

No. 36113-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LAURA BARDO,

Plaintiff/Appellant

v.

CLIFF COOPER, Personal Representative of the Estate of Alwin Winsten Cooper,

Defendant/Respondent

BRIEF OF RESPONDENT

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2. State Statutes

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I. STATEMENT OF THE CASE

The facts in this case are adequately set forth in Appellant's brief for purposes of this appeal. Defendant/Respondent does not stipulate to the facts set forth in Appellant's brief should this case be remanded and proceed to trial. The facts alleged are summarized as follows:

1. Plaintiff claims that every time she needed her diaper changed, her mother would "probe around inside me to make 'sure' I was clean and tell me I had better stay that way." (CP 26, 53).

2. Plaintiff claims that, in response to asking her mother whether she could go on a date, her mother grabbed her crotch and "wriggled her fingers around, telling me that this was all a man was good for and that I should stay home and she could take care of that instead." (CP 34, 53).

The issues in this case are whether the conduct alleged by Plaintiff constitutes "childhood sexual abuse" as defined under RCW 4.16.340(5), and, if so, whether Plaintiff discovered or reasonably should have discovered the causal connection between such alleged abuse and Appellant's alleged damages more than three years prior to following this lawsuit.

II. ARGUMENT

A. Applicable Law.

RCW 4.16.340 provides:

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. (emphasis added).

RCW 4.16.340

A cause of action may survive a statute of limitations defense under this statute only if the conduct alleged would have been a violation of 9A.44 RCW or RCW 9.68A.040.

RCW 9.68A.040

RCW 9.68A.040 deals with sexual exploitation of a minor. The statute reads as follows:

9.68A.040 Sexual exploitation of a minor -- Elements of crime -- Penalty.

(1) A person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Sexual exploitation of a minor is a class B felony punishable under chapter 9A.20 RCW.

RCW 9.68A.040

Clearly, none of the conduct alleged by plaintiff violates this statute.

9A.44 RCW

9A.44 RCW is the Washington Criminal Code as it relates to sex offenses. Plaintiff must show that the conduct alleged in this case would violate this section, or her case must be dismissed.

RCW 9A.44.010(2) provides 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. *(emphasis added)*.

RCW 9A.44.010(2)

B. ISSUE #1: Does the alleged conduct constitute childhood sexual abuse as defined by RCW 4.16.340 and RCW 9A.44?

The alleged diaper changing incidents do not constitute “sexual contact”. If so, thousands of parents would be subject to prosecution under the criminal code every time they changed their children’s diapers. It is hard to believe any adult, especially someone who is 50 or 60 years old, could remember “every time” his or her diaper was changed as a child, much less any comments that were made by his or her parent while the diaper change was occurring.

Even if these alleged incidents occurred, there is not evidence the contact was made for the purpose of sexual gratification, and the comments of Appellant’s mother at the time, assuming they were made, are ambiguous at best, and certainly do not suggest the alleged diaper incidents were done for the purpose of gratifying a sexual desire.

The second alleged incident was perhaps abusive, but there is insufficient evidence it was done for sexual gratification. Such behavior on the part of a parent would be strange, and perhaps cruel, assuming it

occurred. However, such action does not constitute "sexual contact" as defined by the criminal code.

No case law on point could be found involving a parent touching a child's erogenous areas outside of the clothing. However, in cases where touching through clothing occurs by non-parents, or people with "no caretaking function," courts have required some additional evidence of sexual gratification. *State v. Powell*, 62 Wn.App. 914, 816 P.2d 86 (1991).

The *Powell* case involved a situation where, according to a young girl named Windy, a man she knew as Uncle Harry, while she was seated on his lap, hugged her around the chest. As he assisted her off his lap he placed his hand on her "front" and bottom on her "underpanties" under her skirt. On another occasion, while Windy was alone with Uncle Harry in his truck waiting for her cousin, he touched both her thighs. On both occasions, he only touched her on the outside of her clothing. Windy identified Mr. Powell as Uncle Harry.

Id. at 917.

The *Powell* court found that the evidence of Mr. Powell's purpose in both touchings was equivocal and that the evidence was insufficient to support an inference Mr. Powell touched Windy for the purpose of sexual

gratification. *Id.* at 918-1919.

This case involves a mother who is alleged to have grabbed her teenaged daughter's crotch (presumably while clothed) while making an ambiguous statement. It can be argued that the statement was an expression of her opinion or feelings about men. Respondent submits the courts should be even more cautious when a parent touches a child through her clothing, as opposed to a non-parent.

The conduct alleged in this case may have been abusive, but it is a stretch to allege that the contact was made for the purposes of sexual gratification. The mother's statement is ambiguous at best. Therefore, Defendant respectfully requests that the court uphold the trial court's decision that there was not "sexual contact" as defined by RCW 9A.44.010(2).

C. ISSUE #2: Should Appellant have discovered or could she reasonably have discovered the causal connection between such alleged abuse and her alleged damages more than three years prior to filing this lawsuit?

The trial court found that Appellant was 57 years old at the time the summary judgement motion was argued, and that she would have turned 18 roughly 39 years ago. (RP Jan. 15, 2007 at 10). The court found

that the incident alleged to have occurred when Appellant was a teenager occurred when she was 15 years old. (RP Jan. 5, 2007 at 12). Further, the court found that Appellant had been in therapy for roughly 30 years. (RP Jan. 5, 2007 at 12). Under these circumstances, the court determined that a fact finder could do nothing other than find that Appellant could have reasonably understood any consequences as a result of the incident alleged. (RP Jan. 5, 2007 at 12).

Appellant relied on *Hollmann v. Corcoran*, 89 Wn.App. 323, 949 P.2d 386 (1997) and *Cloud ex rel. Cloud v. Summers*, 98 Wn.App. 724, 991 P.2d 1169 (1999) (among a few other cases) in support of her position that the court erred in granting Respondent's Motion for Summary Judgment.¹

Factually, both of those cases are significantly different than the case at bar. Both involve cases where there was a pattern of sexual abuse for many years, the conduct was obviously sexual abuse, and lawsuits were filed fairly soon after the plaintiffs learned through therapy of the causal connection between the abuse and their mental and emotional issues.

In the case at bar, Appellant did not file suit until over 40 years

¹ I will not reiterate the facts of those two cases here as they are sufficiently set forth in Appellant's brief.

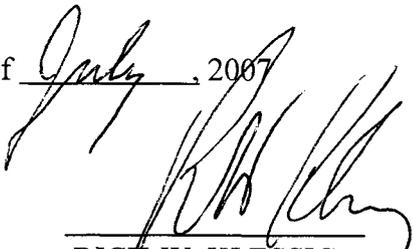
after the abuse was alleged to have occurred and roughly 39 years after Appellant turned 18. Under these circumstances, Appellant should have discovered any alleged causal connection between the alleged abuse and any resulting mental or emotional issues many years ago. Under these circumstances, the trial court's opinion should be upheld.

CONCLUSION

The trial court properly dismissed Appellant's claims of childhood sexual abuse based upon RCW 4.16.340, finding that the alleged conduct did not constitute sexual contact, in finding that the touching was not done for sexual gratification, and by finding Appellant should have discovered any alleged causal connection between the alleged abuse and resulting mental or emotional issues should have been discovered by Appellant well before her 57th birthday.

Accordingly, Respondent respectfully requests that this court uphold the decision of the trial court dismissing this action.

DATED this 7 day of July, 2007



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DECLARATION OF MAILING/
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CERTIFICATE OF SERVICE BY MAIL

I certify under penalty of perjury under the laws of the State of Washington that I have this 3rd day of July delivered, via Legal Messengers, a true copy of Defendant's Brief of Respondent in the above-referenced matter to:

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