

NO. 45342-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

P.L. a single male, and S.B. a married but separated female,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case involves preventable childhood sexual abuse and the application of the special statute of limitations enacted by the Legislature, RCW 4.16.340, designed at providing a broad avenue of redress for the victims involved in such claims. During the proceedings below, the trial court relied upon an expressly “reversed” line of legal reasoning and authority and dismissed the Appellants’ claims. In so doing, the trial court accepted direct misstatements about the existing law that were offered by counsel for DSHS. The misstatements of law proffered by counsel for DSHS were flagrant, deliberate, obvious and all captured by transcribed record yet embraced by the trial court. To be clear, this is unique appeal in that the defending party actually managed to convince the trial court to accept a legal proposition that has been expressly “reversed” by the Legislature and the subsequent Supreme Court and Court of Appeals decisions. Based upon the glaring errors of law, and misapplication of the law to the facts of this case, Appellants ask that the underlying motion for summary judgment be reversed and that these matters be remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

Issue 1: This Court should reverse the trial court's ruling on the motion for summary judgment based upon an error of law that in the form of having relied upon an expressly "reversed" line of reasoning and legal authority, *e.g. Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987), when applying the statute of limitations under RCW 4.16.340 to the facts of this case.

Issue 2: This Court should reverse the trial court's ruling on the motion for summary judgment because DSHS did not meet its burden under the law pertaining to affirmative defense of proving, as a matter of law, that P.L. and/or S.B.'s claim has been properly tolled under RCW 4.16.340(1)(c) in relation to the preventable childhood sexual abuse at issue in this lawsuit and the evidence submitted.

III. STATEMENT OF THE CASE

This matter arises out of the preventable sexual assaults of two child siblings, S.B. and P.L., while in foster care and/or placed within group homes by the DSHS. By way of history, S.B. and P.L., were removed from their original homes in 1984 after it was discovered that S.B. was being sexually assaulted by her stepfather.¹ S.B., P.L., and their other siblings were removed by DSHS from the abusive original home by and dispersed into assorted alternative foster care environments.² S.B. was immediately placed into care with the Towns family.³

¹ CP 440-444: 435-439

² *Id.*

³ CP 435-439

While at the Towns home, S.B. received counseling in relation to the abuse that occurred at the hands of her stepfather.⁴ Mr. Towns would often drive S.B. to the counseling appointments.⁵ Not long after beginning counseling, Mr. Towns began sexually molesting S.B. during the drives after leaving the trips to see the counselor.⁶ This abuse continued for nearly three (3) years.⁷ The abuse did not stop until S.B. and another foster child that was placed in the home complained to a school counselor and they were both immediately removed in 1987.⁸

S.B.'s assigned DSHS social worker was a woman named Audrey Turley.⁹ Ms. Turley was S.B.'s social worker during the entire time that she was in foster care.¹⁰ On multiple occasions while placed in the Towns home, S.B. informed Ms. Turley during monthly safety visits of the actions of Mr. Towns.¹¹ In response to the report, Ms. Turley informed S.B. that she was "misremembering" the abuse that had actually been perpetrated by her stepfather.¹² Ms. Turley conducted no investigation or report as required under RCW 26.44.050, and forced S.B. to remain in the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Towns home until S.B. and another foster child who lived at the Towns home both reported to their school counselor that Ray Towns had been sexually abusive towards the both of them.¹³

P.L. was also placed into the foster care system.¹⁴ After a number of failed placements, DSHS placed P.L. in licensed group home, the Deschutes Children's Center.¹⁵ Prior to P.L.'s placement at Deschutes, DSHS had received notice that the facility was subject to multiple safety violations including that multiple other child resident on resident sexual assaults that had recently occurred.¹⁶ Despite the ongoing safety concerns, and a lack of remediation thereof, DSHS placed P.L. at Deschutes on September 1, 1987.¹⁷

In the same manner as the previous children, during the middle of December 1987, P.L. was sexually assaulted by other child residents.¹⁸ Prior to that occasion, P.L. had never before been sexually assaulted.¹⁹ P.L.'s assigned DSHS social worker, also Ms. Turley, was summoned to Deschutes.²⁰ Upon arrival, P.L. informed Ms. Turley of that has occurred

¹³ *Id.*

¹⁴ CP 440-444

¹⁵ *Id.*

¹⁶ CP 397-414

¹⁷ CP 440-444

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

and his fear of being left at Deschutes.²¹ In lieu of removing P.L., Ms. Turley instructed P.L. to remain at Deschutes in the home, with his assailants, until she could find another foster placement.²² Upon reentry to Deschutes, P.L.'s prior assailants learned that P.L. had reported the assaults.²³ In reaction and in response to P.L.'s report, the child residents retaliated and again sexually assaulted P.L.²⁴ Finally, about a week later, P.L. was removed from Deschutes and placed into another foster care setting.²⁵ It should be noted that when deposed, Ms. Turley denied that P.L. was ever placed at Deschutes despite documents she authored indicating that he was a resident at the time of being sexually assaulted.²⁶

P.L. was later placed into a foster home with the Lacy family.²⁷ During the time that P.L. lived in the Lacy home, the other boys would regularly physically abuse P.L. P.L. reported these physical assaults to Ms. Turley.²⁸ Unfortunately, Ms. Turley forced P.L. to remain in the home.²⁹ After some time in the Lacy home, one of the other children in

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ CP 268-322

²⁷ CP 440-444

²⁸ *Id.*

²⁹ *Id.*

the home forced P.L. to give him oral sex or risk being beaten up again.³⁰ After that occurrence, P.L. ran away from the Lacy home and never returned to foster care because he believed that he would never be protected by DSHS.³¹

P.L. and S.B. have both led fairly tragic lives subsequent their experiences in the foster care system. P.L. has on multiple occasions considered suicide and experienced horrific life tragedies. S.B. too has been admittedly suicidal and lived a similarly tragic life. However, neither S.B. or P.L. have ever engaged in any substantive counseling in relation to the abuse at issue in this lawsuit with the exception that S.B. started seeing a counselor about a latest suicide attempt that occurred after this lawsuit was filed on April 3, 2012.³² P.L. once attempted to speak with a counselor about being sexually assaulted as a child, but he was too ashamed to disclose any details, and the counseling went no place.³³

P.L. struggled with the emotional impact of a ruined childhood well into adulthood. Prior to filing this lawsuit, P.L.'s own children were temporarily removed by DSHS.³⁴ This act on the part of DSHS caused

³⁰ *Id.*

³¹ *Id.*

³² CP 435-439

³³ CP 440-444

³⁴ CP 440-444; 323-396

P.L. to begin reliving memories and concerns about his own experiences.³⁵ P.L. decided that he needed help in the form of counseling and decided to pursue this matter.³⁶ In the course of filing this lawsuit, P.L. and S.B. discovered that their social worker, Ms. Turley, had similarly failed them both.³⁷

P.L. and S.B. are both considered “mentally disabled” by the Social Security Administration and have been subjected to multiple mental health evaluations. However, none of the mental health evaluations were designed to provide counseling pertaining to the childhood sexual assaults or to assist P.L. or S.B. to understand the connections to the childhood sexual abuse.³⁸ There has been no record of P.L. or S.B. ever having the opportunity to identify and explore the extent of their psychological problems or to make the causal “connections” in that regard, prior to this lawsuit being filed.³⁹

P.L. and S.B. were both subjected to forensic psychological examinations during the course of these proceedings. The forensic evaluations, which were conducted by Robert Wynne, Ph. D, supported

³⁵ CP 323-396

³⁶ *Id.*

³⁷ CP 435-439

³⁸ CP 323-326

³⁹ *Id.*

the fact that P.L. and S.B. each suffer severe and deep seated psychological damages that are connected to the childhood sexual abuse at issue in this lawsuit.⁴⁰ P.L. and S.B. each reviewed Dr. Wynne's reports inventorying their extensive injuries for the first time in August of 2013.⁴¹ Prior to this occasion, neither P.L. nor S.B. had ever been evaluated for the purpose of determining the injuries that they suffered from the childhood sexual abuse.⁴²

Dr. Wynne's report assisted S.B. in identifying as ongoing injuries related to the abuse in the Towns foster home to include: (1) her aggravated pre-existing traumatized state, (2) continuing shame, (3) continuing guilt, (3) continuing rage, (4) feelings of being dirty, (5) lack of interpersonal trust, (6) reenactment of situations involving betrayal and violence, (7) avoidant traits, (8) social isolation, (9) chronic anxiety, (10) sexual dysfunction, (11) self cutting, (12) PTSD, (13) substance abuse, and (14) lack of employability.⁴³ Dr. Wynne's report similarly assisted P.L. in identifying his ongoing injuries to include: (1) sexual identity issues, (2) trust issues, (3) homophobia, (4) sleep disturbances, (5) concerns about the ability to care for his children, (6) PTSD, (7) trauma

⁴⁰ CP 323-396

⁴¹ CP 440-444; 435-439

⁴² *Id.*

⁴³ CP 323-396; 435-439

based avoidant character style, (8) vulnerability, (9) impulsivity, (10) self regulatory capacities to manage stress, (11) interpersonal relationship impediments, (12) lack of emotional functioning, (13) lack of academic functioning, and (14) lack of employability.⁴⁴ All of these injuries, and many others, were noted as being connected to the childhood sexual abuse that was not prevented by Ms. Turley and DSHS.

DSHS defended this lawsuit by offering a statute of limitations defense at summary judgment hearing that occurred on August 30, 2013. The parties conceded that the controlling authority was RCW 4.16.340(1)(c). At issue thereafter was whether or not P.L. and/or S.B. had made the requisite “connections” contemplated under RCW 4.16.340 tolling the statute more than three (3) years before the filing of this claim. It should be noted that this claim was filed on April 23, 2012.⁴⁵ So the defense had to demonstrate that P.L. and S.B. “connected” their extensive injuries prior to April 3, 2009. *Id.*

In attempt to meet the burden of proof of demonstrating that P.L. had “connected” his injuries long before filing this lawsuit, DSHS referenced the fact that he had felt homicidal in the past towards Ms.

⁴⁴ CP 323-396; 440-444

⁴⁵ CP 3-7

Turley for having left him in the dangerous foster care placements.⁴⁶ DSHS also submitted mental health evaluations that alluded to the fact that P.L. had been abused in foster care.⁴⁷ But none of the mental health evaluations provided a comprehensive exploration of the cause of P.L.'s injuries. And DSHS submitted no evidence that P.L. had ever been shown any of the mental health reports. None of the evidence submitted in relation to P.L. demonstrated a specific connection between the childhood sexual abuse at issue in this lawsuit and the injuries suffered thereafter.

With respect to S.B., DSHS cited to deposition testimony wherein she admitted having been “depressed” as a result of being abused in a general sense.⁴⁸ But DSHS’s reference and line of inquiry did not even identify which “abuse” caused S.B. to feel this way.⁴⁹ And DSHS also referenced the fact that S.B. had felt suicidal at assorted points during her life.⁵⁰ Beyond that, DSHS failed to make any reference to any sort of injury experienced by S.B. None of the evidence submitted in relation to

⁴⁶ CP 8-30

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

S.B. demonstrated a specific connection between the childhood sexual abuse at issue in this lawsuit and the injuries suffered thereafter.

On August 30, 2013, the trial court conducted a hearing on the motion for summary judgment. At the hearing, counsel for DSHS, Thomas Knoll offered oral argument on the subject matter. Mr. Knoll repeatedly argued at the hearing that according to RCW 4.16.340(1)(c) that *“what the standard is, if it’s a sex abuse claim brought by a child, when the child makes a connection between the prior abuse and current injuries, that’s when the accrual period starts. And the plaintiffs don’t have to make a connection to all of their injuries they relate to abuse at one time. All that is required to start the clock is that they related at least one instance of abuse to – or one injury to an instance of abuse.”*⁵¹ Mr. Knoll offered no (0) legal citation supportive of this proposition that “one” connection tolls RCW 4.16.340(1)(c).⁵² It was learned in subsequent proceedings that the basis of Mr. Knoll’s argument was a “reversed” line of legal authority.⁵³

In response to Mr. Knoll’s argument, the undersigned counsel objected and attempted to argue that Mr. Knoll’s oral argument was

⁵¹ CP 500-502

⁵² CP 496-520

⁵³ *Id.*

directly contrary to RCW 4.16.340 and the existing case law.⁵⁴ It is clear from the transcript that the trial court accepted Mr. Knoll's proposition that the connection of "one" (versus "all") injury to childhood sexual abuse tolled the statute of limitations.⁵⁵ Without reviewing any of the case law that was cited by P.L. and S.B., the trial court accepted Mr. Knoll's argument and ruled from the bench embracing the notion that if P.L. or S.B. connected "one" injury to the childhood sexual abuse, their claims were barred by the statute of limitations and dismissed the claims.⁵⁶ The trial court declined to delineate which evidence supported this conclusion or what date that the statute tolled for either S.B. or P.L.⁵⁷

P.L. and S.B. moved for reconsideration arguing that DSHS had offered an argument based upon an expressly "reversed" line of legal authority in relation to the "one" connection argument that Mr. Knoll offered orally at the hearing.⁵⁸ In response to the motion for reconsideration, DSHS conceded reliance upon *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987).⁵⁹ On reconsideration, P.L. and S.B. had highlighted that the Legislature had expressly "reversed" the

⁵⁴ CP 534

⁵⁵ CP 514-520

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ CP 534

⁵⁹ *Id.*

Raymond opinion when RCW 4.16.340 was enacted.⁶⁰ Despite the fact that DSHS had cited and relied upon a line of legal authority that had been “reversed” by the Legislature, the trial court did not reconsider its ruling and denied the motion.⁶¹ This appeal followed.

IV. PROCEDURAL POSTURE AND STANDARD OF REVIEW

This claim was wrongfully dismissed by the trial court at the summary judgment phase of litigation. On review of an order for summary judgment, the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo and summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). In reviewing a summary judgment motion, the appellate court views all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). In this posture, the non-moving parties were Appellants, S.B. and P.L.

⁶⁰ CP 474-493

⁶¹ CP 536

V. ARGUMENT

- A. The controlling law, including RCW 4.16.340, Supreme Court and Court of Appeals precedent, makes it clear that the standard for having a claim dismissed is very high and requires far more than the sex abuse victim's mere "awareness" of "one" injury related to the abuse.**

The Supreme Court has noted that the Legislature's purpose in enacting RCW 4.16.340 was to provide a broad avenue of redress for victims of childhood sexual abuse. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 985 P.2d 262 (1999). "The three year statute of limitations on a claim arising from an act of childhood abuse does not begin to run at least until the victim discovers 'that the act caused the injury for which the claim is brought.'" *Miller v. Campbell*, 137 Wash. App. 762, 767, 155 P.3d 154 (2007), citing RCW 4.16.340(1)(c). "Legislative findings supporting this statutory discovery rule state the Legislature's intent 'that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.'" *Id.* "The special statute of limitations, RCW 4.16.340, indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet not have knowledge of the potential tort claim against his abuser." *Id.* at 773. "Indeed, as our Legislature has found, childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and

the full extent of the resulting emotional harm until many years later.”
Cloud v. Summers, 98 Wash. App. 724, 735, 991 P.2d 1169 (1999).

The interpretive case law weighs in favor of preserving childhood sex abuse claims whenever possible. *See e.g. Hollmann v. Corcoran*, 89 Wash. App. 323, 949 P.2d 386 (1997). In *Hollmann*, the trial court dismissed a similar childhood sex abuse claim premised upon evidence presented by the defense demonstrating that the victim had received therapy related to the abuse and also had been diagnosed with PTSD, on appeal, the trial court was found to have committed reversible error for the dismissal. *Id.* When reversing the trial court for the improper dismissal, Division III noted that victim subjectively continued to claim that “he did not recognize the causal relationship between his present problems and [the abuser’s] acts.” *Id.* at 333. In relation to the PTSD diagnosis, the Court noted that while the counselor “made an initial diagnosis of PTSD as early as 1989, a jury could find [the victim] did not relate this diagnosis to [the perpetrator’s] abuse.” *Id.* at 334.

In *Hollman*, over three (3) years before the lawsuit was filed, the plaintiff Mr. Hollman had undergone two separate psychological evaluations and treatment with two treatment providers. *Id.* at 328-29. During the course of each evaluation and treatment, the Plaintiff disclosed

he had been sexually molested by the defendant Mr. Corcoran. *Id.* Each provider then treated Mr. Hollman for the symptoms he exhibited. *Id.* Mr. Corcoran then brought the motion to dismiss based on statute of limitation. In reversing the trial court, this Court noted the distinct legislative policies applicable to childhood sex abuse claims:

The Legislature specifically stated its intent in its findings:

(1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.

(2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.

(3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.

(4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.

(5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.

(6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986).

Id. at 333.

This Court held that legislative policies (4) and (5) are particularly applicable to the scenario where a child sex abuse victim fails to recognize the causal relationship between the victim's present problems and the sexually abusive acts. Therefore, even when a child sex abuse plaintiff discloses having been sexually abused for purposes of treating a mental illness, the disclosure and subsequent treatment in and of themselves, do not necessitate the conclusion that the plaintiff made the causal connection between the abuse and injury. Following *Hollman*, this Court must not construe the existence of psychological evaluations in which S.B. and P.L. disclosed having been sexually abuse in passing, as S.B. and P.L. having made the causal connection between the abuse and the injury.

Another trial court made a similar error in dismissing a childhood sex abuse claim in *Korst v. McMahon*, 136 Wash. App. 202, 148 P.3d 1081 (2006). In *Korst*, Division II engaged in a discussion about RCW 4.16.340, specifically noting that there was no "reasonably should have discovered" portion of the law that applies to the victims bringing claims. *Id.* at 207. "In light of the Legislature's findings, the *Hollman* Court interpreted the plain language of RCW 4.16.340(1)(c) as not imposing a duty on the plaintiff to discovery her injuries in childhood sex abuse

cases.” *Id.* at 207-8. According to the *Korst* Court, the trial court erred in that RCW 4.16.340 “does not begin running when the victim discovers an injury.” *Id.* at 208. “The legislature specifically anticipated that **victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse.**” *Id.* (emphasis added).

Further, the *Korst* Court provided illumination to the high burden imposed upon a defending party in establishing, as a matter of law, that a victim made the necessary subjective damages connections in their minds supportive of dismissal. In *Korst*, the defense cited to evidence in the form of “a letter that she wrote to her father” illustrating ongoing suffering stemming from childhood sexual abuse. *Id.* at 208. The Court noted that the “letter simply indicates that she resented her father for sexually abusing her, not that *Korst* understood the effects of the abuse.” *Id.* at 209. Moreover, even though the victim had been diagnosed with PTSD, the Court cited approvingly to trial testimony from the diagnosing health care practitioner noting that “a person with no psychology background would ‘simply not have the capacity to link these varied miscellaneous feelings to posttraumatic stress.’” *Id.* at 210. Division II overruled the trial court finding that “[f]rom this evidence, the trial court could not

reasonably infer that [the victim] already knew in 1995 that her father's sexual abuse caused her physical and emotional symptoms." *Id.* at 211.

According to the controlling case law, "victims of childhood sexual abuse know that they have been hurt, but RCW 4.16.340 makes it clear that a plaintiff's cause of action does not accrue until she knows that the sexual abuse **has caused her more serious injuries.**" *Korst v. McMahon*, 136 Wash. App. 202, 148 P.3d 1081 (2006). To meet the heavy burden of getting a case dismissed, the defending party must show that the victims "discovered that the act caused the injury **for which the claim is brought.**" *Id.*, citing, RCW 4.16.340(c).

B. DSHS failed to offer any connection as contemplated under RCW 4.16.340 to any of P.L. and S.B.s injuries for "which the claim is brought" in this case as is required under the controlling legal authorities.

Here, the trial court should be reversed because DSHS has failed to meet its heavy burden of proving that P.L. and S.B. made a comprehensive connection of all their injuries "for which the claim is brought" to the childhood sexual abuse at issue. *Id.*

1: No connection to S.B.'s extensive injuries:

Specifically, DSHS offered no (0) evidence establishing that S.B. ever made a connection to (1) her aggravated pre-existing traumatized state, (2) continuing shame, (3) continuing guilt, (3) continuing rage, (4) feelings of being dirty, (5) lack of interpersonal trust, (6) reenactment of situations involving betrayal and violence, (7) avoidant traits, (8) social isolation, (9) chronic anxiety, (10) sexual dysfunction, (11) self cutting, (12) PTSD, (13) and substance abuse, and (14) lack of employability.⁶² All of these injuries are claims upon which S.B.'s "claim was brought" as contemplated under RCW 4.16.340. DSHS offered no evidence that S.B. made these subjective connection prior to April 3, 2009.

2: No connection made to P.L.'s extensive injuries:

And DSHS offered no (0) evidence establishing that P.L. ever made any connection to his: (1) sexual identity issues, (2) trust issues, (3) homophobia, (4) sleep disturbances, (5) concerns about the ability to care for his children, (6) PTSD, (7) trauma based avoidant character style, (8) vulnerability, (9) impulsivity, (10) self regulatory capacities to manage stress, (11) interpersonal relationship impediments, (12) lack of emotional

⁶² CP 435-439; 323-396

functioning, (13) lack of academic functioning, and (14) lack of employability.⁶³ All of these injuries are claims upon which P.L.'s "claim was brought" as contemplated under RCW 4.16.340. DSHS offered no evidence that S.B. made these subjective connection prior to April 3, 2009.

3: The defense experts agreed that P.L. and S.B. had not connected their injuries:

The defense retained an expert on damages, Dr. Vandenberg, to offer opinions about P.L. and S.B.'s injuries. In this regard, under oath, Dr. Vandenberg opined:

Q. Okay. Can you tell me, please, are you going to offer any opinions about when Mr. Lewis ever actualized his own injuries, at what point in his life?

A. I'm not sure I understand "actualized." It sounds like an insurance term.

Q. Well, there's an issue in this case, a debate, a legal issue, where the defense is going to say that Mr. Lewis connected in his mind all of the psychological injuries he was suffering a long time ago.

A. Well, my recollection is that Mr. Lewis said at some point that when he attempted suicide when he was, I think, 17 that he was linking that to his sexual abuse. So to me, that's a statement that he had some concept or thought of his concurrent emotional distress and his suicide ideation being linked to a more proximate experience in foster care.

⁶³ CP 440-444; 323-396

Q. Okay. And you're a seasoned, professional medical doctor; is that right?

A. Yeah.

Q. And you've offered opinions and conclusions today about the different ways in which Mr. Lewis may have been impacted by being raped; is that right?

A. Right.

Q. His anger, some of the other things that you inventoried, correct?

A. Right.

Q. And you're capable of making recommendations for counseling and that sort of thing for those issues, right?

A. Right.

Q. I mean, people come to you for treatment for those issues, right?

A. Right.

Q. Do you think that without the benefit of someone with your expertise that Mr. Lewis has likely actualized and understands all of the injuries that you as a medical doctor are able to identify and inventory?

MR. KNOLL: Object to form.

A. Well, that's a little bit like saying could you see something better with glasses than without. It doesn't mean you didn't see it to begin with. Okay? So, you know, assuming that analogy, to me it sounds like Mr. Lewis is saying, I see that there's something that I'm connecting to my sexual abuse that's causing me emotional stress. He might have a greater -- greater degree of acuity about how that contributed at that time after going and seeing a professional. But that doesn't negate that at that point in

time he was saying, I think I'm messed up because I was sexually abused in foster care.

Q. (By Mr. Beauregard) Yeah. But do you see anywhere in the record where Mr. Lewis has made a comprehensive connection of the different injuries that you've described subjectively to himself?

MR. KNOLL: Object to form.

A. Well, if by "comprehensive connection" you mean the same kind of medically informed conclusion that I might make or someone else might make, I don't think that that's what he was having at age 17.

Q. (By Mr. Beauregard) You don't see that in the record?

A. Well, depends on what you call "the record." At some point he made the comment or the statement that at age 17 he was contemplating suicide or he tried suicide because of the things that happened. I don't know -- I don't remember as I'm sitting here right now where exactly that occurs. And if by "the record" you mean some medical visit, I don't remember.

Q. So -- and that's okay if you don't.

A. But he said, When I was 17, here's what happened.

Q. But you don't see a comprehensive point in the record wherein Mr. Lewis identifies understanding all the injuries that you've attributed to him?

MR. KNOLL: Object to form.

A. No.⁶⁴

With regard to S.B., Dr. Vandenbelt opined:

⁶⁴ CP 448-473

Q. Well, for example, you're qualified to help her figure out what therapy she could get to help work through the issued that you've identified?

A. Oh, okay. Sure.

Q. If Sharla came to you for care of the injuries you've identified, you would assign counseling or something for that, right? Treatment?

A. Right.

Q. Okay. And part of that treatment process would be to help -- have Ms. Lewis help her understand the impact on her life so she could get treatment for that; is that right?

A. In a broad sense, yeah.

Q. And it's not your impression that with regard to the injuries you've identified that she's had an opportunity do that yet?

MR. KNOLL: Object to form.

A. Well, asking if she's had an opportunity to do it --

Q. (By Mr. Beauregard) Has she done it yet?

A. **She hasn't done it.** But that could be different that whether she had the opportunity to do so or the possibility of doing so.⁶⁵

* * *

Q. One follow-up question, Dr. Vandenbelt. Mr. Knoll read you a question that he'd asked Ms. Buck where he asked her, You relate abuse to depression, right?

A. I think that paraphrases it, yeah.

⁶⁵ CP 448-473

Q. Yeah. Mr. Knoll's question didn't say anything specifically about the abuse by Mr. Towns, right?

A. I think it was a broader statement about abuse.

Q. Okay. So Sharla could have meant the abuse in her first home, right?

A. She -- it could have been that she was referring to just that, or it could have been that she was referring to a broader set of abuse.

Q. Yeah. Mr. Knoll's question, it didn't pinpoint anything at all, did it?

A. Well, the question, as I read it, was a global one about abuse that she had experienced.

Q. Okay. Would you override your earlier opinions about the degree to which Ms. Lewis has connected in her mind her injuries, the injuries you described, based upon Mr. Knoll's ambiguous question about abuse and depression?

MR. KNOLL: Object to form.

Q. (By Mr. Beauregard) For example, are you changing any of the things you told me earlier in this deposition?

A. Well, not so much based on that particular question, but having looked at, again, the statement regarding feeling homicidal toward Ms. Turley contemporaneous with when she was in the Towns home and feeling angry about the abuse that she was experiencing there and wishing to get retribution on Ms. Turley as a result. So that to me says she's aware that it's a bad situation. She's being abused, and she wants to take it out on somebody.

Q. Okay. But are you changing your earlier opinion you offered to me in spite of -- in contrast to the testimony Mr. Knoll highlighted for you?

A. Well, my recollection of what I said earlier was that I didn't see something in the record that tied her emotional

distress to the abuse she was experiencing in the Towns home earlier in her life. But the statement that she made to Dr. Nguyen, as noted in his report, does contradict that. So I -- in having looked at that again, it's now my understanding that she understood that she was having an emotional and psychological effect earlier in her life.

Q. I see.

A. Contemporaneous with when it was happening.

Q. Okay. So now Mr. Knoll has walked you through some different parts of the records, and are you saying you're changing your opinions?

A. I had not recalled seeing that in Dr. Nguyen's report. And when we looked at it again, then I remembered seeing that, and so that changed it, yeah.

Q. Okay. So now will you be able to offer an opinion that earlier in Ms. Buck's life she realized all of her injuries that stemmed from being abused in the Towns home?

A. I don't know that she understood all of her injuries, but I think that she understood that she was being emotionally affected by what was happening to her.⁶⁶

In order to have this claim dismissed, DSHS was required to submit evidence demonstrating a connection to each of P.L. and S.B.'s injuries prior to April 3, 2009. There is no "should have known standard" under RCW 4.16.340, and all inferences must be construed in favor of the Appellants, S.B. and P.L. There is no way possible on this regard, construing the facts in any light, to conclude that the statute of limitations under RCW 4.16.340 has been tolled.

⁶⁶ CP 448-473

C. The trial court committed legal error by applying an incorrect and overruled legal standard with regard to the tolling of the child sex abuse statute of limitations under RCW 4.16.340 in this case.

When ruling on the original motion for summary judgment, the trial court did not specify what evidence supported the connection.⁶⁷ Instead, the trial court referenced a general “*awareness*” on the part of both S.B. and P.L. of being injured: “*There has been some awareness clearly, and I think that the defense has presented a record that shows an awareness by these victims of the abuse and its implications such that a jury could not reach a different result.*”⁶⁸ And the trial court did not specify a date upon which the statute of limitations began to run: “*I don’t think that I need to show that. I’m looking at the record as a whole, and there’s numerous points where you could conclude that the statute had run, I don’t want to pick a specific date because I’m looking more comprehensively at the entire record than that.*”⁶⁹ This ruling on the part of the trial court was completely inconsistent with RCW 4.16.340. The legal underpinning for the ruling was a reliance of the legal misrepresentations, of unethical proportions, on the part of Mr. Knoll

⁶⁷ CP 514-520

⁶⁸ *Id.*

⁶⁹ *Id.*

during the hearing.⁷⁰ Under RCW 4.16.340, a mere “awareness” of an injury does not toll the statute of limitations.

D. The representations on the part of DSHS’s counsel, Thomas Knoll, at the oral argument were unethical and violated the spirit of Rule 11 and the duty of candor to the court.

DSHS did not even attempt to connect all of S.B. and P.L.’s injuries as noted above. Instead, DSHS offered the “one connection” argument premised upon a line of authority that was expressly “reversed” by the Legislature:

It is still the legislature's intention that *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986) be **reversed**, as well as the line of cases that state that discovery of **any injury** whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. **The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.**" [1991 c 212 § 1.]

See RCW 4.16.340 (express Legislative intent). As noted in the underlying proceedings, Mr. Knoll and DSHS offered argument premised upon *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987) -- a case that was expressly reversed by the Legislature upon enactment of RCW 4.16.340. The trial court accepted DSHS’s legal representations that were originally offered by Mr. Knoll during oral argument, and then

⁷⁰ CP 534

dismissed S.B. and P.L.'s claims based upon bad law. And so it follows that the trial court's ruling dismissing these claims should be reversed and this matter should be remanded for trial.

The undersigned counsel would like to note that what happened during the proceedings below were disappointingly unethical with regard to the misrepresentations of law on the part of Mr. Knoll during the hearing. Mr. Knoll repeatedly and knowingly mis-stated the existing law in a way that is prohibited by the Rules of Professional conduct and the spirit of Rule 11. An example of Mr. Knoll's direct misrepresentations includes the assertions as quoted below:

...But there's a twist in this case, and that is when there is a claim of sex abuse, there is an additional tolling period that does not begin to run under RCW 4.16.340(1)(c). And what the standard is, if it's a sex abuse claim brought by a child, when the child makes a connection between prior abuse and current injuries, that's when the accrual period starts.⁷¹

...All that is required to start the clock is that they relate at least one instance of abuse to – or one injury to an instance of abuse...⁷²

...It identifies one connection with the sex abuse...⁷³

⁷¹ CP 496-520: Hearing Transcript, Page 4

⁷² *Id.* at 5.

⁷³ *Id.*

...Moving onto Phillip. He has made this connection, and again, he doesn't need to make all the connection, only one connection, and he's done so...⁷⁴

MR. KNOLL: The plaintiff is saying about connections to all of your injuries, that is clearly not what the case law represents. I've read all of them. That is not what any of the cases that the plaintiff has cited, Miller, Korst, Hollmann. It identifies one instance of injury back to sex abuse...⁷⁵

...You will not find that the plaintiffs have to connect all their injuries to the sex abuse. It makes it clear: Is a connection made. And that's the goal of the Legislature because as soon as the connection is made, they know they have the opportunity to file suit, an the whole purpose of allowing minors longer time to file a claim, and I'd ask that this case be dismissed based upon the statute of limitations...⁷⁶

While the trial court rendered the ruling, it was premised upon the blind acceptance of Mr. Knoll's disingenuous legal argument. The undersigned invites this Court to review the hearing transcript from August 30, 2013 and make its own determination if it would be possible for an officer of the court, Mr. Knoll in this instance, to make the legal representation at issue in good faith. The misrepresentations of law on the part of Mr. Knoll were flagrantly unethical and misleading and should not be ignored by this Court.

⁷⁴ *Id.* at 7.

⁷⁵ *Id.* at 18.

⁷⁶ *Id.* at 19.

VI. CONCLUSION

The trial court's order must be reversed because it relies on a line of cases that has been expressly overruled by statute. As this Court has made clear in *Hollman* and *Korst*, a childhood sex abuse victim's disclosure of having been sexually abused while undergoing psychological evaluations, without more, do not trigger the accrual of the statute of limitations. The trial Court's finding that, "*there has been some awareness,*" and that the record "*shows an awareness by these victims of the abuse and its implications,*" is not sufficient to warrant dismissal is erroneous because a general "*awareness*" of having been injured does not trigger the accrual of the statute of limitation, again, as this Court made clear in *Hollman* and *Korst*.

Here, DSHS has not met its burden of proving that these childhood sex abuse victims, P.L. and S.B., connected their injuries to their abuse. DSHS has provided no evidence that S.B. and P.L. reviewed the psychological evaluations that listed their symptoms, let alone understood them. Furthermore, Dr. Wynne has identified over 14 specific injuries for each sex abuse victim, S.B. and P.L., and DSHS has provided nothing in the record to show that each of the Plaintiffs connected each of the instance of injury to the sex abuse perpetrated on them. Given these facts

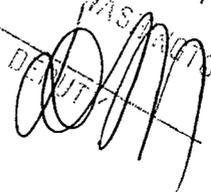
and records, the order of dismissal entered by the Trial Court must be REVERSED.

DATED this 3rd day of October, 2013.

Respectfully submitted

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STATE OF WASHINGTON
BY  DENISE

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

P.L a single male, and S.B. a married
but separated female,

Appellants,

v.

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

No. 45342-8-II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellant's Opening Brief

in the manner indicated to the parties listed below:

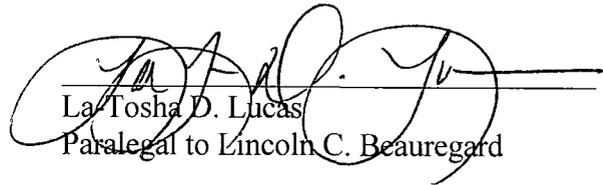
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