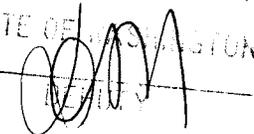


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

AMY CATHERINE SCHORNO,

Petitioner,

vs.

KEVIN KANNADA, a single man; and JEFF KANNADA
and KATHY KANNADA, husband and wife,

Respondents.

RESPONDENTS' REPLY BRIEF

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I. OVERVIEW

A. Petitioner's Brief Relies On Portraying The Case And Summary Judgment Order As Something They Are Not

Ms. Schorno describes a case that does not exist in the record.

The scope of the summary judgment motion was exquisitely narrow and the record relied upon very clear. Kevin's motion utilized only Ms. Schnorno's own, clear deposition admissions. Further, the motion sought judgment on only the sexual contact and intercourse the 31 year old Ms. Schorno clearly admitted at deposition engaging in with the 14 year-old Kevin without any threat of injury or physical compulsion; contact and intercourse she admitted she could have decided not to engage in, but did because it was easier to have sex with the child than explain to her husband what should have been the truth: that she did not.

The alleged threats of violence she cites in her brief all occurred after the period of time at issue on the motion. This court should be careful to avoid Ms. Schorno's invitation to ignore the precise time line she conceded at deposition that was the basis of the Trial Court's Order.

B. Petitioner's Argument Is Fundamentally At Odds With Washington Law And Is Repugnant To Public Policy

Despite pages of string citations to statutes and little more than circular, tautological definitions of words, Ms. Schorno's argument is easy to summarize; she makes it several times explicitly.

According to her, an adult may have sex with a child provided they claim they did not want it and told the child “no” before having it. In that event, it cannot be said the adult acted with “volition” and therefore cannot be viewed as the “perpetrator.” (See Schorno memo, page 38).

There are two fatal flaws in that analysis: (1) it ignores what the act of “volition” is that renders an adult responsible for having sex with a child, and (2) it evaluates children on par with adults when it comes to sex.

Ms. Schorno’s act of volition was not her initiation or agreement - it was her decision to have sexual contact and intercourse when by her own clear testimony she could have simply made the choice not to do so.

In Washington (and it is believed to be the national rule) if an adult can avoid having sex with a child she has an *affirmative obligation* to do so. They cannot sit back, say no, and have a court hear them to complain: “but I said no.” It is precisely that type of mischief Washington’s courts have rejected yet that is precisely what Ms. Schorno’s argument is.

Even within Ms. Schorno’s logic, her act of volition was that upon being confronted with a child asking for sex, deciding it was easier to just have sex with the child versus getting up, not having sex, and defending to her husband the truth that nothing happened. The “trick” of her argument is to focus on her saying “no” and stopping the examination there.

She may have been correct – at the time. It may have been easier to have sex with the child. However, that did not obviate her *affirmative obligation* as the adult in the relationship to get up and leave. When two adults are involved, saying “no” is enough. But that argument may not be made when one is a child. A difficult marriage and distrusting spouse do not provide adults safe harbor to have sex with children.

Kevin respectfully reminds this court that at the end of the day, the obligation of a woman to not have sexual intercourse with a child is no less than the obligation of a man. Because this issue is in pari material to the criminal statutes and law underlying it, what this court decides here will effect every child and criminal prosecution for sex with children.

Thus, the rule announced by this Court must be capable of being applied to a 55 year-old man having sexual intercourse with a 14 year-old girl. Unless this Court desires to sign an opinion creating a defense for a 55 year-old man to have sex with a 14 year old girl by the argument that, ‘I told her ‘no,’ but she said she would tell my wife if I did not,’ then summary judgment here must be affirmed.

Adults should not have sex with children. Period. Whether the child is 10, 12 or 14 – or a boy or a girl - is of no import. The legislature has made that clear.

This is not too great a burden to impose. It simply requires that an adult to get up and walk out of a room, park and leave a car, or any of the myriad of things Ms. Schorno admits she could have done but simply chose not to. Instead, she chose to stay and have sex so she could avoid “the threat” of having to have a conversation with her husband.

C. **Gender Does Not Matter – Petitioner’s Sexists Arguments Will Be Ignored**

Throughout her brief Ms. Schorno argues as a material fact that Kevin was a “male” and she a “female.”

The *affirmative obligation* of an adult to not have sex with a child is no less for a woman than a man. That Ms. Schorno must resort to sexist arguments is notable for the fact she feels she must resort to them. It is sufficient to observe only once that such distinctions are without weight and will be accorded no response at all as none is needed.

As one example, Ms. Schorno argues throughout her brief that Kevin was, despite being only 14, “fully grown.” There was no support for that in the summary judgment record other than her assertion in a declaration to that effect. Her *opinion* Kevin was fully grown was not evidence; fact witnesses must provide facts (his height, his weight, etc.), not conclusions. He was 14. That was the only material fact. More importantly, as all of the contact and intercourse at issue in the motion

were events even she admitted were not accompanied by any physical compulsion or threat, even one only subjectively perceived by her, it is also irrelevant. Kevin's size, whatever it was, did not matter.

II. ISSUES PRESENTED FOR REVIEW

- A. Whether adults have an affirmative obligation to avoid having sex with children?
- B. Whether any oral statement made by a child short of a threat of immediate death or grievous bodily harm (Duress) can justify an adult having sex with the child.
- C. Whether Ms. Schorno presented admissible evidence on summary judgment of anything other than mere oral statements short of Duress to justify her having sexual contact and sexual intercourse with the 14 year-old child.

III. UNDISPUTED FACTS

It is notable that the only evidence relied upon by Kevin in his summary judgment moving papers was the testimony of Ms. Schorno.

Ms. Schorno met Kevin Kanada in **October 2000** at Hawk Prairie Elementary School. (CP 71) Their first kiss was **December 2000**. (CP 79) Ms. Schorno admitted she knew Kevin was **14 years old**. (CP 82)

Ms. Schorno admits her first sexual intercourse with Kevin was in **January 2001**, during a school day, at her house. (CP 72, 73, 75) She admits she knew he was **14 years old**. (CP 91)

Although Kevin is adamant Ms. Schorno initiated their first kiss, according to Ms. Schorno Kevin did. It was conceded for the purpose of

summary judgment that Ms. Schorno's version must be assumed.

However, and although in various briefing below it was wildly depicted by her otherwise, she admitted at deposition there was no force involved. According to her, while in her garage she "reached to get something out of the car, turned around" and when she turned back around Kevin was "right there in my face, and he kissed" her. (CP 80)

As would be expected of any precocious 14 year-old, Ms. Schorno admitted Kevin immediately said he was "sorry." Id.¹

She indicated there was no "embrace," id., and there was no tongue involved. (CP 86) There was no physicality other than the kiss itself. Id. Clearly what was described was a mere peck on the lips.

Mrs. Schorno asserted at deposition she told Kevin she was going to tell her husband that he kissed her. She testified that it was only in response to that statement, that Kevin told her that if she did, he would tell her husband it was her idea. (CP 81)

Thus, to digress momentarily as this is not material, the reliance Ms. Schorno places on this first kiss and Kevin's "threat" to tell her husband is

¹ Not material to this issue, but as an aside, the record below demonstrates that leading up to this time Ms. Schorno had groomed Kevin with affection and flirtatious behavior. It is not as though this first kiss came randomly out of the air. That is not before this court nor is it germane to the legal issue at hand. But, anecdotally, it provides context to the invidiousness of sexual misconduct by adults directed at children. Kevin's immediate sheepish apology which even Ms. Schorno admits he gave demonstrates his act (assuming it even took place) was the act of a young boy encouraged by the inappropriate attention and grooming Ms. Schorno had already lavished upon him. This emphasizes the need to maintain a clear prohibition.

notable by her ignoring that as even she described it at deposition, Kevin only said that as a defensive reaction to her statement that she was going to tell her husband. It was undisputed this was not a situation of Kevin overcoming her by force.

In any event, having identified the very first sexual contact it is critical to skip to “the end” of the time line at issue in the motion below; when Mrs. Schorno alleges Kevin first physically threatened her.

Ms. Schorno admitted the physical threats and actions she now relies on did not start until well after the period of time at issue in the summary judgment motion below – well after the sexual relationship started:

Q: So all the violent threats started in 2001?

A: Well, I don't know that all of them were said then, but that's when the violent threats started, in 2001.

Q: **Was this before or after you had sexual intercourse?**

A: **After.**

(CP 92) As described in greater detail below, the “non-violent” threats according to her was Kevin’s “threat” to tell her husband they kissed.

Having bookened the events, the Trial Court was asked to “rewind the tape” from when the “violent threats” allegedly started in 2001 and examine all of the sexual contact and intercourse Ms. Schorno admitted she engaged in with Kevin after the first kiss and before “2001” when any

“violent” threat took place. If any could be found, Ms. Schorno had no legal excuse for it.

Before they had intercourse, Ms. Schorno admits she had substantial sexual contact with Kevin in the form of kissing and masturbation:

Q: Okay. Was there anything that led up to sexual intercourse in January of 2001, or was this the first sexual encounter?

A: There had been previous sexual encounters.

Q: Okay. When and where?

A: I had masturbated Kevin.

Q: In your car?

A: In my car, yes.

(CP 76)

As will be discussed in greater detail below, despite being able to “sign” very detailed and colorful declarations written for her by counsel, Ms. Schorno’s constant refrain of “I don’t know” or “I don’t remember” when asked for details at deposition cannot be ignored. But despite her deposition obfuscation, she confessed to many instances of kissing and masturbation *in addition to the incident in the car*,² all taking place before the first sexual intercourse and before any alleged physical threat:

Q: Any other sexual conduct, whether it was

² These clear admissions by her are notable as she argues in her memo that the trial court relied only on the incident in the car. That is incorrect.

consensual or not, that occurred during this time frame (referencing between January 1, 2000 and December 31, of 2000, as she pinpoints the “threats” as not taking place until 2001) with Kevin Kannada?

A: There were other kisses and other masturbation also.

Q: Okay. So other kisses and other masturbation. Would this be solely you masturbating him, or are we talking about now him masturbating you?

A: No, me masturbating him.

(CP 89)

When asked how many times she engaged in sexual contact with Kevin between October 2000 and December 31, 2000, in regard to masturbation she admitted:

Q: And if you were asked to approximate how many times did you masturbate him at your home before the end of the year in December or in 2000, what would be your answer to that?

A: I don't know. I would say -- I would guess maybe two, maybe three.

Q: Two to three times?

A: Yes.

(CP 89-90) Again, this is before any intercourse and before she testified to any physical threat or apprehension.

Notably, in her brief Mrs. Schorno argues (at page 4) that “Kevin

forced Amy to masturbate him two or three times...” Her deposition testimony is strikingly devoid of any claim of being “forced.”

In regard to kissing, she admitted there were many more instances of kissing compared to masturbation; after being asked about the same time frame:

Q: And then how many times as far as kissing? Was that more frequent?

A: Yes.

Q: Double? Tripple?

A: He would do that when my children were around, so tripple, double, somewhere. I don't know exactly, but ...

Q: So somewhere between -- What? -- six and nine?

A: Sure.

(CP 90)

Thus on summary judgment, there was no question of fact based on Ms. Schorno’s clear deposition testimony that she engaged in substantial sexual contact and intercourse with Kevin Kannada, then aged 14 and her 31, before any action by Kevin allegedly took place that was described even by her as a physical threat – even assuming a mere “threat” falling short of a threat of “immediate” “death” or “grievous bodily harm” is enough.

Ms. Schorno argues to this court –as she did to the Trial Court – that

this is taking her testimony out of context. That is not well taken. Ms. Schorno was deposed twice and admitted at both depositions the alleged threats of violence did not occur until after she started having sexual intercourse with Kevin.

For reasons that are suspected but will not be commented upon here, Ms. Schorno engaged in a semantic tactic at her second deposition of saying she does not like using the word "rape" to describe non-consensual sex, but instead prefers the word "assault." (Although when it suited her in response to summary judgment, she had no problem signing a declaration drafted by someone else using the word "rape.") It is important to bear in mind her definition of the terms when considering her testimony to follow below:

Q: So you're using the word assault and rape interchangeably?

A: I don't use the word rape. I don't -- I use assault generally in place of rape.

(CP 96)

With that definition in mind, Ms. Schorno went on to confirm at her second deposition that even within her own time line, Kevin did not use any threat of violence or coercion until after the two started having intercourse together. Thus, as the timeline above makes clear, only after substantial sexual contact and intercourse with him had already taken place; from her second deposition:

Q: So in using the term assault, is it your testimony that when you had sex with Kevin between the ages of 14 and 16 -- did he use any threats of violence at the time, or was it just, I was going to tell somebody, and you'd lose your kids?

A: Kevin started threatening me violently with violence probably in early 2001.

(CP 96-97)

“Early 2001” is a critical admission (now clearly made twice) because, as outlined above, all of the sexual contact she confessed to having (identified above) occurred by her own admission before 2001. Supra.

Ms. Schorno attempts to excuse her sexual contact and intercourse with Kevin because of an unhappy marriage and distrusting husband. Even offering that as an excuse makes the most compelling policy argument possible as to why (1) it cannot be used to justify her misconduct and (2) the partial summary judgment order was correct.

According to Ms. Schorno, (again this was denied but was conceded for the purpose of the motion) Kevin persuaded her to have sex with him because of his threat to tell her husband they were having sex if she did not do so. She explicitly and clearly testified it was merely her desire to not have to deal with her husband and her alleged fear over losing her children that persuaded her to give in to Kevin’s alleged urgings, not because of a

physical coercion or threat³ :

Q: ... after that when Kevin kisses you in the garage [...] [i]s there a reason why, if you didn't feel comfortable telling your husband, you didn't go to his parents and talk to his parents?

* * *

Not Dan (her husband's) parents, but is there any reason why you wouldn't have gone to Mr. and Mrs. Kannada and told them about this inappropriate contact?

* * *

A: Because Kevin said if I told, that he would say that I had initiated.

Q: Okay. So meaning if you told anybody?

A: Correct.

* * *

Q: If you didn't feel comfortable going to him, why didn't you go to someone else?

A: Because it would still go to Dan. (her husband)

Q: Okay. And you didn't feel secure enough in your relationship to tell him that a 14-year-old boy had tried to kiss you or kissed you?

A: Kevin's words were, I'm a kid. They'll believe me. That's when -- and it was just a big chance to take.

Q: What do you mean by that, a big chance to take?

³ While not germane to this motion, it would be a gross oversight to not point out the vehemence of Kevin's denial of Ms. Schorno's allegations that he threatened her in any way.

A: Well, you know, I was afraid that Dan -- I didn't know how Dan would react.

Q: And ***that's the only reason why*** you didn't tell him, because you didn't know how he would react and because he had exhibited jealousy tendencies beforehand?

A: **Correct.**

Q: So why didn't you just refuse to have any future contact with Kevin? It seems like a natural thing to do?

A: Right, but **at that point, when I didn't tell, I was trapped.**

(CP 83-85)

Her testimony was not, "at that point" "I was trapped" because Kevin threatened me with "immediate death or grievous bodily injury."

Instead, she clearly admits she decided to have sex with a child, and to continue to do so, because having had a kiss and not telling her husband, she did not want to defend to her husband that the continued sexual contact and intercourse were not her idea. Her testimony could not be more clear.

According to her, "at that point" she was "trapped" and (she argues) she felt she had to continue. This is made clear as she expanded further:

Q: The threats that you felt were threatening and which prohibited you from telling your husband or anybody else was that your husband wouldn't believe you and, Don't tell Dan, or I'll tell him you kissed me, and a reference to the -- I guess at that

point in time not the wellbeing of your children, but that you might lose your children because you had kissed him on one occasion?

A: Well, as the kissing progressed to other things that he did, it became -- you know, he'd say, Well, like Mary Kay Letourneau, **she doesn't get to see her kids anymore -- it became a bigger threat.**

(CP 85)

Again, the "threat" was not Kevin physically threatening or physically coercing her. The "threat" was the consequence of her misconduct in deciding to have sex with a child rather than having to deny to her husband that she did, and being so far down the road having ongoing sex with the child she complains she felt locked in to continue to have sex.

Ultimately, when confronted at deposition over how unreasonable an excuse that was, she clearly admitted Kevin's so-called "threat" that allegedly started everything was not even a threat at all:

Q: Why would you think that he would be believed?
I'm trying to understand why you think that would be a threat, that he would be believed and he would tell Dan?

A: **Well, in hindsight I don't really think it is,** and at the -- well, I shouldn't say that, but at the time it seemed very scary and very real that Dan would believe him and somehow that would disturb my children's wellbeing, disturb their life, disturb their home.

(CP 87)

It is simply the case that even construing all facts in Ms. Schorno's favor, she opted to have ongoing sexual contact and intercourse with a child so she could avoid one uncomfortable evening talking with her husband. When asked point blank if Kevin physically threatened her before or after she started having intercourse, she could not have been more clear:

Q: Was this before or after you had sexual intercourse?

A: After

(CP 92-93)

Two final factual points bear mentioning.

First, one of the more invidious confabulations by Ms. Schorno below was the story Kevin threatened her daughter. She argues that to this court as additional compulsion for her to have sex with him. Those assertions did not create a question of fact: (1) they were well after the time frame involved; (2) even if true would not constitute an "immediate" threat, and most importantly (3) Ms. Schorno clearly testified at deposition they did not happen:

Q: So he threatened your kids -- somehow threatened your kids, and you were concerned about their safety before December of 2000?

A: No, he didn't threaten my children's safety. He threatened my children saying that I wouldn't see my kids anymore, that their home would be disrupted. He didn't threaten their physical safety.

(CP 88) Her declarations were the most egregious attempts to create questions of fact in opposition to her clear deposition testimony.

As a second point, focus should be given to the masturbation incident in the car. Ms. Schorno places enormous weight on her allegation that Kevin placed her hand on him. That is of no import.

First, it ignores the (by her admission) “two or three” other times she masturbated him “at her house” she clearly admitted were before any physical threat to say nothing of the “triple, double” times she made out with him also before any physical threat.

Second, it ignores her own admitted misconduct in the event. She was asked to describe the event in great particularity; she admitted no physical threats were made; she described no apprehension of immediate grievous bodily harm or death. Instead, she admitted her masturbation of him at 14 was nothing short of her deciding to do so simply because he asked:

Q: How is it that you come to masturbate Kevin while you're driving him home?

A: I was driving, and he exposed himself, and he told me to touch him, and I said no. And he said, You know you're going to. You know you're going to do it anyway. And he took my hand off the steering wheel and put my hand on him.

Q: So you're only at that point in time driving with one steering wheel?

A: One hand.

Q: One -- or one hand?

A: (Witness indicates in the affirmative.)

Q: Did you pull off to the side of the road?

A: No.

Q: You continued to drive and masturbate him while you were driving? You never stopped?

A: No, I just took him home.

Q: But that's not the question. You're masturbating him, and you're driving with one hand. You never stopped while you were masturbating him?

A: Correct.

Q: Okay. And tell me what he said again. You know?

A: He said, You know you're going to do it. You know you're going to do it.

(CP 77-78)

To distill that down: she alleges Kevin put her hand on his penis and told her “you know you’re going to do it.” That is it.

Even if Ms. Schorno counters Kevin “forced” her hand onto him initially (she notably did not describe it at deposition as him having to use any degree of “force” to do so), she is the one that made the decision to leave it there, masturbate him, and drive all the way home with one hand.

In her declaration, she protests she did so because she wanted him out

of her car as quickly as possible and feared his telling her husband of it. This court may assume that to be true. However, it is not material.

Not to make light of the situation, but it is startling Ms. Schorno still does not understand her simple obligation at that point: *to take her hand off his penis*. That is all she had to do. It is suggested that is not too great a burden to impose. Alternatively, she could have stopped the car and got out.

Although Ms. Schorno expresses great shock and disdain over her exercising any responsibility as an adult in these events, the law is indeed that clear: as an adult she had an *affirmative obligation* to not have the sexual contact. If that meant taking her hand off him, if that meant getting out of the car and running down the street yelling “stay away,” the law required it.

Indeed, that affirmative obligation is precisely why even the defense of duress is not available if an actor (here Ms. Schorno) recklessly places herself in the situation of being in Duress in the first place. Because of the status of the case of that legal issue was not ripe. However, even assuming a Duress defense might have later arose, Ms. Schorno recklessly placed herself in that situation by her earlier decision not to disengage; the defense is therefore not even available to her. Her affirmative obligation arose at the first kiss. Instead, she recklessly continued on.

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IV. AUTHORITY AND ARGUMENT

A. Ms. Schorno Is Strictly Liable For All Sexual Contact And Intercourse With The Child She Was Not Compelled To Participate In By Duress

1. THESE CIVIL CLAIMS ARE IN PARI MATERIA TO CRIMINAL PROHIBITIONS

Kevin's Complaint alleged, and partial summary judgment entered, that Ms. Schorno committed Childhood Sexual Abuse of Kevin under RCW 4.16.340; specifically, her sexual contact with Kevin absent Duress violated RCW 9A.44.089 and her intercourse with him during the same time frame violated RCW 9A.44.079. Those statutes are titled "Child Molestation" and "Rape of a Child" respectively.

It remained a question of fact for the jury to determine what later acts Duress attached to and she was free to argue she had no liability for such conduct (assuming the defense was available in light of her recklessness). It would have been to the jury to determine how large a scope that was.

Critical to understanding the civil claim is that the CSA and claims brought under it are in pari materia to the criminal statutes that define it. See Christensen v. Royal School Dist. No. 160, 156 Wn.2d 62, 67 (2005) ("The notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result.").

“Statutes which are in pari materia should be read together as constituting one law.” Champion v. Shoreline School Dist. No. 412 of King County, 81 Wn.2d 672, 674 (1972).

Thus, this Court must be cognizant any defense it affirms here will be available to criminal defendants charged with the same misconduct. See Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146 (2001). (“The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. Such statutes must be construed together.”)

2. AN ADULT MAY NOT DEFEND SEXUAL CONTACT OR INTERCOURSE WITH A CHILD BY ANYTHING SHORT OF DURESS

The gist of Ms. Schorno’s argument is that because the sexual intercourse and contact were Kevin’s idea, and she supposedly said “no,” she did not “do” anything. She argues that renders Kevin the initiator (what she calls the “perpetrator”) and therefore her sex with a child is excusable.

While clever, that is nothing more than an argument the sex was the child’s idea and he consented to it. Those defenses are clearly rejected. Ms. Schorno cannot get around that by sharp tautological definitions of words.

The first bar to Ms. Schorno’s argument is that her mere presence in the activity is a strict liability offense:

The Legislature has imposed strict criminal liability...The legislative intent is clear. The Legislature has chosen a specific means to combat the social evil of carnal abuse

over exploitation of children by persons more than two years older than themselves.⁴

State v. Abbott, 45 Wn.App. 330, 333-334 (1986). Thus, either the adult participated in sex with a child or they did not - it is the adult's conduct that is determinative, not their sexual desire. The case of State v. Deer, 158 Wn.App. 854 (2010) cited by Ms. Schorno where the child performed sex on a sleeping woman is such non sequitor it need not be addressed.

The second bar to Ms. Schorno's argument is the simple fact her argument has been made before and rejected:

...[N]either willing participation, initiation by the victim, nor the defendant's lack of initiation, are defenses to the crime of third-degree rape of a child.

Clemens, 78 Wn.App. at 467.

Because of the invidiousness of adults having sex with children, our Legislature has decided an adult may not make the argument Ms. Schorno advances – however disguised. Simply having sex with a child is a “strict liability offense.” If an adult can skirt that by the expedient of saying “but I said no,” it would make a mockery of the law and render the protection of children erected by statute and case law completely ineffective.

Thus, there is only one cognizable defense an adult has when she

⁴ The court was specifically discussing RCW 9A.44.030; that statute has since been amended and the specific ages for violation changed. However, the concept of “strict liability” remains to this day with Abbott cited for this proposition in the more recent case of State v. Heming, 121 Wn.App. 609 (Div. 3 2004) regarding exactly the statutes at issue in the case at bar.

engages in intercourse with a child; duress under RCW 9A.16.060. That is the only defense when an adult is criminally charged with that conduct and as the elements are in pari material that is the law that applies to this civil claim. See Christensen, 156 Wn.2d at 68.

The availability of this defense is a perfect fit to both the public policy and statutory scheme. A person who truly had no choice because of a sufficient physical compulsion to have sex with a child, was subjected to Duress. They may have been involved in the act. However, if they are believed no criminal liability attaches if they demonstrate the defense.

It is only in circumstances, such as at bar, where the adult had a choice to avoid the activity, where liability will attach. Thus, Ms. Schorno's analysis is simply wrong: the Trial Court did not read the statutes incorrectly nor as Ms. Schorno argues at page 15 of her memo rule a child cannot commit rape against an adult.

The standard for Duress is clear and requires no interpretation:

The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to **immediate death or immediate grievous bodily injury**.

RCW 9A.16.060. (bold added).

The defense is by design difficult to make. Self defense requires only "some degree" of fear of mere "danger." Duress by intent erects a much

higher burden:

Washington's duress statute itself reflects our reluctance to allow even the abnormal stresses of life to provide a basis for the defense. Unlike self-defense, which only requires an apprehension of "imminent" danger, our duress statute requires an apprehension of "immediate" harm.

State v. Riker, 123 Wn.2d 351 (1994).

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931 (1996)

demonstrates how high a burden Duress is. Although a wrongful discharge case, specifically evaluating Duress as a defense to a crime explained:

... [I]n a prosecution for any crime other than homicide, it is a complete defense that the actor participated in the crime under compulsion by another **who by threat or use of force** created an apprehension in the mind of the actor that in case of refusal *he or another would be liable to immediate death or immediate grievous bodily injury*. These statutes show society would rather have one commit a crime under duress than refuse compliance and risk the life of whoever is threatened. **Society benefits by a citizen's death being prevented**, to the extent that some constitutional rights and criminal laws are suspended when one acts to save another's life.

Id. at 945. (italics in original, internal citations omitted, bold added).

As repugnant as this is to say but required to illustrate the lack of merit to Ms. Schorno's argument, the availability of Duress as a defense recognizes that society will tolerate an adult having sex with a child if it results in "a citizen's death being prevented." Id. Or arguably, to prevent "immediate **grievous** bodily injury."

However, there was no societal benefit in Ms. Schorno having sexual contact and intercourse with a child so she could avoid having a difficult conversation with her husband.

Kevin stresses that this is not something for this Court to say: well, the evidence from the deposition is strong but it is for a jury to weigh. Ms. Schorno's deposition admissions were clear and unequivocal: she engaged in ongoing sexual contact and intercourse with a child over (allegedly) the fear the child would tell her husband. She cannot by a carefully crafted declaration or compelling legal argument confabulate a question of fact against her own, clear deposition testimony. See McCormick v. Lake Washington School Dist., 99 Wn.App. 107, 111 (1999) and Smith v. Ohio Casualty Insurance Co., 37 Wn. App. 71 (1984)

Ms. Schorno's argument of fear over losing her children is unavailing. Simply, (and not to make light of it when genuinely held), it is not a threat of "immediate death" or "grievous bodily harm." It simply is not within the scope of the statute. Not even the threat of incarceration rises to the level of Duress. See Thorne v. Farrar, 57 Wn. 441 (1910).

Riker cited Criminal Law Defenses: A Systemic Analysis, 82 Colum.L.Rev. 199, 226 (1982) (cited at length in Kevin's summary judgment memos) providing a detailed discussion of the issue. As explained there, Duress is simply not present if the actor's "lack of control is not so

complete as to make the conduct involuntary.” Riker, 123 Wn.2d at fn. 4.

Although Ms. Schorno goes to lengths to justify how having sex with the child was for her the lesser of evils, at deposition she admitted she had a choice. She could have chosen to not engage in the conduct and she described no fear of “immediate death” or “grievous bodily” harm – only her husband’s distrust and CPS – as the consequence for not doing so.

When even Ms. Schorno clearly admitted at deposition that “in hindsight (even she didn’t) really think” what Kevin said to get her to have sex was “a threat,” it is rhetorically asked: how can she in good faith offer any argument on appeal to justify her conduct.

3. ARGUMENT

The first task of this Court must be to ascertain the limited scope of the summary judgment motion and Order. Contrary to Ms. Schorno’s argument, neither involved situations where she alleges Kevin later engaged in physical threats. The scope of the motion was limited to, in Ms. Schorno’s own words, between 2000, and up to “early 2001” when she admits was the first assertion of any physical “threat.” Those were her clear words at deposition.

Even ignoring the contradictions her declaration posed to her own clear deposition testimony, at “best” for her she only asserts she told Kevin ‘at all times’ – in effect – “no.” That she told him she did not want the

contact and intercourse but that by Kevin's use of words – that he would tell her husband and she would lose her children – he persuaded her to proceed.

The ease with which the following is said belies the dispositive nature of it: that is simply not Duress to excuse Ms. Schorno from having ongoing sexual contact and intercourse with a 14 year-old. She may dress up her protestations however she likes; that Kevin initiated, that she said “no,” that Kevin exerted mental distress on her over her husband, etc. None of that changes the language of RCW 9A.16.060 defining Duress. None of that constitutes an “immediate” threat of “death” or “grievous bodily harm.”

Due to the nature of summary judgment, Ms. Schorno's allegations of Kevin's emotional pressure must be assumed. However, this court cannot fashion a “nice” result for Ms. Schorno because of it. What is at risk is too great. Affirmation of the summary judgment order is simply the logical application of the law to Ms. Schorno's own deposition testimony:

The obvious objective of the child rape statutes is to protect children who are too immature to rationally or legally consent. This is indisputably a legitimate state interest.

...older, more mature persons are in a position to prey on the relative immaturity of the child... (Liability regardless of consent) rationally draws a distinction between older, potentially predatory persons and younger, less mature persons in the victim's age group. This distinction thus is not wholly unrelated to the legitimate interest of protecting children from sexually predatory adults.

State v. Heming, 121 Wn.App. 609, 612 (2004).

Children under 16 are incapable of asking for or giving consent to sex. See State v. TJM, 139 Wn.App. 845, 853-854 (2007). As Hemming explains, they are too young to understand what wanting, asking, or consenting means. The adult's obligation is to realize that and extricate themselves from the situation. That is why we require more of an adult interacting with a child, as opposed to an adult interacting with an adult. It is not a harsh result to visit liability on adults who ignore that duty. It is necessary to prevent adults from taking advantage of the situation.

As a final point, and merely to illustrate how high a burden Duress is and how inadequate Ms. Schorno's "evidence" was to create a question of fact on it, to date Kevin has never rose to the bait oft dangled by Ms. Schorno, that the summary judgment order has the import of saying a woman (again, her sexist argument) must resist with all of her might at the risk of injury. But, he will here.

When it comes to adults having sex with children, it may indeed be said an adult, in the most typical situation a man, must give some modicum of physical resistance before "giving in" to sex with a 14 year old girl.

A 55 year old man (or woman for that matter) simply will not be heard to say: 'but I told her "no," she said she would tell my wife, so what choice did I have, I had to sit/lay there and allow her to perform sex on me. I did not "perpetrate" anything. The 14 year-old girl was the perpetrator.'

Respectfully, such an excuse offered by a man would not even pass the giggle test. It is only Ms. Schorno's clothing her argument in sexism that gives her argument any appearance of sympathy. But when her clear deposition testimony is considered, no sympathy is due.

A man, confronted with such a situation, must attempt to get up and leave. And if he cannot offer even that explanation after the fact, the law will not hear him complain that the 14 year-old girl's "threat" to tell his wife was so compelling that he had no choice but to have sex with a 14 year-old girl.

A more difficult case – not presented here – would be if the man or woman did exert some minor physical resistance to disengage and the child responded with some physicality. Under different facts not presented here, it might create a question of fact whether the resistance used by the adult, and the counter-resistance used by the child, was sufficient to create a question of fact of whether the adult's ultimate acquiescence was compelled by an "immediate" threat of "death" or "grievous bodily injury."

However, that is not this case. Ms. Schorno was clear Kevin exerted no physicality and she made no attempt to disengage regarding the events at issue. The record does not present even a scintilla of a question of fact.

This digression is important, however, as it illustrates the fallacy of the entirety of Ms. Schorno's legal theory. Neither Kevin's motion nor the Trial Court's order require as Ms. Schorno argues (and to bait into her sexist

argument) “a woman” to “fight to the death.” But, the Trial Court’s order and the law do require a man or “a woman” to not simply give into sex because of “any” alleged threat of adverse social consequence, or even some minor use of physicality short of death or “immediate” “grievous bodily harm.” Where the line is precisely drawn regarding “how great” the threat of injury must be will have to be determined by a later case; this one presents no facts to do so in the time frame at issue in the motion.

Interestingly, a case cited by Ms. Schorno perhaps best sums up the responsibility she ignored:

In short, the law puts the burden on the adult, not the minor child, to refrain from a sexual relationship.

People v. Tobias, 21 P.3d 758, 759 (Cal., 2001).

B. DIRECT RESPONSE TO MS. SCHORNO’S ARGUMENTS

Essentially the entirety of Ms. Schorno’s brief is the argument that assuming a child may commit Third Degree Rape (RCW 9A.44.060), Kevin’s having sex with Ms. Schorno when she said “no” was Third Degree Rape of her. Therefore it is a legal impossibility for her to have committed Child Rape or Molestation against Kevin at the same time.

Although a creative argument, Ms. Schorno can make it only by closing her eyes to the clear law she cannot draw sexual analogies to a child as though he was an adult. See State v. Dodd, 150 Wn.App. 337, 344 fn. 12

(2009). Truly, no more need be said, but the following is observed.

Ms. Schorno's theory rests upon four legs. The loss of any leg (or said differently, the break of any link in her chain of logic) reveals the fallacy of her conclusion.

The first leg (or link in the chain) spans between pages 19 and 24 of her brief wherein she argues "Amy Schorno's claims against Kevin Kanada allege acts that violate the following statutes." Ms. Schorno identified none of those statutes in her complaint. Her complaint alleges IIED, Defamation, and "assault and battery."

Placing that failure aside, after pages of citations to statutes, at page 22 she argues "consent to the sexual act is a valid defense to the element of "forcible compulsion... thus, Kevin Kannada has the burden of proving that Amy Schorno consented, i.e., that she freely said "yes."

However, the entirety of those arguments are irrelevant as they relate only to Ms. Schorno's claims against Kevin. The Trial Court did not dismiss any claim of Ms. Schorno's.

To address the ostensible conflict Ms. Schorno is trying to paint, what she is really arguing but does not come out and say is that by granting Kevin's motion on the limited acts at issue, that foreclosed her from asserting her claims Kevin assaulted her in those events. This is, to be more direct, her argument a child can commit third degree rape against

an adult and Kevin's allegedly having sex with her after she said "no" is sufficient to allow her to make that claim.

The flaw in that argument is Ms. Schorno's ignoring that the law governing sexual relationships between adults and children – civil and criminal – are joined at the hip: they are in pari material. It is conceded a child can commit first, second and third degree rape. If a child overcomes an adult with force sufficient to constitute Duress, either first or second degree rape may be found. Further, if a 14 year old has sex with another 14 year old when the other simply says "no," that is third degree rape.

However, to take the final leap, which is her arguing an adult can simply say "no" to sex with a child, have sex under no compulsion at all and the child committed Third Degree Rape is where she runs awry of the law. However, this is not a conflict of law. It is a conflict created by her refusal to acknowledge her responsibility as an adult.

If a child uses sufficient physical coercion as to constitute first or second degree rape, Duress in the adult was no doubt present. A child's liability for his or her conduct in that situation thus fits perfectly in the statutory framework. This also reveals Ms. Schorno's various arguments, peppered throughout her brief discussing the fact children are held criminally responsible for sex crimes, etc., to be non-sequiturs. That a child may commit a sex crime, even against an adult, under the right

circumstance has never been denied. Ms. Schorno's overbroad citation to authority to that effect, without any reference to the specific facts of this case, are without weight.

However, and perhaps as an issue of first impression, to assert "third degree" rape by a child against an adult comes up against the wall that adults may not draw analogies to having sex with children as though the child was an adult. Adults may not have sex with children by the expedient of saying "no." This is well and sufficiently briefed above.

Thus, this argument by Ms. Schorno is revealed to be an attempt to argue through the back door that which she knows better than to argue through the front: that an adult cannot defend a claim of child rape by saying the child initiated, consented, and the adult said "no." If an adult cannot raise that as a shield when rape of a child is alleged, they certainly cannot raise it as a sword to affirmatively assert the claim against a child. See Christensen. To even suggest such is legally and morally repugnant.

Although Ms. Schorno cites general cases indicating children may be liable under the rape statutes, she cites none where application of third degree rape was affirmed against a child for having sex with an adult. One can only suspect if there was such a case, anywhere in the country, she would have cited it.

Instead, her only support is to attach in the appendix a document entitled “Rape 2 and Rape 3 Offenses for Juvenile By Age...” From that, at page 26 of brief she makes the amazing leap of speculation to conclude “presumably some of those prosecutions involved adult victims.”

It will simply be observed that her speculative conclusion is both without basis and irrelevant. “Juveniles” in that table include individuals up to the age of 18. Once a person is over the age of 16, they may consent to sex. Thus, that “juveniles” up to the age of 18 may have been convicted of third degree rape (even of an adult) lends no support to whether a 14 year old, who cannot consent and lacks the mental capacity with an adult to even initiate sex, could commit third degree rape against a 31 year old.

In summary, it may be said under CR 12(b)(6) that it states a claim upon which relief may not be granted for an adult to allege liability against a child for “third degree rape.”

The second leg of Ms. Schorno’s argument starts at page 24 by what appears to be a benign statement but is later extended beyond any common sense; she asserts “the statutes for rape of a child... (etc)... require determining who was ‘the perpetrator’ of the sexual contact or sexual intercourse,’ and who was ‘the victim.’”

Ms. Schorno takes that relatively bland statement and asserts at page 25, “certainly ‘perpetrator’ carries a stronger connotation than merely

‘defendant,’ ‘person,’ or ‘accused.’” She takes that assertion and leapfrogs that because a singular previous statute used the phrase “person who engages in sexual intercourse” versus Third Degree Rape of a Child that uses the word “perpetrator,” that represents some type of dramatic sea change in the law by the Legislature.

These sharp distinctions cannot be the basis to erode the clear black letter lines necessary to protect children from sex with adults.

First, as a matter of social dialogue and academia, when “we” speak of adults having sex with children, because of the abhorrent nature of the act, the adult is most always referred to as having “perpetrated” sexual abuse. The Legislature’s use of the word “perpetrator” is as much as reflective of society’s disdain for any person that would have sex with a child than anything else.

Second, taking the term on its face, Black’s Law’s definition of the word “engage” in the earlier statute tracks with Washington’s present concept of strict liability for adults having sex with children.

Engage. To employ or involve one’s self; to take part in; to embark on.

Black’s Law Dictionary, Sixth Edition. For an adult to “take part in” sex with a child, is entirely consistent with the concept of strict liability.

Thus, not simply by Ms. Schorno's logic but by her explicit argument, the Legislature's use of the word "perpetrate" was intended to abrogate the prior concept of strict liability. That at the same time the Legislature has done everything it can to strength the law against adults having sex with children, this amendment was intended to weaken the law.

She cannot have it both ways. She cannot assign the significance she does to the change of that word, and divorce herself from the obvious consequence of the argument.

The change of that one word did not abrogate Washington's strict liability. There is ample case law since affirming strict liability. As both a practical and public policy matter, that change of syntax is of no import. Sometimes, a change in language is simply a change in language.

Ms. Schorno sprinkles essentially the identical argument throughout her brief; notably at pages 33 – 35 arguing again the semantic change to "perpetrator" means as long as she did not desire sex and said no, she did not "perpetrate" anything. She continues at page 36 asserting the legislature only intended liability for adults that "cause" "such activities" to take place. In some respects, that may be conceded. But again, what she ignores is an adult who decides to have sex with a child, even if they do not want it and verbalize "no," but does so anyway despite the fact they could have avoided it, has "caused" the "activity" to take

place. Their act of “volition” is the decision to have sex with the child rather than not and then have a conversation with their spouse.

Her third leg (link of logic), between pages 27 and 43, is simply the same obstinate attempt to make analogies to her having sex with a child as though he was an adult. It is sufficient to simply say he was not.

Her fourth leg (link) is between pages 27 and 29. Ms. Schorno makes lengthy citation to studies and authority never cited below. It is sufficient to say that as new arguments/evidence/authority, they should be accorded no weight here. However, ignoring that, they are also irrelevant. It may be conceded, as Ms. Schorno argues, some rapes are perpetrated not by extreme force and weapons but a lower level of force. However, as even this new evidence cited at page 28 of her brief states, “a low-level of force, then is often quite subtle, is the most typical degree of force used,” is still the use of some force. Ms. Schorno plainly testified at deposition there was never any force, just the verbal “threat” to tell her husband. As a basic matter of the record this new authority/evidence is of no assistance.

At page 29 Ms. Schorno argues Washington’s statute defining third degree rape “was designed specifically to address” the “reality” that significant force may not be used, and merely saying “no” should be sufficient. Again, that may be conceded; in regard to two adults.

However, it does her cause no good to ignore Kevin was 14 and she 31 and for her to continually cite authority that plainly addresses sexual relations between two adults. It also does her cause no good to ignore she clearly stated at deposition that no threat of violence occurred until well after she has substantial sexual contact and intercourse with Kevin; that all it would have taken at any time was a phone call or even her simply getting out of her car to not have the relations.

At page 30 Ms. Schorno argues “Amy Schorno’s encounters with Kevin Kannada bore out the wisdom” of not fighting back. She alleges that when she did later, his response was to injure her. Not only is that irrelevant, but to give that any weight requires a crystal ball.

We will never know what would have happened if Ms. Schorno did the right thing, because she did not. We will never know what would have happened had she not had sexual contact and intercourse with a child for months on end, solely to avoid discussing the issue with her husband. However, we do know from common experience (and the declaration of Dr. Conte) that children whom are sexually groomed and abused by adults later lash out and become emotionally imbalanced. This issue is not before this court. However, it appropriate to observe it is wholly improper for Ms. Schorno to admit to months of inappropriate sexual contact with a child and then complain of the effects her own misconduct wrought. At

the very least, it may be said such arguments, particularly coming as late as they are, do not create a question of fact.

At page 30 Ms. Schorno cites State v. Weisberg, 65 Wn.App. 721 (1992) and makes arguments on it through page 31. In Weisburg, the defendant was 54 years old and the victim 39 years old and mentally handicapped. Id. at 722. What possible application the case has to Ms. Schorno at 31 having sex with Kevin at 14 escapes the respondent.

At page 31 Ms. Schorno cites State v. McKnight, 54 Wn.App. 521 (1989). In McKnight, the perpetrator was 17 (an adult) and the victim 14 (a child). She cites this case for the argument there may be an “implied threat of physical injury... although no overt threat was made.” She also cites State v. Gonzales, 18 Wn.App. 701 (1977) for the same proposition. Interestingly, to even feel the need to make such arguments would appear to be more than a tacit concession there were clearly times of no “overt threat” by Kevin at all – if not, such arguments would be pointless. Placing that aside, these citations are of no assistance to her. Preliminarily, it may be said as to both that neither are applicable because in both there was at least some threat of force. Again, here, as to the conduct at issue Ms. Schorno admits there was none.

More specifically in McKnight the court found the adult perpetrator exercised “forcible compulsion” on the child, indicating the adult “pushed

(the child) down on the couch” and forced her to have sex. Id. at 523. Beyond that, McNight has little to no value to the case at bar as the adult in McNight conceded he was guilty of third degree rape, id. at 534, and the sole issue was what amount of force is sufficient to constitute mere “forcible compulsion.” The standard, as the case demonstrates, is substantially different than the standard of Duress. Thus, to compare McNight to the case at bar is to compare apples to oranges.

The same must be said of Gonzales. First, it involves sex between two adults. To even cite to such a case is a pointless effort. Second, the rape involved was a singular event that clearly escalated to significant overt physical violence. According to the opinion, the defendant “use(d) physical force to embrace and kiss” the victim at the start. The victim actually tried to extricate herself from the situation (unlike Ms. Schorno) by locking the defendant out of the car whereupon the defendant “forcibly dragged her from the car.” Id. at 702. Interestingly, the opinion indicates the defendant “forcibly put (the victims’) hand upon his penis.” That has some minor resonance to the case at bar.

Not to become bogged down in semantics as Ms. Schorno has done, however it seems reasonable to point out there is a qualitative difference between “forcibly” taking a person’s hand and forcing it onto a person’s penis as happened in Gonzales and, as Ms. Schorno described it,

Kevin merely “putting” her hand on his. The former describes physical pressure in the face of resistance and the latter describes “leading” a person willing to be lead.

But regardless, Gonzales obviously describes a long and drawn out escalation in the same transaction of physicality and force. The victim may have acquiesced at the very end to the penultimate act of intercourse but it was only the face of actual, sustained, and substantial force directly leading up to it. That is entirely unlike Ms. Schorno’s descriptions of no force at all, only Kevin’s oral threat to tell her husband.

At page 33 Ms. Schorno argues that because Rape of a Child is a crime that does not require mens rea, does not mean the victim still does not have to prove the adult was the “perpetrator.” This is simply the same argument addressed above: that because the adult did not want to have sex and said no, means they did not “perpetrate” any wrong doing. All of the same replies apply and will not be repeated here.

Ms. Schorno’s citation to State v. Abbott, 45 Wn.App. 330 (1986) is inapposite and confounding. Abbott clearly demonstrates an adult’s mere involvement in sex with a child subjects them to criminal liability. Abbott held an adult commits rape of a child without any “knowledge” that their conduct violates law. Id. at 331-332. The Court held:

A statute may punish conduct alone, without making any specific degree of culpability an element of the crime.

Id. at 332.

Abbott explained that only when there is clear Legislative intent to imply a particular degree of mens rea will the Court do so. Id. However, that in fact requires that a higher element of mens rea is consistent with the intent of the statute.

It is fundamentally inconsistent with both the specific criminal statutes and more specifically the civil CSA to interpret the semantic change of language as intended to increase defenses for adults to have sex with children. The Legislative intent stated following RCW 4.16.340 could not be more clear that it is the Legislature's intention to make it easier for children subjected to sex with adults to pursue civil remedies. There is nothing stated in the Legislative intent following either RCW 9A.44.079 or 9A.44.089 indicating an intention of erecting an additional and higher mens rea element by the amendment. Finally, 13B Wash. Pract. Sec. 2405 provides a detailed history of the amendments and evolutions to this statutory scheme and although it points out new elements of proof for various acts, is silent on any change adding an enhanced mens rea element by the later use of the word "perpetrate."

At page 36 – 38 Ms. Schorno makes arguments based on State v. Deer, 158 Wn.App. (2010). The facts of the case, in part allegedly a child committing sex on an adult while the adult was asleep, are so inapposite to the case at bar that truly no material discussion need be provided.

However, to address her argument, Ms. Schorno argues because Deer in dicta indicated a jury must be instructed on “the implied element of a volitional act” she is entitled to the same consideration here. Ms. Schorno ignores and fails to point out to the Court that while Deer did indicate that, it only applied to the acts of sex the adult contended took place while she was asleep. Id. at 864. (“With regard to those sexual encounters as to which Deer contends she was asleep, the trial court erred by relieving the State of that burden.”) The entirety of Ms. Schorno’s pages 36 – 38 are out of context, inapposite citation to law. Ms. Schorno was never unconscious.

In fact, in regard to the conduct when she was awake, Deer entirely supports summary judgment below that only Duress is a proper defense to an (awake) adult having sexual contact with a child.

In discussing strict liability offenses, Deer precisely echoed both the language and intention of the defense of Duress:

Where the individual has not voluntarily acted, punishment will not deter the consequences.

* * *

Movement must be willed; a spasm is not an act. It is this volitional aspect of a person's actions that renders her morally responsible and her actions potentially deterrable.

Id. at 862-863.

The concept of voluntary/involuntary action discussed in Deer is a direct mirror of the Supreme Court's discussion of Duress in Riker, explaining when "the lack of control is not so complete as to make the conduct involuntary ... the law is generally unwilling to excuse" the act. Riker, 123 Wn.2d at fn. 4.

Thus, as even Deer made clear, if the actor has "the capacity to choose," cf. Deer, 158 Wn.App. at 864, "punishment" will "deter" and will be meted out. Or said another way from Deer, a person will be held "answerable for a state of affairs" "she could have done something to avoid..." Cf. Deer, 158 Wn.App. at 863. This precisely echoes the concept of Duress. See Riker.

Thus again, Ms. Schorno's trick of argument is to focus solely on her alleged desire to not have sex and to confabulate that as being dispositive of her not "perpetrating" the conduct. But, she did have "the capacity to choose" what she did: she simply chose to have sex with a child as a preferable state of affairs than having a discussion with her husband. Given that choice, she made the wrong one.

Ms. Schorno's citation to State v. Eaton, 158 Wn.App. 862 (2010) is inapposite for the same reasons Deer is.

In regard to the quantum of threat necessary for Duress, Schorno argues State v. Harvill, 169 Wn.2d 254 (2010) and State v. Williams, 132 Wn.2d 248 (1997) hold "only an implicit threat" is required.

What she ignores by those citations is although the threat of "immediate" "death" or "grievous bodily harm" may be implied, that there still must be a threat of immediate death or grievous bodily harm. As said repeatedly, in regard to the conduct at issue Ms. Schorno admits there was no threat of any harm (much less death or grievous harm), there were no threats of that import until after they started having intercourse and contact, and the reason she engaged in the conduct at issue on the motion was Kevin's alleged "threat" to tell her husband.

2. **Ms. Schorno's Arguments Regarding A Protective Order, IME, Etc., Are Non-Sequitors**

Ms. Schorno asserts an uncontested protection order from December 2005 is relevant. The conduct at issue on the motion only ran to "early 2001." The events she bootstraps by that 2005 order are not only without time frame, they were not within the scope of the summary judgment order.

Similarly, she cites to an IME of Kevin taken in 2009. Kevin's mental state in 2009, after being groomed and sexually abused by Ms. Schorno, does not create a question of fact on conduct from 2000. Further, the whole of the report is an attempt to offer character evidence that Kevin allegedly has the character to do the things Ms. Schorno asserts.

Ms. Schorno cites to a "psychosexual evaluation" from 2006 her then boyfriend told her to go to, as evidence on the issue. Ultimately, the report asserts Ms. Schorno does not have the character of a person that would do the things she admitted at deposition to doing. Not only is her mental state in 2006 irrelevant, it is character evidence in violation of ER 404 that does not create a question of fact in the face of her clear deposition admissions.

3. **Ms. Schorno's Declaration Alleging "Physical Force" Did Not Create A Question Of Fact**

Ms. Schorno's representations of the record are incapable of being reconciled with her deposition testimony. She argues throughout that Kevin "from the start" physically coerced her into having sex. However, as cited above, at deposition she was clear there was no threat or act of physicality nor threat of violence at all from Kevin until "early 2001," until after she had already had sexual contact and intercourse with him.

It was only in response to summary judgment, after appreciating the position she was in, that in her declaration – albeit without any reference to time – she alleged Kevin threatened her.

Even if this court were to give any weight to her contradictory declaration, her declaration is meaningless without the provision of a time frame for the conduct. Clearly Ms. Schorno alleged that later Kevin threatened her. That was conceded and thus the motion was brought only as to the acts even Ms. Schorno conceded at deposition preceded any threat or act of violence.

V. MOTION TO STRIKE

Essentially the first 41 pages of Ms. Schorno's memo are new argument and novel authority not argued to the Trial Court; Ms. Schorno did argue below she did not commit rape because she did not want to have sex. However, her extended definitional argument is new, minted for appeal – as is the authority and argument she makes based on it.

Further, her new evidence in her appendix and studies she cites, most notably at pages 27-30 – even ignoring their dubious provenance, must be stricken. Ms. Schorno's citation to Wikipedia should not simply be stricken but it is suggested something more ought be said.

VI. MOTION FOR COSTS AND FEES

Pursuant to RAP 18.9 and CR 11 motion is made for Kevin's actual fees and costs in responding to Ms. Schorno's appellate briefing.

This matter was ready for trial in 2009 with it scheduled to start only weeks away when Ms. Schorno filed her motion for discretionary review. Somehow, instead of adhering to the rules, she filed a separate memo for renew of the summary judgment order, the order denying her reconsideration, and the order striking material on the summary judgment motion. 20 pages was the limit for her motion for discretionary review and yet somehow she managed to file approaching 100 with no motion, seeking leave to do so. Ms. Schorno clearly gamed the rules to have 3 briefs on the same issue. Kevin was forced to respond to her over length briefing.

Despite that, the Commissioner saw past Ms. Schorno's rhetoric and denied her motion for discretionary review.

Ms. Schorno filed a motion to "reconsider" the Commissioner's Order. Well, she did not do even that.

Without providing Kevin an opportunity to be heard or file a brief in response, and it is suggested in violation of this Court's own rules, this Court granted her motion. Resulting in Kevin's loss of a long awaited for trial date.

Despite that, Kevin did file a brief in response. It was rejected by this Court – this Court would not even read it.

Kevin filed another motion (at the Clerk's suggestion) seeking leave to file his brief, pointing out the violations of the Rules committed in (1) granting Ms. Schorno's motion without a time to be heard and (2) rejecting his brief even after the fact. This court denied that motion.

Kevin was forced to seek discretionary review in the Supreme Court. (Appendix 2). It was only after filing that motion, outlining the deviation in the Rules (although he did the same in his motion to this Court) in how discretionary review was granted, that this Court indicated it would consider Kevin's brief. However, by then the trial date was lost and thus perhaps not surprisingly, this Court did not change its decision.

The Trial Court spent an enormous amount of time, privately and much more in argument than will be entertained here, in colloquy and parsing out the record. She saw the clarity of Ms. Schorno's admissions and the legal impossibility of her excuse that fear over Kevin allegedly telling her husband meant she could have sex with a child. It is suspected Ms. Schorno's hysterical rhetoric and her aberrant hyperbole in her briefing to this court that the Trial Court ruled, in so many words, that 'a woman must fight to the death' or she is guilty of rape of child, caught the attention of this Court. Perhaps seeing a looming trial date and the

outlandish assertions by Ms. Schorno in her brief, this court felt it had to intervene. On the one hand, that may be understood. But, that is not the record of this case and Ms. Schorno's approach has irreparably harmed this young victim by further delaying closure of these issues.

If after carefully parsing through the record this Court comes to the same conclusion as the Trial Court, it is suggested this court must ask why it was induced to grant review to begin with.

This Court should ask why the record was so distorted in the motion for review to induce it to depart from its own rules, granting review without even providing Kevin an opportunity to respond, and to consider the havoc doing so has visited upon Kevin. This case should have been tried two years ago and Kevin on the road to putting it behind him. It would have been faster to have the trial and take review from that as opposed to the procedure followed in this case. Trial will now have been delayed two years before an opinion is issued, to say nothing of the waste of resources in responding to review that was granted because of inappropriate legal and factual argument. Costs should be awarded.

DATED this 19th day of May, 2011.

~~McGAUGHEY BRIDGES DUNLAP PLLC~~

By:

Shellic R. McGaughey, WSBA 16809

Dan'L W. Bridges, WSBA 24179

Attorneys for respondents

APPENDIX

No. _____

Court Of Appeals Numbers 39752-8-II and 39952-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN KANNADA, a single person,

Petitioner

vs.

AMY CATHERINE SCHORNO, formerly a single person, now married,

Respondent.

PETITIONER'S MOTION FOR DISCRETIONARY
REVIEW [RAP 13.3(a)(2)]

OR IN THE ALTERNATIVE TO TRANSFER THE CASE [RAP 4.4]

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FILE

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- Exhibit #1 Ruling Consolidating Cases and Denying Review
- Exhibit #2 Order Granting Petitioner's Motion to Shorten Time and Granting Discretionary Review
- Exhibit #3 Respondents' Motion to Reconsider Discretionary Review – Motion to Shorten Time
- Exhibit #4 Respondents' Motion to Consider Respondents' Memorandum in Opposition To Petitioner's Motion for Reconsideration
- Exhibit #5 Order Denying Motion

I. IDENTITY OF PETITIONER

Petitioner is Kevin Kannada; he was the respondent in Division Two and the defendant asserting counter-claims against respondent Amy Schorno. Schorno is the plaintiff in the trial court.

II. MOTION

COMES NOW the petitioner Kevin Kannada and moves this court for an order granting discretionary review pursuant to RAP 13.3(a)(2), or in the alternative to transfer the case to this court pursuant to RAP 4.4.

III. OVERVIEW AND IDENTIFICATION OF COURT OF APPEALS DECISION

This motion presents an issue of substantial public importance: the protection of children from childhood sexual abuse. The legal questions herein are, to some extent, ones of first impression. However, that does not mean there is not firm law indicating the answers.

Respondent herein (Schorno) admitted to substantial sexual contact and intercourse with a child under no threat of harm to her. She asserted that after she started having sex with the child, he threatened her physically to continue in the relationship in circumstances that might amount to duress.

The trial court, based on Schorno's own deposition testimony, found no legal excuse existed for her sex with the child that even she conceded preceded any type of duress, and left it for the jury to determine the full

nature and extent of her misconduct in light of Schorno's assertion of facts that might later constitute duress. The trial court's order thus made it possible for Schorno to attempt to excuse some of her later sex with the child and even make claims against the child as of when duress, if proven, attached. The trial court entered an appropriate order of partial summary judgment to that effect that was consistent with well established Washington law protecting children from sexually predatory adult behavior.

Schorno sought discretionary review of that decision which was denied by Commissioner Sckerlic on December 4, 2009. (Ex. #1).

On December 7, 2009 Schorno filed a "motion for reconsideration" of the Commissioner's order.

On December 9, denying Kevin any opportunity to be heard, a panel of Division Two ostensibly converted Schorno's motion for reconsideration into a motion to modify, and granted it. The order was transmitted by fax from the Court at 1 p.m. that day. (Ex. #2).

Upon learning of the order, that same afternoon of December 9 Kevin filed a memorandum in opposition to the motion and seeking "reconsideration." (Ex. #3). The Clerk of the Court rejected the brief. The Clerk suggested filing a motion asking the court to consider the brief.

Following that suggestion, on December 10 Kevin filed a motion asking the court to consider his brief. (Ex. #4). On December 11, the court

denied that motion. (Ex. #5). This motion immediately followed.

Thus, Division Two granted a motion for reconsideration the rules do not provide for, in a manner the rules do not provide for, and rejected all of Kevin's briefing opposing both the motion and the procedure used. And what is worse, this case – now pending for four years – was set for jury trial on December 14, 2009. Thus, not only did Division Two grant Schorno's motion, it stayed all trial court proceedings making this at least the fourth time Schorno has obtained a delay of the trial in this matter.

Division Two's procedure and orders represent probable error, are contrary to the RAPs, and violate Kevin's procedural due process rights.

That deprivation is submitted to not be without consequence. Kevin contends Schorno's "motion for reconsideration" contained patent misstatements of the record which, ostensibly, were relied upon by Division Two: her "motion for reconsideration" could not have been granted without them. By denying Kevin an opportunity to even be heard, not only is Division Two's order contrary to the RAPs, the court did not consider the relevant facts and law Kevin had the right to identify and thus has committed probable error substantially altering the status quo.

Not only should this court grant discretionary review under RAP 13.3(a)(2) of Division Two's interlocutory decisions, it should transfer the case pursuant to RAP 4.4. In order to fully consider the procedural

irregularities below, this court will need to consider the record and underlying issues themselves. Having done so, it would further the “orderly administration of justice” to resolve the underlying legal issues as well. As this issue arises from summary judgment, this matter is particularly suited to resolution by this court.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether Division Two committed probable error substantially altering the status quo in granting emergency summary determination of Schorno’s motion for “reconsideration.”
2. Whether Division Two committed probable error substantially altering the status quo in denying Kevin an opportunity to be heard in opposition to Schorno’s motion for “reconsideration” and/or not considering his memo as a motion for reconsideration.
3. Whether, Division Two committed probable error substantially altering the status quo staying trial and granting discretionary review to consider a proposition by Schorno that is clearly contrary to law.
4. Whether this court should transfer this case due to the irregularities below and make a final decision on the merits of the motion for discretionary review and any other relief this court deems equitable, just, and appropriate.

V. STATEMENT OF THE CASE

A. Facts Relating To Trial Court Order

Amy Schorno met Kevin in October 2000 at Prairie Elementary School. (Appendix, pg. A-333). Kevin was there with his little brother,

Schorno was picking up her children. Id. Schorno admitted at deposition she knew Kevin was **14 years old** at that time. (Appendix, pg. A-344).

Schorno progressed quickly with Kevin. She admits their first kiss was in December 2000. (Appendix, pg. A-341). Kevin contends Schorno initiated the kiss; Schorno contends Kevin initiated it. It was conceded on summary judgment the trial court must assume Schorno's version.

However, Schorno admitted at deposition the kiss was without force, there was no "embrace," there was no tongue. (Appendix, pg. A-342). By any definition, what she described was a quick peck. Id. She also testified Kevin immediately said he was "sorry" for kissing her. Id. Schorno's testimony is notable as she has since contended through counsel's argument the kiss was compelled by physical force; that was not her deposition testimony that constituted the record on summary judgment.

Schorno contended at deposition that Kevin told her if she told anyone, he would say they kissed and it was her idea. (Appendix, pg. A-343). Far from telling anyone, Schorno admits she continued in her sexual contact with the child, which included their first sexual intercourse she admitted took place in **January 2001**. (Appendix, pg. A-338).

Significantly, Schorno admitted to a broad range of other sexual misconduct with the child before she first had sex with him. Schorno admitted that between the first kiss in December 2000 and her first sexual

intercourse in January 2001, she masturbated him at least two to three times and made out with him (kissing) at least “triple, double” the number of times she masturbated him. (Appendix, pgs. A-351 – A-352).

Schorno was asked to identify when Kevin allegedly first physically threatened her (as distinct from the “threat” to tell her husband). She gave a crystal clear answer to a clear question:

Q: So all the violent threats started in **2001**?

A: Well, I don't know that all of them were said then, but that's when the violent threats started, in 2001.

Q: **Was this before or after you had sexual intercourse?**

A: **After.**

(Appendix, pgs. A-354 – A-355).¹ She said the same thing later, affirming Kevin made no threat until “probably in early 2001.” (Appendix, pgs. A-358 – A-359). “Early 2001” is clearly after sexual contact and intercourse.

“Why” Schorno had sex with a child is not relevant per se; the only “relevant” and determinative fact is her admission she did so without any threat or duress. However, her alleged subjective reason emphasizes why her sex with this child subjects her to liability. Schorno gave clear testimony that the reason she kept having sex with this child was she “didn't

¹ It is important to note Kevin denies making any threats; ever. But, he readily conceded the Trial Court was bound to assume the truth of Schorno's deposition testimony on his motion for partial summary judgment.

know how Dan (her husband) would react” when he found out and she feared loosing her children. (Appendix, pgs. A-345 – A-347).

Kevin's words were, I'm a kid. They'll believe me. That's when -- and it was just a big chance to take.

Id. And having gone along, she felt like she needed to keep going.²

...[A]s well, as the kissing progressed to other things that he did, it became -- you know, he'd say, Well, like Mary Kay Letourneau, she doesn't get to see her kids anymore -- **it became a bigger threat.**

(Appendix, pg. A-347). Not, “Kevin’s threatening me physically” was a threat - the consequences of her own misconduct became the “threat.”

Even taking every piece of her deposition testimony in her favor, what she should have done after the first kiss was to not engage in any further sexual activities with the child. When asked to explain why she did not do so, she responded:

Q: So why didn't you just refuse to have any future contact with Kevin? It seems like a natural thing to do?

A: Right, but at that point, when I didn't tell, I was trapped.

Id.

Thus, she testified not that Kevin threatened her with physically nor that he physically overcame her. Her testimony was: she already had sexual

² Kevin vehemently contends the adult, Schorno, initiated these acts. But as this was a motion for summary judgment it is conceded Schorno’s version must be considered.

contact with the child, she was afraid of how her husband would react, so rather than have to explain herself, she volitionally decided to keep having sex with a child to put the revelation off for another day.

Rather than be the adult and do the right thing required by law, the adult Schorno decided it was easier just to keep having sex with the child.

Finally, demonstrating some modicum of introspection, she admitted that what the child was saying – assuming he said it – which she was offering up as her excuse, was not a threat at all:

Q: Why would you think that he would be believed?
I'm trying to understand why you think that would be a threat, that he would be believed and he would tell Dan?

A: **Well, in hindsight I don't really think it is...**

(Appendix, pg. A-349).

Only in response to summary judgment did Schorno contend the child “threatened” her from the beginning of the relationship. However, even if those declarations were considered, as even Commissioner Skerlec pointed out, she never contended he threatened her physically from the beginning. The “threats” are merely the so-called threats identified above.

It was conceded on summary judgment that Schorno, after “early 2001,” asserted facts that may be evidence she was having sex and sexual contact with this child under duress as defined by RCW 9A.16.060 which, if

believed, would allow her to argue not only that her own sexual conduct was excusable, but allow her to argue Kevin had civil liability for it.

Thus, Kevin's motion was brought and granted on an exquisitely limited issue:

In light of her admissions, without the legal excuse of duress, as a matter of law her sexual contact and sexual intercourse with Kevin Kannada constitutes Childhood Sexual Abuse as to that period of time before even she contends her defense of duress arises.

(Appendix, A-306).

There was no intention to preclude, and the trial court did not order, that Schorno could not argue Kevin had liability for forcing or coercing her to have sex as of the period of time Schorno contended Kevin allegedly physically threatened her nor that Schorno could not defend her later sex with the child with the defense of duress.

However, because as a matter of law an adult may not offer the child's consent, the child's initiation, nor any other excuse short of duress as a defense to having sex with a child, Schorno was precluded from denying that her sex and sexual contact with the child predating that time was wrongful.

Schorno has since argued the trial court's order "precludes" her own claims against Kevin. Arguably, it probably does. However, it only precludes them as to the period of time Schorno had sex with this child

before her defense of duress attaches. Absent duress, she had no claims to “preclude.” However, even saying that gives Schorno’s argument too much credit: an adult simply has no claim against a child for sex the adult was not compelled to engage in by the application of duress by the child.

An adult must first have a legal excuse for having sex with a child, before the adult may blame the child for the sex. An adult may not have sex with a child with no legal excuse and assert the child has a civil liability for the adult’s participation in conduct the adult had an affirmative legal obligation to avoid, and no legal excuse for failing to do so.

That was the limit of the trial court’s order, finding only that Schorno committed Childhood Sexual Abuse but reserving all other issues for the jury including Schorno’s defense of duress and therefore her own claims against Kevin after duress, if proven, attached.

B. Facts Relating To Argument On Discretionary Review

In her brief to the Commissioner, Schorno argued, inter alia., that because she asserted on summary judgment she never wanted to have sex with Kevin, that was sufficient to “put at issue” Kevin’s claim. Her defense to Kevin’s claim was that the sex was the child’s idea and therefore she should be able to argue the equivalent that the child committed “third degree

rape” against her.³

Although the panel did not state a specific reason for its order, the Commissioner’s Order provides some insight. From that order:

The Kannadas offer reasonable policy arguments for disallowing a lack of consent defense in childhood sexual abuse cases, but disregard the fact that this case began as a suit against the child, not the adult. The parties have cited no case from this or any other jurisdiction that addresses this particular factual situation, and this court has found none. In addition, the particular circumstances distinguish this case from ordinary rape cases involving adult victims. Here there was not an isolated act, but conduct that continued for a period of four years. The trial court's decision may be error, but given the considerations discussed above, it was not obvious or probable error.

(Ex. #1, Commissioner’s Order) (underline added).

This is the only issue Schorno moved for "reconsideration" on, arguing she should be able to excuse sex with a child by arguing her own "consent," e.g., her allegedly saying "no." There is no reasonable doubt that this is the basis of the order accepting review. The underlined portion of the order above, speaking with skepticism about the trial court’s order that, in essence, found an adult may not argue a child’s alleged consent as a civil defense, makes the basis of Division Two’s order clear.

It also demonstrates the appropriateness of review by this court because the underlined portion is contrary to this court’s decision in

³ Those are in fact Schorno’s words. She wants to argue this child committed third degree rape. For reasons set forth below, that is a legal impossibility.

Christensen v. Royal School Dist. No 160, 156 Wn.2d 62, 67 (2005). Additionally, that the adult filed suit is a patent non-sequitor and yet Division Two puts great weight in it. An adult has no more right to have sex with a child because they later won the race to the courthouse. For Division Two to even suggest otherwise should be cause for alarm.

C. Facts Relating To Division Two's Orders

The time line of the orders is set forth above. Further discussion of Division Two's procedure will be reserved for the authority section below.

VI. ARGUMENT FOR DISCRETIONARY REVIEW

A. Standard Of Review

The standard of review is de novo. This matter arises from an order of partial summary judgment, and Division Two's orders present questions and conclusions of law that are subject to de novo review. See Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880 (2003).

B. Standard For Acceptance Of Review

Either RAP 13.5(b)(2) or (3) are appropriate considerations. Costanich v. Washington DSHS, 164 Wn.2d 925 (2008) accepted review under RAP 13.5(b)(2) to determine an issue of "first impression" wrongly decided by Division One on attorney's fees. Id. at 928. There is little to no citable authority on RAP 13.5(b)(3). Washington Practice suggests it is to provide the courts "maximum discretion in deciding whether to grant or

deny discretionary review.” 2A WAPRAC RAP 2.3 (See 3 WAPRAC RAP 13.5 adopting the analysis of RAP 2.3 to RAP 13.5).

Division Two’s granting Schonro’s motion while denying Kevin any opportunity to be heard illustrates both a departure from “the accepted and usual course of judicial proceedings” as well as “probable error” that substantially alters the status quo. Division Two’s granting discretionary review is also an act of probable error subject to review.

C. **Division Two’s Order Refusing Kevin An Opportunity To Oppose Schorno’s Motion For Reconsideration Should Be Reviewed And Reversed**

On the one hand Kevin does not contend Division Two erred in considering Schorno’s motion for reconsideration as a motion for modification. See RAP 17.7.⁴

However, even as a motion for modification Division Two substantially deviated from the Rules of Appellate procedure by summarily deciding it without considering Kevin’s opposition.

RAP 17.4(e) provides that if a motion is to be decided with oral argument, the responding party has 4 days before argument to respond. If without oral argument, the court shall “set a date for the filing of a reply.”

⁴ But on the other, it is difficult to reconcile the Clerk’s acceptance of Schorno’s inappropriate motion for “reconsideration” while rejecting Kevin’s memo. It would seem if the rules were applied with equal force, Schorno’s “motion” would have been similarly rejected and the parties now engaged in trial. But, in any event.

But in either case, the adverse party has a right to reply.

Division Two had discretion to shorten time on the motion. See RAP 18.8. It appears Division Two had in mind the December 14 trial date. Schorno did make a motion to “shorten time” accompanying her motion.

However, no authority could be found in the RAPs to allow Division Two to both shorten time and deprive Kevin any right of opposition. Not only is there no authority, it simply was not necessary.

Schorno filed her motion on Monday, December 7. Division Two granted the motion a day and a half later on Wednesday, December 9 – and not simply on Wednesday, but apparently in the morning as it faxed its order at approximately 1:00 p.m. that day.

On Wednesday the court could have directed an answer to be filed by Thursday, (it could have done that on Monday when Schorno’s motion was received), and still had time to issue a ruling by Friday, December 11 to stay the trial if that was appropriate. Instead, it decided the motion essentially in one day, leaving the rest of the week unused.

The closest fit in the Rules that could be found for the court’s procedure is RAP 17.4, allowing emergency, summary determination of motions. The effect of the rule is to allow relief on short notice, with no opportunity for the adverse party to be heard.

Interestingly, while the Supreme Court in the rule approved “the

commissioner or clerk” to “decide (an emergency) motion” and order “summary determination” of one, there appears to be no grant of that authority to the judges of the court. Such a limitation is consistent with the whole of the rules: by limiting emergency, summary determination of motions to the clerks and commissioners, the Supreme Court inherently limits the types of matters that may be so decided.

Anything to be decided by the Judges, which could run the entire panoply of relief under the RAPs, even if on shortened time under RAP 18.8, may only be decided after giving the adverse party an opportunity to be heard. That is not an unreasonable restriction in light of the considerable power the judges wield as compared to the clerk and commissioner.

However, placing aside what Kevin submits was an inappropriate summary determination of Schorno’s motion for reconsideration/modification, if the judges are to take on that authority, it is submitted it should be exercised consistent with the rule allowing summary determination which provides at RAP 17.4(c)(2) that if a party timely files a responsive pleading “after the ruling has been entered, the commissioner or clerk will treat the responsive pleading as a motion for reconsideration.” That is a reasonable due process protection.

Here, not only did the Clerk reject Kevin’s brief timely filed on December 9 in response, but the court denied Kevin’s motion filed on

December 10 asking the court to consider his December 9 brief.

By treating Schorno's motion as one of modification and summarily granting it on an emergency basis the court has created a procedural Catch-22: (1) an adverse party is entitled to oppose a motion for modification; (2) an adverse party is entitled to have their timely answer considered a motion for reconsideration of relief summarily determined if received after relief was granted; but (3) the court denied Kevin an opportunity to respond to Schorno's motion and refused to consider his memorandum as a motion for reconsideration of the emergency summary determination of the motion, ostensibly because a party may not seek "reconsideration" of a panel's decision to grant discretionary review.

It is unfair and suggested to depart from the usual and accepted course of judicial proceedings to enter an order providing the enormously substantial relief of modifying the commissioner's order, allowing discretionary review, and staying trial court proceedings that have been pending for four years in what amounts to an ex parte manner.

D. Division Two's Order Granting Discretionary Review Constitutes Probable Error That Should Be Reviewed And Reversed

Although literally hundreds of pages of briefing were filed by Schorno on this issue, the crux of the question is easily stated. Schorno's argument for review may be summarized thusly:

An adult should be able to defend having sex with a child by merely arguing the adult “did not consent.” And consistent with that, an adult should be able to both legally excuse their sex with a child and bring their own civil claims amounting – in her own words – to “third degree rape” of an adult by a child provided the adult merely told the child “no.”

That argument is a fundamental contradiction of well established Washington law, and more specific to her own case, starkly in contradiction to her own clear deposition admissions.

The law on Childhood Sexual Abuse under RCW 4.16.340 is in pari materia to the criminal statutes that define the misconduct. See Christensen, supra., and Champion v. Shoreline School Dist. No. 412 of King County, 81 Wn.2d 672, 674 (1972). Thus, not only does the criminal law determine the scope of defenses available to a civil defendant, id., erosion of the protection of children in the civil context has the direct effect of eroding the criminal protection of children:the court cannot effect one without effecting the other.

An adult engages in Childhood Sexual Abuse by conduct that would violate the criminal childhood sexual abuse statutes. See RCW 4.16.340. An adult has strict liability for behavior in violation of the childhood sex abuse statutes. State v. Abbott, 45 Wn.App. 330, 333-334 (“The Legislature has imposed strict criminal liability...The legislative intent is clear.”)

There is no dispute but that an adult may not make arguments to justify their sex with a child as though the child was an adult. State v. Dodd,

150 Wn.App. 337, 344, fn. 12 (2009). Instead, the adult's conduct must be viewed through the lens of the law specifically defining the duties and restrictions of sex with children. Id.

Unlike sex between adults, an adult will not be heard to argue the sex was the child's idea, at the child's initiation, "nor the defendant's lack of initiation" as excuses for sex or sexual contact with a child. State v. Clemens, 78 Wn.App. 458, 467 (1995).

Thus, adults have an affirmative duty to not have sex with children – they simply will not be heard to argue: (1) I told her "no" but the 14 year old girl said if I did not allow her to give me oral sex she would tell my wife we did; or (2) I told my 13 year student "no," that we could not have sex, but he said he if we did not, he would say we did anyway.

Thus, unlike sex between adults, with a child an adult may not simply say "no," stay and have sex anyway, and argue "hey, I told her no," as a defense. That is simply the other side of the same coin of rejected defenses that the sex was the child's idea or at their initiation, or offering the adult's "lack of initiation" as a defense; all explicitly barred by law. See id.

Taking the child's consent or initiation out, an adult having sex with a child has only duress as defined by RCW 9A.16.060 as a defense. In this context, duress requires that the adult was compelled by an immediate threat of grievous bodily harm or death to have the intercourse or sexual contact.

Allowing only duress as a defense is consistent with Washington law because when present, it constitutes proof that the adult had no choice but to engage in the sex. See State v. Riker, 123 Wn.2d 351, fn. 4 (1994).

However, **absent duress**, the adult had a **choice**. **Absent duress**, the adult could **choose** to not have sex with the child. And with a **choice** present, the adult must **choose** to not have sex with the child.

This reveals the “probable” error of Division Two even entertaining Schorno’s argument she should be able to argue her alleged lack of consent as a defense: an adult arguing they did “not consent,” or said “no” and had sex with the child in circumstances less than duress, is in fact defending sex with a child by the argument the sex was the child’s idea or at its initiation. Our law will not entertain such arguments. See Clemens, inter alia.

The danger to children having sex and the “social evil of carnal abuse over exploitation of children” are so great that an adult has an affirmative obligation to not have sex with a child. See Clemens, 78 Wn.App. at 333-334, inter alia. Allowing an adult to defend sex with a child by anything less than duress, that they had no physical choice on pain of grievous bodily injury but to have the sex, dangerously undermines the protection of children because it allows arguments that are nothing more than arguments of the child’s alleged consent.

Here, Schorno plainly admits she had a choice of whether to have sex with this child; she simply decided having sex with the child was an easier solution than having to explain her prior misconduct to her husband.

Schorno acknowledges she has no evidence of duress to excuse much of her behavior; that is why she argues she should be allowed to argue her mere “lack of consent” as a stop gap – in her words: that she said “no” and that constitutes “third degree rape” against her.

To allow any adult to justify having sex with a child by the expedient of having said “no” before they consummated, will put the child’s “initiation” or “consent” at issue in every case, reducing every child rape case to an inquiry of the child’s desire or initiation, ignoring the adult’s affirmative obligation to not have sex in the first place. State v. Heming, 121 Wn.App. 609, 612 – 613 (2004). That is not the law.

VII. CONCLUSION

There is no concept of law or fact to entertain the argument of Schorno. Division Two departed from the rules of procedure and to even grant discretionary review is probable error, giving credence to legal propositions fundamentally rejected by the courts for the protection of children. This court should accept review or transfer the case.

Dated this 15th day of December, 2009.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: /s/ Dan’L W. Bridges

Dan’L W. Bridges, WSBA #24179

Attorneys for petitioners Kevin Kannada

Exhibit #1

39752-8-II, 39952-1-II

FACTS

In the summer of 2005, Amy Schorno told her husband that for the last four years, Kevin Kannada (then 18 years old) had been raping and assaulting her and making her engage in other sexual acts. In October 2005, she hired Jon Cushman to obtain a protection order against Kannada. The order was issued in December 2005. Schorno began dating Cushman soon after that. She obtained a divorce from Dan Schorno in February 2006.

In September 2006, represented by attorney Brett Purtzer, Shorno filed this lawsuit against the Kannadas, alleging intentional and negligent infliction of emotional distress, defamation, and assault and battery. The Kannadas cross claimed, alleging injury to the parent-child relationship, negligent and intentional infliction of emotional distress, outrage, and negligent supervision.

In October 2006, represented by Jon Cushman, Karen Kannada, Kevin's sister, filed a lawsuit against her parents, alleging assault and battery and negligent and intentional infliction of emotional distress. She voluntarily dismissed the lawsuit on November 30, 2007. On November 13, 2007, Attorney Cushman entered a notice of appearance on behalf of Amy Schorno in her lawsuit against the Kannadas.

In February 2008, in order to facilitate a deposition of attorney Cushman by her parents' attorney, Karen Kannada executed the following waiver:

Any attorney-client relationship I had with Mr. Cushman I am hereby waiving, including such privilege as to any communication between Mr. Cushman and myself at any time.

Kannada appendix at 069. The court struck the deposition.

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On August 4, 2008, Cushman and Schorno married.

This case went to trial in May 2009, but when the Kannadas attempted to argue new claims to the jury, the court declared a mistrial. Thereafter, the Kannadas amended their complaint to include those claims, pertaining to sexual abuse after Kevin's sixteenth birthday. On August 6, 2009, the Kannadas moved to disqualify attorney Cushman on the basis of his prior representation of Karen Kannada. The court denied that motion, holding that Karen's waiver of the attorney client privilege was broad enough to include his use of information she provided in this lawsuit.

The Kannadas filed a motion for discretionary review of that determination. Thereafter, the court made other rulings adverse to Schorno, and she filed two cross motions for review.

ANALYSIS

Disqualification

The Kannadas contend that Karen waived only the attorney client privilege, not attorney Cushman's duty to keep her secrets/confidences, and thus the trial court committed obvious or probable error in failing to disqualify him, justifying review under RAP 2.3(b)(1) and (2).²

² Under those provisions, this court may accept review if: (1) the superior court has committed an obvious error which would render further proceedings useless; or (2) the superior court has committed probable error and the decision of the superior court would substantially alter the status quo or substantially limit the freedom of a party to act.

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The written waiver is not the only consideration here. The Kannadas waited 21 months from the time of Attorney Cushman's appearance in this case to object. Knowing all of the facts about the prior representation of Karen, they even began a trial in this matter. The failure to act promptly after acquiring knowledge of the basis for disqualification can justify denial of the motion. See *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987).

In addition, the duties of loyalty and the protection of confidences invoked here as the bases for disqualification are personal to Karen Kannada. She is not a party to this lawsuit, and the other members of her family cannot assert them. See *State v. Emmanuel*, 42 Wn.2d 799, 816, 253 P.2d 845 (1953). Karen has avenues of redress outside this lawsuit if she wishes to pursue this matter. Given these considerations, the trial court did not obviously, nor probably err in denying disqualification.

Summary Judgment on the Issue of Childhood Sexual Abuse

Granting the Kannadas' motion for partial summary judgment, the trial court ruled as a matter of law that Schorno had committed childhood sexual abuse. The court based its decision on determinations that: (1) Schorno's conduct satisfied the requirements of RCW 4.16.340; and (2) she had not established the defense of duress. Schorno contends that there is an issue of fact regarding who was the perpetrator and who was the victim in this case, and therefore the lack of a duress defense was not determinative.

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Schorno has admitted numerous sexual encounters with Kevin Kannada over a four-year period. She contends that he initiated them, and that she objected. However, he told her he would tell her already jealous husband that she and he were having sexual contact/an affair, and so she complied with his demands. As time progressed, his threats included physical injury, killing her dog, and burning down her house. When he indicated to her that he was interested in having sex with her 14-year-old daughter, she decided she had to report his conduct.

RCW 4.16.340 is not a criminal statute, but a part of the statutes of limitations. It provides limitations periods for claims related to childhood sexual abuse, and it defines that term to mean

[A]ny 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.

RCW 4.16.340(5). The Kannadas assert that Schorno's conduct violated RCW 9A.44.079 (third degree rape of a child) and RCW 9A.44.089 (third degree child molestation). As all parties agree, the crimes cited above are strict liability offenses; neither willing participation nor initiation by the juvenile are defenses. See *State v. Clemens*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995); *State v. Abboitt*, 45 Wn. App. 330, 333, 726 P.2d 877 (1986), review denied, 107 Wn.2d 1027 (1987). As both parties also agree, this criminal standard applies in civil cases. See *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 68, 124 P.3d 283 (2005).

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The Kannadas contend that Schorno's only defense, both criminally and civilly, is duress, as established in RCW 9A.16.060. That statute provides, in pertinent part:

- (1) In any prosecution for a crime, it is a defense that:
 - (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury

RCW 9A.16.060. The Kannadas contend that Schorno cannot establish duress as to much of the conduct because she admitted in her deposition that Kevin's initial threats, gaining her compliance in various acts, including intercourse, were only that he would tell her husband about the sexual activity. The trial court agreed that there was no duress defense as to conduct occurring before 2001 and found that Schorno had committed acts of childhood sexual abuse as a matter of law.

Schorno contends that the court obviously or probably erred because she need only establish that she did not consent to the sexual activity to establish that Kevin committed third degree rape, and she was the victim.³ See RCW 9A.44.060(1)(a) (providing that a person is guilty of third degree rape if under circumstances not constituting a higher degree, he/ she engages in intercourse

³ She also argues that her declaration provided enough evidence to raise a factual question regarding duress. However, all she said was that Kevin was bigger than she was, and she was afraid of him. That is not enough. She must provide a reason for fear based on his conduct. See *State v. Weisberg*, 65 Wn. App. 721, 725-26, 829 P.2d 252 (1992).

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with another person who "did not consent . . . and such lack of consent was clearly expressed by the victim's words or conduct").

The Kannadas offer reasonable policy arguments for disallowing a lack of consent defense in childhood sexual abuse cases, but disregard the fact that this case began as a suit against the child, not the adult. The parties have cited no case from this or any other jurisdiction that addresses this particular factual situation, and this court has found none. In addition, the particular circumstances distinguish this case from ordinary rape cases involving adult victims. Here there was not an isolated act, but conduct that continued for a period of four years. The trial court's decision may be error, but given the considerations discussed above, it was not obvious or probable error.

Denial of Summary Judgment on Mental Incapacity

In August 2007, the Kannadas amended their counter claims to add two claims based on conduct that occurred after Kevin's sixteenth birthday. These claims depend upon a claim that he was mentally incapacitated. Schorno sought summary judgment on this issue, contending that such a determination could not be made in the absence of a declaration from Kevin, himself, and the expert opinions he provided were insufficient to establish incapacity because: (1) there was no finding of mental incapacity, only diminished capacity; and (2) the experts found that he had average cognitive ability, understood what he was doing was wrong, and exercised control in certain ways. The court denied summary judgment, finding that there were material issues of fact regarding the issue.

"Mental incapacity" is defined as

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That condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

RCW 9A.44.010(4). A meaningful understanding of the nature and consequences of sexual intercourse includes an understanding of the potential for emotional involvement and the disruption of established relationships. See *State v. Ortega-Martinez*, 124 Wn.2d 702, 712, 881 P.2d 231 (1994). The experts believed that Kevin did not understand the psychological impact that a sexual relationship could have. Dr. Jon Conte believed that Schorno had groomed Kevin for the sexual relationship, and that the conditioning process of grooming made it difficult for him to resist and to extricate himself. This is enough to raise a question of fact regarding mental capacity. Additionally, while the parties have cited no Washington case that addresses grooming in this context, and this court has found none, at least one jurisdiction has determined that this kind of conditioning is sufficient to establish mental incapacity. See *State v. Collins*, 7 Neb. App. 187, 583 N.W.2d 341 (1998).

Schorno also contends that the amended claims are barred by the statute of limitations. This argument is not addressed by the trial court in its order, and Schorno has not provided the transcript of the hearing on her motion. It is not clear that this issue was argued to the lower court. In any case, this was a denial of a motion for summary judgment. It did not make further proceedings useless, change the status quo, or limit Schorno's ability to act.

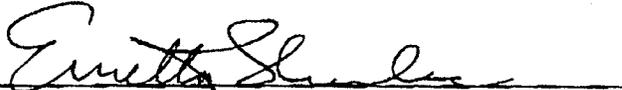
39752-8-II, 39952-1-II

Finally, Schorno contends that the trial court erred in striking the report of her polygraph examination and all references to it. It is certainly true that in reaching his/her opinion, an expert may rely upon data that would be inadmissible at trial, and may testify about such reliance. ER 703. But the expert may not relate such data as substantive evidence. As the polygraph results could not be used to establish Schorno's credibility, their absence does not materially limit her freedom to act.

The parties have not established the prerequisites of RAP 2.3(b). The trial is scheduled for December 14, 2009, and it should proceed. Any party aggrieved will be able to obtain review of these and other decisions in short order. Accordingly, it is hereby

ORDERED that review is denied.

DATED this 4th day of December, 2009.



Ernetta G. Skerlec
Court Commissioner

cc: Shellie McGaughey
Dan'L W. Bridges
Jon Cushman
Brett Purtzer
Jeffrey H. Sadler
Hon. Linda C.J. Lee

Exhibit #2

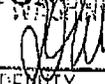
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DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY 
 CLERK

AMY CATHERINE SCHORNO,

No. 39752-8-II

Petitioner,

v.

ORDER GRANTING PETITIONER'S
MOTION TO SHORTEN TIME AND
GRANTING DISCRETIONARY
REVIEW

KEVIN KANNADA, a single man; and JEFF
KANNADA and KATHY KANNADA,
husband and wife,

Respondents,

Petitioner, Amy Schorno, filed a Motion to Shorten Time to Hear the Motion for Reconsideration of a Commissioner's Decision Denying Discretionary Review and a Motion for Reconsideration of Commissioner's Decision Denying Discretionary Review on December 7, 2009.

After review of the files and records herein, we grant Petitioner's Motion to Shorten Time and her Motion for Reconsideration. Discretionary review is granted. All proceedings at the trial court are stayed pending review.

DATED this 9th day of December, 2009.

PANEL: Jj. Van Deren, Penoyar, Armstrong

FOR THE COURT:

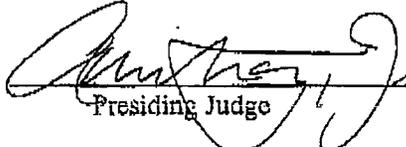

Presiding Judge

Exhibit #3

No. 39952-1-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

AMY CATHERINE SCHORNO,

Petitioner,

vs.

KEVIN KANNADA, a single man; and JEFF KANNADA
and KATHY KANNADA, husband and wife,

Respondents.

RESPONDENTS' MOTION TO RECONSIDER DISCRETIONARY REVIEW –
MOTION TO SHORTEN TIME

**REQUEST FOR EMERGENCY HEARING ON
FRIDAY, DECEMBER 11, 2009**

Dan'L W. Bridges, WSBA # 24179
McGaughey Bridges Dunlap, PLLC
Attorneys for Kannada
325 – 118th Avenue Southeast, Suite 209
Bellevue, WA 98005
(425) 462-4000

1. Motion

Respondents move this court to reconsider its December 9, 2009 order granting discretionary review.

Respondents request an emergency hearing for Friday, December 11, 2009.

Whether this court considers this motion brought under the authority of RAP 18.2, 18.4, 18.8 or the inherent authority of any court to consider its own orders, is left to the sound discretion of this court.

Respondents ask that this court shorten time pursuant to RAP 18.8. The basis of that request inheres in the request itself and does not require detailed discussion: The parties are set for a jury trial on December 14, 2009.

2. Overview

When Kevin Kannada was 14 years old, the then 31-year-old Amy Schorno had sex with him. Repeatedly. She masturbated him. She made out with him.

She admitted at her deposition she did all those things without any fear of battery much less duress. She admitted she did those things because, allegedly, Kevin told her if she did not, he would tell her husband that they did anyway and that it was her idea.

That is her excuse, offered after the fact, to justify having sex with a child. What abuser does not offer an excuse. That Schorno has one should

not be a surprise. But even taking her's at face value, it was clearly legally insufficient to excuse her having sex with a 14 year old child.

This matter was filed in 2006. Since that time, Amy Schorno has already sought and obtained numerous trial continuances.

When this matter was reset for trial the last time to December 14, 2009 the trial court indicated in the most stern fashion possible that further delay by Schorno would not be tolerated.

In an attempt at further delay, Schorno in her briefing to this court fundamentally misrepresented the scope of the court's partial summary judgment order; claiming it had a preclusive effect against her claims that not even Kevin contends it does.

Kevin Kannada's healthcare providers have testified that the ongoing delay of resolution to this matter is an open wound in Kevin's psyche. The sexual abuse perpetrated against Kevin, which Schorno admits to, has fairly well destroyed the life of that young 14 year old child, who is now a 24-year-old man that continues to grapple with the after effects of the abuse.

Further delay of this matter is not only legally not indicated, it comes at an enormous personal cost to Kevin.

It is suggested to be extraordinary that this court would grant Schorno's motion for reconsideration, literally at the 11th hour before trial, without allowing Kevin to be heard.

The court's order was received at 1:04 PM by facsimile on Wednesday, December 9. This matter is being prepared immediately thereafter and will be delivered to the Court of Appeals the same day.

3. **Argument**

A. **The Trial Court's Order Had No Preclusive Effect On Plaintiff's Claims – The Trial Court's Order Is Consistent With Well Established Washington Law**

The fundamental aspects of law and fact that pertain to this issue are assumed to be within this court's knowledge in light of the briefing already on file with the court.

In light of the short time, respondents rely on their briefing already on file that provides a broad range of authority for the legal propositions stated herein. Therefore, respondents will cut directly to the heart of the matter.

It is manifest that Schorno admitted to substantial sexual contact and intercourse with Kevin during the ages of 14 and 15, when she was 31 and 32; and that she admitted that contact occurred without any fear of injury nor under the influence of duress.¹

¹ It is acknowledged that only in opposition to summary judgment that Schorno drafted declarations asserting she was under duress the entire time. Not only did the trial court properly not consider those matters as creating a question of fact as they were an attempt to create a question of fact in contravention of her clear deposition testimony, as the Commissioner of this court pointed out when Schorno's counsel again attempted to rely on them at oral argument: even if considered those declarations merely gave voice to alleged "threats" by Kevin – there was no articulation of evidence that the conduct that

Based on her clear deposition admissions in response to clear questions, the court granted an order of partial summary judgment indicating that the fact that Schorno committed childhood sexual abuse against Kevin was established. However, the full nature and extent of that abuse were issues left to be decided by the jury.

While respondents cannot read this court's mind, they can read the Commissioner's order. The Commissioner indicated the trial court "may" have committed error because of what Schorno argued was a potential preclusive effect of the court's summary judgment order on her own claims. In short, Schorno argued that the trial court's order had the effect of denying her the ability to argue she was battered sexually against her will by Kevin at a later time.

The trial court's order simply did not have that effect.

As already well briefed, the law is clear an adult may not have any type of sex or sexual contact with a child under 16 without the presence of duress as defined by RCW 9A.16.060.

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was at issue on the motion was accompanied by a threat of violence, instead, it was only the alleged "threat" that Kevin would tell Schorno's husband and that he would be believed, not her. For reasons amply discussed elsewhere, that is not a "threat" that may excuse having sex with a child.

An adult's merely "being there" in sexual activity with a child, absent the presence of cognizable duress, renders them culpable: they are "strictly liable." State v. Abbott, 45 Wn.App. 330, 333-334 (1986).

However, provided duress is present, not only may an adult excuse their own conduct, it is conceded they may argue the child has culpability for forcing the conduct on the adult.

Thus, this court's order of partial summary judgment did not preclude any claim by Schorno. It merely properly defined the outer limits of them.

Hypothetically, Schorno may make a claim that Kevin tortously had sex with her while he was under the age of 16, provided the events she was forced (battered) to engage in, where forced/battered under cognizable duress. The law is clear: if the circumstances were anything less than duress, she as the adult had the affirmative obligation to disengage.

When a child is involved, arguments that the sex was the child's idea or at his initiation will not be heard. State v. Clemens, 78 Wn.App. 458, 467 (1995). Absent duress, the adult bears responsibility for the conduct. Abbott. Schorno's argument to the contrary treats Kevin as though he was an adult. That is categorically not the law; the Courts of Appeal have squarely rejected an adult making legal/factual analogies to sex with children as though the child is an adult. State v. Dodd, 150 Wn.App. 377, 344, fn. 12 (2009).

While an adult may simply say “no” to sex with another adult and if the other adult continues that may constitute third degree rape, simply saying “no” is categorically not the limit of an adult’s obligation when a child is involved. And yet, that is the argument Schorno argues she is being “precluded” from making as a component of her claims against Kevin: that she allegedly said no or otherwise had sex with a child under circumstances less than duress, and that was the child’s fault. As a matter of law, she may not make that claim. Surpa. She is not being “precluded” from making a claim she may actually make.

Kevin conceded at the trial court and in this court that Schorno absolutely may make claims against him for any period of time (including when he was 14) wherein she demonstrates she was under duress. The trial court’s partial summary judgment order does not preclude those claims. Even the trial court stated that.

Thus, the trial court’s summary judgment ruling merely addresses conduct where plaintiff by her deposition testimony admitted she was not under duress – not the conduct where she claims she was.

The issue for her at trial is simply to demonstrate with evidence when her alleged duress began.

Because the trial court’s partial summary judgment order merely determined that childhood sexual abuse took place, and left for the jury to

determine the full nature, scope, and extent of that abuse, the plaintiff is free to argue that at any given point Kevin subjected her to duress which has the effect of both cutting off her liability and establishing Kevin's.

Thus, the trial court's partial summary judgment order neither precluded any claim of the plaintiff's nor found as a matter of law that an adult may never bring a claim arising out of sexual contact or intercourse with a child, against the child. Instead, it merely properly defined the outer parameters of such a claim which, in light of Washington's black letter law that an adult may not engage in sexual intercourse or contact with the child, requires that the adult was actually compelled to engage in the conduct under Duress.

B. Even If There Was Error It Is Harmless Because Any Claim Of Plaintiff's That She Argues Is Precluded Is Barred By The Statute Of Limitations

It is impossible to sufficiently stress the respondents' position that the trial court did not commit error.

However, even if an argument for error could be articulated, it is harmless because any claim plaintiff alleges was precluded by the trial court order is barred by the statute of limitations anyway.

Plaintiff started having sexual contact with Kevin in 2000, and sexual intercourse no later than December 2000 or January 2001.

Plaintiff filed her lawsuit very late; September 6, 2006. Therefore, by any measure her claims are limited to a three-year statute of limitation

(assuming outrage has a three-year limitation) and thus no act of Kevin may give rise to liability before September 6, 2003.

That being the plain operation of the statute of limitations, the argument plaintiff asserts she is precluded from making, that a child has the ability to rape an adult, is barred by the statute of limitations.

Therefore, even if the trial court's partial summary judgment order precluded plaintiff from making that argument, in this case she cannot make that argument anyway.

In regard to the time frame in which plaintiff may assert liability against Kevin, commencing as of September 6, 2003, Kevin had already turned 17 (he was born on October 12, 1986). He had the ability to give consent and therefore the plaintiff has legal standing to argue that she merely said "no," that most basic level of resistance by her was sufficient, and the conduct of Kevin to have sex with her constituted a battery - or in her words third degree rape. The court's partial summary judgment order does not preclude that.

C. Review Is Premature – The Issue Is One Of Jury Instructions Which The Trial Court Has Not Even Given Yet

To pull together the various strands above, ultimately what the issue comes down to is how the jury is instructed.

The claims statement proposed by respondents and already filed with the trial court is attached hereto. It demonstrates that the order allows Schorno

to make every civil claim she is entitled to make within the statute of limitations.

At trial, what the trial court needs do is simple:

1. Instruct the jury on its summary judgment finding and make it clear that the summary judgment finding did not determine the extent of the misconduct of Schorno but that instead, that is an issue for the jury to determine;
2. Instruct the jury on the defense of duress;
3. Instruct the jury on the elements of plaintiff's causes of action.

Based on those instructions, it will be a question for the jury to determine at what point in time Schorno's defense of duress kicks in (if proven to exist) that will excuse her admitted sexual contact and intercourse with Kevin.

And at that point in time, with her participation in the sexual contact and intercourse with Kevin excused, that commences the time in which she is able to assert that the sexual contact and intercourse with Kevin was, for lack of a better term "Kevin's fault" subjecting him to liability (if within the statute of limitations) and giving her the ability to recover damages from Kevin.

4. Conclusion

It is typical in cases such as this that the adverse party complains of delay, and the responding party indicates that as long as there is a money judgment entered ultimately, it is a no harm no foul situation.

This case, however, is different.

It is impossible to understate the injury that will be caused to Kevin by further delay. He has been vilified by Schorno in his community by the spreading of gossip and rumors. Healthcare providers, including Michael Conte, Ph.D., a nationally recognized expert in the field of childhood sexual abuse, have opined that Schorno groomed Kevin from their first meeting, conditioned him to have sex with her, and that his life has been abjectly derailed since that time.

Every day this litigation hangs over his head, maintains that open wound; it continues to visit upon him the abuse he suffered at the hands of Schorno.

This case has been pending for four years. The distress caused to Kevin by another false start, yanking trial away at the last minute, will be devastating.

In light of the foregoing, it is respectfully submitted that this court's order granting discretionary review ought to be reconsidered and that an emergency motion should be held on Friday, December 11 if this court has any remaining doubts. Otherwise, based the foregoing memorandum it is submitted that these

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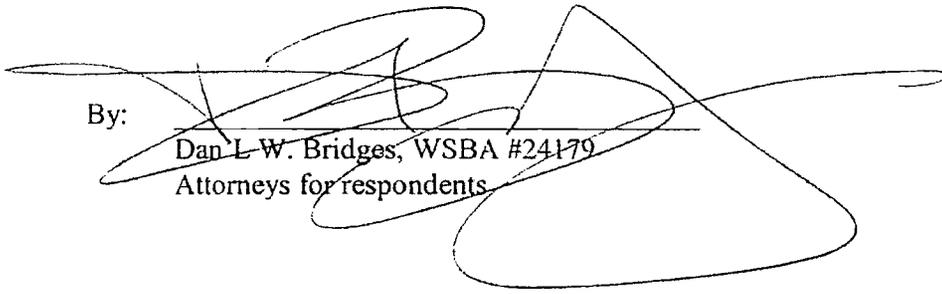
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issues are sufficiently clear for this court to reconsider its order without further delay.

DATED this 9th day of December, 2009.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:



Dan L. W. Bridges, WSBA #24179
Attorneys for respondents

INSTRUCTION NO. _____

1. In this lawsuit, plaintiff Amy Schorno claims to be entitled to damages from defendant Kevin Kannada; defendant Kevin Kannada claims to be entitled to damages from plaintiff Amy Schorno; and Jeff and Kathy Kannada (Kevin Kannada's parents) claim to be entitled to damages from plaintiff Amy Schorno.

2. Amy Schorno claims Kevin Kannada committed the torts of Assault and Battery, and Intentional Infliction Of Emotional Distress against her, and that said conduct was the proximate cause of damage to her. Kevin Kannada denies those claims, and the nature and extent of Amy Schorno's alleged damage, if any.

Statutes of limitation apply to Amy Schorno's claims and she may not recover damages on any claims based on conduct alleged to have occurred before September 6, 2003.

3. Kevin Kannada counter-claims plaintiff Amy Schorno committed the torts of Childhood Sexual Abuse, Malicious Interference With The Parent-Child Relationship, and Defamation against him, and that said conduct was the proximate cause of damage to him. Amy Schorno denies those claims, and the nature and extent of Kevin Kannada's alleged damage, if any.

4. Jeff and Kathy Kannada counter-claim Amy Schorno committed the tort of Malicious Interference With The Parent-Child Relationship against them and that said conduct was the proximate cause of damage to them. Amy Schorno denies that claim, and the nature and extent of Jeff and Kathy Kannada's alleged damage, if any.

5. This court has already determined that Amy Schorno committed Childhood Sexual Abuse against Kevin Kannada by some of her conduct at issue in this

Exhibit #4

APPENDIX

No. 39752-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

AMY CATHERINE SCHORNO,

Petitioner,

vs.

KEVIN KANNADA, a single man; and JEFF KANNADA
and KATHY KANNADA, husband and wife,

Respondents.

RESPONDENTS' MOTION TO CONSIDER RESPONDENTS' MEMORANDUM IN
OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION

REQUEST FOR ORAL ARGUMENT ON FRIDAY, DECEMBER 11

Dan'L W. Bridges, WSBA # 24179
McGaughey Bridges Dunlap, PLLC
Attorneys for Kannada
325 – 118th Avenue Southeast, Suite 209
Bellevue, WA 98005
(425) 462-4000

1. **Motion**

Come now the respondents pursuant to RAP 1.2(a) and request that this court consider their brief filed on December 9, 2009 as opposition to petitioner's motion for "reconsideration" of the commissioner's order denying discretionary review, and to set this matter for emergency hearing on Friday, December 11, 2009.

This request is also made pursuant to RAP 17.4(b) regarding emergency motions and RAP 18.8 regarding the waiver or extension of time.

2. **Argument**

By order dated December 4, 2009 the commissioner denied petitioner's motion for discretionary review.

On December 7, 2009 respondents received petitioner's "motion for reconsideration of commissioner's decision denying discretionary review."

By December 9, 2009 - before respondents could prepare any response, even assuming one could be filed without being called for by the court - this court granted petitioner's motion for reconsideration. Notice of that order was received by facsimile at 1:04 PM on September 9, 2009.

It is respectfully submitted that to grant petitioner's motion for reconsideration without providing respondents an opportunity to even be heard, is not equitable.

Petitioner's original motion was not procedurally well-founded. Instead of a motion for reconsideration, petitioner should have filed a motion for modification. That is an important difference.

It appears a motion to modify a commissioner's order should be directed to RAP 17.6 regarding motions for modification. Such a motion is made to the judges.

Instead, petitioner filed a motion for reconsideration. Motions for reconsideration are governed by RAP 12.4.

Regardless of whether the petitioner's motion was considered by respondents under RAP 17.6 or 12.4, it is submitted to be inequitable to require them to respond on essentially 12 hours notice without any notice by this court of that type of timeline.

Candidly, looking at petitioner's motion as received, it did not appear any response was due, much less due on a one-day turnaround. As a so-called motion for "reconsideration" as framed by petitioner, a party adverse to a motion for reconsideration may not even file a brief unless directed to do so by the court. See RAP 12.4(d).

As a motion for modification, RAP 17.4 provides that the responding party is unable to even determine the time for an answer until the court determines whether the motion is to be decided with or without oral

argument. RAP 17.4(e). If to be determined without oral argument, the court is to set a date for filing an answer. If with oral argument, the answer is not due until "at least four days preceding the day of the hearing." Id.

When the petitioner's motion for reconsideration was originally received, reference was made to RAP 12.4 regarding motions for reconsideration. As a motion for reconsideration, it was decided that no response was due unless called for by the court.

But even observing that, it was also observed that the motion was not properly one for reconsideration but instead a motion to modify and in that regard reference to RAP 17.4 made it clear that no reply would be due until some type of notice was received from the court; setting the matter for decision with or without oral argument.

What respondents never conceived is that this court would rule on petitioner's motion for reconsideration on basically 12 hours notice.

Even if this court was to consider petitioner's motion, improperly captioned as a motion for reconsideration, as an emergency motion under RAP 17.4(b), even under that extraordinary circumstance the rule indicates that respondents should have been given an opportunity to be heard.

Placing aside the fact that RAP 17.4 does not appear to be a good fit for this court's December 9 order because RAP 17.4 appears to authorize

only emergency motions of the type that may be made to "the commissioner or clerk" and thus does not appear to not allow the court/judge's to enter relief on an emergency basis, but assuming this court may, before a decision is rendered the rule provides that "the court will notify the parties and other persons entitled to notice of the date, time, and place the motion will be heard." RAP 17.4(b). There was certainly time in this instance to give respondents an opportunity to be heard.

And even if this court were to consider petitioner's motion "for reconsideration" as an emergency motion requesting "summary determination" under RAP 17.4(c) (and again ignoring it does not appear the rule allows the court to grant that type of relief, but instead limits it to the type of relief that could be given by a commissioner), even if appropriate by a commissioner the rule indicates such relief may be granted only if it "does not effect a substantial right of the party." RAP 17.4(c). It is submitted that losing a trial date, at the 11th hour of trial, in a case that has been pending for four years, involving the extraordinarily sensitive child abuse issues involved in this matter, in which every day it remains open is a continued injury to the child victim, is indeed a "substantial right."

Finally, even if RAP 17.4 could be applied to a summary determination by the court as opposed to the commissioner, the rule is clear

that if summary determination is given and "a party files and serves a timely responsive pleading after the ruling has been entered, the commissioner or clerk will treat the responsive pleading as a motion for reconsideration of the ruling."

But, on December 10 when this matter was discussed with the clerk, he indicated that he would not accept respondents' brief because it is a motion for reconsideration. It is submitted that what the court has done is to create a Catch-22 for the respondents and in that Catch-22 has denied respondents any opportunity to be heard when the rules require, even for emergency relief summarily provided, an opportunity to be heard.

Based on the foregoing, respondents' had a right to be heard on a motion to modify the commissioner's ruling. Granting petitioner's motion on essentially 12 hours notice, deprived respondents of their right to be heard.

Summary determination does not appear to be an authority explicitly conveyed to this court (the judges, it clearly is to the commissioners) by the rules and it is submitted the rules do not convey that authority because by giving that authority only to the commissioners, that inherently limits the type of relief that may be summarily granted. If this court takes it upon itself to grant summary determination relief on the full panoply of matters within its discretion, that would appear to allow summary relief on matters beyond

the scope contemplated under the rules.

But if this court is to assume such authority, it is respectfully submitted that it must at least utilize that authority in accordance with the rule authorizing emergency summary relief: RAP 17.4. And thus, to treat respondents' brief filed on December 9, as a motion for reconsideration under RAP 17.4(c)(1).

Which brings this matter full circle, back to the Clerk's refusal to accept respondents' brief as being an improper motion for reconsideration.

If a place cannot be found in the rules for respondents' request for an opportunity to be heard by way of their December 9 brief in response to petitioner's motion for reconsideration, then it is suggested a place cannot be found in the rules for this court's December 9 order granting petitioner's motion on basically 12 hours of notice with no due process to respondents to respond. It is suggested that to use the term "reconsideration" to reject respondents' December 9 memorandum, is not well placed.

It is appreciated that this court wanted to move quickly in light of the December 14 trial date. However, it is suggested that the short time before trial is not an appropriate reason to deny respondents due process and an opportunity to reply to a motion by petitioner that requested extraordinary relief by way of a stay of a trial date, at the 11th hour, that has been four years

in the making and is nearly 10 years after petitioner commenced her abuse of Kevin.

Petitioner may not be heard to complain about timing. She did not file her motion for discretionary review as soon as she could, and once set for oral argument waited nearly 30 full days to request a continuance of the date of hearing to a later date when she knew for almost 3 weeks that she had a scheduling conflict (please see petitioner's motion for a continuance and respondents' reply thereto). She has thus already delayed an orderly resolution of this matter twice by her own inaction. That she found herself up against the trial date is entirely of her own making and should not be a reason to deprive respondents a meaningful opportunity to be heard.

In speaking with the Clerk, and acknowledging he was not giving legal advice, it was suggested that respondents file a motion under RAP 1.2 to request relief under RAP 18.8 for a waiver or extension of time in regard to the filing of respondents' brief. If this court or the court clerk deems it appropriate to view this motion through that lens in order to consider this motion as well as respondents' brief filed on December 9, respondents will not undertake to second guess the court or the clerk.

However, it is respectfully submitted that to suggest that what the respondents are asking for here is a waiver or extension of time under the

rules, or a bending or suspension of them, is not entirely well-founded. Respondents' time to file a response was not ripe and if this court in its discretion felt it necessary to move with the speed it did, it is respectfully submitted there was still time to allow respondents to file a brief and be heard. December 9 was a Wednesday. Instead of issuing the order on Wednesday, the court could have called for a brief or set a deadline for a brief on Thursday, and this court could have made its determination on Friday.

Respondents do not want to debate the calendar. However, for the reasons set forth above as well as the memorandum which was filed on December 9, the content of which they adopt hereby cross-reference for additional support for this motion, respondents only ask this court to move with the same dispatch that it did in considering petitioner's motion for "reconsideration."

To be clear as to the relief requested, respondents respectfully ask this court to (1) consider their brief filed on December 9 as opposition to petitioner's "motion for reconsideration," (2) to deny petitioner's motion for discretionary review if the court deems itself sufficiently informed, and/or (3) if not sufficiently informed or if questions remain, to set oral argument on this matter for Friday, December 10.

Four final notes bear mentioning.

First, Mr. Cushman protested in a brief he filed on December 10 that he is at a mediation on Friday, December 11 and therefore is not available. Mr. Cushman is only one of three attorneys representing petitioner and it is submitted that this matter is of sufficient import that he should be able to excuse himself for 15 to 20 minutes to attend an oral argument by phone or have someone cover his mediation for him, or even to reschedule his mediation.

Second, Mr. Cushman protests that this court should not entertain this issue because he has allegedly "released" his witnesses. That would appear to have been presumptuous on his part and cannot be a reason for this court to not reach the correct decision on this issue, whatever this court deems the "correct" decision to be.

Third, Mr. Cushman argued that respondents December 9 memorandum "added nothing new," and that "due process should prevail." Respondents agree: due process should prevail. Due process requires a meaningful opportunity to be heard in opposition to relief requested from a court. Again, while respondents appreciate the dispatch with which this court moved, it is submitted that to deny respondents an opportunity to be heard is in fact a denial of due process.

in even this most recent briefing, it is submitted, should give this court pause when granting the relief she requests based on her brief filed at the 11th hour.

These are the types of issues that are properly teased out either in briefing or on an oral argument and is for that reason that respondents ask this court to consider their brief and grant the relief requested.

This is an "emergent" matter. No less than it was an "emergent" matter than when petitioner filed her motion to shorten time. It is novel – and it is submitted speaks louder than anything respondents can say about the lack of reliability over anything set forth in petitioner's brief - that petitioner would argue this is not something deserving of the court's immediate attention, when she herself was making the same argument over the same issue only three days ago.

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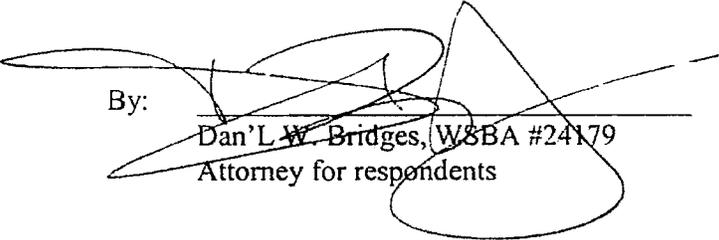
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It will be noted that respondents in error filed their December 9 memorandum under the consolidated cause number 39952-1-II. If they need file an additional brief, they will be pleased to do so on the direction of the clerk.

DATED this 10th day of December, 2009.

McGAUGHEY BRIDGES DUNLAP, PLLC.

By:


Dan L W. Bridges, WSBA #24179
Attorney for respondents

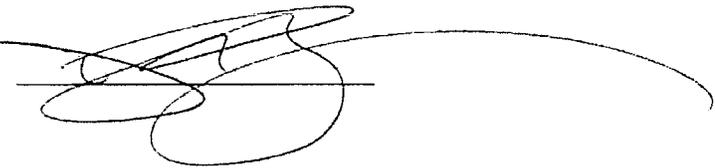
Certificate of Delivery

I, Dan L W. Bridges, certify under oath and the penalty of perjury of the laws of the state of Washington that on December 10, I caused to be delivered a copy of this memorandum to the attorneys for petitioner by the means agreed to by the parties and their service and delivery agreement.

12/10/09 

Certificate of Delivery for December 9, 2009 memorandum

I, Dan L W. Bridges, certify under oath and the penalty of perjury of the laws of the state of Washington that on December 9, I caused to be delivered a copy of the respondents' memorandum filed with this court on December 9, to the attorneys for petitioner by the means agreed to by the parties and their service and delivery agreement.

12/10/09 

case. As a result of that ruling by the court, you are to accept as established that Amy Schorno committed Childhood Sexual Abuse against Kevin Kannada but the full nature and extent of that Childhood Sexual Abuse, and the amount of any damage caused by it, are issues for you to determine based on the evidence presented and the law that will be given to you at the conclusion of this case.

WPI 20.02

Defendant's Proposed Instruction No. _____

Exhibit #5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AMY CATHERINE SCHORNO,

Petitioner,

v.

KEVIN KANNADA A SINGLE
MAN; AND JEFF KANNADA
AND KATHY KANNADA,
HUSBAND AND WIFE,

Respondents.

No. 39752-8-II

ORDER DENYING MOTION

FILED
COURT OF APPEALS
DIVISION II
09 DEC 11 PM 12:35
STATE OF WASHINGTON
BY [Signature]

THE RESPONDENT has filed a Motion to Consider Respondents' Memorandum In Opposition To Petitioner's Motion For Reconsideration in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 11th day of December, 2009.

PANEL: Jj. Van Deren, Armstrong, Penoyar

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

Jon Emmett Cushman
Attorney at Law
924 Capitol Way S
Olympia, WA, 98501-8239

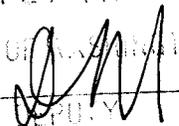
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COURT OF APPEALS
DIVISION II

11 MAY 24 PM 1:21

STATE OF WASHINGTON
BY: 

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

AMY CATHERINE SCHORNO,)	
)	
Petitioner,)	NO. 39952-1-II
)	
vs.)	DECLARATION OF
)	SERVICE
)	
KEVIN KANNADA; JEFF KANNADA and)	
KATHY KANNADA,)	
)	
Respondents.)	
_____)	

I, Lyndsi M. Foster, hereby declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to this case.

2. On Friday, May 20, 2011 I caused the original of RESPONDENTS' REPLY BRIEF to be filed with the Clerk of the above captioned court. The address to which these documents were provided to appellant's attorney was:

Jon E. Cushman
924 Capital Way South
Olympia, WA 98501

Lenell Nussbaum
2003 Western Ave., Suite 330
Seattle, WA 98121

- by hand delivery
- legal messenger (ABC Messenger Service)
- facsimile
- U.S. Mail

DATED this 20th day of May, 2011.


Lyndsi M. Foster