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

K.C. and L.M.,

Respondents,

v.

STATE OF WASHINGTON and DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendants,

GOOD SAMARITAN HOSPITAL, PATRICK SHEEHY, PhD, and LINDA WILLIAMS, M.S.W.,

Appellants,

and

DONNA JOHNSON,

Defendant.

APPELLANTS GOOD SAMARITAN HOSPITAL, PATRICK SHEEHY, PHD AND LINDA WILLIAMS' OPENING BRIEF

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I. INTRODUCTION

In this medical negligence case, K.C. and L.M., two adult women, allege that defendants Good Samaritan Hospital, Patrick Sheehy, Ph.D. and Linda Williams, M.S.W. (collectively "GSH") are responsible for the sexual abuse they suffered as children at the hands of their stepfather, Walter Carl Johnson, who resided with them and their mother, defendant Donna Melby Johnson (Melby), from 1981 to 1991. Specifically, they allege that GSH counselor Patrick Sheehy, who provided counseling to Johnson, and GSH social worker Linda Williams, who co-signed a letter drafted by Sheehy, negligently recommended to Johnson's parole officer in 1981 that Johnson could live in Melby's home with K.C. and L.M.

In 2013, K.C. and L.M. initially sued only the State of Washington and DSHS (the State), alleging that the State failed to prevent their abuse by failing to properly monitor Johnson, who was under state supervision due to an indecent liberties conviction involving his biological daughter. The State moved for summary judgment in August 2014, arguing, among other things, that because most of the relevant documents were unavailable (due to the passage of time) and important witnesses were deceased, there was no way for K.C. and L.M. to prove: (1) negligence by the State; or (2) legal and/or factual causation. The State also argued that K.C.'s claims were barred by the statute of limitation. The trial court,

Judge Stolz, granted the State's summary judgment motion, holding that because of faded memories and missing records there was no way to determine what really happened without resorting to speculation. Judge Stolz also based the summary judgment dismissal of K.C.'s claims on statute of limitations grounds.

After their claims against the State were dismissed, K.C. and L.M amended their Complaint in November 2014 to name Good Samaritan Hospital, Sheehy, and Williams as defendants.[1] In two separate motions, GSH moved for summary judgment on numerous grounds, including lack of evidence, lack of legal and factual causation, laches, collateral estoppel and statute of limitations. The trial court, Judge Hogan, denied those motions, but granted K.C. and L.M.'s summary judgment motion, striking the statute of limitations affirmative defense.

GSH moved for discretionary review based on Judge Hogan's rulings on both Good Samaritan's and K.C. and L.M.'s summary judgment motions. Court Commissioner Bearse granted discretionary review on the following issues:

1. Whether collateral estoppel bars K.C.'s claims;
2. Whether some or all of K.C. or L.M.'s claims are barred by the statute of limitations; and

[1] The mother, Melby, had already been made a defendant on October 10, 2014. CP 919.

3. Whether the trial court erred in dismissing GSH's statute of limitations affirmative defense.

The trial court erred in not barring K.C.'s claims based on collateral estoppel and not dismissing L.M.'s claims based on statute of limitations. The court also erred in dismissing GSH's affirmative defense of statute of limitations. This court should reverse the trial court and remand for entry of judgment in favor of GSH.

II. ASSIGNMENTS OF ERROR

Based on the partial grant of review by Commissioner Bearse, GSH makes the following assignments of error:

1. The trial court erred in denying GSH's motion for summary judgment dismissal of K.C.'s claims based on collateral estoppel.
2. The trial court erred in denying GSH's motion for summary judgment dismissal of L.M.'s claims based on statute of limitations.
3. The trial erred in granting K.C. and L.M.'s motion for partial summary judgment dismissal of GSH's affirmative defense of statute of limitations.

III. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in denying summary judgment dismissal

of K.C.'s claims based on collateral estoppel when the court had previously dismissed K.C.'s claims against the State based on statute of limitations under identical facts and all of the elements of collateral estoppel were met?

2. Did the trial court err in denying summary judgment dismissal of L.M.'s claims based on statute of limitations when L.M.'s own medical records show that she connected her injuries to the abuse outside of the statute of limitations period?

3. Did the trial court err in granting summary judgment dismissal of GSH's statute of limitations affirmative defense when the trial court admitted that it did not know when the causes of action accrued?

IV. STATEMENT OF THE CASE

A. Underlying Substantive Facts.

Many details of the underlying events, occurring as much as 35 years ago, are unknown because of the lack of documents that remain. Of the records that do exist, most are from the Pierce County criminal court file in *State of Washington v. Walter Carl Johnson*, Pierce County Cause No. 57120.

1. In 1980, Johnson pled guilty to indecent liberties with his biological daughter and received a deferred sentence with required counseling and state supervision.

In July 1980, Walter Carl Johnson pled guilty to indecent liberties for molesting his biological daughter, Jackie, and received a deferred sentence. CP 1703, 1715. As part of his sentence, he was required to attend counseling. CP 1715. Johnson initially received counseling from psychologist H.R. Nichols Ph.D., but left in January 1981 and began treatment at Good Samaritan Mental Health Center with counselor Sheehy. During that time, Johnson also began a relationship with Melby, who was aware of his conviction for indecent liberties. CP 1730.

2. There are few existing documents or known facts related to Johnson's treatment at GSH.

Because the treatment at issue occurred over 30 years ago, GSH has not retained any of the medical records or other evidence of his treatment. CP 1685. The only evidence related to Johnson's treatment at GSH is an August 10, 1981 letter in Mr. Johnson's criminal file addressed to his parole officer, Ken Davis, that Sheehy drafted and Williams co-signed. CP 1735-36.

In that letter, Sheehy wrote that he had sent Johnson to undergo psychological testing by psychologist Sheldon Kleine, Ph.D. and a psychological evaluation by psychiatrist James Lurie, M.D. *Id.* Sheehy summarized the results of Kleine's and Lurie's testing and evaluation as showing that Johnson did not suffer from sexual psychopathology, as his

testing profile did not match that of a sex offender. *Id.* Sheehy stated in the letter that, based on his joint therapy sessions with Johnson and Melby and Lurie's psychological evaluation of Johnson, both he and Lurie felt that Johnson's relationship with Melby was a sincere attempt to re-establish a normal family life and start over again, and noted that Melby and Johnson intended to marry. *Id.*

Sheehy recommended that Johnson meet monthly with his probation officer to discuss situational problems as they arise. He also recommended that the court monitor the situation by periodically interviewing Melby concerning her relationship with Johnson and Johnson's relationship with her children. *Id.* Sheehy stated that with these recommendations in place, he felt it would be appropriate for Johnson to make his residence with Melby. *Id.*

Beyond Sheehy's single letter, there is no evidence of Johnson's treatment at GSH. There is no record of Lurie's psychological evaluation of Johnson, or of Kleine's psychological testing. CP 1685. Lurie died in September 2014, and Kleine died in 2010. There also is no record of Sheehy's counseling sessions with Johnson and/or Melby, and neither Sheehy nor Williams has any recollection of Johnson, his treatment, or the August 10, 1981 letter. CP 1393-97.

3. Little is known of what occurred with the court or the monitoring of Johnson after the August 1981 letter.

On October 1, 1981, more than two months after the Sheehy letter, Parole Officer Davis filed a report with the court (Judge E. Albert

Morrison), as to whether Johnson should be allowed to live with Melby and her young children. CP 1723-24. The report references conflicting opinions on that subject. On the one hand was the view of psychologist Nichols who, in January 1981, sent a letter to parole officer Susan Cole advising against such living arrangements. CP 1721-22. On the other hand was the competing view of Sheehy, Kleine and Lurie that, based on Johnson's passing of various psychological tests, there was nothing to indicate that he should be kept out of the home, subject to certain conditions. CP 1723-24.

There is no evidence of how Judge Morrison ruled at the hearing on this issue or the basis for that ruling, and no evidence of what other evidence was before the court. Melby has no recollection of that hearing. CP 1231. Johnson married Melby on November 23, 1981. CP 1266. There is little or no evidence as to what, if any, continued monitoring of Johnson either the parole officer or the court conducted in light of the recommendations contained in Sheehy's letter.

K.C. and L.M.'s biological father, Delbert Melby, learned of Johnson's indecent liberties charge and enlisted the assistance of United States Senator Max Baucus to gain information about Johnson. According to Mr. Melby, on January 10, 1984, Laurie Merta of the Community Corrections Office drafted a letter to the office of Senator Baucus, United

States Senator for Montana regarding Johnson.[2] CP 1883-84. Merta wrote that, on July 23, 1980, Johnson was convicted of indecent liberties and, on September 25, 1980, was granted a five-year deferred probation sentence by Judge Morrison. *Id.* As part of his probation conditions, Johnson was ordered to continue in counseling. *Id.* Merta also wrote that Johnson was permitted to marry Melby and establish a residence with the Melby children, and commented that "[i]t should be noted that both the superior and juvenile court, as well as the Child Protective Services in this area were involved in this decision." *Id.* Merta further wrote that "[a]s a further testament to Mr. Johnson's successful treatment, he was recently awarded custody of his 14-year-old daughter (Jackie)[3] under the supervision of [DSHS]." *Id.* Merta noted that "[p]resently all the reports from the various agencies are positive and most notable with Mr. Johnson's total cooperation." *Id.*

In 1985, DOC corrections officers filed a Request for Dismissal of Johnson's indecent liberties charge. CP 1726-27. According to that request, Johnson had been vigorously investigated after K.C. and L.M.'s biological father made allegations that Johnson had had sexual contact with K.C. and L.M. *Id.* According to the request, Johnson and the family

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[2] Merta was writing in response to a letter from Senator Baucus's staffer, Mark Smith, who had requested information regarding Johnson for Delbert Melby.
[3] Jackie was the daughter with whom Johnson had pled guilty to indecent liberties.

"underwent a vigorous investigation by Children's Protective Services as well as the juvenile courts and probation office, and it was determined the allegations were untrue."[4] *Id.* The request included an assertion that the family had been in counseling and were being monitored. *Id.* The court granted the request for dismissal. *Id.*

In February 1986, Johnson's biological daughter Jackie disclosed to CPS that Johnson had been waking her up by kissing her stomach and thighs. CP 1749. Johnson's daughter was removed from the home. See CP 1754, 56. Johnson disclosed to the court that he was living with K.C. (age 7) and L.M. (age 9) and, although the court ordered Johnson and his biological daughter to participate in counseling, the court did not order that K.C. or L.M. be removed from the home. See CP 1756.

On December 16, 1986, the Juvenile Court ordered Johnson to undergo psychosexual evaluation. CP 1754. There is no indication as to where the psychosexual evaluation was to be performed, or what the results of the evaluation were.

Melby testified in her deposition that she became aware of Johnson sexually abusing her daughters in 1986 or 1987. CP 1732. Melby asked Johnson to leave the house, but he only left for about a week. *Id.* Melby and Johnson divorced in 1991. CP 1785-87; 1789-90. Even after the

[4] None of the documents reflecting that investigation still exist.

divorce, Melby allowed Johnson to have unsupervised contact with L.M. while he transported L.M. to medical appointments. CP 1793-94.

B. <u>Facts Related to L.M.'s Claims Regarding Statute Of Limitations</u>.

On January 16, 2015, GSH propounded discovery requests to plaintiff L.M. Among the responses received from plaintiff L.M. was the following:

> **INTERROGATORY NO. 10**: Describe in detail all injuries (physical and mental) which you claim to have suffered as a result of the alleged wrongful acts of the defendant.
>
> **ANSWER**: ***
>
> I am not sure of the exact physical injuries that were inflicted upon me as a child, I do remember multiple issues with my genital area that required warm baths and creams to soothe or ease discomfort and pain. Multiple complaints of headaches, nausea, vomiting, asthma attacks, pain, etc.
>
> As for any mental issues, this has affected my life for as long as I can remember. This has affected my life daily in my professional and personal practices and continues to do so.

CP 1366.

In response to discovery, plaintiffs also produced L.M.'s medical records from Ana Casillas, MFT at PsyCare, Inc. According to L.M.'s Initial Evaluation and Development of Treatment Goals dated December 30, 2010, L.M. was experiencing poor sleep due to anxiety from childhood sexual abuse, anxiety with night time triggers, and a history of overeating

to cope with abuse. CP 1472-74. Ms. Casillas noted that L.M. had symptoms of sadness, loss, grief, and PTSD due to an extensive history of childhood abuse. CP 1475.

L.M. received individual psychotherapy throughout 2011, during which her childhood sexual abuse and related conditions were constantly discussed. On February 17, 2011, the chart indicates that L.M. had difficulty trusting others due to extensive childhood abuse. CP 1481. On April 25, 2011, the major issues discussed were "1. Fears of losing control (stemming from childhood trauma), 2. Pain & hurt processed in session." CP 1484.

On June 20, 2011, L.M. described having ongoing sleep disturbances due to sexual abuse in childhood. CP 1489. On July 14, 2011, L.M. saw increased connections between the abuse of her past and her depression and anxiety symptoms. CP 1492. Major issues discussed during that therapy session included processing triggers from her abusive past and identifying several ways traumas affect her current situations and relationships. *Id.* The intervention included processing her hurt, pain, fears due to PTSD and ways to cope. *Id.* On July 28, 2011, L.M.'s chart reveals that L.M.'s history of abuse was "leading to anxieties & fears at night" with sleep disturbances ongoing. CP 1493. On August 11, 2011, Ms. Casillas noted that L.M.'s PTSD symptoms were increasing, and were

"triggered a lot," mostly at night. CP 1494. On September 9, 2011, Ms. Casillas wrote that major issues discussed included history of abuse, and PTSD issues in the way of L.M.'s relationship with her spouse (lacking trust and openness). CP 1496. On September 12, 2011, Ms. Casillas and L.M. discussed poor boundaries as a result of child sexual abuse. CP 1497. Finally, on November 14, 2011, her chart reveals that L.M. had insecurity about self-value and was beating herself up, stemming from her abuse. CP 1501.

C. The Summary Judgment Motions.

In September 2014, before Good Samaritan, Sheehy, and Williams were sued by K.C. and L.M, the State moved for summary judgment, arguing in part that due to the passage of time, there was insufficient evidence to prove negligence and causation without resorting to speculation. CP 16-44. The State also moved for summary judgment as to K.C. based on statute of limitations. CP 29-32.

The Court granted the summary judgment motion on both bases.

> The Court: Yeah, but, you know, again, you don't know what [Judge] Morrison chose to do. There's no evidence because, presumably, if it was directed to his attention, one would hope he did something; but there's no evidence to show that he did or did not do anything, and we can't basically speculate now as to what Judge Morrison would have done.
>
> * * *

> The Court: And, unfortunately, your expert witness in this case, what they're saying is based on a sketchy record and is speculation about what should have happened 30 years ago.

CP 968, 973; see also, CP 969. The court also ruled that the speculative nature of the case was "not the only basis" for granting summary judgment as "it's outside the statute of limitations for at least one of them, K.C." CP 973.

Following the State's dismissal, plaintiffs added the GSH defendants on November 19, 2014. CP 1006-14. On June 19, 2015, GSH moved for summary judgment. Because of an earlier trial court ruling that plaintiffs were entitled to additional discovery before a motion could be brought on factual causation, GSH's first summary judgment motion was limited to: (1) lack of legal causation; (2) statute of limitations; (3) collateral estoppel (related to statute of limitations) and (4) laches. CP 1399-1423. K.C. and L.M. also moved for summary judgment, seeking to strike the statute of limitations affirmative defense. CP 1022-38.

The trial court, Judge Hogan denied GSH's motion, ruling that neither legal causation nor the statute of limitations barred K.C. and L.M.'s claims. 7/10/15 RP 31-32, CP 1628-29. Regarding collateral estoppel, Judge Hogan ruled that it did not apply because the record she had before her was different than the record before Judge Stolz, as K.C. and L.M were now claiming additional injuries. 7/10/15 RP 31; CP 1628.

With respect to the statute of limitations argument, Judge Hogan granted K.C. and L.M.'s motion for summary judgment dismissal of the statute of limitations affirmative defense, despite the fact that she admittedly did not know when the causes of action accrued. 7/10/15 RP 32-37; CP 1629-34. GSH later brought a second summary judgment motion, based on standard of care, lack of factual causation and collateral estoppel (related to the State being dismissed because the case was speculative). CP 1656-1683. Judge Hogan also denied that motion. CP 1984-86.

V. ARGUMENT

A. Standard of Review.

"Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo." *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 305, 96 P.3d 957, 960 (2004). Likewise, the standard of review in reviewing a summary judgment order is also de novo. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2011).

B. All of K.C.'s Claims are Barred by Collateral Estoppel.

Under the doctrine of collateral estoppel, a party is estopped from relitigating an issue when: (1) the issue decided in a prior adjudication was identical with the one presented in the action in question; (2) there was a final judgment on the merits in the prior adjudication; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior

adjudication; and (4) the application of the doctrine will not work an injustice on the party against whom the doctrine of collateral estoppel is applied. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 85 Wn. App. 249, 253, 931 P.2d 931 (1997); *see also*, *Gausvik v. Abbey*, 126 Wn. App. 868, 884-85, 107 P.3d 98 (2005).

Here, the trial court dismissed all of the claims K.C. brought against the State on statute of limitations grounds. All of the elements of collateral estoppel are met in this case and therefore dismissal of K.C.'s claims against GSH is mandated.

First, the issue in the State's summary judgment motion was, as it is here, whether K.C.'s claims arising out of the abuse from Walter Carl Johnson were time barred. CP 29-32. A comparison of the original complaint (against the State only), CP 2-5, with the second amended complaint against GSH, CP 1008-1010, shows the factual basis for the lawsuit is the same. As such, the first element of collateral estoppel is satisfied.

The other elements of collateral estoppel are also satisfied. As to the second element, there was a final judgment as summary judgment constitutes a final judgment on the merits. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 870, 316 P.3d 520, 531 (2013). As to the third element, privity, K.C. was a party when the State brought its summary

judgment motion and therefore she is bound by that decision. Lastly, as to the fourth element, whether collateral estoppel will work an injustice, the application of the doctrine of collateral estoppel does not work an injustice where a plaintiff "had an unencumbered, full and fair opportunity to litigate his claims in a neutral forum." *Nielson,* 85 Wn. App. at 255. Here, plaintiff had that opportunity.

In the trial court, as well as on the motion for discretionary review, K.C. argued that the record before the Judge Stolz on the State's motion for summary judgment was different than the record before Judge Hogan on GSH's motion for summary judgment. 7/10/15 RP 31; CP 1628. But, the alleged differences in the record do not exist. At oral argument before Judge Hogan, which is where K.C. first raised this "different record" issue, K.C.'s counsel argued that K.C. had additional injuries (educational injuries and the early birth of a child) and saw increased connections to the abuse. 7/10/15 RP 19-20; CP 1932-33. But these same alleged injuries were in front of Judge Stolz when she ruled on the issue of whether the statute of limitations barred the claim against the State. CP 29-32; CP 442-91, especially CP 466-67, 481-82. And, when plaintiffs made this same argument to Commissioner Bearse on the motion for discretionary review, Commissioner Bearse correctly ruled that there were no

significant differences in the records of the two proceedings. *Ruling of February 29, 2016 at 20.*

The other argument raised by K.C. in opposition to the application of collateral estoppel was the assertion that application of the doctrine would work an injustice (the fourth element of the collateral estoppel analysis) because Judge Stolz represented the biological father of K.C. and L.M., Delbert Melby, in 1984 in filing a writ of habeas corpus to secure his previously ordered visitation rights involving K.C. and L.M. CP 994. But plaintiffs waived any complaint they may have had about Judge Stolz's qualification to rule on the State's summary judgment motion.

Following the dismissal of the State, plaintiffs brought a motion to recuse Judge Stolz. CP 883-85. In that motion, plaintiffs argued that because of the prior representation of Delbert Melby, Judge Stolz should recuse herself and have the summary judgment motion heard "anew." *Id.* The State opposed the motion, noting that plaintiffs had the information about Judge Stolz' representation of Delbert Melby prior to the summary judgment hearing and therefore any complaint about Judge Stolz had been waived. CP 909-14. The State also argued that the Court had no jurisdiction, due to the plaintiff's appeal of the summary judgment decision, and that there was no evidence of actual bias. *Id.*

Judge Stolz denied the motion. CP 929-30. After plaintiffs amended the complaint to add Donna Melby Johnson as a defendant, Judge Stolz transferred the case to another department, but wrote that she had no knowledge of the representation when she ruled on the summary judgment motion (the plaintiffs were identified only by their initials) and that it did not play any role in her granting the motion to dismiss. CP 994.

Judge Stolz's alleged bias is a red-herring that does not defeat the application of collateral estoppel. First, any argument that Judge Stolz was biased was waived. If a litigant proceeds to trial or a hearing despite knowing of a reason for potential disqualification of the judge, she waives the objection and cannot challenge the court's qualification on appeal. *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 939, 813 P.2d 125 (1991) (citing *Brauhn v. Brauhn*, 10 Wn. App. 592, 597-98, 518 P.2d 1089 (1974)), *review denied*, 118 Wn.2d 1002 (1991); *see also In re Marriage of Duffy*, 78 Wn. App. 579, 582-83, 897 P.2d 1279 (1995) (wife's failure to object to judge's prior working relationship with husband's counsel waives claim on appeal), *review denied*, 128 Wn.2d 1017 (1996). Second, a party must timely object whether the party seeks disqualification of the judge on either statutory or due process grounds. *Brauhn*, 10 Wn. App. at 597-98. If a party fails to seek disqualification, the objection is considered waived. *Id.*

The proper time for plaintiffs to argue Judge Stolz's bias was before Judge Stolz ruled on the State's Motion for Summary Judgment; otherwise, plaintiffs could just wait to see if Judge Stolz ruled in their favor before seeking disqualification. Plaintiffs learned of Judge Stolz's representation of plaintiffs' biological father in obtaining a writ of habeas corpus through the case file on *In Re: Welfare of Melby Children,* Pierce County Cause No. 84-2-03219-2. This case file, in addition to being public record, was provided to plaintiffs by the State on August 7, 2014. CP 909. Judge Stolz heard the State's summary judgment motion more than a month-and-a-half later, on September 26, 2014. Plaintiffs did not raise the issue of Judge Stolz's involvement in the 1984 habeas corpus case until ***after*** they received an unfavorable ruling from Judge Stolz. As such, any argument that Judge Stolz was biased has been waived.

If the plaintiffs wanted to argue that Judge Stolz's ruling was in error or improper, they could have appealed that decision, and in fact, they did file an appeal of that decision, CP 876-77, but then withdrew their appeal after the State raised the jurisdiction issue in response to the motion to recuse. CP 911, 928, 993, 1020.

Third, even if the argument was not waived, it is not an injustice under the collateral estoppel analysis. In this context, "'in-justice' means more than that the prior decision was wrong. When faced with a choice

between achieving finality and correcting an erroneous result, we generally opt for finality." *State Farm Mut. Auto. Ins. Co. v. Avery,* 114 Wn. App. 299, 306, 57 P.3d 300 (2002).

Finally, Judge Stolz' representation of Delbert Melby, a non-party, 20 years prior did not disqualify her to preside over this case. *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141, 144 (1996). In *Dominguez*, the defendant was convicted of burglary and theft. *Id.* at 326. On appeal, he argued that he was entitled to a new trial because the judge "failed to disqualify himself" and "violated the appearance of fairness doctrine." *Id.* Dominguez argued that the judge "had once represented Mr. Dominguez as defense counsel and Mr. Dominguez claimed he had filed a complaint against the judge regarding that representation, and the judge had once prosecuted Mr. Dominguez."

The Court of Appeals rejected the argument. It found no evidence of actual or potential bias. "[T]he mere fact that the judge earlier acted once for Mr. Dominguez and once against him, both times in his professional capacity as an attorney, does not establish potential bias. Generally, disqualification is required when a judge has participated as a lawyer in the case being adjudicated; however, unless there is a specific showing of bias, a judge is not disqualified merely because he or she

worked as a lawyer for or against a party in a previous, unrelated case." *Id.* at 329.

Here, Judge Stolz indicated that, when she ruled on the summary judgment motion, she had no knowledge of the prior representation of Mr. Melby and that it did not influence her decision. CP 994. Her representation of Mr. Melby, who has never been a party to this case, in enforcing previously ordered visitation rights, is much more attenuated than the relationship of the judge to the defendant in *Dominguez.* Plaintiffs' attempt to use this issue to defeat the application of collateral estoppel fails. Collateral estoppel applies and all of K.C.'s claims should be dismissed.

C. <u>L.M.'s Claims are Barred by the Statute of Limitations</u>.

As discussed above, the issue of whether K.C.'s claims are barred by the statute of limitations was already determined by Judge Stolz and that decision precludes K.C. claims against the GSH defendants under the theory of collateral estoppel. As a result, this section will address whether L.M.'s claims are barred by the statute of limitations.

Regarding statute of limitations, a tolling statute, RCW 4.16.340, applies to claims brought by victims of childhood sexual abuse, and provides that such claims must be filed "(b) [w]ithin 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) [w]ithin three years of the time the victim discovered that the act caused the injury for which the claim is brought." The statute of limitations is not tolled when the victim of sexual abuse is able to understand or connect the alleged childhood sexual abuse to the emotional harm or damage. *Oostra v. Holstine*, 86 Wn. App. 536, 540-41, 937 P.2d 195 (1997) (citing the legislative history of the statute).

In *Carollo v. Dahl*, 157 Wn. App. 796, 240 P.3d 1172 (2010), a teacher had sexually abused the minor plaintiff over the course of several years. *Id.* at 798. At the time, the plaintiff sought counseling to deal with issues arising from those assaults. Ten years later, in 1995, when the plaintiff was well past age 21, he was diagnosed with PTSD. In 2008, his PTSD worsened and he filed suit.

The trial court in *Carollo* granted summary judgment and the Court of Appeals affirmed. *Id.* at 799. The Court of Appeals stated that a plaintiff can demonstrate compliance with RCW 4.16.340(1)(c) in one of two ways: (1) show that the evidence of the harm being sued upon is qualitatively different than the other harms previously connected to the abuse; or (2) show that the plaintiff had not previously connected the recent harm to the abuse. *Id.* at 801. In *Carollo*, the plaintiff did not allege a newly discovered connection but rather asserted that his condition

was worse. The Court of Appeals affirmed, because a worsening of a condition is not a new or qualitatively different condition. *Id.* at 803.

Here, L.M. connected her injuries to the abuse no later than mid-2011. Indeed, her injuries from the sexual abuse have been long standing. In response to Interrogatories, L.M. has stated "As for any mental issues, ***this [the abuse] has affected my life for as long as I can remember***. This has affected my life daily in my professional and personal practices and continues to do so." CP 1366 (emphasis added).

The notes from L.M.'s *very first* counseling session in 2010 include the phrase, "Sxs [Symptoms] of sadness, loss, grief, and PTSD due to extensive hx [history] of childhood abuse." CP 1475. She reported experiencing poor sleeping, anxiety, and overeating due to the abuse. CP 1472, 74. Each of these chart notes is signed by L.M. herself. In July 2011, L.M. discussed with her therapist that she was seeing increased connections between the abuse of her past and her depression and anxiety. CP 1492. They discussed how she could process triggers from her abusive past and identify ways traumas affect her current situations and relationships. *Id.*

In response to the medical records, L.M. submitted a declaration to the trial court in which she denied coming to any conclusion that her abuse was causing her problems prior to November 19, 2011. CP 1457-1471.

As such, she argued, she had not subjectively made the connection between her abuse and her injuries, and therefore her claims were not time barred. This attempt to contradict the records through a sworn statement fails. *Marshall v. AC&S*, 56 Wn. App. 181, 782 P.2d 1107 (1989). In *Marshall*, the issue was when the plaintiff's cause of action for negligence (related to asbestos exposure) accrued. The medical records indicated that by July 12, 1982, the plaintiff had knowledge that his injuries were caused by asbestosis. *Id.* at 182-83. He filed suit on November 19, 1985. When the defendant brought a summary judgment motion based on statute of limitations, Marshall signed a declaration stating that he did not have breathing problems until 1983, and did not learn he had an asbestos related disease until 1985. *Id.* at 183. He argued that there was an issue of fact as to when his cause of action accrued. *Id.* at 184. The court rejected this argument and affirmed the summary judgment, holding that the only reasonable inference from the records was that his claim accrued in July 1982. *Id.* at 185.

Here, the only reasonable inference is that L.M. connected her injuries to the abuse no later than mid-2011, more than three years before she filed suit against GSH. The records cited above, some of them signed by L.M., lead to only one conclusion – L.M. knew as of 2010 or early 2011 that her issues were related to her childhood abuse. Indeed, the

initial evaluation (CP 1472-75), on the very first visit in December 2010, contains the "history of present illness." This is obviously coming from the patient. Indeed, L.M. who has earned an associate, bachelor and master's degree in nursing, CP 403, would have more knowledge than most regarding medical terms, such as PTSD. The only conclusion that can be drawn from these records is that L.M. knew of the connection between her abuse and her injuries more than three years before suing GSH. As such, her claims are time barred.

D. The Trial Court Erred in Dismissing the Statute of Limitations Affirmative Defense.

As discussed above, it is GSH's position that, as a matter of law, the plaintiff's claims are barred by the statute of limitations. However, even if this Court disagrees with any part of that analysis, at a minimum the trial court erred in dismissing GSH's statute of limitations affirmative defense, as there would at least be a factual issue as to when the causes of action accrued.

In the trial court, plaintiffs argued that, under *Korst v. McMahon,* 136 Wn. App. 202, 209, 148 P.3d 1081 (2006), GSH had not produced enough evidence to support the affirmative defense. CP 1958. The trial court agreed and struck the affirmative defense. CP 1580-81.

Korst presented a very different factual scenario. In *Korst*, a young girl was molested by her father. *Id.* at 204. Years later, in 1995, she wrote a letter to her father complaining of her mistreatment. *Id.* Then, in 2002, she began seeing a counselor who diagnosed her with PTSD due to her childhood abuse. *Id.* at 204-05. She then sued her parents. After a bench trial, the trial court held that the statute of limitations barred the claim, based solely on the 1995 letter. *Id.*

On appeal, the court reversed, holding that the 1995 letter did not show a connection between her abuse and her symptoms. *Id.* at 209. The court held that "Korst's letter does not suggest that she knew that her father's abuse had caused her many injuries. The letter simply indicates that she resented her father for sexually abusing her, not that Korst understood the effects of her abuse." *Id.*

Here, there are both factual and procedural differences. Factually, the evidence shows that the plaintiffs knew that Johnson was molesting them back in the 1980s and 1990s. That is comparable to the 1995 letter in *Korst*. As in *Korst*, that knowledge is not enough to start the statute of limitations running. In *Korst*, it was the counseling sessions in 2002 that triggered the statute of limitations. Similarly, for L.M. it is also the counseling sessions, starting in 2010, which start the statute of limitations clock. Unlike *Korst*, however, here the lawsuit was filed more than three

years after these counseling sessions and therefore the claims are time-barred. At a minimum, a factual issue is created.

Procedurally, the *Korst* case was after a bench trial. Here, we are at the summary judgment stage, as noted by Commissioner Bearse. *Ruling of February 29, 2016 at 25.* Moreover, Judge Hogan admitted that she did not know when the causes of action accrued. 7/10/15 RP 37; CP 1950. In *B.R. v. Horsley*, 186 Wn. App. 294, 345 P.3d 836 (2014), the court held in a sexual abuse case that, because of the conflicting evidence, "a jury must resolve the factual issues and determine whether the statute of limitations bars her claim." *Id. at 306*; *see also Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997) (holding in a sexual abuse case that "[w]e note that it was properly a question for the trier of fact to determine whether Oostra had timely filed this action"). Here, the trial court's ruling has precluded any factual finding by the jury as to when the causes of action accrued, and this was error.

VI. CONCLUSION

The trial court erred in not dismissing K.C.'s claims based on collateral estoppel. Her claims against the State were dismissed on statute of limitations grounds under the same set of facts and collateral estoppel requires the dismissal of her claims. Additionally, the trial court erred in denying GSH's motion for summary judgment on statute of limitations

grounds. L.M.'s claims accrued before November 19, 2011 (three years before she filed suit against GSH) and therefore her claims are time barred. Finally, the trial court erred in dismissing GSH's statute of limitations affirmative defense. At a minimum, there is a factual issue as to when the causes of action accrued and therefore the jury would have to resolve those factual disputes. This court should remand this case with instructions to dismiss all claims with prejudice. At a minimum, the case should be remanded with instructions to reinstate the statute of limitations affirmative defense.

RESPECTFULLY SUBMITTED this 23rd day of May, 2016.

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CERTIFICATE OF SERVICE

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