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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 48029-8-II

COURT OF APPEALS, DIVISION II BY
OF THE STATE OF WASHINGTON

DEPUTY

K.C. and L.M.,

Respondents,

v.

STATE OF WASHINGTON and DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Defendants,

GOOD SAMARITAN HOSPITAL, PATRICK SHEEHY, PhD, and
LINDA WILLIAMS, M.S.W.,

Appellants,

and

DONNA JOHNSON,

Defendant.

**APPELLANTS GOOD SAMARITAN HOSPITAL,
PATRICK SHEEHY, PHD AND LINDA WILLIAMS'
REPLY BRIEF**

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I. REPLY

Defendants Good Samaritan Hospital, Patrick Sheehy, Ph.D. and Linda Williams, M.S. (collectively GSH) provide this reply brief.

In this medical negligence case, three issues were accepted for discretionary review: (1) whether collateral estoppel bars K.C.'s claims; (2) whether the statute of limitations bars all or some of L.M.'s claims; and (3) whether the trial court erred in dismissing the statute of limitations affirmative defense.

The first issue, collateral estoppel, is an issue of law for the Court that is reviewed *de novo*. Despite myriad arguments by K.C., ultimately all of the elements of collateral estoppel are met and her claims must be dismissed. Second, regarding L.M.'s claims, the medical records show that she connected her injuries to the abuse prior to the statute of limitations period. Her declaration to the contrary is not admissible to create an issue of fact. As a result, all of K.C.'s and L.M.'s claims should be dismissed. Finally, if this Court determines that any of K.C.'s or L.M.'s claims remain, the statute of limitations affirmative defense was improperly dismissed, and must be reinstated.

A. K.C.'s Claims are Barred by Collateral Estoppel.

In response to the argument that K.C.'s claims are barred by collateral estoppel (based on the prior ruling by Judge Stolz that K.C.'s

claims were barred by the statute of limitations), K.C. argues that: (1) the evidentiary record before Judge Hogan and Judge Stolz were different; (2) the statute of limitations can be re-tolled upon the recognition of new injuries; (3) Good Sam caused different injuries than DSHS; (4) there is no privity; (5) the application of collateral estoppel is discretionary; and (6) collateral estoppel must not work an injustice and Judge Stolz's prior representation of Delbert Melby disqualified her from ruling in this case. None of these arguments has merit.

1. The evidentiary record and issue before Judge Stolz was not different in any material manner than the evidence and record in front of Judge Hogan.

K.C. argues the record before Judge Hogan was different than in front of Judge Stolz, but plaintiff provides no example or citation to the record to support this argument, other than citing to the oral argument where Judge Hogan stated that the record was different. There is no evidence of any material difference in the record between Judge Stolz and Judge Hogan. Also, contrary to plaintiff's assertion, GSH did identify the underlying record to Judge Hogan, as GSH referenced the summary judgment arguments of both DSHS and plaintiffs. CP 1570.

As it relates to collateral estoppel, the issue decided in each motion was the same; namely, whether K.C.'s claims arising out of the abuse from Walter Carl Johnson were time barred. CP 29-32. In its brief, DSHS

argued that the issue was when plaintiff K.C. made the connection between her injuries and the abuse she suffered. CP 31, citing RCW 4.16.340. That is the same issue here. The abuse at issue was inflicted by Walter Carl Johnson. The allegations against both DSHS and GSH were that the defendants allowed Johnson to have access to K.C. and L.M. Under RCW 4.16.340, the issue is not when the alleged negligence occurred, but rather when K.C. and L.M. connected their injuries to the abuse. This analysis is the same for both DSHS and GSH.

As noted in the opening brief, a comparison of the original complaint (against the State only), CP 2-5, with the second amended complaint against GSH, CP 1008-1010, shows the factual basis for the lawsuit is the same. Ultimately, Commissioner Bearse correctly ruled that there were no significant differences in the records of the two proceedings. *Ruling of February 29, 2016 at 20*. The issues before the two courts were the same, and plaintiff's argument is without merit.

2. The statute of limitations is not tolled upon the recognition of new injuries.

K.C. next asserts that "it is entirely possible for an old claim to be re-tolled upon the recognition of new injuries." Respondents' Brief at 23, citing *B.R. v. Horsley*, 186 Wn. App. 294, 345 P.3d 838 (2015). That assertion is incorrect, and, in fact, *Horsley*, as well as the statute itself and the legislative history for the amendment to RCW 4.16.340, stand for the

proposition that claims for certain injuries can be time-barred while others may be timely. Nothing in the statute or the legislative history supports an argument that the assertion of new injuries saves injuries that are already time-barred.

RCW 4.16.340(1)(c) provides that the statute of limitations is “within three years of the time the victim discovered that the act caused ***the injury for which the claim is brought.***” (emphasis added). In *Carollo v. Dahl*, 157 Wn. App. 796, 801, 240 P.3d 1172 (2010), the court, quoting the legislative intent for the amendment to RCW 4.16.340, noted that “[t]he legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations ***for injuries that are discovered later.***” *Id.* (emphasis added). While the statute of limitations for childhood sexual abuse is broad, it is not limitless. *Id.* at 803.

In *Horsley*, the trial court had dismissed plaintiff’s childhood sexual abuse claims as time-barred. *Id.* at 297. On appeal, the court reversed, finding that factual issues precluded summary judgment. *Id.* at 306. But, in doing so, the court’s opinion indicates that the case must be examined on an injury-by-injury basis, as it analyzed each claimed injury separately. For example, the court wrote that “until recently, she [plaintiff] was not aware that her new, adult difficulties with her marriage, her work, and connecting with religion were caused by the childhood abuse.” *Id.* at 301. The court also wrote that there were factual issues as to “what type of injuries she suffered and when she connected them with her abuse,” holding that “she experienced new and more serious injuries as

an adult” and that she only recently connected those new injuries to her childhood abuse. *Id.* at 304. The court held that there were factual issues as to “whether she suffered new work-related injuries within the three-year statute of limitations.” *Id.* at 305. Finally, regarding her discomfort with religion, the court held that, because she just realized this was connected with her abuse, summary judgment was not appropriate “on this claim.” *Id.* at 306.

Thus, *Horsley* does not stand for the proposition that “old” injuries plaintiff connected to the abuse more than three years before filing suit can be “reinvigorated” if she discovers new injuries connected to the abuse. That would be inconsistent with the statute and the legislative intent. Taken to its logical conclusion, K.C.’s arguments on the statute of limitations and collateral estoppel would lead to absurd results with no finality. A plaintiff could sue “Defendant X” for claims arising out of childhood abuse, alleging injuries A, B and C. After a defense verdict, according to plaintiff’s theory, plaintiff many years later could sue “Defendant X” again, alleging injuries D, E and F, and argue that not only are the D, E and F injuries properly before the court, but so are injuries A, B and C, as neither the statute of limitations nor collateral estoppel applies. Such an argument, if accepted by the Court, would violate the purpose of the doctrine, as collateral estoppel is “designed to conserve judicial resources and provide finality to litigants.” *State v. Longo*, 185 Wn. App. 804, 808, 343 P.3d 378 (2015).

3. There is no evidence that GSH caused different injuries than DSHS.

K.C. argues, in one sentence, that “[m]oreover, Good Sam caused different injuries than DSHS.” Respondents’ Brief at 23. This argument has no factual citation, and there is no evidence that the injuries allegedly caused by Good Sam are different than DSHS. As an undeveloped argument, this argument need not be considered. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *Erection Co. v. Dep’t of Labor & Indus.*, 160 Wn. App. 194, 211 n.3, 248 P.3d 1085, 1094 (2011). Even if considered, its lack of factual support makes this argument unpersuasive.

4. There is privity, as K.C. was a party to the first litigation.

K.C. argues privity is lacking because Good Sam and DSHS are different parties with different obligations. Respondents’ Brief at 23. But plaintiff misunderstands the requirements of privity. In the prior adjudication involving the State, K.C. was a party. Collateral estoppel requires that the party *against whom collateral estoppel is asserted* must have been a party or in privity with a party in the prior adjudication. *Nielson v. Spanaway Gen. Medical Clinic, Inc.*, 85 Wn. App. 249, 253, 931 P.2d 931 (1997) (emphasis added). Thus, it does not matter that GSH was not a party at the time that K.C.’s claims were dismissed. The privity requirement is satisfied.

5. K.C.'s argument that collateral estoppel is a discretionary ruling is incorrect.

K.C. further argues that collateral estoppel is a discretionary doctrine, citing to *State v. Gary*, 99 Wn. App. 258, 991 P.2d 1220 (2000). Respondents' Brief at 23-24. *Gary* does not support K.C.'s position. In *Gary*, a criminal defendant argued that a trial court erred in failing to dismiss certain charges against him based on collateral estoppel. . *Id.* at 259-262. The trial court ruled that one of the charges had never gone to a jury. *Id.* at 263. As to another charge, the court ruled that another previous charge, while involving the same parties, was based on a separate event, occurring at a different time. *Id.* Because of these issues, the elements of collateral estoppel were not met. The court of appeals held that the trial court did not err. *Id.*

While the *Gary* court does reference abuse of discretion, the proper standard of review for collateral estoppel is *de novo*. *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 305, 96 P.3d 957, 960 (2004). Moreover, the doctrine of collateral estoppel is no more discretionary than any trial court decision. If a trial court errs, that court is subject to appellate review. Here, that standard of review is *de novo* and the trial court erred in failing to apply the doctrine to bar K.C.'s claims.

6. Judge Stolz's representation of a non-party 30 years ago did not disqualify her from presiding over this case and does not preclude the application of collateral estoppel.

Finally, K.C. argues that you cannot apply collateral estoppel when it would result in an injustice, and Judge Stolz's prior representation of Delbert Melby mandated that she disqualify herself. As such, K.C. argues, it would be an injustice to base collateral estoppel on her ruling. K.C. is incorrect.

This issue was addressed by GSH in the opening brief (see Opening Brief of GSH at 17-21). As part of that argument, GSH argued that K.C. had waived this argument based on her failure to bring up the issue at the time of the rulings. GSH Brief at 18-19. K.C. did not address this argument. Additionally, GSH argued that Judge Stolz's representation of Delbert Melby 30 years ago did not disqualify her, citing to *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141, 144 (1996). K.C. also did not respond to this argument, and did not address the *Dominguez* case.

B. L.M.'s Claims are Barred by the Statute of Limitations.

Seeking to avoid dismissal, L.M. argues that, despite what is in the medical records, and despite her discovery responses, CP 1366, she did not subjectively connect her injuries to the abuse until 2014. Her attempt to create a factual issue fails.

Regarding her medical records, L.M. argues that these were conjoint sessions with her husband. First, it is unclear what relevance this distinction provides. The records are for L.M. and reflect L.M.'s feelings, symptoms and beliefs regarding those symptoms. Second, this assertion is only partially true. A review of the records shows that either "individual," "conjoint" or "family" was checked for each session. While some of the sessions were conjoint, others were individual, including CP 1478 1484, 1485, 1493 and 1496. Additionally, it appears that the original evaluation, CP 1472-77, was also an individual session. It was in L.M.'s original evaluation, which she signed, in which she discussed her poor sleep due to childhood abuse, CP 1472; overeating from childhood abuse, CP 1474; and sadness, loss, grief and PTSD due to childhood abuse, CP 1475. In an individual session on April 25, 2011, she complained of a fear of losing control due to childhood abuse. CP 1484. As noted in the opening brief, her records also show difficulty trusting others, relationship issues, and poor boundaries that she attributed to the abuse. CP 1472-99.

L.M. argues that the records show the counselor's notes, but not her subjective feelings. The records themselves belie this assertion. First, as noted above and in the opening brief, some of the notes contain L.M.'s signature. Second, the other records show symptoms that L.M. subjectively linked to the abuse. L.M. did not address the case of

Marshall v. AC&S, 56 Wn. App. 181, 782 P.2d 1107 (1989), in which a plaintiff's medical records indicated that the claim was time-barred and the plaintiff's declaration to the contrary was not admissible to create an issue of fact. *Id.* at 185.

L.M. does cite to *Hollmann v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386 (1997), to argue that there is a factual issue as to when her causes of action accrued. In *Hollmann*, the issue was when a man had connected his prior abuse to his injuries. A former counselor, who had treated the plaintiff outside of the statute of limitations period, expressly testified that she did not believe that plaintiff had the ability to connect his symptoms to his prior abuse. *Hollmann*, 89 Wn. App. at 328. This same counselor also testified that she was not trying to determine the cause of his condition. Here, there is no testimony from Ms. Casillas, L.M.'s counselor on these issues. To the extent that Ms. Casillas had similar testimony as the counselor in *Hollmann*, L.M. would have provided such a declaration.

L.M. also references the issue of new, qualitatively distinct harms. In *Carollo v. Dahl*, 157 Wn. App. 796, 240 P.3d 1172 (2010), the court did rule that new, qualitatively distinct issues, as opposed to quantitatively distinct, might survive summary judgment even if other claims are time-barred. Though L.M. lists several new injuries in her brief (page 21), these are quantitative, rather than qualitative injuries, and/or injuries not

even referenced by L.M. in her declaration, CP 1089-1101. For example, parenting issues, weight issues, relationship issues, grief, depression and PTSD are all issues that were addressed with Ms. Casillas. Moreover, in her declaration, L.M. does not even address the alleged new injuries set forth on page 21 of her brief. See CP 1470-71.

Even if L.M. could show some injuries that were qualitatively different, it would only save the claims as to those injuries, while all claims based on the injuries that L.M. connected to the abuse more than three years before filing suit against GSH would have to be dismissed. *Id.*

C. **The Trial Court Erred in Dismissing the Statute of Limitations Affirmative Defense.**

The final issue is whether the trial court erred in dismissing the statute of limitations affirmative defense. The issue here is what burden GSH faces in maintaining its affirmative defense in the summary judgment context.

As set forth above, it is GSH's position that K.C.'s claims should be dismissed based on collateral estoppel (pursuant to a prior summary judgment based on statute of limitations) and that L.M.'s claims should be dismissed on statute of limitations grounds. However, even if this Court believes there are factual issues, the trial court erred in dismissing this affirmative defense.

Plaintiffs argue that unless GSH can prove that a jury could *only* find that the claims were barred by the statute of limitations, then not only is GSH's motion for summary judgment on statute of limitations properly denied, but the affirmative defense must be dismissed as well. This is incorrect.

Regarding the affirmative defense, if GSH has presented evidence that a jury might find that K.C. and L.M.'s claims are barred by the statute of limitations, then that issue must go to the jury. *B.R. v. Horsley*, 186 Wn. App. 294, 345 P.3d 836 (2014) (holding that if there are factual issues related to when a cause of action accrued, "a jury must resolve the factual issues and determine whether the statute of limitations bars her claim."); *Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997) (holding in a sexual abuse case that "[w]e note that it was properly a question for the trier of fact to determine whether Oostra had timely filed this action").


II. CONCLUSION

The trial court erred in three separate areas: (1) failing to dismiss K.C.'s claims based on collateral estoppel; (2) failing to dismiss L.M.'s claims based on statute of limitations; and (3) dismissing GSH's statute of limitations affirmative defense. For the reasons stated above, the trial

court should be reversed on each issue, and all of K.C. and L.M.'s claims should be dismissed.

RESPECTFULLY SUBMITTED this 6th day of July, 2016.

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I hereby certify under penalty of perjury of the laws of the State of Washington that on the date below a copy of the foregoing document was forwarded for service upon the following:

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DATED this 6th day of July, 2016.

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