

NO. 46361-0-II

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

SUSAN A. KIRCHOFF f/k/a SUSAN LOWE a/k/a
SUSAN CASSIDY,

Appellant

v.

CITY OF KELSO, COWLITZ COUNTY, and STATE OF
WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court dismissed this action on the basis of the statute of limitations. The issues on appeal address only the proper application of the statute of limitations in a case arising from childhood sexual abuse. The court offered no ruling regarding the other grounds DSHS relied upon in its summary judgment motion, including absence of duty and lack of proof of proximate cause. For the purpose of this appeal, plaintiff assumes the trial court would have ruled in favor of her had it reached the other grounds for DSHS's motion and accordingly limits the discussion here to the grounds for dismissal relied upon by the court.

The facts of the case are largely uncontested. Plaintiff was the youngest of three sisters molested and raped by their stepfather during the late 1970's. The abuse of plaintiff, alone, continued into early 1980. Plaintiff's middle sister reported this abuse to a school counselor and, following an investigation, DSHS removed plaintiff's older two sisters from the home. DSHS left plaintiff in the home. Plaintiff was thereafter abused by her stepfather over the following months until his incarceration for indecent liberties in 1980.

Many years passed. Though plaintiff never forgot the abuse, she never knew she had any claim arising from DSHS's actions following the report from plaintiff's sister. In 2007, while training as a group home

licensor for DSHS, plaintiff attended a class taught by an assistant attorney general. One scenario discussed during the class concerned DSHS removing two—of three—abused children from a home, without properly evaluating whether the third should be removed as well. The class was told that such an outcome would be negligent for failure to protect the third child from harm by the abuser in the home. At this moment plaintiff first realized that she had a claim for what had happened to her more than 25 years earlier. Plaintiff filed suit against DSHS within three years of attending the class.¹

II. ASSIGNMENTS OF ERROR

The trial court erred by dismissing plaintiff's claims against DSHS on the basis of the statute of limitations.

A. Issues Pertaining to Assignments of Error

Whether properly applying RCW 4.16.340(1)(c) requires reversal of dismissal because plaintiff did not discover 'the act' which lead to her claim until 2007?

Whether RCW 4.16.340(1)(b) entitles plaintiff to make claim for newly discovered harm resulting from DSHS's performance failure, about which plaintiff was previously ignorant?

¹ Of note is that more than 20 years passed after DSHS failed to earlier act with regard to Ms. Kirchoff before the Supreme Court even announced that those like plaintiff had a cause of action against DSHS. Not until *Tyner v. Department of Social and Health Services* was decided in 2000 did the Supreme Court unequivocally rule that a violation by DSHS of its duties of investigation under RCW 26.44 permitted those injured thereby to state a claim against the State. *Tyner v. Department of Social and Health Services*, 141 Wash.2d 68, 1 P.3d 1148 (2000).

III. STATEMENT OF THE CASE

Susan Kirchoff brought this action against DSHS in 2009 because the agency failed to remove her from the family home—at the same time it removed her two sisters—after the agency determined that the girls' stepfather had been abusing all three girls for years. CP 245-250.

Prior to trial, DSHS moved to dismiss the case on the basis that the statute of limitations had expired long before plaintiff filed suit in 2009. DSHS also moved on the basis that the agency owed no duty to plaintiff and/or that plaintiff failed to show a proximate cause between any breach of duty and harm to plaintiff. The trial court solely dismissed the case on the basis of the statute of limitations. CP 363-366. The error plaintiff raises here is that the trial court applied the wrong standard regarding how to construe the statute of limitations in light of when plaintiff acquired her knowledge of DSHS's errors.

In 1979 plaintiff lived with her mother, her two minor sisters, and the mother's common law husband, Lotus Cassidy. CP 245. By a prior husband Ms. Brewer had had three daughters, N.B. (17 in 1979), C.B. (15) and Susan (13). During the latter half of 1979 C.B. reported to a school counselor that her stepfather was sexually abusing her. CP 148; CP 174. CPS caseworker Ann Watkins was assigned to investigate. The investigation included administering a polygraph test to C.B.--regarding

the truthfulness of her reports of abuse--which C.B. passed. CP 151; CP 174.

Ms. Watkins also determined that N.B., the oldest daughter, was pregnant. Since N.B. had no rational explanation for how she got pregnant—other than that she might have shared bath water with Lotus Cassidy--Ms. Watkins concluded she had been impregnated by Lotus Cassidy. CP 152-153; CP 160; CP 176-177.

After Ms. Watkins advised Mr. Cassidy that C.B. had passed a polygraph, Mr. Cassidy admitted having intercourse with both older girls and to 'getting fresh with' Susan. CP 150. Thereafter both C.B. and N.B. were removed from the home, though Susan was left behind. Ms. Watkins testified regarding the sequencing of her thinking about what was occurring in the family home:

Q (By Mr. Keane) Tell me what you mean by that.

A When I first spoke to N.B., she denied being pregnant, N.B. (sic). Then we went I believe from there to some discussion of virgin birth. Thirdly, she said that Lotus Cassidy bathed first, and then the kids would bathe in the same water. So the extent of denial on her part along with C.B.'s information led me to believe that there were serious concerns.

Q In other words, the fact that this child is pregnant, although she first says she is not, and later gives you a completely outlandish explanation for how that happened, combined with C.B.'s report of having had

intercourse with her stepfather, made you not believe N.B. and her report that she hadn't had any sexual contact with her stepfather. Is that fair?

A Well, she clearly had sexual contact with somebody.

Q I got it. And I presume you asked, or did you ask who she had sexual contact with?

A I believe the closest we got to accurate information was -- and it wasn't accurate -- was the bath water.

Q What did you think in response to that?

A What did I think. I thought that there was clearly a disturbed family dynamic.

Q (By Mr. Keane) And that you were not getting the truth from N.B.

A Correct.

CP 160.

From there Ms. Watkins assured that both C.B. and N.B. were removed from the home and safely placed in foster care. CP 161; CP 165-167. But Susan--the youngest child whom child rapist Lotus Cassidy admitted 'getting fresh with' to Ms. Watkins--was left in the home with Lotus Cassidy and her mother. CP 246-248. Ms. Watkins signed an affidavit stating that Susan "vehemently" denied being abused. In her deposition, though, Ms. Watkins had absolutely no recollection of speaking to Susan. CP 163; CP 244-250. Lotus Cassidy further sexually

abused Ms. Kirchoff in the home and, even after Ms. Kirchoff moved to her grandparents' home in Shelton she sometimes returned to the Kelso residence where he further abused plaintiff during 1980. CP 244-250.

In 2007 Ms. Kirchoff sought to become a foster home licensor for DSHS. CP 248. Toward that end, she was required to take a course taught by an assistant attorney general who instructed regarding the duties of CPS in the context of investigating allegations of child sexual abuse in a home. The hypothetical the attorney used fit, almost exactly, Ms. Kirchoff's situation in 1979: two abused girls were removed, the third was left behind, and she was further abused. The instructor made clear that this was deficient performance by CPS. Ms. Kirchoff, understandably, felt betrayal that she had not been protected when CPS had the opportunity to protect her. CP 248-249. For the first time she realized that she had been the victim of negligent investigation by DSHS and she thereafter brought this suit.

Ms. Kirchoff claimed damages against DSHS for the harm done to her by Lotus Cassidy after the time she was left in the family home, and claimed damages for the harm stemming from her 2007 discovery of DSHS's betrayal, and the consequent reawakening of her PTSD symptoms. CP 201-206; CP 249.

Ms. Kirchoff's psychological trauma expert Dr. Laura Brown testified regarding the damages flowing from plaintiff's discovery of this 'betrayal,' as well as from the re awakening of her PTSD symptoms stemming from the same source. CP 205-210.

This action was originally filed against DSHS, the City of Kelso, and Cowlitz County. Plaintiff later nonsuited Kelso and Cowlitz County for lack of proof of any conduct supporting the claims against them.

IV. SUMMARY OF ARGUMENT

Ignoring the 'savings' statute of limitations for victims of childhood sexual abuse, RCW 4.16.340, the trial court dismissed based upon the authority of *Allen v. State*, 118 W.2d 753, 826 P2d. 200(1992). The trial court held that plaintiff 'knew or should have known' of her ability to file suit more than three years prior to the time she did file suit.

In doing so the trial court relied upon non-applicable authority. In short, the trial court found that plaintiff had sufficient knowledge that she should have known of her right to sue earlier than she did. The simplest presentation of the question before this court, then, is whether in the absence of plaintiff's actual knowledge before 2007 that DSHS's defaults in performance in 1979-1980 were actionable, is the statute of limitations tolled or not by plaintiff's ignorance?

V. ARGUMENT

The plaintiff in a claim based upon childhood sexual abuse is excused from the ‘reasonably should have known’ burden placed upon other tort claimants when applying the statute of limitations. Thus, unlike other plaintiffs, victims of childhood sexual abuse enjoy special treatment under Washington’s statute of limitations.² This court in *Korst v. McMahon*, 136 Wash.App. 202, 148 P.3d 1081 (2006) explained the rationale behind these special rules for victims of sexual abuse:

Most statutes of limitations impose a duty on the plaintiff to discover injuries. But this subsection is unique in that it omits the language “or reasonably should have discovered.” In fact, the legislature included a “Findings—Intent” section, with this statute, to explain why childhood sexual abuse cases arising from intentional conduct warrant a unique statute of limitations. As Division Three of this court noted in *Hollman v. Corcoran*, 89 Wash. App. 323, 334, 949 P.2d 386 (1997), legislative findings (4) and (5) explain this specific omission:

² 4.16.340. Actions based on childhood sexual abuse

(1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

(a) Within three years of the act alleged to have caused the injury or condition;

(b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or

(c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

...

(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.

RCW 4.16.340 (Finding—Intent—1991 c 212). When the legislature amended RCW 4.16.340 in 1991, it “intend[ed] that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.” Laws of 1991, ch. 212, § 1. 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 discover her injuries in childhood sexual abuse cases. *Hollman*, 89 Wash.App. at 334, 949 P.2d 386. Moreover, this special statute of limitations is unique in that it does not begin running when the victim discovers an injury. Instead, it specifically focuses on when a victim of sexual abuse discovers the causal link between the abuse and the injury for which the suit is brought. RCW 4.16.340(1)(c). The legislature specifically anticipated that victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse. We are bound to follow the legislature's intent. *Born v. Thompson*, 154 Wash.2d 749, 117 P.3d 1098 (2005).

Korst, 136 Wash.App. 207-208.

A. Discovery of “The Act” Which Harmed Her in 2007 Permitted Ms. Kirchoff to Timely Bring This Action in 2009.

Ms. Kirchoff presents two different methods of analyzing why she timely filed her lawsuit. The first concerns when plaintiff discovered ‘the act’ which caused her to realize she had a claim against DSHS. As to this

argument, plaintiff did not actually know until 2007---nor in its motion did DSHS ever suggest otherwise—that she had any claim against DSHS for being left to be abused in her stepfather’s house after her sisters were removed.

Relying upon the language of the statute itself, the first analysis concerns plaintiff’s discovery of ‘the act’ which lead to her bringing suit. That act, or rather the failures to act in a series of performance defaults by DSHS in the 1979-1980 time frame, were never known to plaintiff until many years later.

RCW 4.16.340(1)(c) provides that a claim is timely brought if brought: (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought. Examining the reach of this statute then requires an understanding of what ‘act’ in the statute refers to in this case.

Where the trial court erred was in either ignoring this statute or in concluding that ‘the act’ could only concern an act by Lotus Cassidy. Such a misreading may stem from the legislature’s use of the words “. . . the act that caused the injury.” Intuitively, reference to ‘the act’ seems to apply to the act or acts of the sexual abuser---the touching or, in this case, raping which Ms. Kirchoff endured at the hands of her stepfather.

But that narrow reading would necessarily limit the use of this claims ‘saving’ statute of limitations only to cases brought against the person who committed the acts of sexual abuse—since it was their physical acts which caused harm to the plaintiff. Thus, this improper reading of the statute would exclude from its protection the conduct of other defendants in these cases who do not touch, or rape, children but, rather, negligently prevent rapists from doing harm to children. The Washington Supreme Court has addressed this issue and decided it in a manner which supports Ms. Kirchoff’s argument.

In *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 W.2d 699, 985 P.2d 262 (1999) the question was whether “the act” also applies to a negligent—and not intentional—tortfeasor. If it applies to a negligent, non intentionally acting tortfeasor, it has much broader application and captures within its protection the conduct of DSHS which plaintiff ‘discovered’ in 2007.

If ‘the act’ applies to other than an intentional tortfeasor in this setting, the statute’s command that no statute of limitations begins to run until plaintiff’s actual ‘discovery’ of her cause of action must be honored here. This purely subjective test is protective of plaintiffs’ rights and

consistent with the overall and broad purposes of the childhood sex abuse savings statute.³

In applying the statute to non intentional tortfeasors, the Supreme Court reasoned:

[S]pecifically, we must decide whether the act contemplates causes of action sounding in negligence. If it does, we must then decide whether the definition of “childhood sexual abuse” contained in subsection (5) nevertheless limits the act’s applicability only to claims brought by a victim against the actual perpetrator of the abuse.

Subsection (1) of RCW 4.16.340 controls the scope of the statute’s applicability. The relevant language is expansive. It permits “[a]ll claims or causes of action” brought by “any person” provided only that claims be “based on intentional conduct” involving “childhood sexual abuse.” RCW 4.16.340(1).

.....

[A]ccordingly, under the plain meaning of the statute, an action is “based on intentional conduct” if intentional sexual abuse is the starting point or foundation of the claim.

.....

Similarly, under the facts presented here, intentional sexual abuse is the predicate conduct upon which all claims are based, including the negligence claims. The alleged sexual abuse is essentially an element of the plaintiffs’ negligence claims. Absent the abuse, plaintiffs would not have suffered any injury and their negligence claims could not stand.

³ E.g. *Cloud v. Summers/Seattle School District (Cloud ex rel. Cloud v. Summers*, 98 Wash.App. 724, 991 P.2d 1169, Wash. App. Div. 1, 1999; *M.H. v. Corporation of Catholic Archbishop of Seattle*, 162 Wash.App. 183, 252 P.3d 914 (2011); *Fleming v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints*, 2006, WL 691331 (unpublished Federal District Court case, not cited as precedent but only for illustration).

Thus, the “gravamen” of plaintiffs’ claims is that defendants are liable for injuries resulting from acts of intentional sexual abuse.

.....

[T]aken as a whole, therefore, the statute is not limited in scope to intentional torts, but specifically includes negligence causes of action.

138 W.2d 708, 709, 710. (emphasis supplied)

The Supreme Court could not have stated it more clearly. It needed to since various courts had struggled with whether the special protected status of childhood sex abuse victims extended to cases where such victims brought claims against others besides those who intentionally abused them, e.g., a school district, a church, youth groups, the Boy Scouts, etc. *CJC* confirmed that such claims were encompassed within the protection of the statute.

In words directly applicable to the conduct of CPS here, before analyzing each of the component cases in *CJC*, the Court concludes:

In giving effect to all the words used in the statute, and from our determination of legislative intent, we conclude RCW 4.16.340 encompasses causes of action sounding in negligence against parties who did not themselves directly perpetrate acts of childhood sexual abuse, but who allegedly failed to protect child victims or to otherwise prevent the abuse.

138 W.2d 713-714. (emphasis supplied).

The “act” which this broad interpretation of the statute applies to, then, includes the conduct of a person or entity which owed a duty of protection to the plaintiff. And until the plaintiff ‘discovers’ that duty and its breach, no statute of limitations begins to run.

B. Since Plaintiff’s Cause of Action Did Not Accrue Until October, 2007, Claims Against DSHS for Damages Arising From DSHS’s Betrayal of Plaintiff Are Protected From Dismissal by RCW 4.16.340(1)(b).

Independent of the above analysis, plaintiff is also protected by a second branch of the statute of limitations savings statute because the damage which flowed from her discovery of DSHS’s failures occurred *then* and not at any earlier time.

What resulted from plaintiff learning—in 2007—that she was entitled to protection in the same manner as her sisters were protected from Lotus Cassidy, was the feeling that DSHS betrayed her.

Plaintiff’s damage expert Dr. Laura Brown describes this reaction as ‘betrayal trauma’ damages. What resulted for plaintiff were reawakened PTSD symptoms stemming from the long ago sexual abuse by Lotus Cassidy, as well as a newly precipitated need for therapy following her discovery of CPS’s betrayal. These damages were described during the deposition of Dr. Brown:

Q So, in the context of this case, please explain to me what betrayal trauma means, and the damages that are attributable to betrayal trauma that have been sustained by Susan Kirchoff.

A So betrayal trauma theory, which was as I said, developed by Jennifer Freyd, a cognitive psychologist at the University of Oregon, helps us to understand how it is that when people make different meaningful events in their lives, that they come to be experiencing trauma as a result of feeling betrayed. And feelings of betrayal arise when a person realizes that an individual or institution that they think should have protected them failed in that protective duty that they believed to have been there. And betrayal is itself an experience of trauma. It's an experience of realizing oneself to have been unprotected when one should have been protected. The theory was actually first developed to help explain why it is that some children don't remember being sexually abused, usually by close family members, and in this instance, what I have observed and *what I will opine is that for Ms. Kirchoff, the attendance at that training where she heard a case similar to her own life experience being described, was for her an experience of uncovering betrayal, and she has come to believe herself to have been unprotected, left to be harmed yet again in her family of origin by Mr. Cassidy. She sees that her sisters were taken from the home and received protection, and she struggles with feelings of, why wasn't I protected? Why was I not also taken from this home where DSHS had pretty good reason to suspect that this man was sexually abusing my sisters? So for her, that has been the traumatic event that to me is the nexus of understanding what is happening here.*

CP 205-207.

Dr. Brown further described those damages and their cause:

I think the main thing for me when I listen to Ms. Kirchoff is that she didn't forget she was sexually abused. She didn't not know she was affected by it. *What she didn't know until the fall of 2007 is perhaps things could have been different, and learning that things perhaps could have been different opened up huge psychological distress for her, and I believe that to be the nexus of this matter. To me this is not really about the sexual abuse, it's about what she believes to be her betrayal by CPS and DSHS, which is something that she believes she learned in the fall of 2007.*

Q Can you attribute any diagnoses to the betrayal trauma?

- A Aggravation of post-traumatic stress disorder.
- Q Is it your opinion that that PTSD preexisted the fall, 2007, training?
- A Oh, yes.
- Q By aggravation, can you articulate any concrete examples of how it was exaggerated, or aggravated?
- A I think I have described that previously, which is increased anger and irritability, the gambling problem, depressed mood, difficulty functioning.
- Q We previously talked about how much treatment you would recommend for someone like Susan Kirchoff. I believe you said it was three to five years of individual therapy, weekly to every other week, is that accurate?
- A Weekly at first, eventually going to every other week.
- Q Is there any chunk of that treatment plan that you would attribute to preexisting PTSD?
- A It's difficult to separate them out. When you are treating PTSD, you are treating PTSD, so the betrayal trauma aggravates the trauma related to the sexual abuse. You can't in treatment really segregate them one from the other.

CP 208.

Thus, as Dr. Brown explains, learning of her betrayal not only created new harm, in the form of 'betrayal trauma' (which the trial judge explicitly accepted as sufficiently scientifically based to satisfy any *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923) issues), but it exacerbated and worsened her pre existing PTSD.

These are damages which were discovered only after DSHS's failures were explained to her and those damages became the basis for a suit plaintiff brought less than three years later.

Washington has clearly adopted a policy which permits a plaintiff like Ms. Kirchoff to bring suit for this latter discovery of new, and different, damage than that of which she was previously aware.

Even some prior recognition of harm in the sexual abuse setting does not override the legislature's decision---when passing the childhood sexual abuse statute of limitations in 1991 that: "[t]he earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later." Laws of 1991, ch. 212 § 1 (cited with approval in *Hollman v. Corcoran*, 89 Wash.App. 323, 333, 949 P.2d 38 (1997)).

VI. CONCLUSION

Ms. Kirchoff was the victim of horrifying, long term, sexual abuse at the hands of her stepfather, Lotus Cassidy. Even after its discovery of Mr. Cassidy's wrongdoing, and even after he admitted 'getting fresh' with plaintiff, DSHS left plaintiff in the family home where she suffered additional abuse.

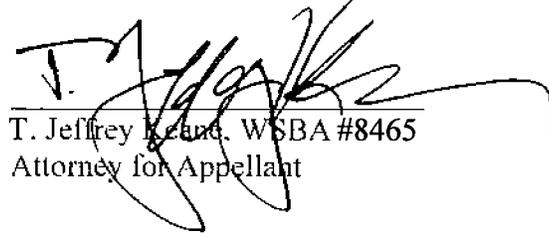
Upon her discovery that she need not have suffered further abuse following the removal of her sisters, plaintiff's prior harm was worsened imposing new harm upon her, and she for the first time suffered 'betrayal

trauma' which, as the name suggests, could not have existed prior to the time she learned of her betrayal by DSHS. Having brought suit within three years of her discovery that DSHS had wronged her, Ms. Kirchoff's case should not have been dismissed based upon the statute of limitations.

In light of the foregoing, Ms. Kirchoff respectfully requests that this Court reverse dismissal of her case and reinstate it for trial.

Dated this 1st day of December, 2014.

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**IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

SUSAN A. KIRCHOFF f/k/a SUSAN LOWE)
a/k/a SUSAN CASSIDY, a married person,)

Appellant,)

vs.)

CITY OF KELSO, a municipal corporation of)
the State of Washington, COWLITZ COUNTY,)
a municipal corporation of the State of)
Washington, DEPARTMENT OF SOCIAL)
AND HEALTH SERVICES, a subdivision of)
the State of Washington,)

Respondents.)

No. 46361-0-II

DECLARATION OF SERVICE

Donna M. Pucel declares under penalty of perjury as follows:

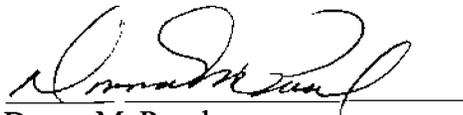
1. That I am a paralegal at the Keane Law Offices, over the age of majority, and competent to testify herein.

2. That on the 1st day of December, 2014, I sent via email, Appellant's Brief to the following:

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DATED this 1st day of December, 2014.



Donna M. Pucel

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