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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**No. 36723-8-II**

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

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A.O. and S.O.,

Appellants,

vs.

PUGET SOUND SOCIAL SERVICES and THE STATE OF WASHINGTON,

Appellees,

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

This appeal arises out of the wrongful dismissal by the trial court on a motion for summary judgment of a childhood sexual abuse claim. During the proceedings before the trial court, fundamental tort principles were misapplied and expert testimony on ultimate issues of fact were discounted and/or ignored. The facts giving rise to this claim are clear and straightforward: the director of a State licensed group home encouraged sexual interaction between the child residents, A.O. was raped and molested as a direct result, and the group home operator, Puget Sound Social Services, and the State, upon receiving notice of the director's activities, failed to act reasonably to prevent this abuse. Given these undisputed facts, this claim should not have been dismissed. The State had a statutory and regulatory duty to protect A.O. and its failure to do so was both "but for" and legally the cause of his sexual abuse.

In relation to the statute of limitations, the trial court seemed to be resistant to the notion that the Legislature permitted claims for childhood sexual abuse to be brought later in life, and injected unsupported personal views on the record about the well established right of a claimant to bring such a claim. While noting the absence of expert testimony supporting the defense, on a motion for reconsideration in order to fortify the record on the erroneous dismissal, the trial court actually read self-researched psychological analysis into the transcript record at the same time as recognizing that the defense had no expert testimony upon which to rely. In this instance, A.O. suffers from a plethora of psychological injuries and diagnosis which were only connected, by way of expert

testimony including a diagnosis of posttraumatic stress disorder, for the first time in June of 2007. The defendants completely failed to meet their burden as the moving party of proving otherwise. As is set forth herein, this matter should be sent back to the trial court for a trial on the merits.

## **II. ASSIGNMENTS OF ERROR**

**Issue No. 1:** The trial court erred as a matter of law in dismissing this childhood sex abuse claim based upon any purported lack of duty owed by the group home operator and the State of Washington to the child residents of Deschutes, including A.O, by ignoring well established Supreme Court precedent and the statutes that are directly on point.

**Issue No. 2:** The trial court erred as a matter of law in dismissing this childhood sex abuse claim based upon any purported deficiency of evidence in relation to causation and ignored uncontroverted expert testimony supporting the causal connection.

**Issue No. 3:** The trial court erred as a matter of law in dismissing this childhood sex abuse claim based upon the statute of limitations and misapplied the tolling principles set forth under RCW 4.16.340 and case law.

## **III. STATEMENT OF THE CASE**

As an 11 year old child, A.O. was placed by the State of Washington at the Deschutes Children Center, a state licensed group home which is was operated by Puget Sound Social Services (PSSS). A.O. was a resident between April 15, 1988 and August 15, 1989.<sup>1</sup> On the very first day at Deschutes, two other child

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<sup>1</sup> CP 54-59

residents urinated upon A.O. while he was in his bedroom.<sup>2</sup> A.O. recalls that “*I told a staff member named Tori what had happened, and Tori did not do anything to discipline the other residents. The inaction on the part of Tori was the way that the staff always handled complaints like mine, and none of the residents seemed to feel like there were any consequences for their wrongful actions.*”<sup>3</sup> One of the two residents raped A.O. a few months later.<sup>4</sup>

While a resident at Deschutes, A.O. was continually physically and sexually abused and molested by other residents, and also abused by the staff.<sup>5</sup> With respect to the physical abuse, “*I was physically beaten by a staff member at Deschutes. The staff member’s name was David Dickenson.*”<sup>6</sup> The cause of the physical and sexual abuse perpetrated against A.O. was the poor supervision on the part of PSSS, Ron Hanna, and the State, and the sexually permissive atmosphere, as between child residents, which was created and encouraged by the director of Deschutes, Patsy Blackstock.

In December of 1987, DSHS was notified by a concerned parent that Ms. Blackstock was “without adequate credentials” and was “without morals and ethics”.<sup>7</sup> Subsequently, Ms. Blackstock proved the concerned parent’s concerns which were reported to DSHS as being true. Ms. Blackstock’s own admissions,

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<sup>2</sup> CP 54-59

<sup>3</sup> CP 54-59

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> CP 54-59

<sup>7</sup> CP 40-50

as captured in a letter dated June 15, 1988 are telling wherein she admits to engaging in bizarre inappropriate sexualized behavior with the residents:

*...I did two things that completely turned around the energy and opened things up for some really productive talk about rape and sex.*

*I am aware that the two things I did are controversial, but please remember that I had basically been abandoned by the staff and that my best thinking was somewhat constrained by the situation and having to keep myself and the boys safe. The first thing I did was break the carrot into little pieces and then hold them in my hand just above my crotch and said to them, "Get the magic carrot." They dove for the carrot pieces and sat up and chewed the carrot laughing. A couple of guys took 2 turns and then they stopped all together going for my crotch. They continued to go for my breasts, though, so I pulled away, stood up and before they could rush me, pulled my shirt up and down very fast, which brought varied responses such as "Gross," and "Why did you do that?"*

*I immediately took ahold of the opening I had created to talk to them about what was happening for me...*

*...I see them through the eyes of someone who, through education and training, remembers that they have 10, 11 and 12 year old bodies but they are really much younger emotionally. This is how I treated their acting out...as if it were play. It was scary, but a positive therapeutic outcome was reached.<sup>8</sup>*

In relation to this incident, A.O. noted that "[i]t seemed like Patsy thought that the whole carrot incident was a joke, and that she was encouraging the residents to act in a sexual manner."<sup>9</sup> And the two other child residents that sexually assaulted A.O. were present to witness the example being set by Ms. Blackstock.<sup>10</sup>

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<sup>8</sup> CP 1-19

<sup>9</sup> CP 54-59

<sup>10</sup> CP 74-75

This letter was sent directly to Ms. Blackstock's PSSS supervisor, Barbara Gorzinski, and the executive director of PSSS, Ron Hanna, was also made aware of the incident. The State licensor was also notified and conducted an investigation. Thereafter, while realizing that Ms. Blackstock presented a danger to the residents at Deschutes, based upon the advice and encouragement of state licensors, Ms. Blackstock was not removed from the position of director of the facility.<sup>11</sup> Mr. Hanna admits that Ms. Blackstock was a danger to the other children and should have been removed. He negligently failed to do so while relying upon the bad advice of State licensors, and, thereafter, Ms. Blackstock remained as director until the end of 1988.<sup>12</sup> It was by and through the decision not to remove Ms. Blackstock, and other poor supervisory occurrences and oversight by the State licensors that A.O., and likely other residents, was allowed to be physically and sexually abused before Ms. Blackstock was fired and finally removed from the position of director Deschutes.

It is important to note that when the State licensors were conducting the inquiry regarding the "carrot incident" in June of 1988, the licensor that handled the inquiry, Mr. Ennet, did not interview any of the residents, or evidently any of the staff either, about the occurrences going on at Deschutes.<sup>13</sup> Based upon the failure to interview the residents and to conduct a thorough and appropriate investigation it was not until November of that same year that the State learned of another incident ("megaphone incident") which already occurred in March of

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<sup>11</sup> CP 40-50

<sup>12</sup> CP 40-50

<sup>13</sup> CP 62-73

1988 between Ms. Blackstock and some of the residents. Mr. Ennet described the report as follows:

Q. Okay. Can you tell me, please, what other complaints did you ever learn of about Ms. Blackstock in relation to Deschutes?

A. There was one other concern that came up after June, and I believe it was in November of that same year that a person had called me about an incident that had happened the previous March, I believe. That incident involved Ms. Blackstock meeting with some boys in the large room at the -- living room of the facility, and one of the boys had a flute or some type of plastic tube or something and was playing around with it and said something about, "Mine's bigger." He held it up to himself and said, "Mine's bigger," and then she kind of -- she said something about a penis, and I don't recall the exact words. But the description was that she sat on the tube, and the boy was on the other end, and there was some sexual gyrations being made, according to the person who had talked to me on the phone. I asked her to come in, and we discussed it, but that's the only other thing that I recall.

Q. And who was it that you spoke to?

A. I'm thinking it was Mary Jane Klaila, but I can't be certain. I'd have to see the record.

\* \* \*

Q. (By Mr. Beauregard) And when was an incident involving a megaphone described to you?

A. That may have been used to describe it. I don't -- my understanding was it was more like a plastic tube or flute-shaped kind of thing.

Q. And what was the description of the allegations with respect to Ms. Blackstock and the flute?

A. That she had --

MR. FREIMUND: Hold on. I'm going to object. It's already been asked and answered. Go ahead.

THE WITNESS: That she had -- the boy had made some remark about the flute being like a penis, and his was bigger, and she sat -- she somehow got it, sat on it and made some remark. He sat on the

other end, and there was some gyrations from both of them about it. That was it. That was the description of the incident that I got in November '88.

The former counselor who reported the incident, Mary Jane Klaila, recalls the incident: "*I personally witnessed sexual encounter with Patsy, the boys, a megaphone, and there were instances where boys would lay on her and against her in a manner that was inappropriate.*"<sup>14</sup> It should be noted that the "megaphone incident" occurred in March of 1988, prior to the "carrot incident", and prior to A.O. being sexually assaulted.

A.O. recalls that all the residents were talking openly about the "megaphone incident" throughout the time that A.O. was placed at Deschutes:

*I heard about an incident involving Patsy, some other residents, and a megaphone. It was my understanding that Patsy engaged in some sort of simulation of anal intercourse with one of the boy residents. It was a few months thereafter in the summer when Jason anally raped me. Even though I was not present at the time of the megaphone incident, I was told about it by other residents. Residents would laugh and giggle and make it a topic of conversation even after the megaphone incident occurred.*<sup>15</sup>

Even though the "megaphone incident" was a spirited topic of conversation between the residents, Mr. Ennet failed to inquire directly with any of the residents about the "carrot incident" which would have led to the discovery of the other wrongdoing on the part of Ms. Blackstock further emphasizing her unsuitability to hold the supervisory position at Deschutes. Mr. Ennet documented in a letter dated June 21, 1988 the fact that when inquiring about the "carrot incident" he relied entirely upon Ms. Blackstock's recitation of events, and, instead of actually interviewing the residents, he suggested only that:

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<sup>14</sup> CP 51-53

<sup>15</sup> CP 54-59

*Should spontaneous complaints be heard from the children themselves, however, I would feel it appropriate at that point to deal with such reports immediately, on an individual basis, in a private interview situation with a well qualified CPS worker.*<sup>16</sup>

And in relation to actual Child Protective Services involvement, Mr. Ennet noted that:

*Ms. Gorzinski asked if the [carrot] incident should have been reported to Child Protective Services for investigation. My response was that since the incident had been reported to the department already, I had discussed the incident with Mark Redal and appropriate action had been taken thereafter, no further action was required.*<sup>17</sup>

With respect to causation, as is demonstrated in the declaration of A.O., Ms. Klaila and the admission of PSSS's executive manager, Ron Hanna, allowing Ms. Blackstock to remain as director of Deschutes created an "overly permissive" and sexually charged atmosphere:

Q. Okay. Did you document in your letter dated December 29<sup>th</sup>, 1988 that Ms. Blackstock's style of management created an overly permissive environment?

A. Are you saying do I own up to that?

Q. Did you document that?

A. Yeah.<sup>18</sup>

\* \* \*

Q. (By Mr. Beauregard) Do you think that her actions, such as the carrot incident, encouraged poor delineation of boundaries between the children?

A. Yes.<sup>19</sup>

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<sup>16</sup> CP 1-19

<sup>17</sup> *Id.*; It should be noted that according to RCW 26.44.030(10), that State regulators are permitted to conduct interviews of the children involved in suspected abusive situations.

<sup>18</sup> CP 40-50.

<sup>19</sup> CP 40-50

Consistently therewith, Ms. Klaila explained that as *“of the time that Patsy became the director, there was a drastic increase in sexualized activity on the part of the boys, and I believe that this increase in the sexual tension was directly related to Patsy’s actions as director during her tenure.”*<sup>20</sup> And A.O. explained that *“the whole entire group home was out of control in that the staff was never attentive to the residents, and that the residents were allowed to act without consequences and/or discipline while Patsy was the director”* and that *“Patsy made it seem like it was ok and/or encouraged boys to have sexual relations at Deschutes with her and each other.”*<sup>21</sup>

Also, with respect to the issue of causation, the following expert testimony offered by Jane Ramon was also before the trial court:

*Ms. Blackstock’s approach to supervising and managing Deschutes would, and did, expectedly create a sexually charged and overly permissive environment as is described by Mr. Hanna in his letter dated December 29, 1988 and by A.O. and Ms. Klaila in their declarations. In the overly permissive environment, as was created and encouraged by Ms. Blackstock, resident physical and sexual aggression was enhanced. Children of the ages that were placed at Deschutes need strong role models, clear rules and consequences, and well defined boundaries. It is evident that Ms. Blackstock did the opposite. She took actions and provided sexual experiences that would, and did, encourage children to act out sexually. This is particularly troubling for children that have already been the victims of sexual abuse.*<sup>22</sup>

With respect to the sexual assaults at issue, in relation to the timeline of events, A.O. recalls that *“these sexual assaults occurred after I had been a resident at Deschutes for several months after the carrot incident involving Patsy*

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<sup>20</sup> CP 51-53

<sup>21</sup> CP 40-50

<sup>22</sup> CP 20-39

and the other residents.”<sup>23</sup> When describing the most traumatizing rape, A.O. explained:

*As I was naked and on hands and knees being raped by Jason, Tori, the staff member, walked in while I was being raped. Tori did not do anything but, instead, turned around and walked away. To the best of my knowledge, Tori never did anything in reaction to having observed me being anally penetrated in my anus by Jason. The fact that Tori did not do anything did not surprise me because that is the way the staff at Deschutes handled the residents, in other words, by doing nothing.*<sup>24</sup>

Ms. Klaila, the former staff member that quit due to Ms. Blackstock’s inappropriate supervision style and overly permissive disposition, noted that:

*According to Patsy, this was all in the course of a new therapy that she had learned about at Lios (grad school).*

\* \* \*

*And when staff suggested changes be made, Patsy told staff to make sure boys went up to their respective rooms at night and if there were any issues she would address them personally.*

\* \* \*

*...Jason [the boy that raped A.O.] became more aggressive during the time that Patsy was the director.*<sup>25</sup>

And again, it is not disputed that Ms. Blackstock was fired for having created this overly permissive and sexually charged atmosphere. The only issue remains whether or not PSSS and the State should be held liable for the corresponding negligence.

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<sup>23</sup> CP 54-59

<sup>24</sup> Id.

<sup>25</sup> CP 51-53. Given that this is a summary judgment posture, there is a logical inference (and the inferences are construed in A.O.’s favor at this point) that the staff member Tori did not intervene in A.O. being raped by Jason Vargas as a result of Ms. Blackstock’s management style thereby lending to another causation theory.

#### **IV. PROCEDURAL POSTURE ON REVIEW**

This claim was wrongfully dismissed by the trial court at the summary judgment phase of litigation. On review of an order for summary judgment, the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo and summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). In reviewing a summary judgment motion, the appellate court views all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). In this instance, all of A.O.'s assertions must be taken as true and without credibility judgments, and all of the experts' opinions must be taken as true without incorporating value judgments. *Id.*

#### **V. THE STATE OF WASHINGTON HAS A STATUTORY DUTY TO PROTECT CHILDREN THAT ARE PLACED IN GROUP HOMES.**

The State challenged the notion that any duty was owed to A.O. and the child residents of Deschutes. In so doing, the State ignored Washington Supreme Court precedent, clear Legislative dictates, and controlling administrative regulations. Under the controlling law, there can be no legitimate dispute: PSSS and the State, by and through DSHS, owed a duty to A.O. and children placed in State licensed group homes. As is supported by statutory obligation and expert testimony, the failures on the part of DSHS are two fold. According to an expert in child sex abuse and the operation of child care agencies, upon receipts of Ms.

Blackstock's admitted actions in relation to the "carrot incident", immediate action should have been taken to protect the residents. Additionally, the DSHS investigator that inquired about the "carrot incident" failed to interview a single resident at Deschutes, and correspondingly failed to learn about other inappropriate sexualized activities on the part of Ms. Blackstock such as the "megaphone incident" which had just occurred a few months earlier and was a regular topic of discussion amongst the boys at Deschutes. In essence, DSHS failed to react reasonably and appropriately upon learning about the "carrot incident" and, additionally, failed to conduct a reasonable investigation thereafter. If DSHS had properly executed either of these responsibilities which are recognized under Washington law, Ms. Blackstock would have been removed from Deschutes, and the sexual assaults committed upon A.O. would have been prevented.

**A. According to well established precedent and the child abuse/neglect statutory scheme, the State owed a duty to the child residents of Deschutes.**

With respect to the duty issue in relation to the State of Washington, when determining the Legislative intent of the statutory scheme set forth under RCW Chapter 26.44 *et seq.*, the Washington State Supreme Court has "recognized that this statute creates an actionable duty that flows from DSHS to both children and parents who are harmed by DSHS negligence that results in wrongfully removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home." *M.W. v. Department of Social*

*and Health Services*, 149 Wash. 2d 589, 598, 70 P.3d 954 (2003).<sup>26</sup> In other words, placing children in an abusive home, or leaving children in an abusive home is actionable against the State. *Id.*

In that regard, with respect to carrying out the duty recognized under RCW Chapter 26.44 *et seq.* and *M.W.*, in this case, Jane Ramon opined that:

*...Upon learning of the facts and circumstances as described by Ms. Blackstock, the State of Washington, to include specifically Licensor Steve C. Ennet, should have aggressively seen to it that Patsy Blackstock was removed from the premises. Referrals should have been frozen while temporary management positions were filled. Additional experienced staff should have been brought in during the change, and DSHS should have directed a permanent executive director and management process. **If this could not be accomplished then all child residents should have been removed.***<sup>27</sup>

*See J.N.*, 74 Wn. App. 49 (reversing trial court for ignoring expert testimony on ultimate issue). Based upon the controlling authority with respect to the duty issue set forth in *M.W.* and RCW 26.44 *et seq.*, and given the facts of the case including Ms. Ramon's expert opinion that the children should be removed if the conditions at Deschutes were not remedied, any dismissal on the part of the trial court based upon a purported lack of duty is reversible error.

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<sup>26</sup> See also *Yonker By and Through Snudden v. State Dept. of Social and Health Services*, 85 Wn.App. 71, 76-77 930 P.2d 958 (1997) (citing *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992); *Rodriguez v. Perez*, 99 Wn. App. 439, 443, 994 P.2d 874, review denied, 141 Wn.2d 1020, 10 P.3d 1073 (2000) (citing *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991)(negligent investigation for placing foster children in home of man with history of sexual abuse); *In re Estate of Shinaul M.*, 96 Wn. App. 765, 980 P.2d 800 (1999) (negligent investigation and recommendation of group home to disabled child); *Lesley v. Dep't of Soc. & Health Servs.*, 83 Wn. App. 263, 921 P.2d 1066 (1996) (negligent investigation due to biased and incomplete reporting by CPS caseworker).

<sup>27</sup> CP 20-39

**B. DSHS failed to adequately investigate the “carrot incident” which would have led to the discovery of other inappropriate sexualized activity on the part of Ms. Blackstock such as the “megaphone incident” which occurred not long prior.**

DSHS documented in internal records the fact that Mr. Ennet failed to properly handle and investigate the “carrot incident” as was documented in correspondence from June of 1988. According to an internal memo:

During the audit of Puget Sound Social Services’ Deschutes Center, we came across a Report of Child Abuse and Neglect, dated November 17, 1988, which identified questionable practices on the part of the facility director. Attached for your information is a copy of the report and a letter of justification prepared by the director, Patsy Blackstock, in June 1988.

The letter indicates that the regional licensor, Steve Ennett, believed that the director was handling the matter well and that there was no licensing issue. At the exit conference on November 22, 1989, Ron Hanna also indicated that Ennett had written him a four page letter which took the position that no licensing standards had been violated.

We are concerned because there is an appearance that the licensor may have dropped the ball on this matter...<sup>28</sup>

In addition to “dropping the ball” by failing to remove Ms. Blackstock upon receiving notice of her inappropriate supervision style via the letter dated June of 1988 describing the “carrot incident”, DSHS also failed in its duty to properly investigate the report of abuse and learn about other sexualized occurrences such as the “megaphone incident” which had occurred a few months prior about which all the residents were openly discussing; A.O. explained:

*I heard about an incident involving Patsy, some other residents, and a megaphone. It was my understanding that Patsy engaged in some sort of simulation of anal intercourse with one of the boy residents. It was a few months thereafter in the summer when Jason anally raped me. Even though I was not present at the time*

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<sup>28</sup> CP 40-50

*of the megaphone incident, I was told about it by other residents. Residents would laugh and giggle and make it a topic of conversation even after the megaphone incident occurred.*<sup>29</sup>

The controlling statutory scheme mandates that either a law enforcement agency or DSHS conduct an investigation in relation to reports of child abuse. See RCW Chapter 26.44 *et seq*; see also *M.W., supra*.

Mr. Ennet did not ask a single child resident about the “carrot incident” and correspondingly failed to learn anything about the “megaphone incident” that was openly being discussed by the children. When one of Ms. Blackstock’s supervisors asked Mr. Ennet if the matter needed to be referred to Child Protective Services, he answered no, “*since the incident had been reported to the department already, I had discussed the incident with Mark Redal and appropriate action had been taken thereafter, no further action was required.*”<sup>30</sup> Instead of interviewing the residents, Mr. Ennet waited for “*spontaneous complaints*” from 11 and 12 year old boys about sexual encounters in relation to an adult in a position of power over them.<sup>31</sup> Ms. Blackstock should have been removed from Deschutes based upon her admissions in the letter summarizing the “carrot incident” and DSHS should have interviewed the residents and learned about the “megaphone incident” which occurred just a few months prior. DSHS failed in both respects, and correspondingly failed in its duty to protect the residents of Deschutes including A.O.

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<sup>29</sup> CP 54-59

<sup>30</sup> CP 1-19

<sup>31</sup> *Id.*

**C. According to the Legislature, the State owed and owes a duty to the families with children placed in State licensed group home facilities.**

Contrary to the State's arguments offered before the trial court, cases involving children in group homes are not analogous to driver's licensing cases, *i.e.* holding the State liable for licensing a bad driver, in that, in group homes, under RCW 26.44. *et seq.* and RCW 74.15 *et seq.* there is a specific statutorily designated group, children in harms way in group homes, that the State has an obligation to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (duty owed to statutorily designated groups). It is a fundamental tort principle that the public duty doctrine does not protect the State "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent)" and "where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce)." *Bailey*, 108 Wn.2d at 268. The declaration of purpose for the licensing statutory scheme as to group homes specifically identifies the purpose of intended recipients of protection:

To safeguard the health, safety, and well-being of children, expectant mothers and developmentally disabled persons receiving care away from their own homes...

RCW 74.15.010(1). In other words, the Legislature has specifically delineated that persons owed a duty (children in group homes and their parents) by the State in relation to group home licensing practices. And so it follows that dismissal by the trial court based upon a purported lack of duty was reversible error.

**D. The State licensor of Deschutes admitted that he was acting pursuant to an obligation to investigate and maintain standards according to regulations set forth under the Washington Administrative Code.**

Under Washington law, a duty is created when imposed by an administrative regulation. *Doss v. ITT Rayonier, Inc.*, 60 Wash. App. 125, 803 P.2d 4 (1991); *Kness v. Truck Trailer Equipment Co.*, 81 Wash. 2d 251, 501 P.2d 285 (1972). According to the State licensor, Steve Ennett, in relation to investigating the “carrot incident” which was documented by Ms. Blackstock in June of 1988, and corresponding failure to learn about the “megaphone incident”, he was carrying out investigatory duties and obligations imposed by the Washington Administrative Code:

Q. Did anything that you ever learned Ms. Blackstock to do ever cause you any concern?

A. Yes

Q. Can you tell me what’s the answer “yes” to?

A. [the Carrot incident].

\* \* \*

Q. Was there anything about Ms. Blackstock’s action that caused you concern as a licensor?

A. [I]t was not within the intent of the WAC code that governs staff behavior at facilities – licensed facilities.<sup>32</sup>

In relation to the regulations referenced by Mr. Ennett, for decades these regulations have been in place requiring that the State supervise the care of children in group homes. *See e.g.* WAC Title 388. The presently enacted regulatory intent is described as follows:

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<sup>32</sup> CP 62-73.

The department issues or denies a license or certification on the basis of compliance with licensing requirements. This chapter defines general and specific licensing requirements for foster homes, staffed residential homes, group facilities, and child-placing agencies. We include licensing requirements for people who operate foster homes, group care programs and facilities, staffed residential homes, and child-placing agencies. In addition, we describe our requirements for specialized services offered in these homes and facilities, including: maternity services, day treatment services, crisis residential centers, services for children with severe developmental disabilities and programs for medically fragile children. Unless noted otherwise, these requirements apply to people who want to be licensed, certified, relicensed and re-certified.

The department is committed to ensuring that the children who receive care experience health, safety, and well-being. We want these children's experiences to be beneficial to them not only in the short run, but also in the long term. Our licensing requirements reflect our commitment to children.

WAC 388-148-0005. And the regulations which were enacted at the time in 1988 had a similarly described purpose. *See* WAC Title 388 *et seq.* (in effect in 1988). And so it follows that, in addition to the duties imposed by case law and the previously identified statutes, the State owes a duty based upon the licensing regulations which were enacted at the time to provide for the safety of children that were placed in State licensed group homes.

**E. Under Washington law, a duty exists whenever the injury is foreseeable.**

The State also owed a duty to the residents of Deschutes premised upon conventional tort principles. *See Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007). “If a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it.” *Id.* at 436. An injury is foreseeable when it falls within the general field of danger that should have been anticipated. *Id.* In this instance, the testimony from A.O. concerning the environment at Deschutes,

from Ms. Klaila concerning her fears that the residents were in danger, the admissions of Mr. Hanna concerning the overly permissive atmosphere, and the expert testimony of Ms. Ramon concerning the notice and corresponding dangers provided to the children lends to the strong and uncontroverted conclusion that the residents at Deschutes faced the foreseeable danger of being sexually abused. Based upon the facts of the case, given the foreseeability of harm to the residents, the State owed a duty given the facts and circumstances.

**VI. THERE IS ABUNDANT EVIDENCE OF RECORD TO SUPPORT BOTH CAUSE IN FACT AND LEGAL CAUSATION AGAINST PSSS AND THE STATE OF WASHINGTON.**

The trial court suggested that the dismissal of the State was based upon a purported deficiency of evidence as to the tort element of causation. There is abundant evidence from which the jury is likely to find that both PSSS and the State failed to prevent A.O. from being sexually assaulted. PSSS and the State knowingly allowed A.O. to remain under the care of a group home director that illustrated and encouraged inappropriate sexual activity. The supporting evidence includes the first hand observations of a former counselor who worked at Deschutes, first hand observations on the part of A.O., expert testimony, and admissions by the director of PSSS. Additionally, a former counselor personally observed that one of the residents that raped A.O., Jason Vargas, notably increased in his aggressive tendencies while under Ms. Blackstock's overly permissive supervision.

**A. There is abundant evidence from which the jury is likely to find that PSSS and the State caused A.O. to be abused.**

According to the Washington State Supreme Court, “[c]ause in fact is usually a question for the jury; it may be determined as a matter of law only when reasonable minds can not differ.” *Joyce v. State, Department of Corrections*, 155 Wash. 2d 306, 322, 119 P.2d 825 (2005) (trial court correctly permitted jury to decide whether state’s supervision of offender negligently caused death of motor vehicle accident victim); *see also Unger v. Cauchon*, 118 Wash. App. 165, 73 P.3d 1005 (2003) (trial court erroneously granted summary judgment to county; whether county’s alleged failure to make public road safe proximately caused plaintiff’s injury was for jury); *Doherty v. Municipality of Metropolitan Seattle*, 83 Wash. App. 464, 921 P.2d 1098 (1996) (trial court improperly granted summary judgment to bus company; question was for the jury whether driver’s having paused in the middle of a left turn was proximate cause of collision when oncoming driver lost control of her car due to hypoglycemic shock). Based upon the overwhelming evidence that is of record, PSSS’s concession concerning a connection between Ms. Blackstock’s negligence and the sexual assaults, and in contrast to the controlling legal principles as to the issue of causation, A.O. submits that the issue of causation is for the jury to determine.

Turning to the controlling law and facts, “[i]n general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue of material fact, precluding summary judgment.” *J.N. v. Bellingham School District*, 74 Wn. App. 49, 61, 871 P.2d P.2d 1106 (1994) (reversing trial court for ignoring expert testimony under analogous

circumstances). When deposed, Ms. Ramon, an expert in the field of child sexual abuse and prevention, opined as follows:

Q. Would you agree that keeping Miss Blackstock in the position as Director increased the possibility that other kids would be sexually abused at Deschutes?

MR. FREIMUND: Objection, leading.

A. Yes.

MR. BEAUREGARD: Okay. That's all I have.

EXAMINATION BY MR. FREIMUND:

Q. How would it increase that possibility?

A. Because of the amount of sexual behavior to the boys or in and around them; the amount of abusive behavior, the amount of sexually charged behavior. The environment in which they, there is, granted an overly permissive environment, but one in which the boys' sexualized behaviors were increasing. And when that is occurring, then there is a very real possibility, high probability in fact that the boys will act out toward each other and in many situations very inappropriately, very aggressively, at times violently, very abusively.

Q. So, it's your opinion then that because Miss Blackstock is engaging, allegedly, in heterosexual behaviors, i.e, male/female, that increases the probability that the boys will engage with homosexual behaviors between themselves?

A. **Absolutely.** She's engaging in behaviors with children, you know, 10 to 14 years of age. She's role modeling and teaching them. And boys that age developmentally speaking are starting to question and think and have much more interest in sex; aside from the fact that I'm sure a number of them had seen and been involved in things already that they shouldn't. Now they're coming into a place where they should be able to trust the staff, and instead the staff, in fact, the Director of the place is doing something similar to them that perhaps has been done already in other places. They can't trust, they can't feel safe, there are not good boundaries. It's

not healthy. It's not safe and secure. It's abusive; just like what they came from.<sup>33</sup>

During the proceedings below, the following additional expert testimony on the part of Ms. Ramon was also before the trial court:

*Ms. Blackstock's approach to supervising and managing Deschutes would, and did, expectedly create a sexually charged and overly permissive environment as is described by Mr. Hanna in his letter dated December 29, 1988 and by A.O. and Ms. Klaila in their declarations. In the overly permissive environment, as was created and encouraged by Ms. Blackstock, resident physical and sexual aggression was enhanced. Children of the ages that were placed at Deschutes need strong role models, clear rules and consequences, and well defined boundaries. It is evident that Ms. Blackstock did the opposite. She took actions and provided sexual experiences that would, and did, encourage children to act out sexually. This is particularly troubling for children that have already been the victims of sexual abuse.*<sup>34</sup>

In dismissing this case in a summary judgment posture, the trial court discounted this expert testimony, made credibility judgments concerning the sworn statements of A.O., Ms. Klaila, and Mr. Hanna, and also disregarded expert testimony and opinion offered by Ms. Ramon in relation to the consequences, *i.e.* causal effects, of Ms. Blackstock's supervisory style. In accordance with *J.N.* and CR 56, the trial court committed reversible error.

In *J.N.*, the issue presented was whether or not a school should have prevented a student upon student sexual assault. 74 Wn. App. 49. The trial court improperly decided (and dismissed the case in a summary judgment posture) without having properly evaluated the evidence to include having not taken account of or properly considered expert testimony regarding the foreseeable consequences on the manner in which the students were supervised including

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<sup>33</sup> *Declaration of Beauregard (emphasis added)*

<sup>34</sup> CP 40-50

expert notations that “[a]bused children frequently become abusers” which was one of the circumstances that led to the sexual assaults. *Id.* at 61. One of the expert opinions that the trial court improperly ignored in *J.N.* explained that:

...there was overwhelming evidence known to school personnel that made it foreseeable that [A.B.] had the potential to be both assaulting and aggressive towards another student. That [A.B.'s] assaulting behavior could take the form of sexual molest was indicated by a combination of factors [known to the District].

*Id.* As here, the plaintiff in *J.N.* submitted expert declarations, such as that from Ms. Ramon which mirrors that from *J.N.*, framing the issues, and the appellate court reversed the trial court for improperly discounting the evidence of record. *Id.*

Additionally, in *J.N.*, the plaintiff was suing the school for improperly supervising a potentially dangerous student, *i.e.* failing to prevent (caused by omission) the sexual assaults. *Id.* Much of the plaintiff’s case rested upon the purported breach because the school “had only one playground supervisor” thereby increasing the possibility that students were not properly supervised and may sexually assault each other during recess. *Id.* at 54. By contrast, A.O.’s theory of the case, which is fully and overwhelming supported by lay and expert testimony, is that when a group home director creates, via inappropriate supervision and example, a sexually charged environment and encourages sexual activity between young boys, then young boys are going to be sexually assaulted as a result. It should be noted in contrast that in *J.N.* the Court noted that there was no specific notice that the offending student would lash out sexually, but, instead, just that he was an unruly student needing proper supervision, but the Court still held that the sexual assaults, as compared to the inappropriate

supervision style, was within the “general field of danger” that could have been foreseen and prevented. *Id.* at 56-7.

In this instance, there is strong evidence that Ms. Blackstock, who doubled as the sex education teacher, encouraged, by supervision and example, these permissive sexual activities as a matter of practice based upon what she learned in graduate school. It should be noted that as of the time that the State received notice of the sexually charged environment through the “carrot incident” which occurred in June of 1988 (which was prior to A.O. being raped), Ms. Blackstock had already created this foresee-ably harmful environment:

- By example through what has become known as the “carrot incident” (holding broken carrot above crotch for boys to grab) in front of all the residents to include having sexualized conversations at the same time which was admitted to by Ms. Blackstock
- By also having flashed her breasts purportedly to gain control of the room which was witnessed by A.O. and the sexually assailing boys which was admitted to by Ms. Blackstock
- By emulating sexual activity with the boys using a megaphone (“megaphone incident”) which was witnessed and complained about by Mary Jane Klaila and other residents at the group home
- By engaging in sexual activity with boys in the closet as was witnessed by A.O. and later reported to the State licensors
- By discouraging other staff members from disciplining children while in their bedrooms upstairs which was sworn to by Mary Jane Klaila and illustrated by the staff member Tori
- By having outwardly sexual contacts with the male staff members in front of the children which was witnessed by Mary Jane Klaila

- By allowing for children to act out aggressively and without consequences which was admitted by Ron Hanna and testified to by Mary Jane Klaila and A.O.
- By engaging in all of the above actions while acting as a supervisor, manager, formal sex-education teacher, disciplinarian, and role model for all of the residents

Mr. Hanna, Ms. Blackstock's boss, ultimately fired her because she created an "overly permissive environment" that placed children in danger. *Compare McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953) (school could be held liable for rape to child based upon having left a room unlocked and that rape was in the "general field of danger" that should have been anticipated and prevented); *see also Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) ("If a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it."). Ms. Klaila, the counselor that witnessed the "megaphone incident", also explained:

*Other staff members and I had long discussions, sometimes for hours after work, to talk about Patsy's inappropriate manner as director of Deschutes. We were all concerned for the safety of the boys, and even I ended up leaving employment with Deschutes based upon those same concerns...*<sup>35</sup>

In a summary judgment posture as to the issue of causation, A.O. respectfully submits that this should not even be a close call. Moreover, it would be fundamentally unfair to set a precedent that a group home director can create and encourage a sexually permissive environment and not be held liable for the corresponding sexual assaults. Ms. Blackstock created an undisciplined and sexually charge environment wherein the residents, such as the resident that raped A.O., were observed to have freely and predictably acted out in a sexual manner.

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<sup>35</sup> CP 51-53

How much more evidence is needed to surpass a summary judgment motion above and beyond uncontroverted first hand testimony and expert opinions that are directly on point? In light of the overwhelming evidence, and the controlling law, the trial court must be reversed and this case reinstated.

**B. There is direct evidence that Ms. Blackstock’s overly permissive and inappropriate supervision style caused one of the offending residents, Jason Vargas, to act out of control.**

Given the nature of Ms. Blackstock’s overly permissive supervision style which encouraged sexual activity, any resident on resident assault, sexual or non-sexual, would be well within the “general field of danger” of what should have been anticipated by PSSS and the State. *See McLeod, supra; Parilla, supra.* In relation to a child resident, Jason Vargas, who raped A.O., there is first hand testimony from a trained counselor, Ms. Klaila, that Jason Vargas became more aggressive in response to Ms. Blackstock’s supervision style. Ms. Klaila personally observed:

*Jason Vargas was a larger and very aggressive boy, and after Patsy arrived at Deschutes and began her sexually charged behaviors, Jason seemed to get worse. To my knowledge Patsy did not remove Jason from the upstairs bedroom even after it was reported that A.O. and Sean were being sexually prayed upon by him and urinated upon by him and urinated in their beds.<sup>36</sup>*

In other words, there was direct evidence in the form of and observations on the part of a counselor that worked at Deschutes indicating that Ms. Blackstock’s supervision style caused Jason Vargas to become more sexually aggressive.<sup>37</sup>

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<sup>36</sup> CP 51-53

<sup>37</sup> Id.

Additionally, according to Ms. Klaila, under Ms. Blackstock's supervision, A.O. and Jason Vargas were not separated thereby lending to the sexual assault.<sup>38</sup>

Additionally, A.O. explained that "*Jason Vargas, and probably [the other boy that sexually assaulted him], were present at the carrot incident involving Patsy.*"<sup>39</sup> Ms. Ramon opined that the manner in which Ms. Blackstock supervised, set an example, and failed to impose consequences caused the child residents to act out of control.<sup>40</sup> "*Children of the ages that were placed at Deschutes need strong role models, clear rules and consequences, and well defined boundaries.*"<sup>41</sup> It does not take an expert to understand that 11 and 12 year old children that are not properly disciplined and witness their sex education role model engaging in inappropriate activity, such as the boys that sexually assaulted A.O., will act in kind. Ms. Ramon opined that this "*is particularly troubling for children that have already been the victims of sexual abuse.*"<sup>42</sup>

In comparing this case to *J.N.*, in *J.N.*, the offending student was known to be a problem student with dangerous propensities, and it was the school's fault for not taking steps to decrease the danger. Here, Jason Vargas was known to be dangerous, and instead of decreasing his potential to harm, Deschutes amplified it through Ms. Blackstock's inappropriate supervision and example. The trial court discounted and/or ignored this and other evidence in complete contradiction with

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<sup>38</sup> Id.

<sup>39</sup> CP 74-75

<sup>40</sup> CP 20-39

<sup>41</sup> Id.

<sup>42</sup> Id.

CR 56. On this issue and for ignoring this evidence, the trial court must be reversed. *Id.*

**C. Ms. Blackstock’s supervision style caused indifference and inaction on the part of the counselors at Deschutes thereby further lending to the consequence free environment.**

Ms. Blackstock’s inappropriate supervision style led to indifference and inaction on the part of other counselors at Deschutes further contributing to the overly permissive atmosphere and propensity for harm to the residents. For example, on the first day the A.O. was placed at Deschutes, he was urinated on by two other boys. A.O. recalls that *“I told a staff member named Tori what had happened, and Tori did not do anything to discipline the other residents. The inaction on the part of Tori was the way that the staff always handled complaints like mine, and none of the residents seems to feel like there were any consequences for their wrongful actions.”*<sup>43</sup> Jason Vargas was one of the boys who was not disciplined for urinating on A.O.<sup>44</sup> And it was not long after that Jason Vargas raped A.O. too.

A.O. describes the fact that a counselor, Tori, actually walked into the room while he was being raped by Jason Vargas, and that the counselor failed to intervene and elected to just walk back out of the room.<sup>45</sup> The indifference on the part of the counselor was observably consistent with the supervision style and standard as described by another counselor, Ms. Klaila: *“Patsy told staff to make sure boys went up to their respective rooms at night and if there were any issues*

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<sup>43</sup> CP 54-59

<sup>44</sup> *Id.*

<sup>45</sup> CP 54-59

*she would address them personally.*<sup>46</sup> And according to Ms. Blackstock, “*this was all in the course of a new therapy that she had learned about at Lios (grad school).*”<sup>47</sup> It is not disputed that Ms. Blackstock created this “overly permissive” atmosphere. Based upon this evidence, the trial court must be reversed.

**D. There is abundant evidence from which the jury is likely to find that PSSS and the State legally caused A.O. to be sexually assaulted.**

On the issue of proximate cause, the State relied upon *Beltran v. DSHS*, 98 Wn. App. 245, 989 P.2d 604 (1999) wherein the Court clearly recognized that licensors owe a duty to protect children in licensed homes, but also ruled that dismissal was appropriate based upon legal causation. *Id.* The injury at issue was a sexual assault committed by a child of the licensed entity in the home. *Id.* The Court noted that there was no notice to the licensed entity or to the State licensors of the sexually assaultive propensities of the offending child, so the imposition of liability was not proper based upon legal causation principles. *Id.* This case is distinguishable from *Beltran* in that here, the State did have notice that the children may be subjected to sexual assaults from one and other based upon the environment that was created at Deschutes:

*Ms. Blackstock's approach to supervising and managing Deschutes would, and did, **expectedly** create a sexually charged and overly permissive environment as is described by Mr. Hanna in his letter dated December 29, 1988 and by A.O. and Ms. Klaila in their declarations. In the overly permissive environment, as was created and encouraged by Ms. Blackstock, resident physical and sexual aggression was enhanced. Children of the ages that were placed at Deschutes need strong role models, clear rules and consequences, and well defined boundaries. It is evident that Ms. Blackstock did the opposite. She took actions and provided sexual*

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<sup>46</sup> CP 51-53

<sup>47</sup> CP 51-53

*experiences that would, and did, encourage children to act out sexually. This is particularly troubling for children that have already been the victims of sexual abuse.*<sup>48</sup>

In fact, the State admits it had notice of Ms. Blackstock's sexually charged tendencies in June of 1988. This issue is not even disputed.

Put another way, by comparison, in *Beltran*, the sexual assaults were not foreseeable so the imposition of liability was not proper as a matter of law, *i.e.* no legal causation. Foresee-ability is deemed to be that which falls within the "general field of danger" of that should be anticipated in accordance with the notice provided to the defendant. *See McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953); *see also Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) ("If a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it."). In this case, the licensors should have foreseen the potential danger to the residents of Deschutes upon learning, in June of 1988, of the sexually charged environment that was created by Ms. Blackstock. The premise is simple: **if you leave previously sexually abused and abusive prepubescent boys under the supervision of a woman that encourages sexual activity, inappropriate sexual activity (rapes in this instance) will continue to occur.** As is supported by the opinions of Ms. Ramon, the testimony of Ms. Klaila, and the admissions of Mr. Hanna, the residents at Deschutes were recognizably (to the State licensors, PSSS, Ron Hanna, and Ms. Blackstock who all had the same information) in danger of being sexually assaulted, dismissal on that basis was contrary to law. Moreover, if any one of these entities could have foreseen the potential sexual assaults (because

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<sup>48</sup> CP 20-39

they all had or should have had the same information (notice) as of June of 1988) every one of them can be held liable on that same principle for the subsequent sexual assaults upon A.O.

## **VII. THE TRIAL COURT ERRED IN DISMISSING THIS CLAIM BASED UPON THE STATUTE OF LIMITATIONS**

The trial court erred when dismissing this claim based upon the statute of limitations. According to the Legislature and interpretative case law, claims involving injuries from childhood sexual abuse are to be liberally permitted given the nature of such claims. In this instance, there is abundant expert testimony delineating that A.O. was only recently diagnosed for the first time ever with posttraumatic stress disorder for which he needs treatment, and an assortment of other serious psychological traumas stemming directly from the sexual abuse which occurred at Deschutes. It should be noted from the outset that with respect to the statute of limitations as applied properly under RCW 4.16.340, according to this Court:

...this special statute of limitations is unique in that it does not begin running when the victim discovers an injury. 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. RCW 4.16.340(1)(c). The 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. We are bound to follow the legislature's intent.

*Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006). On this issue, when applying the applicable statute of limitations properly to this case, the trial court should be reversed.

**A. According to Washington law, claims involving childhood sexual abuse are permitted well into adulthood.**

It is well understood by the Legislature and Courts of this State that childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later. *Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999). Until that “disability” is lifted, the cause of action either will not accrue or, if accrued, the running of the statute of limitations will be tolled. *Id.* The Legislature enacted a special statute of limitations with the specific purpose of allowing for the liberal assertion on the part of claimants for claims arising out of childhood sexual abuse. *See* RCW 4.16.340. “The special statute of limitations, RCW 4.16.340, indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet not have knowledge of the potential tort claim against his abuser.” *Miller v. Campbell*, 137 Wn. App. 762, 773, 155 P.3d 154 (2007) (reversing trial court for erroneously dismissing childhood sex abuse claim under analogous circumstances); *see also Hollmann v. Corcoran*, 89 Wash. App. 323, 332-333, 949 P.2d 386 (1997) (reversing trial court for erroneously dismissing childhood sex abuse claim under analogous circumstances).<sup>49</sup> The Legislature intended to deal with claims that arise from the problem of childhood sexual abuse. *Oostra v. Holstine*, 86 Wn. App. 536, 937 P.2d 195, review denied, 133 Wn.2d 1034, 950 P.2d 478 (1997).

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<sup>49</sup> With respect to the mother S.O.’s claim, it should be noted that the limitations period on the claims of parents of victims of childhood sexual abuse begins to run at the same time as the underlying claims of their children. *Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169 (1999).

As an example in application, in *Miller*, the plaintiff “admits that he always knew he had been injured” by the childhood sexual abuse. *Id.* at 770. However, the *Miller* Court ruled that the statute of limitations issue was a question of fact for the jury based upon the expert testimony that his claim was “premised upon new injuries, the major depression and posttraumatic stress disorder recently discovered through therapy with Dr. Adriance.” *Id.* Additionally, the *Miller* case illustrates that ongoing psychological injuries, including those which were actualized and connected earlier in life, are still actionable as separate claims if those same injuries continue throughout the course of adulthood. *Id.* In this case, the facts are analogous, and the result should be no different. *Id.*

**B. The defendants failed to meet their burden as the moving party in relation to the statute of limitations.**

It should be also noted that “the defendant bears the burden of proof as to the statute of limitations.” *Korst*, 136 Wn. App. at 208. The complaint in this case was filed on November 9, 2005 so any injury which was connected after November 9, 2002 (three years earlier) tolls the statute of limitations. *See* RCW 4.16.340. In application, that means that the defendants had the burden of proving A.O. understood the connection between every injury he suffered as a result of the abuse including each injury which was connected for the first time by Dr. Conte in June of 2007 such as the posttraumatic stress disorder diagnosis, the emotionally stunted growth, and the corresponding inability to maintain employment and wage loss. At the summary judgment hearing, the defendants failed to meet this burden and, instead, offered at oral argument and without expert testimony, hair splitting argument concerning what sort of psychological

injury is worse than another and evidently confused the trial court enough to erroneously dismiss this claim. The defendants were required to demonstrate, as the moving party, that A.O. was aware of, made the connection between, and understood every injury which was connected to the abuse. The State completely failed to do so.

When moving for summary judgment, the defendants cited to testimony from A.O. wherein he noted that during his childhood in the immediate proximity to the time that he was sexually abused and for the most part while he was still a resident at Deschutes, he obviously realized that some of his anguish was correspondingly connected to being sexually assaulted. At the same time, the defendants failed, as the moving party, to prove that all of A.O.'s psychological injuries during adulthood as noted herein were already "connected", and failed to account for the Legislative dictate that a claimant "may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later." RCW 4.16.340 (intent section); *see Miller, supra* (illustrating ongoing nature of claims). Beyond that, the defendants completely failed to account for the fact that A.O. was diagnosed for the first time with posttraumatic stress disorder by a treating psychiatrist in December of 2005 -- within the time period of 3 years preceding the filing of his lawsuit.

Moreover, A.O. referenced and relied upon the uncontroverted opinions of Dr. Conte in relation to the statute of limitations motion explaining that:

*I have been told that, according to Dr. Jon Conte, I have Post Traumatic Stress Disorder (PTSD) and that it was caused by the sexual assault at Deschutes. I remember meeting with Dr. Katerina Riabova at Fairfax hospital on December 28, 2005, but I do not remember her telling me that I had PTSD. Prior to 2007, no one told me that I was suffering from PTSD and it is hard for*

*me to understand the connection between my PTSD and the sexual assault at Deschutes. I have a friend that has PTSD and he had to walk with a cane. I thought that it was something that affects your body. I did not realize that it is a psychological disorder.*

*Until June of this year, I did not know that my other psychiatric disorders that prevent me from holding employment were connected to and caused by the abuse that I suffered at Deschutes. Additionally, I did not think, and only now realize based upon Dr. Conte's assessment, that what is described as my "hyper vigilant" sexuality was caused by my having been abused at Deschutes.*

*I did not know, until June of 2007, that what has been described as my stunted maturity was caused by having been abused at Deschutes<sup>50</sup>*

The defendants out on no evidence to the contrary completely failed to prove that prior to June of 2007 when A.O. learned about Dr. Conte's assessment, that, prior to that time, A.O. had an awareness and understanding as to the extent of his psychological injuries including the posttraumatic stress disorder diagnosis. Additionally, the defendants, when moving for summary judgment, failed to even reference or address the injuries which were connected, for the time first time in June of 2007, by Dr. Conte. Because the defendants failed to meet their burden as the moving parties, the trial court must be reversed.

**C. This Court should clarify that in order to meet the burden as the moving party on the statute of limitations issue, competent expert testimony must be submitted proving that the child victim "connected" the sexual abuse and corresponding injuries over three (3) years prior to filing a claim.**

The trial courts are routinely being reversed by the higher courts after erroneously dismissing childhood sex abuse claims premised upon an evident lack of clarity and direction as to how to apply RCW 4.16.340. *See e.g. Korst, supra; Miller, supra; Hollmann, supra.* As is illustrated in *Korst, Miller and Hollmann,*

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<sup>50</sup> CP 74-75

much more than the child victim's mere awareness of the childhood victimization is required in order to "connect" and understand the corresponding injuries later in life. A.O. submits that the proper guidance can be provided by appropriately applying the rules of evidence in relation to childhood sex abuse claims and the special tolling statute. Providing this guidance will aid trial courts in appropriately applying the legislature's intent and court precedent applying RCW 4.16.340.

Under Washington law, "[o]nly if evidence is observable by lay persons and describable without medical training is expert testimony not necessary." *Morianga v. Vue*, 85 Wash. App. 822, 832, 935 P.2d 637 (1997). In order to be qualified to offer opinions to a jury, a witness requires the requisite education, training, and experience in the appropriate field. *Id.*; ER 701-3. To properly move for summary judgment on the statute of limitations, the State must have identified competent expert testimony in relation to the psychological injuries versus just relying on out of context testimony from A.O. about areas of psychiatric expertise. *Id.* The State offered no expert testimony from either A.O.'s treating physician or any other expert to opine that about A.O.'s injuries. Therefore, the State failed to meet its burden as the moving party on the statute of limitations issue. *See Korst*, 136 Wn. App. at 208. The State offered absolutely no expert testimony establishing that A.O. was made aware of and understood the connection between his injuries and his sexual abuse prior to June of 2007. *Id.* In relation to issues of childhood sexual abuse and the facts of this case, Dr. Conte opined:

*In lay-terms, a victim of sexual abuse such as A.O. is typically able to articulate certain consequences of the abuse that has occurred*

*in simple terms as does A.O., but is unable to comprehend to full extent of the psychological impact of the abuse, and is not in a position to assess all of the psychological consequences of the abuse despite being aware of the abusive “event” and the corresponding life long impacts.*<sup>51</sup>

Washington law already clearly holds that expert testimony is required to establish a causal connection to injuries which are beyond a lay person’s understanding. *Clare v. Saberhagen Holdings*, 129 Wn. App. 599, 602, 123 P.3d 465 (2005) (statute of limitations tolled until breach connection to damages confirmed).<sup>52</sup> In relation to the discovery of injuries, it is also the law in Washington law that “a cause of action does not accrue until a party knows...the essential elements of the possible cause of action.” *Id.* at 602. Unlike the conventional discovery rule, according to RCW 4.16.340, the “should have known” standard is not applicable, but, instead, only actual notice is determinative. *Id.*

The perfect analogy to this case is found in *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998), a toxic exposure case, wherein the plaintiff consulted with a lawyer for legal advice about the potential for a connection between the toxic exposure and corresponding injuries in 1991, and then, in January of 1992 was able to confirm the connection by virtue of medical evidence. *Id.* Even though, based upon suspicions as to a potential connection the plaintiff had consulted with legal counsel in 1991, the *Green* Court held that the statute of limitations did not begin to run until January of 1992, the time that the doctors made the medical connection. *Id.* As in *Green*, here, the defendants failed to

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<sup>51</sup> CP 76-83

<sup>52</sup> The *Clare* Court also expressly makes clear that the time that a party obtains legal counsel is not determinative, but, instead the “key consideration under the discovery rule is the factual, not the legal, basis for the cause of action.” 129 Wn. App. at 603-4.

meet the burden as the moving party on the statute of limitations issue by failing to submit medical evidence supporting the notion that A.O. had more than a lay person's limited suspicions about certain psychological conditions. *See* CR 56. This Court should follow the analysis in *Green*, and the trial court should be reversed.

And so it follows, as in *Green*, in order to have a case dismissed at the summary judgment phase of litigation, the moving party should be required to identify expert testimony (from a treating provider and/or hired expert) opining that the child victim actually "connected" and understood the claimed which are related injuries to the childhood abuse. *Green, supra*. Clarifying the knowledge of harm standard which is set forth in *Green*, which is consistent with RCW 4.16.340, and which is consistent with the rules of evidence would greatly assist the trial courts in evaluating these claims in a summary judgment posture. In this instance, the State failed to identify such evidence and instead relied solely upon A.O.'s testimony concerning psychological disorders and childhood sex abuse. In so doing, the trial court committed reversible error.

**D. There is abundant evidence from which the jury is likely to find that A.O. was not aware of and did not understand all of his injuries until within three years of filing this claim.**

Turning to the specific facts of this case, with respect to the statute of limitations, Dr. Jon Conte opined:

*During an inpatient stay at St. Francis Hospital, it was noted on March 19, 2003 that A.O. "processed what had happened – another patient had penetrated his butt and he was upset by that. Said his past sexual abuse got triggered." The medical records from St. Francis Hospital note that A.O. offered relatively extensive dialogue about being abused in a group home in Tumwater (i.e. Deschutes) at the same time that he was admitted with extreme depression and suicidal ideation. There is a*

*connection made in the medical records between A.O. having learned about a friend from Deschutes having passed away two weeks earlier thereby leading to an instance of binge drinking, and A.O. having emotionally spiraled out of control resulting in the psychiatric hospitalization. The death of A.O.'s friend from Deschutes appears to be a psychological triggering event in relation to his memories and reliving the sexual abuse at Deschutes and the corresponding trauma. In my opinion, the death of A.O.'s friend was likely a catalyst that "triggered" the emotional trauma described herein and in the medical records.<sup>53</sup>*

And, in relation to specific injuries, Dr. Conte opined:

*A.O. presents with symptoms consistent with a diagnosis of Post Traumatic Stress Disorder (PTSD – Axis I) which was previously not diagnosed in the medical records that have been provided and reviewed with the exception of that on the part of Dr. Katerina Riabova of Fairfax Hospital on December 28, 2005. A.O. also suffers from other serious mental illnesses to include schizophrenia, bi-polar disorder, Tourette's syndrome, ADHD, and Obsessive Compulsive Disorder which cumulatively, and possibly each diagnosable condition independently, has rendered A.O. unable to function in a socially appropriate manner, and also unable to maintain employment since 1995. The lack of a prior PTSD diagnosis on the part of the other treating counselors and medical providers, in all probabilities, is as a result of an emphasis of treatment of A.O.'s other diagnosed and more pronounced psychological disorders versus upon a focus as to PTSD as a result of sexual assault.*

\* \* \*

*A.O.'s manifestation of the PTSD diagnosis is a relatively new occurrence in that prior to 2005, there are no medical records indicating this diagnosis, and if any such medical diagnosis ever occurred, A.O. appears unaware of it. It is interesting to note that on July 15, 2004, it was documented by Behavioral Health Resources that "Despite the client's history of sexual abuse and at least one rape in adolescence, the client denies any symptoms consistent with PTSD. Specifically, he denies intrusive or troublesome memories, dreams or nightmares about the events, or re-experiencing them in any way." Up and until 2005, A.O. was unaware of the PTSD diagnosis, and the need for corresponding treatment and care.*

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<sup>53</sup> CP 76-83.

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*The onset of major mental illness can be brought about by the exposure to extreme psychological trauma to include sexual assault such as that which was suffered by A.O. This is particularly true for individuals with a pre-existing vulnerability and/or noted historical vulnerability to suffering from the onset of mental illness. In this instance, it is more likely than not, that the sexual abuse at Deschutes brought about the onset of A.O.'s major mental illnesses which, to this day, prevent him from functioning appropriately in society and/or maintaining gainful employment. The major mental illnesses that can be associated with this diagnosis and opinion include schizophrenia, bi-polar disorder, ADHD, and Obsessive Compulsive Disorder. My diagnosis is consistent with the medical notation on February 22, 2005 from Dr. Riabova specifically explaining that A.O. was in special education for most of his schooling which "could either indicate a low-average IQ or, more likely, effects of chronic mental illness and PTSD."*

*A.O. presents with the emotional and social maturity of an approximately 12 year old boy. While evidently able to function more fully and certain times and under certain circumstances, based upon the medical records, the observations of A.O.'s mother, A.O.'s self reporting, any my forensic observation and evaluation, it is my opinion that A.O.'s combined psychological conditions which were caused by the abuse at Deschutes rendered A.O. unable to mature in the manner of a normal person, and left him, for the most part, permanently unable to grow or mature, with any degree of significant development, beyond his chronological age at the time of the abuse. This observation is illustrated by medical notations from treating physicians such as that on the part of Dr. Nagavedu D. Raghunath on October 21, 1996 in chart noting that A.O. is "quite immature", and by Dr. Rajiv Vyas chart noting on March 5, 2001 that A.O. "throughout the hospitalization, showed a degree of immaturity and often adolescent-like opposition behavior."*

*It should be noted that A.O. continues to experience severe emotional consequences, some actualized and some not, stemming directly from the abuse that occurred at Deschutes. For example, on February 22, 2005, A.O. was admitted to Fairfax Hospital on a voluntary basis in relation to suicidal ideation after he went off of his psychoactive medications. During the admission at Fairfax Hospital, while suffering from hallucinations and extreme depression, A.O. described having nightmares and flashbacks, and specifically noted having been raped as a child. A.O. is not aware*

*of the PTSD diagnosis, nor the connection between the PTSD diagnosis and the abuse, or the challenges and psychological suffering that he is likely to continue to experience into the future. It is also noteworthy that A.O. has repeatedly been admitted for treatment of severe depression and suicidal ideation which is evidently connected with the sexual assaults.*

*A.O. demonstrates a level of hyper vigilant sexuality which he, himself, does not attribute to being abused at Deschutes. It is my opinion that A.O.'s hyper vigilant sexuality is an extension and a consequence of his being sexually abused at Deschutes, and that he has failed to make this connection.<sup>54</sup>*

Until Dr. Conte provided a psychological assessment in July of 2007, A.O. was unaware that the childhood sexual abuse had caused the posttraumatic stress disorder for which he now needs treatment, caused and/or exacerbated his major mental illness including schizophrenia, caused and/or contributed to A.O.'s need for special education, caused A.O. to suffer from stunted emotional development, caused A.O. to act out in a sexually hyper vigilant manner, caused A.O. to suffer from psychological injuries rendering him unable to maintain employment, and caused all of the other injuries described by Dr. Conte. Based upon this evidence, it was error for the trial court to dismiss this claim based upon the statute of limitations.

**E. It was reversible error for the trial court to ignore expert testimony as to the ultimate issue of fact related to the statute of limitations.**

It is reversible error for a trial court to ignore expert testimony which is submitted to support an ultimate issue of fact. *See J.N.*, 74 Wn. App. 49 (reversing trial court for ignoring expert testimony on ultimate issue). Here, there is clear expert testimony from a well qualified psychological expert strongly supporting the fact that A.O. suffers from injuries about which he was not and/or

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<sup>54</sup> CP 76-83

is not aware as a direct result of his having been sexually abused at Deschutes. And so it follows that because the trial court ignored this expert testimony on an ultimate issue of fact, the trial court should be reversed and this claim should be reinstated.

### VIII. CONCLUSION

For the reasons set forth herein, the trial court should be reversed, and this matter should be remanded for a trial on the merits of the case.

RESPECTFULLY SUBMITTED this 23 day of October, 2007

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

A.O. and S.O.,

Plaintiffs,

vs.

PUGET SOUND SOCIAL SERVICES d/b/a  
THE DECHUTES CHILDREN CENTER;  
RON HANNA; PATSY BLACKSTOCK; and,  
THE STATE OF WASHINGTON,

Defendant.

NO. 36723-8 II

**AFFIDAVIT OF SERVICE**

THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 23<sup>rd</sup> day of October, 2007, she sent by ABC Legal Messenger a copy of the Appellants' Opening Brief to the following at their respective addresses set forth below:

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DATED this 23<sup>rd</sup> day of October, 2007.

  
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