was a question of fact that must be determined by the trier of fact. 318 Or. at 257, 864 P.2d 1319. The court explained:

> "Whether a reasonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact that depends upon the nature of the harm suffered, the nature of the medical procedure, and other relevant circumstances. The nature of the harm suffered is important in determining whether a reasonable person would have been aware of a substantial possibility of tortious conduct. * * * A reasonable person that experiences symptoms that are incidental to a particular medical procedure may not be aware that he or she has been a victim of tortious conduct * * *."

Id. at 256–57, 864 P.2d 1319. Similarly, in *Doe v. American Red Cross,* 322 Or. 502, 513, 910 P.2d 364 (1996), the court held that the limitations period did not begin to run when the facts giving rise to a claim for negligence occurred: when the defendant provided the plaintiff's husband with blood for a transfusion, allegedly negligently, and the husband contracted a serious disease as a result. The limitations period did not begin to run until the plaintiff knew or should have known that defendant may have acted tortiously—a question of fact that precluded summary judgment for the defendant. *Id.* at 515, 910 P.2d 364.

[5] [6] [7] [8] [9] As those cases demonstrate, knowledge that an actor committed an act that resulted in harm is not always sufficient to establish that a plaintiff also knew that the act was tortious. And, as those cases also demonstrate, whether a plaintiff knew or should have known the elements of a legally cognizable claim, including the tortious nature of a defendant's act, is generally a question of fact determined by an objective standard:

> "The discovery rule applies an objective standard—how a reasonable person of ordinary prudence would have acted in the same or a similar situation. The discovery rule does ***333** not require actual knowledge; however, mere suspicion also is insufficient. The statute of limitations begins to run when the plaintiff knows or, in the exercise of reasonable care, should have known facts that would make a reasonable person aware of a substantial possibility that each of the elements of a claim exists."

Kaseberg v. Davis Wright Tremaine, LLP, 351 Or. 270, 278, 265 P.3d 777 (2011) (internal citations omitted). In applying that standard, a court must consider the facts from the perspective of a reasonable person in the circumstances of the plaintiff. *T.R. v. Boy Scouts of America,* 344 Or. 282, 297–98, 181 P.3d 758 (2008). Those circumstances include, but are not limited to, plaintiff's status as a minor, *id.* at 297, 181 P.3d 758, the relationship between the parties, *Kaseberg,* 351 Or. at 279, 265 P.3d 777, and the nature of the harm suffered. *Gaston,* 318 Or. at 256, 864 P.2d 1319. A court cannot decide that question as a matter of law unless the only conclusion that a reasonable trier of fact could reach is that the plaintiff knew or should have known the critical facts at a specified time. *Kaseberg,* 351 Or. at 278, 265 P.3d 777 (so stating); *T.R.,* 344 Or. at 296, 181 P.3d 758 (same).

[10] [11] [12] The same principles are applicable here. Just as the negligent character of a defendant's conduct is not always immediately apparent, the line between offensive ****1296** and socially acceptable touching also may be difficult to ascertain:

> "The relationship of the parties, the customs prevailing in the particular community, and the attitude of the actor in the circumstances are important in determining whether a particular contact is a battery. Thus, persons on close and intimate terms will engage in conduct toward one another that would be intolerable between strangers. Frequently the question of battery or no battery will turn on the issue of implied consent. Familiarities not justified by the peculiar association of the parties must conform to the usages of the community and contacts not thus sanctioned may be actionable batteries. Although the state of mind of the actor may make offensive contact not otherwise so and, conversely, make inoffensive acts that, if done in anger, would be highly objectionable, nevertheless even well-intentioned acts, such as practical jokes or horseplay, may be actionable if they exceed the bounds of tolerable taste. Thus, a pat or similar display of affection

> by a sincere and even passionate *334 lover may be highly offensive to an unresponsive woman who has not consented thereto, and an elephantine sense of humor may be responsible for contacts that are offensive to one with a more delicate sensitivity."

Harper, 1 *Harper, James and Gray on Torts* § 3.2 at 310–11 (footnotes omitted). Just as a plaintiff's discovery of the negligent character of a defendant's conduct is a question of fact requiring consideration of the relationship between the parties and the nature of the harm, so too are those factors relevant to a discovery of whether a defendant has engaged in offensive contact.

[13] In this case, defendant argues that the trial court was correct that the only conclusion that a reasonable trier of fact could reach was that, in 1984, plaintiffs knew or should have known that Johnson's touching was offensive. Plaintiffs respond that, given their status as minors, their relationship with Johnson, and the nature of the harm that his acts inflicted, a jury could find from the facts that they alleged that they reasonably did not know that Johnson's acts were offensive when they occurred. We agree with plaintiffs. Although it is true, as defendant argues, that in the 1970s and 1980s many fifth-graders would have known that Johnson's touching was offensive, plaintiffs alleged facts from which a jury could find that these plaintiffs reasonably did not reach that conclusion at the time of Johnson's actions. Plaintiffs alleged that Johnson engaged in a "grooming process" that included gaining the support of plaintiffs' families so that they would counsel their sons to respect his authority and comply with his instructions and requests. Plaintiffs alleged that, as a result, they had such admiration and respect for Johnson, and the wrongful touching in which Johnson engaged was so similar to the non-tortious touching that they had experienced during the grooming process that, as young boys, plaintiffs were confused by Johnson's conduct and unable to discern that the touching was inappropriate.

In *Johnson v. Mult. Co. Dept. Community Justice,* this court addressed whether a plaintiff who had been sexually assaulted should have learned from newspaper articles that the defendant's negligent supervision of a sex offender—her assailant—had contributed to her injury. *335 344 Or. at 113, 178 P.3d 210. The court considered the plaintiff's particular circumstances in concluding that, even though published media reports indicated that the defendant may have been negligent, the plaintiff had raised a question of fact about whether she knew or should have known of the defendant's potentially tortious conduct. *Id.* at 122–23, 178 P.3d 210. The court reasoned:

> "In the end, defendant's proposal—that all plaintiffs should be deemed to know all information relating to their claim that has been published in the local media—involves a leap of faith that we are not prepared to make."

Id. at 122, 178 P.3d 210.

In this case, we are similarly unprepared to make the leap of faith for which defendant contends—that in 1984, all fifth-graders must be deemed to have known that a trusted teacher who had touched them in socially acceptable ways and whom they had been conditioned to respect and obey had crossed a line and touched them in a new way that society abhorred.

In stating that conclusion, we emphasize that plaintiffs' complaint does no more than **1297 allege facts that they must prove. Defendant may challenge the truth of plaintiffs' allegations at many remaining junctures, and our decision does not foreclose it from doing so. We also do not mean to imply that a limitations period does not begin to run until a plaintiff knows the full extent of the harm that has been inflicted or becomes aware of the legal implication of facts rather than of the facts themselves. Defendant is correct that, if a plaintiff knows that he or she has suffered some harm and knows that it is the result of tortious conduct, an argument that the plaintiff did not know the full extent of the harm or that those facts had legal significance will be of no avail. That is not the case here, however. Here, plaintiffs contend that they did not know a fact necessary to their battery claims—that, at the time that it occurred, Johnson's conduct was offensive.

[14] We also reject defendant's final, statutory argument. Defendant asserts that ORS 12.117, which provides a statute of limitations for child abuse claims brought against *336 private actors, is indicative of a legislative policy that should govern our decision in this case. [14] ORS 12.117 provides that an individual who was a minor when he or she was subjected to "child abuse" by a private actor may bring an action for damages until he or she reaches age 40 or within five years from the date that the individual discovered or should have discovered the causal connection between the injury and the child abuse, whichever is longer. That statute does not explicitly address "child abuse" committed by public actors, deprive individuals abused by public actors of existing remedies, or preclude the application of the discovery rule in battery claims against public actors. That the legislature saw fit to *grant* individuals subjected to "child abuse" by private actors at least five years from the date of discovery of the causal connection between the injury and the abuse to bring their claims does not indicate a legislative intent to *deprive* others subjected to battery by public actors of a two-year period from the date they discover their injuries to commence their actions. ORS 12.117 does not render the discovery rule inapplicable to plaintiffs' claims.

For the reasons stated, we conclude that the trial court erred in granting defendant's ORCP 21 motion to dismiss plaintiffs' claims for "Sexual Abuse of a Child"—claims that we have analyzed as claims for battery—on timeliness grounds. [15] The trial court and the Court of Appeals did not draw a distinction between plaintiffs' battery claims and their claims for intentional infliction of emotional distress and negligence. We also will follow that approach at this *337 stage of the proceedings and, therefore, conclude that the trial court erred in dismissing plaintiffs' claims for intentional infliction of emotional distress and plaintiff Jack Doe 6's claim that defendant was negligent in failing to supervise or terminate Johnson, and in entering a limited judgment for defendant. [16]

The decision of the Court of Appeals is reversed. The limited judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

All Citations

353 Or. 321, 297 P.3d 1287

Footnotes

* Appeal from Clackamas County Circuit Court, James C. Tait, Judge. 242 Or.App. 605, 259 P.3d 27 (2011).

** Landau, J., did not participate in the consideration or decision of this case.

1 The trial court dismissed the claims that plaintiffs asserted against the school district in their Third Amended Complaint. We take the facts relevant to our decision from the claims that plaintiffs labeled as claims for "Sexual Abuse of a Child."

2 Plaintiffs brought their action against both Johnson and the Lake Oswego School District and both are defendants in this case. However, because it is the trial court's order dismissing plaintiffs' claims against the district that is at issue on review, we refer to the school district as "defendant" and to Johnson by name.

3 Plaintiffs also alleged that Johnson engaged in intentional conduct "resulting in *some or all* of the following: physical injury, mental injury, rape, sexual abuse, and sexual exploitation[.]" (Emphasis added.) Plaintiffs immediately followed those allegations with the specific allegations set out in the text above. Because the parties base their arguments on the specific allegations set out in the text above, and because plaintiffs alleged that Johnson engaged in *some* but not necessarily *all* of the conduct set forth in their general allegations, we do not consider those general allegations in our analysis.

4 Plaintiffs also alleged claims for violation of their civil rights under 42 U.S.C. section 1983. The trial court granted defendant's motion to dismiss those claims and the Court of Appeals affirmed. *Doe v. Lake Oswego School District,* 242 Or.App. 605, 621–23, 259 P.3d 27 (2011). The Court of Appeals concluded that plaintiffs had failed to plead facts necessary to constitute those claims—in particular, facts alleging that defendant had acted pursuant to a policy or custom of "deliberate indifference." Plaintiffs do not challenge that conclusion in this court.

5 ORCP 21 A provides, in part:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto,

> except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (9) that the pleading shows that the action has not been commenced within the time limited by statute."

6 ORS 30.275, provides, in part:

> "(1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.
>
> "(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:
>
> "(a) For wrongful death, within one year after the alleged loss or injury.
>
> "(b) For all other claims, within 180 days after the alleged loss or injury.
>
> "* * * *
>
> "(9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of [the OTCA] shall be commenced within two years after the alleged loss or injury."

7 In their Third Amended Complaint, plaintiffs included a claim for declaratory judgment and alleged that, if the court accepted defendant's argument that their claims were time-barred under the OTCA, the OTCA was unconstitutional as applied to them.

8 The limited judgment resolved all of plaintiffs' claims against defendant district. The limited judgment did not resolve plaintiffs' claims against Johnson. The trial court entered an order staying those claims.

9 However, the Court of Appeals required a different form of limited judgment than had been entered by the trial court. The Court of Appeals vacated the trial court's limited judgment dismissing plaintiffs' claim for declaratory relief and required that the trial court instead enter a limited judgment for defendant declaring that "the OTCA's statute of limitations provisions do not violate the state or federal constitution." *Doe,* 242 Or.App. at 618 n. 4, 259 P.3d 27.

10 Plaintiffs do not argue that their claims were tolled pursuant to ORS 12.160 and we do not consider or decide whether the minority tolling provisions in that statute apply to a claim under the OTCA. *See Baker v. City of Lakeside,* 343 Or. 70, 77, 164 P.3d 259 (2007) (discussing applicability of ORS 12.160 to claims brought under the OTCA as context for interpretation of ORS 12.020).

11 ORS 12.110(4) provides, in relevant part:

> "An action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commenced within two years from the date when the *injury* is first *discovered* or in the exercise of reasonable care should have been discovered."

(Emphasis added.)

12 In *Johnson,* the court explained that those three elements of the discovery rule—harm, causation, and tortious conduct—also incorporate a fourth element: the probable identity of the tortfeasor. 344 Or. at 118 n. 2, 178 P.3d 210. *Accord T.R. v. Boy Scouts of America,* 344 Or. 282, 292, 181 P.3d 758 (2008).

13 Plaintiffs also argue that the claims that they labeled as claims for "Sexual Abuse of a Child" may be viewed as negligence claims alleging a breach of fiduciary duty. For reasons that we explain later in this opinion, we do not reach that argument.

14 ORS 12.117(1) provides:

> "Notwithstanding ORS 12.110, 12.115 or 12.160, an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse that occurs while the person is under 18 years of age must be commenced before the person attains 40 years of age, or if the person has not discovered the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the causal connection between the injury and the child abuse, not more than five years from the date the person discovers or in the exercise of reasonable care should have discovered the causal connection between the child abuse and the injury, whichever period is longer."

15 In this court, plaintiffs argue that their claims for "Sexual Abuse of a Child" also may be viewed as negligence claims alleging a breach of fiduciary duty. Because we reach the conclusion that the trial court erred in dismissing those claims, we need not address that argument.

16 Because our holding may or may not affect the trial court's ruling as to the merits of plaintiffs' claim for declaratory judgment, we concluded that that is a matter that the trial court should consider on remand.

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344 Or. 111
Supreme Court of Oregon,
En Banc.

Akilah JOHNSON, Respondent on Review,
v.
MULTNOMAH COUNTY DEPARTMENT OF COMMUNITY JUSTICE, Petitioner on Review,
and
Department of Corrections, Defendant.

(CC 0406–06577; CA A128667; SC S054697).

Argued and Submitted Nov. 5, 2007.

Decided Feb. 14, 2008.

Synopsis

Background: Rape victim filed notice of tort claim against county department of community justice more than five years after rape by a man under department's supervision. The Circuit Court, Multnomah County, Michael C. Zusman, J. Pro Tem., granted department's summary judgment motion. Victim appealed. The Court of Appeals, Schuman, J., 210 Or.App. 591, 152 P.3d 927, reversed and remanded. Review was granted.

Holdings: The Supreme Court, Gillette, J., held that:

[1] victim's knowledge of attacker's identity and newspaper articles about the crime did not, as a matter of law, impose a duty to inquire into department's role, and

[2] factual issues precluded summary judgment on when 180-day period began to run.

Court of Appeals decision affirmed; Circuit Court reversed; and case remanded.

West Headnotes (6)

[1] **Municipal Corporations** ⊶ Service or Presentation;Time Therefor

Period of 180 days for giving notice of claim against public body does not commence to run, under the discovery rule, until a plaintiff knows or, in the exercise of reasonable care should know, that he or she has been injured and that there is a substantial possibility that the injury was caused by an identified person's tortious conduct. West's Or.Rev. Stat. Ann. § 30.275(2)(b).

8 Cases that cite this headnote

[2] **Counties** ⊶ Service or Presentation;Timeliness

Rape victim's knowledge of attacker's identity, newspaper articles about the crime, and supervision by county department of community justice of attacker as sex offender did not, as a matter of law, impose a duty on victim to inquire into department's role and commence 180-day period for filing notice of tort claim; the fact that news about some event was available at a particular time did not, by itself, resolve whether a reasonable person would have read or heard that news, much less what a reasonable inquiry based on that news would have uncovered. West's Or.Rev. Stat. Ann. § 30.275(2)(b).

1 Cases that cite this headnote

[3] **Judgment** ⬰ Existence of Defense

Municipal Corporations ⬰ Trial, Judgment, and Review

The question whether and when a plaintiff knew or should have known that his or her injury was caused by a particular defendant's tortious conduct ordinarily is a question of fact for the jury on issue of when 180-day period began to run for filing notice of tort claim against public body; it may be decided on summary judgment as a matter of law only if the record on summary judgment presents no triable issue of fact. West's Or.Rev. Stat. Ann. § 30.275.

6 Cases that cite this headnote

[4] **Municipal Corporations** ⬰ Service or Presentation;Time Therefor

The discovery rule as applied to notice of claim statute does not protect plaintiffs who fail to make a further inquiry when a reasonable person would do so. West's Or.Rev. Stat. Ann. § 30.275(2)(b).

Cases that cite this headnote

[5] **Municipal Corporations** ⬰ Service or Presentation;Time Therefor

A plaintiff's duty to inquire and gain knowledge commencing 180-day period for filing notice of tort claim against public body must arise from circumstances stronger than the mere drifting possibility that something of interest might come to light. West's Or.Rev. Stat. Ann. § 30.275(2)(b).

Cases that cite this headnote

[6] **Judgment** ⬰ Existence of Defense

Judgment ⬰ Public Officers and Employees, Cases Involving

Genuine issue of material fact as to when rape victim should have known of county department's connection to her injury precluded summary judgment on when 180-day period began to run for filing notice of tort claim against county for inadequate supervision of attacker. West's Or.Rev. Stat. Ann. § 30.275(2)(b).

1 Cases that cite this headnote

**211 On review from the Court of Appeals. *

Attorneys and Law Firms

Jacqueline A. Weber, Assistant County Attorney, Portland, argued the cause and filed the brief for petitioner on review. With her on the brief was Agnes Sowle, Attorney for Multnomah County.

Kevin J. Tillson, of Hunt & Associates, PC, Portland, argued the cause and filed the brief for respondent on review. With him on the brief was Lawrence B. Hunt.

Douglas G. Schaller, of Johnson, Clifton, Larson & Schaller, P.C., Eugene, filed a brief for amicus curiae Oregon Trial Lawyers Association.

Opinion

GILLETTE, J.

***113** This case is concerned with the so-called "discovery rule," as it applies to ORS 30.275(2)(b), a provision of the Oregon Tort Claim Act that requires any person bringing a tort claim against a public agency to give notice to the agency of the claim within 180 days of the alleged loss or injury. [1] Specifically, it asks whether, and to what extent, the appearance of newspaper articles in local papers suggesting that a public agency may have had a role in a plaintiff's injury should be deemed to put that plaintiff on notice of his or her claim against the public agency, and thus trigger the 180-day notice period. We do not reject the possibility that, in some circumstances, information appearing in such media reports may be imputed to a plaintiff as a matter of law. However, we conclude that, in the present case, reasonable jurors could disagree whether plaintiff should have learned about defendant's involvement in her injury from the stories that appeared in the local newspapers at the time that they appeared. The Court of Appeals reached the same conclusion, *Johnson v. Mult. Co. Dept. Community Justice,* 210 Or.App. 591, 152 P.3d 927 (2007), and we affirm its decision.

On November 5, 1997, when plaintiff was 14 years old, she was raped by an unknown assailant, who was identified, years later, as Ladon Stephens. Stephens had been released from prison about ten months before the rape, after serving six years for three separate attempts to kidnap young girls. At the time that Stephens raped plaintiff, he was being supervised as a high risk sex offender by the Multnomah County Department of Community Justice (defendant).

***114** In April 2002, Stephens was arrested for the rape of another young woman. Shortly thereafter, the authorities connected Stephens to the November 5, 1997, rape of plaintiff by means of DNA evidence. Authorities also connected Stephens to two other rapes that occurred earlier in 1997 and, most notoriously, to the 2001 rape and murder of yet another young girl, Melissa Bittler. At some point thereafter, and at least by July 2003, plaintiff became aware that Stephens very likely had been her assailant.

In December 2003, plaintiff's parents told her that Stephens was being supervised by defendant when he raped her and that defendant's supervision of Stephens may have been inadequate. Well within 180 days of that conversation—on April 28, 2004—plaintiff gave notice to defendant that she had been injured as a result of its negligent supervision of Stephens and that she intended to file a civil action seeking damages. A few months later, plaintiff filed the action at issue here, alleging that defendant was negligent ****212** in using parole officers who were not trained in sex offender management to supervise defendant; in failing to carry out all required home visits; in failing to act when polygraph tests and other evidence suggested that Stephens was being untruthful about his activities; in failing to act when Stephens missed scheduled appointments and examinations; and in sending Stephens for sex offender treatment to a psychologist who was not qualified to provide such treatment.

Defendant filed an answer, and then moved for summary judgment on the ground that plaintiff had failed to give notice of her claim within 180 days of her injury, as ORS 30.275(2)(b) requires. In its motion, defendant acknowledged that, under this court's cases, the notice period set out at ORS 30.275(2)(b) does not commence to run until the plaintiff has had a reasonable opportunity to discover his or her injury and the identity of the party responsible for that injury. *See Adams v. Oregon State Police,* 289 Or. 233, 239, 611 P.2d 1153 (1980) (so holding). Defendant noted, however, that that standard does not allow plaintiffs to ignore pertinent information but, instead, imputes to them the level of knowledge that a reasonable person would have had under the circumstances. Applying that standard to these circumstances, defendant

argued, led inexorably to the conclusion that *115 plaintiff's April 28, 2004, notice of claim was untimely: *as a matter of law*, defendant argued, a reasonable person in plaintiff's shoes would have learned about defendant's allegedly inadequate supervision of Stephens long before October 28, 2003 (180 days before April 28, 2004, when plaintiff gave notice of her claim to defendant).

In so arguing, defendant relied primarily on the fact that numerous articles about Stephens, his crimes, and his history with the county justice system had appeared in *The Oregonian* in 2002 and 2003. Defendant submitted eight of those articles with its summary judgment motion. The first article appeared on the front page of the *Oregonian's* May 30, 2002, edition—shortly after Stephens was arrested in April 2002—and stated that Stephens had been linked through DNA evidence to the 2001 rape and murder of Melissa Bittler and to three other rapes in 1997. The article described the date, location, and circumstances of each crime, but did not disclose the names of victims other than Bittler. The article noted that Stephens had been released from prison in 1996, but did not mention his parole status. Another similar article that appeared in the local section the next day (May 31, 2002) *did* mention that Stephens had been on high level supervision "until his April arrest."

The next article, which appeared in the local section of the paper on June 1, 2002, focused on attempts by Portland police to process a backlog of evidence collected in other rape cases. The article described how police had linked Stephens to earlier crimes, including a rape on November 5, 1997—the date on which plaintiff had been raped. The article noted that Stephens had been on supervision since his December 1996 release and described some of the terms of his supervision.

A third article, an editorial, appeared in the *Sunday Oregonian* on June 2, 2002. It argued for expanded DNA testing of convicted felons and described how DNA evidence had been used to link the Bittler murder to a rape that had occurred on November 5, 1997—again, a clear reference to the day on which plaintiff had been raped.

Thus far, however, no newspaper article had intimated that Stephens's freedom during the time period in question was attributable to any lack of care on defendant's *116 part. An article that appeared in the local section on July 28, 2002, was the first to describe defendant's supervision of Stephens with any degree of detail. Toward the end of that article (which was devoted primarily to the inadequate investigation of Stephens's 1997 crimes by Multnomah County police), the author noted that Stephens committed his crimes while he was being supervised as a high risk sex offender by defendant. The article noted that Stephens had failed some polygraph tests, but then reported that defendant had "reviewed Stephens'[s] parole supervision and concluded that 'procedures were followed.' "

Only three *Oregonian* articles that defendant submitted with its motion were directly **213 critical of defendant's supervision of Stephens. A December 7, 2002, article, entitled "Report Rips Parole Oversight of Suspect," reported the results of a Multnomah County internal review: Stephens's case had been passed among at least six different parole officers; not all of Stephens's parole officers had been trained in sex offender management; parole officers had failed to follow up when Stephens failed polygraph tests; and parole officers had not raised alarms when they could not contact Stephens at home. A December 26, 2002, editorial repeated much of the information contained in the December 7 article and then went on to call for "thorough soul-searching by the parole and probation department and a full public accounting early next year of everything that has changed, or is going to change as a result of this case." Finally, an October 3, 2003, article described changes that defendant had made in its procedures for supervising sex offenders in the wake of the Stephens case and, in the process, described various errors that (in the opinion of the authors of the article) defendant had made in supervising Stephens.

Defendant submitted other material with its summary judgment motion, including: (1) transcripts of news stories about Stephens that aired on Portland television stations, two of which reported (in October and December 2003) concerns about defendant's supervision of Stephens; (2) an affidavit by the Multnomah County Chief Deputy of Corrections, stating that plaintiff had been incarcerated in various Multnomah County jail facilities between December 30, 2002 and July 18, 2003, and that she had had reasonable access to *117 local newspapers and television news programs

during that time; (3) a partial transcript of plaintiff's testimony at Stephens's trial, in which plaintiff stated that she had concluded that Stephens was her attacker when "he got arrested and it was in all the newspapers and stuff"; and (4) plaintiff's deposition testimony acknowledging that police had talked to her about a possible connection between her case and Melissa Bittler's murder before Stephens was arrested and that she had heard about Stephens's arrest from "other people" at the time that it was reported in the news.

Plaintiff responded to defendant's motion by arguing that the dispositive issue was not when plaintiff did or should have known that Stephens was her attacker, but when she should have known about *defendant's role* in her injury. Plaintiff then argued that that issue could not be decided on summary judgment, because a rational trier of fact could find that plaintiff reasonably did not discover defendant's involvement in her injury until her parents told her about defendant's negligent supervision of Stephens in December 2003. In an affidavit submitted with her response, plaintiff acknowledged that, "on or around July of 2003," she knew that Stephens could have been her assailant. She also averred that she had been incarcerated from December 31, 2002 until October 20, 2003; that she did not watch television or read the newspaper during her incarceration; and that her parents had informed her, in December 2003, that defendant had committed errors in its supervision of Stephens.

The trial court rejected plaintiff's arguments and granted defendant's motion. On plaintiff's appeal, the Court of Appeals reversed, holding that defendant was not entitled to summary judgment because (1) a rational juror could conclude that a reasonable person in plaintiff's circumstances would not necessarily have been aware of media reports questioning defendant's supervision of Stephens before October 28, 2003; and (2) any duty to inquire into defendant's role in the rape did not arise until plaintiff knew that Stephens was under defendant's supervision at the time of the rape, and a triable issue remained as to when plaintiff acquired that knowledge. *Johnson,* 210 Or.App. at 597–600, 152 P.3d 927. We allowed defendant's petition for review.

***118** [1] There is no dispute that the "discovery rule" that this court has applied to many statutory limitations periods since *Berry v. Branner,* 245 Or. 307, 421 P.2d 996 (1966), also applies to the 180–day notice of claim requirement at ORS 30.275(2)(b). *See Adams,* 289 Or. at 237–39, 611 P.2d 1153 (so stating). Neither is there any dispute about the parameters of the discovery rule. At least in theory, the parties agree that the ****214** discovery rule does not require *actual* discovery or knowledge of the claim but, instead, imputes to the plaintiff the level of knowledge that an exercise of reasonable care would have disclosed. *See, e.g., Forest Grove Brick v. Strickland,* 277 Or. 81, 86, 559 P.2d 502 (1977) (stating that rule). Finally, the parties agree that "discovery" of an injury involves actual or imputed knowledge of three separate elements: harm, tortious conduct,[2] and causation. *Gaston v. Parsons,* 318 Or. 247, 255, 864 P.2d 1319 (1994). In other words, the notice of claim period does not commence to run, under the discovery rule, until a plaintiff knows or, in the exercise of reasonable care should know, that he or she has been injured and that there is a substantial possibility that the injury was caused by an identified person's tortious conduct. *Adams,* 289 Or. at 239, 611 P.2d 1153 (so stating).

[2] In the present case, plaintiff's knowledge of her injury is not an issue. The controversy pertains, instead, to when plaintiff "discovered," or reasonably should have discovered, *defendant's* involvement in her injury—that is, when she knew or should have known that defendant had acted tortiously (by failing to supervise Stephens adequately) and that that tortious conduct had "caused" her injury (by allowing Stephens to remain on the streets, free to commit crimes against plaintiff and other young women).

[3] The question whether and when a plaintiff knew or should have known that his or her injury was caused by a particular defendant's tortious conduct ordinarily is a question of fact for the jury; it may be decided on summary judgment as a matter of law only if the record on summary judgment presents no triable issue of fact. *See generally* ***119** *Gaston,* 318 Or. at 256–62, 864 P.2d 1319 (discussing when genuine issue of fact exists as to when plaintiff discovered defendant's tortious conduct in medical malpractice case). Defendant contends that, in light of the uncontroverted evidence in the record of media coverage of Stephens's crimes and, later, of defendant's supervision of Stephens, plaintiff has no room to argue that she reasonably did not discover defendant's role in her injury until October 28, 2003, or later.

In that regard, defendant's arguments follow two separate lines. First, defendant focuses on the idea that plaintiff failed to make a reasonable inquiry into the causes of her injury at the appropriate time. It argues that plaintiff was on "inquiry notice" [3] by July 2003, at the very latest, and that a reasonable inquiry at that time would have led to media reports about defendant's negligent supervision of Stephens:

> "Plaintiff admits in her affidavit that she was aware '[o]n or around July of 2003 that Ladon Stephens could have been the man that raped me.' * * * Beginning in May 2002, numerous news articles appeared in the local media discussing the [defendant's] supervision of Stephens. Plaintiff testified that, although she did not read any news articles herself, or see [the reports] on the [television] news, she was aware of the media attention to the case, because other people told her about it. Therefore, as of July 2003, plaintiff had full access to sufficient information to trigger reasonable inquiry that would have lead to the discovery that [defendant's] supervision of Stephens was in question."

[4] Defendant is correct insofar as it suggests that the discovery rule does not protect plaintiffs who fail to make a further inquiry when a reasonable person would do so. *Gaston,* 318 Or. at 256, 864 P.2d 1319. But when, in these circumstances, can we say that a reasonable person would have made a further inquiry? [4] Defendant suggests, in ****215** the material quoted above, ***120** that that moment arrived when plaintiff learned that Stephens may have been her attacker and that the local media had been covering Stephens's crimes.

We do not agree. The victim of an intentional crime perpetrated by an unknown assailant would have no reason even to speculate that his or her injury might have been caused in part by the tortious conduct of a parole agency or any other third party. Learning the identity of the perpetrator of the crime and that the perpetrator is the subject of local news reports would not necessarily change anything in that regard. The crime victim still would have no reason to suppose that the actions of a third party might be involved. Certainly, a rape victim who learns that her attacker is in the news might be motivated by general curiosity to inquire into that news coverage and, in the process, might acquire information suggesting that the person was negligently supervised by a parole agency. But that is a far cry from saying that, *as a matter of law,* a reasonable rape victim with that information would inquire into the possibility that tortious conduct by a third party somehow had caused her injury.

[5] Put differently: A duty to inquire must arise from circumstances stronger than the mere drifting possibility that something of interest might come to light. The facts that defendant relies on—plaintiff's knowledge of Stephens's identity and her knowledge that Stephens was being discussed in the media—might raise a question in the mind of a reasonable person about the involvement of a parole agency in plaintiff's injuries, but would not necessarily do so. We reject defendant's theory that, as a matter of law, the record on summary judgment establishes that, by July 2003 at the latest, a reasonable person in plaintiff's circumstances would have made inquiries that would have led to the knowledge that defendant's supervision of Stephens in 1997 might have been deficient. [5]

Defendant argues, in the alternative, that the fact of extensive news coverage relevant to plaintiff's claim between ***121** May 2002 and October 3, 2003, is sufficient by itself to establish, as a matter of law, that plaintiff should have known of her claim before October 28, 2003. In that regard, defendant proposes that, for purposes of the discovery rule, an objectively reasonable person should be assumed to be aware of readily available media publications relevant to his or her tort claim. Defendant contends that that proposal is consistent with the idea that, to take advantage of the discovery rule, plaintiffs must "exercis[e] the diligence expected of a reasonable person." *Gaston,* 318 Or. at 256, 864 P.2d 1319. [6] Defendant notes, moreover, that some federal courts have applied that rule, concluding that defendants were entitled to summary judgment on statute of limitations grounds when defendants had submitted evidence of widespread publicity about events underlying the plaintiffs' claims. *See, e.g., Hughes v. Vanderbilt University,* 215 F.3d 543 (6th Cir.2000) (publicity in 1994 and 1995 about university's experiments on human subjects in the 1940s was sufficient to charge the plaintiff with constructive knowledge ****216** of the events underlying her tort claim against the university, which was based on assertion that she had been subjected to experiments in 1945 when she was eight years old). *See also Rakes*

v. U.S., 442 F.3d 7 (1st Cir.2006) and *Moseley v. Wyeth*, 2002 WL 32991341 (W.D.Okla.2002) (reaching analogous conclusions).

However, assuming that the opinions of federal courts might carry any weight in our analysis, it is worth noting that at least as many federal cases have reached an opposite result. In *Bibeau v. Pacific Northwest Research Foundation*, 188 F.3d 1105 (9th Cir.1999), for example, a ***122** plaintiff who had been subjected to radiation experiments in the 1960s, while he was imprisoned at the Oregon State Penitentiary, brought an action in 1995 against the research foundation that conducted the experiments—within two years of reading a news report referring to similar experiments. The defendant moved for summary judgment, arguing that the statute of limitations period had passed. The trial court granted the motion but the Ninth Circuit Court of Appeals reversed. The defendant had submitted "a litany of news reports and other public revelations regarding the * * * experiments," most of which were published in the mid–1980s, but the court concluded that, particularly in light of certain aspects of plaintiff's history and education, the reasonableness of the plaintiff's failure to discover his claim at the time those news reports were published was an issue for the jury. *Id.* at 1110. Other federal courts have taken a similar view. *See, e.g., In Re Swine Flu Products Liability Litigation*, 764 F.2d 637 (9th Cir.1985) (in spite of evidence that local paper reported in late 1976 that government's swine flu vaccination program had been suspended because of connection to neurological problems, additional fact-finding was necessary to determine whether the general community awareness of the connection was sufficient to find that the plaintiff should reasonably have known at that time that vaccination caused his wife's death).

In the end, defendant's proposal—that all plaintiffs should be deemed to know all information relating to their claim that has been published in the local media—involves a leap of faith that we are not prepared to make. The fact that news about some event was *available* at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news, much less what a reasonable inquiry based on that news would have uncovered.

[6] In the present case, defendant demonstrated that local media outlets had issued stories mentioning defendant's supervision of Stephens as early as June 2002 and directly addressing possible inadequacies in that supervision by December 2002. We are not prepared to say that a juror would be required to conclude, from the mere fact of that coverage, that an objectively reasonable person would have or should have known sufficient facts to trigger the 180–day ***123** notice period before October 28, 2003. Although it is true that plaintiff's responsive submissions primarily addressed her *actual* knowledge (or lack thereof) of defendant's involvement in her injury, the fact remains that *defendant's* submissions were insufficient to establish, *as a matter of law*, the level of awareness that an objectively reasonable person would have had under the circumstances.[7] We agree with the Court of Appeals that there is a triable issue of fact as to when plaintiff should have known of defendant's connection to her injury. It follows that the trial court erred in granting defendant's motion for summary judgment.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed and the case is remanded to the circuit court for further proceedings.

All Citations

344 Or. 111, 178 P.3d 210

Footnotes

* Appeal from Multnomah County Circuit Court, Michael C. Zusman, judge pro tempore. 210 Or.App. 591, 152 P.3d 927 (2007).

1 ORS 30.275 provides, in part:

> "(1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body * * * shall be maintained unless notice of claim is given as required by this section.

"(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

" * * * * *

"(b) For all other claims, within 180 days after the alleged loss or injury."

2 It may be argued that there is a fourth element, *viz.*, the probable identity of the tortfeasor. We think that that element inheres in the concept of "tortious conduct"—someone, after all, must have carried out the "conduct."

3 "Inquiry notice" is a confusing and imprecise label. "Notice" may cause an "inquiry" based on it, but the inquiry is not one made on "inquiry notice." We specifically disapprove of the use of that term. *See Greene v. Legacy Emanuel Hospital,* 335 Or. 115, 123, 60 P.3d 535 (2002) (to the same effect).

4 And—perhaps even more importantly—when can we say that a reasonable further inquiry would have led to the discovery of further evidence that would give plaintiff knowledge of her claim?

5 Of course, before the plaintiff may be charged with responsibility for the passage of time, it also must be true that the inquiry that plaintiff would have conducted would have brought the pertinent facts to light. *See Doe v. American Red Cross,* 322 Or. 502, 910 P.2d 364 (1996) (illustrating proposition).

6 Defendant also argues that the rule is consistent with the approach taken by the legislature in many "notice" statutes—statutes that "presume [ ] that a reasonable person reads the local newspaper for purposes of notice." Defendant cites, as examples, ORCP 7 D(6) (providing for court order for service of summons by, among other methods, publication in a newspaper of general circulation) and ORS 113.155 (notice of initiation of estate proceedings can be accomplished by publishing information once a week for three consecutive weeks in a newspaper published in the county in which the estate proceeding is pending). In fact, however, those statutes are irrelevant to the issue at hand, *viz.*, the plaintiff's actual or presumed state of awareness. Such statutes, which declare that, as a matter of law, publication itself qualifies as notice, are designed to further the ability of courts to consider various forms of legal proceedings. They cannot by their own terms realistically be expanded to encompass the different issues associated with the question of potential plaintiffs' imputed knowledge of, *e.g.*, the identify of one who harmed them.

7 There may be cases in which news coverage of a topic is *so* widespread that a general community awareness (and, thus, the awareness of any objectively reasonable person) can be determined as a matter of law. However, this is not such a case.

End of Document

344 Or. 282
Supreme Court of Oregon,
En Banc.

T.R., Petitioner on Review,
v.
The BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; Cascade Pacific Council, Boy Scouts of America, an Oregon non-profit corporation; and James Donald Tannehill, Defendants,
and
City of The Dalles, a political subdivision of the State of Oregon, Respondent on Review.

(CC 0206–05750; CA A125742; SC S054071).
|
Argued and Submitted June 19, 2007.
|
Decided March 13, 2008.

Synopsis

Background: Plaintiff brought § 1983 action against city, alleging plaintiff was sexually abused by city police officer when plaintiff, as a teenager, was involved in a police department's youth program. At close of evidence, city filed motion for directed verdict on statute of limitations grounds. The Circuit Court, Multnomah County, Alicia Fuchs, J., denied the motion, and entered judgment on jury verdict for plaintiff. City appealed. The Court of Appeals, 205 Or.App. 135, 133 P.3d 353, reversed. Review was allowed.

[Holding:] The Supreme Court, Walters, J., held that whether plaintiff's knowledge that police officer had sexually abused plaintiff should have alerted plaintiff to possibility that city played a causal role in the abuse, and whether investigation by plaintiff would have disclosed facts indicating city's role, were issues for jury.

Court of Appeals reversed; remanded.

West Headnotes (12)

[1] **Civil Rights** ⬰ Governmental Ordinance, Policy, Practice, or Custom

A municipality can be held responsible, under § 1983, for a violation of a citizen's constitutional rights when, and only when, it has a policy, custom, or usage that violates those rights. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[2] **Civil Rights** Acts of Officers and Employees in General;Vicarious Liability and Respondeat Superior in General

A city is not liable under § 1983 merely because it employs a tortfeasor; in other words, respondeat superior liability does not apply in § 1983 actions. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[3] **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

To establish a municipality's liability under § 1983, a plaintiff must prove that the municipality has adopted a policy or custom, and that the execution of the policy or custom, whether made by the municipality's lawmakers or by those whose edicts or acts may fairly be said to represent official policy, caused the constitutional violation. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[4] **Civil Rights** Lack of Control, Training, or Supervision;Knowledge and Inaction

A municipality's failure to act can constitute an official policy that gives rise to liability under § 1983, if that failure evidences a deliberate indifference to the rights of its inhabitants. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[5] **Limitation of Actions** Civil Rights

The accrual rule that applies to determine when a plaintiff's § 1983 claim accrued, for limitations purposes, is a "discovery" accrual rule, under which the statute of limitations does not begin to run until a reasonably prudent plaintiff perceives both the injury and the role that the defendant has played in that injury. 42 U.S.C.A. § 1983.

10 Cases that cite this headnote

[6] **Limitation of Actions** Nature of Harm or Damage, in General

Under the "discovery" accrual rule, the limitations period for a tort claim begins to run as to each defendant when the plaintiff discovers, or a reasonable person should have discovered, the defendant's causal role, and thus, when the facts that should alert a plaintiff to a defendant's role are different for different defendants, the date of accrual may also be different as to each defendant.

9 Cases that cite this headnote

[7] **Limitation of Actions** Nature of Harm or Damage, in General

When a duty to investigate exists, the statute of limitations for a tort claim begins to run, under the "discovery" accrual rule, only if the investigation would have disclosed the necessary facts.

4 Cases that cite this headnote

[8] **Limitation of Actions** Nature of Harm or Damage, in General

For purposes of "discovery" accrual rule with respect to commencement of limitations period for tort claim, a plaintiff is not necessarily charged with employing experts to uncover facts that a reasonable person in plaintiff's circumstances could not uncover.

2 Cases that cite this headnote

[9] **Limitation of Actions** ⬰ Nature of Harm or Damage, in General

A defendant asserting a statute of limitations defense to a tort claim must prove that an investigation by plaintiff would have disclosed the necessary facts, thereby commencing the limitations period under the "discovery" accrual rule.

3 Cases that cite this headnote

[10] **Limitation of Actions** ⬰ Nature of Harm or Damage, in General

The "discovery" accrual rule provides that a plaintiff's tort claim against a particular defendant accrues, for limitations purposes, when: (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing the plaintiff's injury to require further investigation, and (2) an investigation would have revealed the defendant's role.

10 Cases that cite this headnote

[11] **Limitation of Actions** ⬰ Questions for Jury

Application of the "discovery" accrual rule, with respect to commencement of limitations period for tort claim, is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that plaintiff knew or should have known critical facts at a specified time and did not file suit within requisite time thereafter.

14 Cases that cite this headnote

[12] **Limitation of Actions** ⬰ Questions for Jury

Whether plaintiff's knowledge, that city police officer had sexually abused plaintiff while plaintiff, as a teenager, was participating in police department's youth program, should have alerted plaintiff to possibility that city played a causal role in the abuse, and whether investigation by plaintiff would have disclosed facts indicating the city's role, were issues for jury, for purposes of application of "discovery" accrual rule for commencement of limitations period, with respect to plaintiff's § 1983 claim against city. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

**759 On review from the Court of Appeals. *

Attorneys and Law Firms

Kelly Clark, O'Donnell & Clark, LLP, Portland, argued the cause for petitioner on review. With him on the briefs were Kristian Roggendorf and Jonathan Clark.

Robert E. Franz, Jr., Law Offices of Robert E. Franz, Jr., Springfield, argued the case for respondent on review. With him on the briefs was Jason M. Montgomery.

Christina M. Hutchins, Assistant Attorney General, Salem, submitted a brief on behalf of amicus curiae State of Oregon.

Opinion

WALTERS, J.

***285** Under 42 U.S.C. section 1983, plaintiff brought a claim against defendant City of The Dalles [1] (city). Plaintiff asserted that the city's deliberate indifference to his right under the Fourteenth Amendment to the United States Constitution to be free from sexual abuse by a governmental actor constituted a city policy that caused him to be subjected to sexual abuse by a city police officer. The question before us is whether there was evidence from which a reasonable jury could have found, as the jury in this case did, that plaintiff timely filed his Section 1983 claim. The city contends that plaintiff's Section 1983 claim against the city necessarily accrued in 1996, when the officer, Sergeant James Tannehill, committed the acts of sexual abuse, and that plaintiff did not file his claim within the requisite time thereafter. Plaintiff contends that his Section 1983 claim against the city did not accrue until he discovered or should have discovered that the city had a role in causing his injury, that that ****760** date was a question of fact for the jury, and that a reasonable jury could have found that plaintiff reasonably did not discover the city's role in 1996.

The trial court agreed with plaintiff that the city's statute of limitations defense required resolution of a question of fact and denied the city's motion for a directed verdict. The Court of Appeals agreed with the city that plaintiff's claim necessarily accrued when Tannehill committed the acts of abuse, concluded that the trial court erred in denying the city's motion, and reversed the judgment against the city. *T.R. v. Boy Scouts of America,* 205 Or.App. 135, 133 P.3d 353 (2006). We allowed plaintiff's petition for review and now reverse the decision of the Court of Appeals and remand the case to that court for further proceedings.

To analyze the opposing contentions, we begin with the facts established at trial, viewing them in the light most favorable to plaintiff. ***286** *Boothby v. D.R. Johnson Lumber Co.,* 341 Or. 35, 38, 137 P.3d 699 (2006). We set forth in some detail the facts upon which plaintiff relied to establish the city's role in causing the harm he suffered, because it is that role that plaintiff asserts he reasonably did not discover until after 1996.

The city police department created and operated an Explorer Scout program. That program was a unit or post of the Cascade Pacific Council, which is a chartered organization of the Boy Scouts of America. The purpose of the city's Explorer Scout program was to introduce teens to law enforcement by educating them about and involving them in police operations. The Boy Scouts of America and the Cascade Pacific Council (together referred to as the Boy Scouts) devised and disseminated policies and procedures to protect participants in their programs from exploitation and sexual abuse. Components of those policies and procedures included the training and education of adults and youth in recognizing, resisting, and reporting sexual abuse. One of the primary Boy Scout mandates is that its programs set up oversight committees to ensure their proper management and supervision.

The Boy Scouts advised the city of its policies and procedures and their importance in preventing child sexual abuse, but the city did not implement or follow them. For instance, the Boy Scouts required that any Explorer program that sent participants to a regional or national conference conduct extensive youth protection training. The city sent participants to such a conference, but did not conduct youth protection training. The city did not caution its officers or Explorers against the dangers of sexual abuse or teach them how to recognize or report sexual abuse. Without training him for the position, the city delegated authority to run the Explorer program to Tannehill, the officer who sexually abused plaintiff. Although the city created an oversight committee "on paper," in reality, as a city officer admitted, it did not exist. The city included a prohibition on fraternization between officers and Explorers in its Explorer Manual, but did not otherwise instruct Tannehill or other officers that they were not to socialize with Explorers outside of authorized program activities. Moreover, when city officials learned ***287** that its officers were engaging in misconduct, such as regularly spending time alone with Explorers and serving them alcohol, the city tolerated and did not discourage the officers' violations. In one instance, when the city learned that an officer was "having an affair" with an Explorer, the

department delayed and created impediments to a fair and full investigation and, thereafter, continued to operate the program, unchanged, without protection or oversight.

Plaintiff was 16 years old and living in foster care when Tannehill approached him at a gym, commented on his physique, and suggested that he enroll in the Explorer program. Plaintiff was flattered by the attention. The program offered him a chance to pursue his dream of becoming a police officer and, as plaintiff testified, "It was the most [he'd] ever been needed in [his] life." Shortly after joining the program, Tannehill began spending time alone with plaintiff, on and off duty, during and outside of regular Explorer activities, at Tannehill's home, at the gym, and in Tannehill's car. Tannehill regularly served plaintiff alcohol and made sexual comments to him. After a period of time, Tannehill began touching plaintiff inappropriately, **761 and, ultimately, sexually molested him. Plaintiff was confused about whether what was happening to him was normal. He asked two other city police officers about Tannehill's serving him alcohol and whether Tannehill had an interest in boys. One just laughed, the other told him he didn't want to talk about it. When plaintiff tried to distance himself from Tannehill, Tannehill became angry and used threats and intimidation to coerce continued contact. As soon as he could, plaintiff took an early high school graduation and joined the army.

Plaintiff was 22 years old and working in Washington state when, in October 2001, his grandmother read him a newspaper article that reported that the Oregon State Police had arrested an officer from The Dalles (not Tannehill) on charges of serving alcohol to a minor. The newspaper article included a number to call to provide information. Plaintiff responded, and in answers he gave during in-person and phone interviews by the state police over the next few weeks, disclosed Tannehill's actions. Within the month, plaintiff attended grand jury proceedings concerning Tannehill and *288 found that many city officers were also present to testify. Based on statements those officers made and questions the grand jury asked, plaintiff suspected for the first time that department members, and perhaps even command staff, may have permitted the sexual abuse that Tannehill had committed and failed to protect Explorers, including himself, against such abuse. Plaintiff filed his Section 1983 claim against the city on July 7, 2003, within two years of those October 2001 events.

At trial, the city moved for a directed verdict, asserting, as one basis for its motion, that the uncontroverted evidence established that plaintiff's Section 1983 claim was barred by the statute of limitations. The city argued that the two-year general personal injury limitations period found in ORS 12.110(1)[2] applied to plaintiff's Section 1983 claim, and that because plaintiff had not commenced his action against the city within the requisite time after Tannehill's acts,[3] his claim was barred. Plaintiff agreed that ORS 12.110(1) stated the applicable limitations period, but contended that he reasonably had not discovered the facts that gave rise to his Section 1983 claim against the city at the time that Tannehill committed the acts of abuse, and that the date on which his claim against the city accrued was a question of fact for the *289 jury. The trial court agreed, denied the city's motion, and instructed the jury that, for the city to prevail on its statute of limitations affirmative defense, it was required to prove that, before July 7, 2001, "plaintiff either knew or, in the exercise of reasonable care, should have known facts which would make a reasonable person aware of the substantial possibility that the City of the Dalles caused the plaintiff some harm." The jury returned a verdict against the city and made a special finding that "plaintiff discover[ed] that he had a claim against the City of the Dalles" in October of 2001.

In the Court of Appeals, the city assigned error to the trial court's denial of its motion for a directed verdict on statute of limitations grounds. The Court of Appeals agreed with the city as to that assignment of error and reversed the judgment against the city. Applying **762 a "discovery" accrual rule, the Court of Appeals held that plaintiff's Section 1983 claim against the city accrued, as a matter of law, in 1996, when plaintiff knew that he was injured and that Tannehill was the physical cause of his injury. The Court of Appeals reasoned that plaintiff's knowledge of his injury and its physical cause triggered a duty to inquire further into the city's role in causing that injury "by 'seeking advice in the medical and legal community[,]' " and therefore commenced the running of the statute of limitations. *T.R.*, 205 Or.App. at 143, 133 P.3d 353 (quoting *United States v. Kubrick*, 444 U.S. 111, 123, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). Because plaintiff concededly did not bring his action within the required time after Tannehill's 1996 actions, the Court of Appeals ruled that the trial court erred in denying the city's motion for a directed verdict on statute of limitations grounds. The Court of Appeals did not reach the city's other assignments of error. We allowed plaintiff's petition for review.

The Court of Appeals assumed, and the city agrees, that the appropriate accrual rule is a discovery rule. The issue that this case presents is whether the trial court properly applied that rule. If the only conclusion a reasonable jury could have reached was that plaintiff should have discovered that he had a potential Section 1983 claim against the city in 1996, when Tannehill committed the acts of abuse, the trial ***290** court erred in denying the city's motion for a directed verdict. [4] If, however, a reasonable jury could also have reached the conclusion that plaintiff reasonably did not discover the city's role in 1996, the trial court correctly denied the city's motion.

[1] [2] [3] We begin our analysis with an explanation of the facts that give rise, generally, to a Section 1983 claim against a municipality. A municipality can be held responsible for a violation of a citizen's constitutional rights under Section 1983 when, and only when, it has a policy, custom, or usage that violates those rights. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690–91, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A city is not liable under Section 1983 merely because it "employs a tortfeasor." *Id.* at 691, 98 S.Ct. 2018. In other words, *respondeat superior* liability does not apply in Section 1983 actions. Rather, the municipality itself must be the actor, and its own actions must violate the citizen's constitutional rights. A plaintiff must prove that the municipality has adopted a policy or custom, and that the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," caused the constitutional violation. *Id.* at 694, 98 S.Ct. 2018.

[4] That policy need not be written in order to be "official":

> "[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments * * * may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S.H. Kress & Co.,* [398 U.S. 144, 167–68, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)]: 'Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials.... Although not authorized by written law, such practices of ***291** state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.' "

Id. at 690–91, 98 S.Ct. 2018. Furthermore, a municipality's failure to act can constitute an official policy that gives rise to liability if that failure evidences a " 'deliberate indifference' to the rights of its inhabitants." *Canton v. Harris,* 489 U.S. 378, 388–89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *see also Board of Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (citing *Canton*).

****763** In this case, plaintiff alleged, and was required to prove, that he had a constitutional right under the Fourteenth Amendment to the United States Constitution to be free from sexual abuse by a governmental actor, and that the city's deliberate or conscious disregard for that right constituted a city policy that caused him to be subjected to such abuse. *See Monell,* 436 U.S. at 691–92, 98 S.Ct. 2018 (municipality's official policy or custom must cause constitutional violation to render it liable under Section 1983); *Canton,* 489 U.S. at 388–89, 109 S.Ct. 1197 (deliberate indifference to rights of inhabitants may constitute official city policy); *Ingraham v. Wright,* 430 U.S. 651, 673–74, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (liberty interest of Fourteenth Amendment implicated where school officials inflicted appreciable pain on a child).

[5] As we have noted, the accrual rule that applies to determine when plaintiff's Section 1983 claim accrued is a "discovery" accrual rule. We set forth the reason for recognizing a discovery accrual rule in *Berry v. Branner,* 245 Or. 307, 312, 421 P.2d 996 (1966):

> "To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who

has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law."

Following that rationale, we have held that the statute of limitations does not begin to run until a reasonably prudent plaintiff perceives both the ***292** injury and the role that the defendant has played in that injury. *Schiele v. Hobart Corporation,* 284 Or. 483, 490, 587 P.2d 1010 (1978). In both respects Oregon law mirrors the generally applicable common-law discovery rule. Dobbs frames that rule as follows:

"[T]he usual idea seems to be that the statute will not begin to run until

"(a) all of the elements of the tort are present *and*

"(b) the plaintiff discovers, or as a reasonable person should have discovered,

"(i)that she is injured and

"(ii)that the defendant, or the defendant's product or instrumentality, had a causal role in the injury, or that there was enough chance that defendant was connected with the injury to require further investigation that in turn would have revealed the defendant's connection."

Dan Dobbs, 1 *The Law of Torts, Practitioner Treatise Series* § 218, 554 (2001) (emphasis in original).

[6] There are two aspects of the discovery accrual rule that warrant further attention. First, the limitations period begins to run as to each defendant when the plaintiff discovers, or a reasonable person should have discovered, that defendant's causal role. *See Adams v. Oregon State Police,* 289 Or. 233, 237–39, 611 P.2d 1153 (1980) (plaintiff knew towing company had found his car but claim against state did not accrue until later when plaintiff learned of state's causal role in the towing). When the facts that should alert a plaintiff to a defendant's role are different for different defendants, the date of accrual may also be different as to each. As one court put it, "[C]laims based on two independent legal theories against two separate defendants can accrue at different times." *E–Fab, Inc. v. Accountants, Inc. Services,* 153 Cal.App.4th 1308, 1323, 64 Cal.Rptr.3d 9 (2007) (citing *Fox v. Ethicon Endo–Surgery, Inc.,* 35 Cal.4th 797, 802–03, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005)).

[7] Second, when a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts. *Greene v. Legacy Emanuel Hospital,* 335 Or. 115, 123, 60 P.3d 535 (2002) ("The period of ***293** limitations * * * commences from the earlier of two possible events: (1) the date of the plaintiff's actual discovery of injury; or (2) the date when a person exercising reasonable care should have discovered the injury, *including learning facts that an inquiry would have disclosed.*") (original emphases omitted; emphasis ****764** added). *See also* Dobbs, 1 *The Law of Torts* § 218 (statute will not begin to run until there is "enough chance that defendant was connected with the injury to require further investigation *that in turn would have revealed the defendant's connection* ") (emphasis added).

In this case, the Court of Appeals put its own gloss on the discovery rule and concluded that, *as a matter of law,* (1) a reasonable plaintiff who knows that he or she has been injured and knows the physical cause of the injury would investigate the possible existence of an additional defendant that may have caused the injury "by seeking advice in the medical and legal community"; and (2) the limitations period commences when that duty to investigate arises. *T.R.,* 205 Or.App. at 142–43, 133 P.3d 353.

There are three problems with that reasoning. First, as we have explained, the discovery rule recognizes that the existence of one type of wrongdoing does not necessarily disclose tortious conduct of a different sort, by a different tortfeasor. A plaintiff who knows that one defendant has caused him or her harm does not necessarily know that another defendant has done so in a different way. Depending on the facts of the particular case, a reasonable person who knows the identity

of the tortfeasor who was the immediate physical cause of his or her injury may or may not be alerted to the possible existence of other tortfeasors.

[8] Second, a plaintiff who is alerted to the need for further investigation only is required to conduct an investigation that a reasonable person in his or her circumstances would conduct. *See Doe v. American Red Cross,* 322 Or. 502, 511–13, 910 P.2d 364 (1996) (discovery is determined by objective, reasonable person standard). A plaintiff is not necessarily charged with employing experts to uncover facts that a reasonable person in plaintiff's circumstances could not uncover.

***294** [9] Third, the Court of Appeals decided that the statute of limitations began to run because plaintiff had a duty to investigate. *T.R.,* 205 Or.App. at 142–43, 133 P.3d 353. That is not so, however, unless an investigation would have disclosed the necessary facts. The party who asserts the statute of limitations defense must prove that an investigation would have disclosed those facts. *See Doe,* 322 Or. at 514–15, 910 P.2d 364 (party who asserts limitations defense must prove the facts investigation would disclose). The Court of Appeals failed to consider that aspect of the discovery rule, and erroneously concluded that the duty to investigate alone was sufficient to commence the running of the statute of limitations.

The Court of Appeals based its decision on two United States Supreme Court cases, *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), and *Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). But neither *Kubrick* nor *Rotella* is a Section 1983 case, and neither bears on whether a plaintiff's knowledge of the existence of one tortfeasor charges the plaintiff with knowledge of the existence of other defendants or whether a plaintiff should be expected to hire experts to investigate the possibility that other defendants exist. In *Kubrick,* the Court described both the fact "that [the plaintiff] has been hurt" *and* "who has inflicted the injury" as "critical facts" that a plaintiff must know to start the statute of limitations running. 444 U.S. at 122, 100 S.Ct. 352. In *Kubrick,* the plaintiff knew both critical facts. He knew that he had been harmed and that his physician had harmed him. Plaintiff argued, however, that his claim did not accrue until he also realized the legal consequences of those facts: that "the acts inflicting the injury may [have] constitute[d] medical malpractice." *Id.* at 113, 100 S.Ct. 352. In rejecting plaintiff's argument, the Supreme Court explained that a plaintiff cannot be expected to know facts that only an expert could obtain, but a plaintiff can be expected to seek out an expert in order to learn the legal ramifications of known facts. The Court stated:

> "We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury and its cause should receive identical treatment. That he has been ***295** injured in fact may be unknown or unknowable until the injury manifests itself; ****765** and the facts about causation may be in control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask."

Id. at 122, 100 S.Ct. 352. *Kubrick* stands for the proposition that a plaintiff who knows the facts establishing that a particular defendant played a causal role in his or her injury must seek medical and legal advice about whether those facts justify legal action-advice within the expertise of those consultants. *Kubrick* does not stand for the proposition that a plaintiff who does not know the facts indicating that a particular defendant played a causal role in his or her injury must employ the assistance of doctors or lawyers to uncover such facts.

Rotella also does not convince us that we should reach a different conclusion. As in *Kubrick,* the plaintiff in *Rotella* both knew that he had been injured and that the named defendant had injured him by engaging in illegal action. Plaintiff argued, however, that his Racketeer Influence and Corrupt Organization (RICO) claim did not accrue until he discovered, in addition to those critical facts, that the named defendant had engaged in a pattern and practice of illegal acts. 528 U.S. at 552–53, 120 S.Ct. 1075. The Court rejected plaintiff's argument, reasoning that Congress had modeled RICO on the Clayton Act, and that adopting an accrual rule that required discovery of a defendant's pattern and practice

in addition to that defendant's discrete illegal act would not comport with Clayton Act limitations or the purposes of the RICO statute. *Id.* at 557–58, 120 S.Ct. 1075. *Kubrick* and *Rotella* are consistent with the discovery accrual rule as we have stated it. [5]

***296** [10] [11] [12] To restate, then, the discovery accrual rule provides that a plaintiff's claim against a particular defendant accrues when (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing the plaintiff's injury to require further investigation; and (2) an investigation would have revealed the defendant's role. Application of the discovery accrual rule is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter. *See Brown v. J.C. Penney Co.*, 297 Or. 695, 705–06, 688 P.2d 811 (1984) (appellate court cannot set aside trial court's denial of motion for directed verdict unless there is no evidence from which the jury could have found the necessary facts). In this case, the specific question presented is whether the only conclusion that a reasonable jury could have reached was that plaintiff's knowledge in 1996 should have alerted him to the possibility that the city played a causal role in his abuse, that a reasonable person in plaintiff's circumstances would have investigated that possible role, and that such an investigation would have disclosed facts indicating the city's role. [6]

****766** The city argues that, in 1996, plaintiff knew that he had been injured, that Tannehill was the immediate cause of his injury, and that Tannehill was employed by the city. The city argues that a reasonable jury would necessarily have concluded from those facts that plaintiff should have known ***297** that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury *could* have reached that conclusion, we do not agree that that was the *only* conclusion a reasonable jury could have reached. Tannehill's wrongful acts were very personal and private. Although some of those acts were committed while Tannehill was on duty, others were not, and the nature of the acts did not necessarily indicate that Tannehill committed them within the scope of his employment. More importantly, under Section 1983, the city could not be held liable for Tannehill's acts solely because it employed him. The city's liability necessarily required proof of municipal wrongdoing-wrongdoing of a different kind than Tannehill's. A reasonable jury could have found that, at the time of the abuse, plaintiff did not suspect the city itself of causing him harm, and that plaintiff's state of mind at that time was a reasonable one.

Two particular aspects of this case support our conclusion. First, plaintiff was a minor when Tannehill committed the acts of abuse. In reviewing the facts presented to the jury, we look at them, as the jury was required to do, from the perspective of a reasonable person under the relevant circumstances, which include plaintiff's minority. [7] *See* W. Page Keeton, *Prosser and Keeton on Torts* § 32, 179–80 (5th ed 1984) (in determining whether actions of child tortfeasor are reasonable, view actions from the perspective of a reasonable child). [8] As this court explained in *Doe:*

> "The test involved in such circumstances is an objective one: 'In most cases, the inquiry will concern what a plaintiff ***298** should have known in the exercise of reasonable care. In such cases, the relevant inquiry is how a reasonable person of ordinary prudence would have acted in the same or similar situation.' "
> 322 Or. at 512, 910 P.2d 364 (quoting *Gaston v. Parsons*, 318 Or. 247, 256, 864 P.2d 1319 (1994)). A reasonable jury could have found that a teenager subjected to sexual abuse by a police officer reasonably may have believed that that officer's acts were the acts of a man who was acting on his own, based upon his own sexual proclivities, and reasonably may not have suspected that higher city officials could have been to blame for his predicament.

Second, when plaintiff ventured to question two city officers about Tannehill's drinking with him and whether Tannehill had an interest in boys, one exhibited acceptance of the misconduct and the other discouraged any further inquiry. The reactions of those adults did not put plaintiff on notice that what Tannehill or the city was doing, or failing to do, might merit investigation. *See Gaston*, 318 Or. at 257, 864 P.2d 1319 (assurances by persons in positions of trust and ****767** confidence that action is not tortious may be considered in determining whether reasonable person would have engaged in further investigation). Tannehill coerced and intimidated plaintiff and was in a position of authority in the department.

A reasonable jury could have found that the responses that plaintiff received when he attempted to question other officers about Tannehill's behavior served to reinforce plaintiff's reasonable belief that further inquiry would not be productive.

In summary, we hold that, based on the evidence in this record, a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused him harm.

Alternatively, and even if a reasonable person would have made inquiry as to the city's role in 1996, we cannot conclude, as a matter of law, that an inquiry would have revealed facts indicating that a city policy may have caused plaintiff harm. *See Doe,* 322 Or. at 514, 910 P.2d 364 (accrual depends on ***299** what facts party with duty to investigate would have been able to learn); *see also Kubrick,* 444 U.S. at 122, 100 S.Ct. 352 (acknowledging that a plaintiff may not be able to sue when the facts are "in control of the putative defendant"). The statute of limitations is an affirmative defense, and the city had the burden of persuasion on that issue. ORCP 21 G(2) (statute of limitations is affirmative defense); *Keller v. Armstrong World Industries, Inc.,* 342 Or. 23, 38 n. 12, 147 P.3d 1154 (2006) (citing *Nelson v. Hughes,* 290 Or. 653, 664–65, 625 P.2d 643 (1981)). The city has not argued and has not pointed to evidence that, had plaintiff inquired, its officials would have disclosed that they knew that they should have had policies and procedures in place to protect plaintiff but did not, or that, although they knew that their officers were engaging in misconduct that could lead to sexual abuse, they permitted the misconduct to continue. To the contrary, the record discloses evidence that when plaintiff did make a limited inquiry into Tannehill's behavior, his inquiries were rebuffed. As one witness put it, the city styled its management after an ostrich with its head in the sand, not wanting to know about, admit, or correct any wrongdoing. A former sheriff's deputy testified, for instance, that, in approximately 1992, he reported concerns about a party where city officers furnished alcohol to minors and about one officer in particular who was rumored to be having what was referred to as "an affair" with a teenage Explorer. That officer said he was "just having fun" with the teenager, and the city did nothing in response to that report other than warn the officer that he should be very careful with the relationship. The fraternization and the "affair" continued, and there was evidence that when that "affair" was revealed, the police department actively hindered its investigation and prosecution. In addition, a former Explorer testified that, in approximately 1998, when he told the city manager about finding several of his friends "falling down drunk" at the home and in the presence of the officer who was arrested in 2001 for serving alcohol to minors, the city manager replied that he "did not want to hear that," and, to the knowledge of that witness, failed to follow up with any investigation. Whether the city would have divulged facts indicating its responsibility for plaintiff's injuries if he had inquired was certainly a jury question.

***300** The city's final argument is that plaintiff did not learn facts in October 2001 that he did not know at the time of Tannehill's abuse and, therefore, plaintiff must have known all the facts necessary for his claim to accrue at the time of the abuse. As the city portrays it, the only fact plaintiff learned in 2001 was that others knew that Tannehill was gay, a fact plaintiff had known all along. But that portrayal does not accurately capture the facts presented to the jury. The jury heard evidence that it was in October 2001 that plaintiff learned that an officer other than Tannehill had engaged in similar misconduct, *i.e.,* that Tannehill's misconduct might not be that of a lone officer, but could be more widespread. It was then that plaintiff was questioned by state police officers who demonstrated that Tannehill's behavior was cause for governmental concern, and it was during the grand jury proceedings that followed that plaintiff learned that the city may have ****768** known about widespread misconduct in the Explorer program and failed to protect him from being abused. Perhaps the jury could have drawn the inference from the evidence that the city urges, but we cannot say that it was required to do so.

Because there were facts from which a reasonable jury could have found, as the jury did in this case, that plaintiff's Section 1983 claim against the city did not accrue at the time Tannehill committed the acts of sexual abuse, the trial court did not err in denying defendant's motion for a directed verdict on statute of limitations grounds.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

All Citations

344 Or. 282, 181 P.3d 758

Footnotes

* Appeal from Multnomah County Circuit Court, Alicia Fuchs, Judge. 205 Or.App. 135, 133 P.3d 353 (2006).

1 Plaintiff also brought claims against the Boy Scouts of America, Cascade Pacific Council, and James Donald Tannehill. Before trial, the court dismissed plaintiff's claims against the Boy Scouts and Cascade Pacific Council. At trial, plaintiff obtained a verdict against Tannehill. The court entered judgment against Tannehill and he did not appeal from the judgment entered against him.

2 ORS 12.110(1) provides:

> "An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

3 Because plaintiff was a minor, his minority was not counted in computing the two-year limitations period set forth in ORS 12.110(1). During the relevant time period, ORS 12.160 (1995) provided:

> "If, at the time the cause of action accrues, any person entitled to bring an action mentioned in ORS 12.010 to 12.050, 12.070 to 12.250 and 12.276 is:
> "(1) Within the age of 18 years,
> "(2) Insane, or
> "(3) Imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than the person's natural life, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases."

4 It is important to note that the city does not argue here, and did not argue below, that there was some date between 1996 and 2001 when the statute of limitations began to run.

5 The city also urges that we consider, and the Court of Appeals cited and relied on, a Ninth Circuit decision, *Plumeau v. School Dist. # 40 County of Yamhill,* 130 F.3d 432 (9th Cir.1997). In that case, a school janitor sexually abused a young girl, who, five years later, attempted suicide. Shortly thereafter, the girl told her mother about the abuse and she and her mother brought an action against the school district. The court affirmed summary judgment for the district. As to plaintiffs' state law claims, the court rested its ruling on the fact that plaintiffs did not give the requisite tort claim notice within the time required after the girl informed her mother of the abuse. *Id.* at 440. As to plaintiffs' Section 1983 claim, the court rested its ruling on plaintiffs' failure to adduce sufficient facts to establish district liability. *Id.* at 438–39. *Plumeau* did not decide that plaintiffs' Section 1983 action against the district was untimely. To the contrary, in *dicta,* the court stated that the opposite assumption was appropriate because plaintiffs filed their Section 1983 claim within two years from the "date of discovery." The court considered the "date of discovery" to be the date the girl manifested injury from the abuse, attempted suicide, and reported the abuse to a trusted adult, not the date the girl was subjected to the acts of abuse. *Id.* at 438. We do not find *Plumeau* to be inconsistent with the discovery accrual rule as we have articulated it.

6 In addition to arguing that the trial court correctly denied the city's motion for a directed verdict because there was a question of fact as to when plaintiff reasonably should have discovered the city's role, plaintiff also argues that the trial court ruled correctly because a question of fact existed as to when he reasonably should have discovered that the acts of abuse caused him harm. Because we decide that there was a question of fact as to when plaintiff reasonably should have discovered the city's role, we do not address plaintiff's additional argument or whether plaintiff properly preserved that argument.

7 The Court of Appeals noted that although plaintiff was a minor when Tannehill committed the acts of abuse, he was no longer a minor when he turned 18 and was permitted time to bring his claim thereafter. *See* ORS 12.160 (1995) (tolling statute during minority, but for no more than five years total or one year after the plaintiff reaches the age of majority, whichever first occurs). The Court of Appeals therefore granted no significance to the fact that plaintiff was a minor when he was subjected to the abuse. *T.R.,* 205 Or.App. at 143 n. 4, 133 P.3d 353. In our view, because the city argues that plaintiff's claim accrued when

Tannehill committed the abuse and plaintiff was a minor at that time, we cannot disregard the fact of plaintiff's minority. The discovery rule requires a determination of what a reasonable person would have known at the time of asserted accrual.

8 The "reasonable person" standard is generally discussed in terms of the actions a reasonable defendant would have taken, but it is equally applicable where there is a contention that a plaintiff did not act reasonably.

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APPENDIX E

RCW 9.68A.100

Commercial sexual abuse of a minor—Penalties—Consent of minor does not constitute defense.

(1) A person is guilty of commercial sexual abuse of a minor if:

(a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;

(b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or

(c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

(2) Commercial sexual abuse of a minor is a class B felony punishable under chapter **9A.20** RCW.

(3) In addition to any other penalty provided under chapter **9A.20** RCW, a person guilty of commercial sexual abuse of a minor is subject to the provisions under RCW **9A.88.130** and **9A.88.140**.

(4) Consent of a minor to the sexual conduct does not constitute a defense to any offense listed in this section.

(5) For purposes of this section, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter **9A.44** RCW.

[2013 c 302 § 2; 2010 c 289 § 13; 2007 c 368 § 2; 1999 c 327 § 4; 1989 c 32 § 8; 1984 c 262 § 9.]

NOTES:

Effective date—2013 c 302: See note following RCW **9.68A.090**.

Findings—Intent—1999 c 327: See note following RCW **9A.88.130**.

*Additional requirements: RCW **9A.88.130**.*

*Vehicle impoundment: RCW **9A.88.140**.*

RCW 9.68A.130

Recovery of costs of suit by minor.

A minor prevailing in a civil action arising from violation of this chapter is entitled to recover the costs of the suit, including an award of reasonable attorneys' fees.

[1984 c 262 § 12.]