

NO. 448742

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BRITTANY ROBERTS,

Appellant/Plaintiff,

v.

SUZANNE HORSLEY, FREDERICK HORSLEY, KEITH TIMMER,
and CHURCH OF THE LIVING WAY,

Respondents/Defendants.

Appeal from the Superior Court of Washington
for Pierce County
(Cause No. 12-2-05018-5)

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Introduction

It is beyond dispute that Suzanne Horsley sexually abused appellant Brittany Roberts for three years while Horsley was a youth leader in Roberts' church. The abuse started in Roberts' early teens. Once the abuse came to light, Roberts immediately went into counseling and completed thirty treatment sessions with licensed counselor, Kelly Peck. The 17-year-old Roberts recognized some of the impact of the abuse during counseling, but could not predict how the abuse would continue to affect her as an adult.

The ultimate toll of the abuse did not become apparent until 2011 and 2012 when Roberts was (1) unable to engage in a fulfilling sexual relationship with her husband, (2) refused to consider having children for fear that they would be sexually abused, and (3) struggled to hold down full-time employment as an adult due to mistrust of authority figures. Roberts did not know that the abuse had caused these injuries when she worked with counselor Kelly Peck in 2006.

Roberts vigorously disputes the Respondents' assertion that she presented the same symptoms and problems when she began counseling with Mary Dietzen in 2011 that she had previously identified with Kelly Peck. The trial court improperly resolved this factual dispute by

concluding that the injuries which prompted Roberts to re-enter counseling in 2011 were the same injuries that she identified during her counseling sessions from 2005 to 2006.

The Respondents' simplistic reading of RCW 4.16.340(1)(c) ignores the legislative history that anticipates abuse victims bringing claims for more serious injuries that develop in adult life as a result of childhood sexual abuse, overlooks the courts' clear intent to provide broad avenues of redress for victims, and effectively punishes young abuse victims for seeking prompt treatment of injuries by barring claims for more serious injuries that develop later in life.

Roberts respectfully asks this Court to reverse the summary judgment dismissal and remand for trial, because genuine issues of material fact exist to demonstrate that Roberts discovered new and more serious injuries from the abuse in 2011, making this action timely.

B. The Trial Court Improperly Made Factual Determinations When Dismissing Roberts' Claim On Summary Judgment

Respondents state "plaintiff presented the same symptoms and problems to her therapist in 2011-2012, as she had reported to her therapist in 2005-2006." Reply at 1. This assertion is false and flatly contradicts deposition testimony from Mary Dietzen, the psychologist that

Roberts worked with beginning in 2011. Dr. Dietzen testified that many of Roberts' current issues first presented themselves in 2011 or 2012.

Q. Did you ask her how long she had felt this way, that the abuse by Horsley had taken from her certain things that she felt were important, such as intimacy, sexuality, and those kinds of things?

A. I got the impression that it's been in the last, you know, two – two-plus years, because she's older now, she's – she takes classes, she's out in the world, she's away from that environment, she's in a relationship – got in this relationship with Jody. So more of it has come to her – you know, to the forefront in the last year or two, I would say, she's developed a lot more understanding of kind of the impact.

CP 159-160 (Dietzen Dep. at 51-52).

Dietzen rejected the assertion that she was working with Roberts on the exact same problems that Roberts had reported to Kelly Peck:

Q. Did – did she tell you that some of the problems that she worked through with Kelly, the counselor, were very similar to some of the problems that she was seeing you for?

A. I don't know if she said that exactly to me, but –

Q. In so many words?

A. Some of the things were similar, **not all of them, though.**¹

CP 115-116 (Dietzen Dep. at 32-33).

Respondents latch on to a single quote from Roberts where she stated that “everything is pretty much the same”² and ignore the volumes of deposition testimony identifying new problems and injuries that became

¹ Emphasis added.

² Reply at 5.

apparent during Roberts' marriage and failed attempts to hold down full-time employment.

Respondents claim that Roberts' first mental health counselor, Kelly Peck, "diagnosed her with post-traumatic stress disorder (PTSD), anxiety, and depression." Reply at 1. This statement contradicts Peck's own deposition testimony that she did not make a PTSD diagnosis or a diagnosis related to anxiety, but merely observed some of these symptoms. CP 109 (Peck Dep. at 76, 78).

Peck emphasized that she worked with Roberts to reduce the symptoms of two separate problems: (1) damage caused by physical abuse at the hand of her stepfather and possible early childhood sexual abuse by her biological father and (2) problems related to the more recent sexual abuse by Suzanne Horsley. CP 237 (Peck Dep. at 31). Roberts had not lived with her biological family since ninth grade and was moving between placements among extended family, friends, and couples from her church. CP 105 (Peck Dep. at 28-29).

Peck's primary goal was to reduce Roberts' feelings of anger in order to prevent continued disruption of living placements and help her engage in high school. CP 108 (Peck Dep. at 72). Peck stated that some of Roberts' injuries could be attributed to the early childhood abuse by her

family, and that the counseling did not focus solely on the abuse by
Horsley:

Q. Would you agree that the vast majority of the time that you met with her and counseled her that the focus was on the sexual abuse from the offender?

A. I can't say that for certain, because – according to the notes, if – if it was brought up – if both issues are brought up, it means they were both discussed, so it doesn't say at what length.

CP 108 (Peck Dep. at 72).

Respondents claim that the “problems with sexuality and interpersonal relationships” that Roberts discussed with Peck were the same as those discussed with psychologist Mary Dietzen in 2011. “Defendant does not dispute that Plaintiff had problems with intimacy and sex during marriage. But Plaintiff first reported problems with sexuality and interpersonal relationships due to the abuse in 2005-2006.” Reply at 13. This is a gross distortion of deposition testimony.

Roberts was not in a dating relationship or a sexual relationship while in counseling with Peck. CP 153 (Peck Dep. at 94) The problems with inter-personal relationships involved feelings of anger with her mother, siblings, and people Roberts was living with on a temporary basis. CP 108 (Peck Dep. at 72). Roberts did not identify an inability to form an emotional attachment in a romantic relationship because she was not sexually active with anyone until her marriage relationship.

Mary Dietzen stated that Roberts' problems relating to another person sexually "really came to a head for her when she was married to Levi and cared about him as a friend but also realized that she's not sexually attracted to him and wondering what – what is this about. It seems like that was kind of a turning point in a way for her with that kind of stuff." CP 114 (Dietzen Dep. at 25). When asked if Roberts had any problems relating to boys or young men prior to Levi, Dietzen responded, "I believe she did not." CP 114 (Dietzen Dep. at 26).

The trial court improperly concluded that a vague report regarding "problems with boys" made by a 17-year-old girl who was not in a dating relationship is the same as later reporting problems with sexual and emotional intimacy that destroyed her marriage.

Respondents distort deposition testimony by claiming that Kelly Peck made a diagnosis of PTSD. Reply at 5. However, Peck rejected the assertion that she had formally diagnosed Roberts with PTSD and explained that she did not have the training to make those kinds of diagnoses. CP 240 (Peck Dep. at 76).

Likewise, Respondents do "not dispute that Plaintiff has had problems in her jobs, due to her difficulty staying awake, concentrating, experiencing intrusive thoughts and having nightmares. But Plaintiff first had problems sleeping, focusing, concentrating, and experienced intrusive

thoughts, and nightmares as early as 2005” Reply at 13. Again, the trial court concluded that experiencing nightmares due to the abuse was the same injury in 2005 as Roberts experienced in later years, despite the fact that the continuing nightmares prevented her from holding a job at a fire station for fear of crying out while sleeping during her shifts at the station. The same general complaint—nightmares—produced a much more serious injury later in Roberts’ life.

A jury should determine if Roberts’ injuries identified in this suit are the same that she discussed with Kelly Peck and connected with the abuse in 2005-2006.

C. RCW 4.16.340’s History Demonstrates The Legislature’s Intent To Permit Sex Abuse Claims For More Severe Reactions That Develop Later In Life; Respondents Fail To Address This Argument

Respondents failed to address Roberts’ argument that the legislative history for RCW 4.16.340(1)(c) gives examples of “much more severe reaction[s]” to childhood sexual abuse that mirror the injuries that Roberts discovered after completing counseling in 2006. The Legislature listed examples of “more severe reactions” to the abuse that may develop later in life, such as “marital problems, sexual dysfunction, [and] extreme fear for safety of the victim’s children from sexual abuse” House Bill Report, HB 2058, Reported by House Committee on: Judiciary, March 6,

1991. The Legislature recognized that a child abuse victim might not discover the full scope of her injuries because of her infancy.

Additionally, Respondents do not attempt to distinguish their argument from an identical argument presented and rejected by both the Washington State Supreme Court and Division One in *Raymond v. Ingram*, 47 Wn. App. 781, 787, 737 P.2d 314 (1987) (“Raymond admitted that, before she had therapy, she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse. Before her therapy, she also had memories of the events giving rise to her cause of action and of some injury associated with those events.”)

Respondents’ decision to ignore key components of Roberts’ opening brief demonstrates that they rely on a narrow and outdated view of the discovery rule as applied to childhood sexual abuse cases.

D. *Carollo v. Dahl*, The Only Case Supporting Respondents’ Argument, Is Contrary To Binding Precedent

Relying on *Carollo v. Dahl*, 157 Wn. App. 796, 240 P.3d 1172 (2010)³, Respondents assert that to prevail on summary judgment, Roberts had to “present evidence to the trial court of new symptoms in 2012, that were either qualitatively or quantitatively different than the symptoms she reported in 2005-2006.” Reply at 19. In summarizing this Court’s

³ Notably, no other court has cited or relied on *Carollo v. Dahl* since its publication in 2010, and the case was not appealed to the Supreme Court.

decision in *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081 (2006), Division Three in *Carollo* ruled that a victim of childhood sexual abuse must present evidence “that the harm being sued upon is qualitatively different from other harms connected to the abuse which the plaintiff had experienced previously” *Carollo*, 157 Wn. App. at 801. Again, the *Carollo* court purports to be applying *Korst* when stating, “If Mr. Carollo’s problems were qualitatively different than they had been in the past, then the *Korst* rule would apply.” *Id.* at 802.

However, this Court’s decision in *Korst* does not mention the need for injuries being sued upon to be qualitatively different from other harms already. In fact, the thrust of the *Korst* opinion discusses the statute of limitations does not begin running until a victim connects the injury to the abuse, and supports Roberts’ position that “earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.” *Korst*, at 207 (quoting Laws of 1991, ch. 212, § 1). *Korst* also quotes the legislative findings that recognize “more serious injuries may be discovered many years later.” *Id.* **Nothing in *Korst* or the cases and legislative materials discuss the supposed requirement of a qualitatively different harm.** *Korst* does not restrict claims as *Carollo* suggests. *Korst* explicitly recognizes a cause of action for more serious injuries discovered later without qualification.

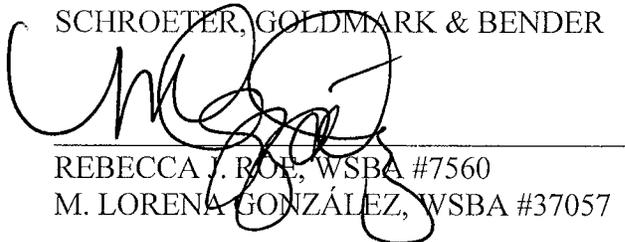
II. CONCLUSION

Roberts did everything in her power to attempt to heal the wounds Horsley's sexual abuse caused her. She entered counseling immediately after reporting the abuse to police, and completed all of the recommended sessions to deal with her acute symptoms. But thirty sessions of counseling did not undo all of the damage caused by Horsley's actions. As a teenager, Roberts could only guess how the abuse might impact future relationships and job prospects. Once Roberts connected the abuse to severe reactions that developed in her adult life, she commenced suit within the statute of limitations.

The Superior Court erred in dismissing, as a matter of law on summary judgment, Roberts' claim against Horsley for sexually abusing her as a child. Roberts respectfully asks the Court to reverse the grant of summary judgment and remand this case for trial.

DATED this 22nd day of November, 2013.

SCHROETER, GOLDMARK & BENDER



REBECCA J. ROE, WSBA #7560

M. LORENA GONZÁLEZ, WSBA #37057

CERTIFICATE OF SERVICE

On the 22nd day of November, 2013, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

<p>Gary A. Trabolsi Gardner Trabolsi & Associates, PLLC 2200 Sixth Ave. Seattle, WA 98121 gtrabolsi@gandtlawfirm.com Attorneys for Respondents Timmer and Church of the Living Way</p>	<p><input type="checkbox"/> Via Hand Delivery – ABC Legal <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via CM/ECF System <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email</p>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 22nd day of November, 2013.



Darla Moran
Legal Assistant

SCHROETER GOLDMARK BENDER

November 22, 2013 - 3:00 PM

Transmittal Letter

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