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No. 56736-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL MILLER,

Appellant,

vs.

CHARLES CAMPBELL, as Personal Representative
of the Estate of PATRICK W. CAMPBELL,

Respondent.

Appeal from the Superior Court for Snohomish County
The Honorable Michael T. Downes

BRIEF OF APPELLANT

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COURT OF APPEALS
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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

I. ASSIGNMENTS OF ERROR..... 1

 1. The trial court erred by dismissing all claims against the Estate of Campbell..... 1

 2. The trial court erred by denying Michael Miller’s Motion for Partial Summary Judgment 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

 1. Is a debtor in a 1998 bankruptcy action who does not list potential claims against his former stepfather for childhood sexual abuse as an asset because he is unaware of the causal connection between the sexual abuse and substantial damages he has suffered, and because he does not remember some of the acts of abuse, judicially estopped from asserting in 2003 claims based on the later-discovered harms and later-remembered abuse against the estate of the abuser? 1

 2. Should a motion for summary judgment be denied due to a party’s inability to obtain opposing evidence when there is no possibility that the evidence can ever be obtained because the person who might provide it is deceased? 1

 3. Should summary judgment as to liability for childhood sexual abuse be granted where the uncontroverted evidence establishes that during his childhood the moving party was repeatedly sexually assaulted by his former stepfather, did not remember some of the incidents of abuse until 2002 or thereafter, and was unaware of the connection between the sexual assaults and substantial harms caused by them until 2003?..... 2

III. STATEMENT OF THE CASE.....	2
A. Facts	2
1. Michael Miller Was Unable to Reveal Extensive Sexual Abuse at the Hands of His Stepfather Patrick Campbell Until Years Later When Campbell Was Dying.....	2
2. Although Michael Miller Had Always Remembered Some Sexual Abuse by Patrick Campbell, He Only Learned of Substantial Injuries the Abuse Had Caused after He Began Therapy in 2003, by Which Time He Had Begun Recovering Additional Memories of the Sexual Abuse.....	4
3. When Michael Miller Filed for Chapter 7 Bankruptcy Protection in 1998 He Did Not Mention the Sexual Abuse by Patrick Campbell Which Had Occurred 15 to 20 Years Earlier.	7
B. Procedure.....	8
IV. ARGUMENT.....	10
<i>STANDARD OF REVIEW</i>	10
A. Michael Miller Could Not Have Brought His Present Claims Before March, 2003, When He First Discovered the Injuries for Which These Claims Are Brought and Began Remembering Incidents of Abuse He Had Not Remembered Before.....	12
B. Judicial Estoppel Is Improper When a Bankruptcy Claimant Was Unaware of Childhood Sexual Abuse Claims at the Time of the Bankruptcy.....	15
C. Bankruptcy Courts Recognize the Effects of Sexual Abuse on a Victim's Cognizance of His or Her Claims.....	20
D. To the Extent that Michael Miller May Have Been Aware at the Time of the Bankruptcy of Any of the Elements of His Current Claims Against the Estate, His Failure to List any Such Claims Was at Most Inadvertent.	23

E. No Cases under Washington Law or Federal Bankruptcy Law Have Applied Judicial Estoppel Under These Circumstances.	26
F. The Purposes of Judicial Estoppel Are not Served by Dismissing Michael Miller's Claims.	28
G. Michael Miller Presented Uncontroverted Evidence of Childhood Sexual Abuse and His Motion for Partial Summary Judgment as to Liability Should be Granted.	31
1. Michael Miller Presented Uncontested Facts Fully Supporting Liability as a Matter of Law.	31
2. Any Evidence Unavailable to the Estate Because Patrick Campbell is Deceased Will Never Be Available and Should Not be Considered as a Basis for Denying Michael Miller's Motion for Partial Summary Judgment.	33
V. CONCLUSION.	34
APPENDIX	A1

TABLE OF AUTHORITIES

Cases

<i>Burnes v. Pemco Aeroplex, Inc.</i> , 291 F.3d 1282, 1286 (11th Cir. 2002) ..	24
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P.3d 671 (2003).....	33
<i>C.J.C. v. Corp of Catholic Bishop</i> , 138 Wn.2d 699, 985 P.2d 262 (1999)14	
<i>Catholic Bishop of Spokane a/k/a the Catholic Diocese of Spokane</i>	22
<i>Cloud v. Summers</i> , 98 Wn. App. 724, 991 P.2d 1169 (1999).....	14
<i>Cunningham v. Reliable Concrete Pumping</i> , 126 Wn.App. 222, 108 P.3d 147 (Wash.App. 2005).....	11, 15, 16, 27
<i>DeAtley v. Barnett</i> , 127 Wn. App. 478 (2005).....	11, 27
<i>Garrett v. Morgan</i> , 127 Wn. App. 375, (2005).....	11, 27
<i>Guillen v. Pierce County</i> , 127 Wn. App. 278, 110 P.3d 1184 (2005)	11
<i>Hamilton v. State Farm Fire & Cas. Co.</i> , 270 F.3d 778, (9th Cir. 2001) 16, 17, 27, 28	
<i>Hay v. First Interstate Bank of Kalispell</i> , 978 F.2d 555 (9 th Cir. 1992) ...	27
<i>Hollmann v. Corcoran</i> , 89 Wn. App. 323, 949 P.2d 386 (1997).....	14
<i>In re Coastal Plains</i> , 179 F.3d 197, (5th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000).....	15, 18, 24, 27
<i>In Re Coastal Plains, Inc.</i> , 179 F.3d 197, 208 (5th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000).....	15
<i>In re Costello</i> , 255 B.R. 110 (Bankr. E.D.N.Y. 2000).....	18

<i>In re Envirodyne Indus. v. Viskase Corp.</i> , 183 B.R. 812 (Bankr. N.D. Ill. 1995)	27
<i>In re Heritage Hotel Partnership I</i> , 160 B.R. 374 (9 th Cir. BAP 1993) ...	27
<i>In re Johns-Manville Corporation</i> , 36 B.R. 743 (Bankr. S.D.N.Y. 1984.	22
<i>In re Oneida Motor Freight, Inc. v. United Jersey Bank</i> , 848 F.2d 414 (3 rd Cir. 1988)	27
<i>Johnson v. Si-Cor, Inc.</i> , 107 Wn. App. 902, 28 P.3d 832 (2001)	19
<i>Johnson v. State Of Oregon</i> , 141 F.3d 1361 (9th Cir. 1998)	24
<i>Kim v. Lee</i> , 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001)	11
<i>King v. Clodfelter</i> , 10 Wn. App. 514, 519, 518 P.2d 206 (1974);	30
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975)	11
<i>Levinson v. U.S.</i> , 969 F.2d 260 (7th Cir. 1992)	19
<i>Matter of Cassidy</i> , 892 F.2d 637, 641 (7th Cir. 1990).....	24
<i>Monroe County Oil Co. v. Amoco Oil Co.</i> , 75 B.R. 158 (S.D. Ind. 1987)	27
<i>Oostra v. Holstine</i> , 86 Wn. App. 536, 937 P.2d 195 (1997)	14
<i>Payless Wholesale Distributors, Inc. v. Culver</i> , 989 F.2d 570 (1 st Cir. 1993)	27
<i>Puget Sound National Bank v. Ferguson</i> , 102 Wn. App. 400 (2000).....	28
<i>Roman Catholic Archbishop of Portland in Oregon</i> , 2005 WL 148775 (Bankr. D. Or. 2005)	20, 22
<i>Russell v. Rolfs</i> , 893 F.2d 1033 (9 th Cir. 1990).....	28
<i>Seattle-First Nat'l Bank v. Marshall</i> , 31 Wn. App. 339, 343, P.2d 1194, rev. denied, 97 Wn.2d 1023 (1982)	30

<i>Teledyne Industries, Inc. v. NLRB</i> , 911 F.2d 1214 (6th Cir. 1990)	19
<i>Tyson v. Tyson</i> , 107 Wn.2d 72, 727 P.2d 226 (1986).....	14
<i>Young v. Estate of Snell</i> , 134 Wn.2d 267, 948 P.2d 1291 (1997).....	11

Statutes

11 U.S.C. § 101(5).....	26
ORS 12.117(1).....	21
RCW 9A.44.100.....	32
RCW 9A.88.100.....	32

Rules

CR 56	11
ER 56(f)	33

Treatises

Orland, Wash. Prac. § 382	30
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ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing all claims against the Estate of Campbell.
2. The trial court erred by denying Michael Miller's Motion for Partial Summary Judgment.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a debtor in a 1998 bankruptcy action who does not list potential claims against his former stepfather for childhood sexual abuse as an asset because he is unaware of the causal connection between the sexual abuse and substantial damages he has suffered, and because he does not remember some of the acts of abuse, judicially estopped from asserting in 2003 claims based on the later-discovered harms and later-remembered abuse against the estate of the abuser?

2. Should a motion for summary judgment be denied due to a party's inability to obtain opposing evidence when there is no possibility that the evidence can ever be obtained because the person who might provide it is deceased?

3. Should summary judgment as to liability for childhood sexual abuse be granted where the uncontroverted evidence establishes that during his childhood the moving party was repeatedly sexually assaulted by his former stepfather, did not remember some of the incidents of abuse until 2002 or thereafter, and was unaware of the connection between the sexual assaults and substantial harms caused by them until 2003?

STATEMENT OF THE CASE

A. Facts

1. Michael Miller Was Unable to Reveal Extensive Sexual Abuse at the Hands of His Stepfather Patrick Campbell Until Years Later When Campbell Was Dying.

Patrick W. Campbell married Michael Miller's mother in 1975, when Michael was 11 years of age. Patrick Campbell sexually abused Michael on many occasions during the period of time Michael Miller was 11 through 17 years old. (CP 333). Campbell touched and fondled Michael's genitals, rubbed his groin against Michael, exposed his own

genitals to Michael and urinated in Michael's bath water. (CP 333). Campbell was also physically abusive toward Michael. (CP 333).

Michael never told anyone about Campbell's sexual abuse until 2002, when he spoke obliquely about it to his mother. His mother had been telling Michael about Campbell's health problems, and he became increasingly upset at the mention of Campbell's name. Finally, he told his mother that Campbell had "done more than just beat" him. (CP 334). At this time, Michael began suffering from more of the nightmares that had plagued him for years, remembering more incidents of sexual abuse, and experiencing overwhelming feelings of worthlessness. (CP 334).

Michael contacted his half-brother Erik Campbell, the son of Patrick Campbell, and learned that Erik had also been sexually abused by Campbell. Patrick Campbell died on November 17, 2002. Erik and Michael discussed possible claims against his estate for the damage caused by his abuse. Michael filed a claim against the estate on March 28, 2003. (CP 334).

2. Although Michael Miller Had Always Remembered Some Sexual Abuse by Patrick Campbell, He Only Learned of Substantial Injuries the Abuse Had Caused after He Began Therapy in 2003, by Which Time He Had Begun Recovering Additional Memories of the Sexual Abuse.

Michael always remembered physical abuse by Campbell and at least some of the sexual abuse. He had lived in fear of Patrick Campbell from the time he was 11 years old. Michael felt guilty and ashamed. As a youngster and a young man, he had few friends and felt worthless much of the time. He knew that the sexual touching had been wrong and thought of himself as a bad person because he had somehow allowed it to happen. (CP 333-335, CP 414-415). When his claim against the Campbell estate was filed, Michael was terrified. During that same year a friend of Michael's was murdered, his dog died, and his first child was born. Overwhelmed by all of these events, Michael sought professional counseling for the first time in March, 2003. (CP 334).

Lisa Adriance, Ph.D., initially treated Michael from March 28, 2003, until June 13, 2003. Dr. Adriance reports:

Mr. Miller presented for treatment reporting that he had experienced severe and prolonged physical, sexual, and emotional abuse throughout his childhood. He was very angry about and disturbed by these experiences. He felt extreme shame and had a great deal of difficulty talking about his history, his symptoms, and his goals for treatment. Over the course of treatment, he acknowledged symptoms of depressed mood, inability to experience

pleasure, poor concentration, low self-esteem, diminished activity, hopelessness, anger and guilt. He also reported high anxiety with hypervigilance, detachment from others, dissociation, isolation, hyperstartle response, flashbacks, intrusive memories, and nightmares in addition to other disturbing psychological experiences. Mr. Miller met DSM IV-R criteria for a diagnosis of Major Depressive Disorder and Posttraumatic Stress Disorder. He had not had any prior treatment for these mental health problems.

(CP 359).

Michael describes his emotional state at the time he began seeing

Dr. Adriance as follows:

I was emotionally drained. I couldn't sleep, and went to bed each night with a flashlight by my side and a chair jammed up against the bedroom door. I was avoiding work because I was afraid of what the other employees would think of me if they found out about the sexual abuse. At times I was overwhelmed by fear and dread. I kept remembering more and more incidents of abuse.

(CP 334).

Dr. Adriance helped Michael understand the relationship between the feelings he recognized all along (fear, sleep problems, nightmares, etc.) and the sexual abuse. She provided him with information through therapy and recommended readings that helped him comprehend other symptoms that he was suffering but hadn't recognized, such as dissociation and flashbacks. Before entering therapy with Dr. Adriance, Michael had no idea he was suffering from Post Traumatic Stress Disorder

and Major Depression as a result of the abuse. (CP 335). One aspect of Dr. Adriance's treatment was to help Michael to see "his psychological process, emotional distress and coping behaviors as a normal response to an abnormal, overwhelming and devastating situation." (CP 360). This was all news to Michael, who experienced a measure of relief as a result of this knowledge. (CP 335).

Jon Conte, Ph.D., met with Michael Miller on May 21, 2005, to conduct a forensic evaluation. Dr. Conte made the following observations:

In regard to the question of when did he first discover particular harms caused by the abuse it is my opinion that the information I have available to me as of this date indicates that he did not start focusing on the fact of having been abused until his mother's constant mentioning Mr. Campbell's name at the time his dying. As life events ... unfolded he thought more and more about his youth, the abuse, and his life course. It appears that as he spent time in thought he did remember additional abusive incidents and behaviors. I can find no evidence that he understood that the abuse had had a negative impact on him until he started therapy in March 2003. This therapy appears to have taught him about some of his symptoms (e.g. PTSD, depression). This therapy was extremely limited and it does not appear to me that he has much understanding about how he has adapted to the abuse over his lifetime. Nor does he appear to have an appreciation of the more subtle and pervasive impacts of the abuse on his development.

(CP 427).

3. When Michael Miller Filed for Chapter 7 Bankruptcy Protection in 1998 He Did Not Mention the Sexual Abuse by Patrick Campbell Which Had Occurred 15 to 20 Years Earlier.

Michael Miller's claim against the Estate of Campbell was rejected on July 11, 2003. The summons and complaint in this matter were filed on August 8, 2003. (CP 341-345).

Five years earlier, Michael had filed for Chapter 7 bankruptcy. In the schedule of personal property filed in conjunction with his July 15, 1998, Voluntary Petition in the bankruptcy he did not identify any claims against his former stepfather as a potential asset.¹ At that time he had not discovered the particular injuries caused by Campbell's sexual abuse upon which his current claim is premised and he had no memory of some of the incidents of sexual abuse which he has more recently remembered. (CP 334-335). On November 24, 1998, United States Bankruptcy Judge Samuel J. Steiner, issued a Discharge of Debtor which released Michael from all dischargeable debts. (CP 285).

Respondent Estate of Campbell (hereinafter "the Estate") asserts that Michael's "failure" to list a potential claim against Patrick Campbell as an asset in the bankruptcy prevents him from bringing his current claims

¹ The category in which such claims would be listed was "Other contingent and unliquidated claims of every nature, including tax refunds, counter claims of the debtor, and the rights to setoff claims." Michael Miller listed a small estimated tax refund and "possible claim against Ford under lemon law" in this category.

because the bankruptcy discharge judicially estops him from bringing these claims. (CP 328-329).

B. Procedure

The complaint in this matter was filed on August 8, 2003. Michael made claims against the Estate for damages arising from childhood sexual abuse. (CP 343-345). The Estate filed its answer on October 13, 2003, placing all claims in dispute. (CP 337-340).

On March 8, 2004, the Estate filed its first motion for summary judgment based on statute of limitation issues. The Estate asserted that Michael knew all injuries caused by the sexual abuse prior to three years before the complaint was filed in 2003. Michael presented evidence substantiating that the connection between the sexual abuse and specific injuries, including Post Traumatic Stress Disorder and symptoms such as dissociation, was unknown to him until some time after Patrick Campbell's death in November of 2002, and that some instances of abuse were remembered for the first time after Campbell's death. (CP 334-335). On April 14, 2004, Snohomish County Superior Court Judge Larry McKeeman denied the Estate's summary judgment motion. (A 3).

On November 19, 2004, Michael Miller brought a motion for partial summary judgment as to liability. The Estate simultaneously filed a

second motion for summary judgment, premised on the protections of the Dead Man Statute, RCW 5.60.030.² The Estate had submitted Michael Miller's deposition in support of the initial summary judgment motion and did not object to Miller's responsive declaration. Both the deposition and the declaration contained descriptions of the sexual abuse by Campbell. Snohomish County Superior Court Judge J. Michael Downes ruled that the Estate had thereby waived the protections of the Dead Man Statute. Therefore the Estate's second motion for summary judgment was denied on February 16, 2005. (A 6).

As to Plaintiff's Motion for Partial Summary Judgment, Judge Downes found that the Estate was "unable to procure affidavit evidence because the decedent is unavailable and thus pursuant to CR 56(f)" the motion was denied. (A 6).

² RCW 5.60.030 provides as follows:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

On June 3, 2005, the Estate brought a motion for dismissal of all claims, urging the trial court to find that Michael Miller was estopped from pursuing his claims against the Estate because Miller did not list them as an asset in his federal bankruptcy action in 1998. On June 24, 2005, Snohomish County Superior Court Judge Gerald L. Knight issued a ruling in favor of the Estate, dismissing Michael Miller's claims on the basis of judicial estoppel. (CP 83-84). Judge Knight determined that Michael "knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured. He may not have known the full extent of those injuries. But he had an obligation to list the above as a potential asset..." (RP 25-26). Michael Miller moved for reconsideration. Judge Knight denied the motion for reconsideration by letter opinion on July 22, 2005. (CP 11). This appeal was then timely filed. (CP 4).

ARGUMENT

STANDARD OF REVIEW

The issues in this matter were presented to the trial court based solely on a written record. The facts considered were not in dispute.³ The

³ Miller's counsel did indicate an objection to consideration of one exhibit submitted by the Estate in support of their motion for dismissal. Judge Knight indicated that the exhibit was not a factor in his decision. (RP 26, CP 83).

motion for dismissal was decided as a matter of law, and should be reviewed *de novo*. *DeAtley v. Barnett*, 127 Wn. App. 478, 482 (2005); *Guillen v. Pierce County*, 127 Wn. App. 278, 284, 110 P.3d 1184 (2005); *Kim v. Lee*, 145 Wn.2d 79, 85, 31 P.3d 665, 43 P.3d 1222 (2001).

A trial court's application of the doctrine of judicial estoppel to a particular set of facts is reviewed for abuse of discretion. *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005). "A court abuses its discretion when it bases its decision on untenable grounds or reasons." *Garrett v. Morgan*, 127 Wn. App. 375, 379 (2005).

A trial court's denial of summary judgment is reviewed *de novo*. *Young v. Estate of Snell*, 134 Wn.2d 267, 271, 948 P.2d 1291 (1997). "A summary judgment motion should be granted if, after considering all the submissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)." *Id.*

A. Michael Miller Could Not Have Brought His Present Claims Before March, 2003, When He First Discovered the Injuries for Which These Claims Are Brought and Began Remembering Incidents of Abuse He Had Not Remembered Before.

Michael Miller brought claims against the Estate pursuant to RCW

4.16.340, which provides as follows:

(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:

PROVIDED, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

(2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

(3) The knowledge of a custodial parent or guardian shall not be imputed to a person under the age of eighteen years.

(4) For purposes of this section, "child" means a person under the age of eighteen years.

(5) As used in this section, "childhood sexual abuse" means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

When RCW 4.16.340 was amended in 1991, the Legislature
included the following Finding of Intent:

The legislature finds that:

(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).

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.

These legislative findings “make clear that [the legislature’s] primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation.” *C.J.C. v. Corp of Catholic Bishop*, 138 Wn.2d 699, 712, 985 P.2d 262 (1999). “[T]he statute of limitations is tolled until the victim of childhood sexual abuse in fact discovers the causal connection between the defendant's acts and the injuries for which the claim is brought.” *Hollmann v. Corcoran*, 89 Wn. App. 323, 325, 949 P.2d 386 (1997). *See also, Oostru v. Holstine*, 86 Wn. App. 536, 937 P.2d 195 (1997).

The broad intent of this statute is discussed in *Cloud v. Summers*, 98 Wn. App. 724, 733, 991 P.2d 1169 (1999), as follows:

Our Legislature has determined that a victim of childhood sexual abuse may know he was abused, but be unable to make a connection between the abuse and emotional harm or damage until many years later. He may also be aware of some injuries, but not discover more serious injuries until many years later. This is because of the insidious nature of childhood sexual abuse - it is a traumatic experience causing long-lasting damage.

Michael Miller did not discover his most serious injuries, including Post Traumatic Stress Disorder, until after March 27, 2003. The present action is premised on those injuries and on incidents of sexual abuse first remembered after Patrick Campbell's death in 2002. The Complaint in this matter was filed on August 8, 2003. (CP 343).

B. Judicial Estoppel Is Improper When a Bankruptcy Claimant Was Unaware of Childhood Sexual Abuse Claims at the Time of the Bankruptcy.

“The Bankruptcy Code and court rules ‘impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.’” *Cunningham v. Reliable Concrete Pumping*, 126 Wn.App. 222, 229-230, 108 P.3d 147 (Wn.App. 2005) (quoting *In Re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000)).

“Judicial estoppel will be imposed when the debtor has knowledge of

enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001). “The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding.” *In Re Coastal Plains, Inc.*, *supra*, 179 F.3d at 208.

In order for this doctrine to apply to bar a post-bankruptcy action on an unlisted claim, common sense dictates that the claim must actually exist at the time of the bankruptcy. The claims in the present lawsuit did not exist in 1998. They could not have been brought at that time because Michael Miller had not discovered the connection between the childhood sexual abuse by Patrick Campbell and the injuries on which his current claim is based. The events which would trigger the running of the statute of limitation contained in RCW 4.16.340 had not yet occurred. The claims had not accrued.

Judicial estoppel has been found to bar claims filed after a bankruptcy discharge in cases where all of the elements of the claims were known to the debtor at the time of filing and yet the potential claims were not disclosed as assets in the debtor’s bankruptcy. In *Cunningham*, *supra*,

126 Wn.App. at 223, the debtors "filed their petition in bankruptcy under Chapter 7 of the Bankruptcy Code, but failed to list in their schedules a third-party personal injury claim arising out of a workplace injury. Following receipt of a discharge and closing of their bankruptcy as a no-asset case, Cunningham sued Reliable Concrete Pumping, Inc. and its division, Reliable Hardware & Equipment, Inc. (collectively "Reliable") for this workplace injury." The personal injury action was commenced eleven days after the bankruptcy discharge. The Cunninghams knew all elements of the claim before the bankruptcy petition was filed.

In *Hamilton v. State Farm, supra*, 270 F.3d 781, the facts recited by the court are as follows:

Hamilton filed his bankruptcy schedules on November 14, 1997, listing a \$160,000 residential vandalism loss against his estate in his Chapter 7 Financial Statement, but failing to list the corresponding claims against State Farm as assets of the estate. On Schedule B, Question 20, under the heading "Other contingent and non-liquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to set-off claims," Hamilton listed "None," ignoring his insurance and bad faith claims against State Farm as assets of the bankruptcy estate. The bankruptcy court discharged Hamilton's debts on April 6, 1998 based on the false information he provided in his Chapter 7 schedules and Financial Statement.

Mr. Hamilton was clearly aware of all elements of his insurance claim, as he listed them in his own bankruptcy. This is in stark contrast to Michael Miller, who had never spoken to anyone about the sexual abuse

during the 15 years since it had ceased, was not aware of substantial injuries caused by it, and had not even remembered some of the incidents of abuse at the time of his bankruptcy.

The Estate cited *In re Costello*, 255 B.R. 110 (Bankr. E.D.N.Y. 2000) in support of its assertion of judicial estoppel. In *Costello* a woman had filed an adversary complaint in her former husband's bankruptcy, seeking to have debts owed by him to her and alleged to have arisen from the parties' divorce declared nondischargeable. She had previously filed and been discharged from a Chapter 7 bankruptcy of her own in which she had not listed these alleged debts as assets. The court held that she was judicially estopped from pursuing the alleged debts in her ex-husband's bankruptcy because of her nondisclosure of their existence in her earlier bankruptcy. Unlike Michael Miller, the former wife in *Costello* was presumably well aware of the existence and basis of the alleged debts before she filed bankruptcy, as they were explicitly set forth in the divorce decree between the parties.

In *In re Coastal Plains*, 179 F.3d 197, 208 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000), the court found that Coastal Plains' CEO had executed sworn bankruptcy schedules for the company that did not disclose his belief that Coastal had claims of up to \$10 million against another company. The court found that because

of the nondisclosure, Coastal could not later assert those claims against the company. *Id.*, at 203. Again, these facts differ significantly from those herein.

In contrast, the court in *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001), found no judicial estoppel when the debtor had incurred the injury giving rise to a later lawsuit⁴ while the bankruptcy was pending, after he had filed his initial petition for a Chapter 13 bankruptcy but before he converted to a Chapter 7 bankruptcy and filed amended bankruptcy schedules which did not include the potential lawsuit. The *Johnson* court said, at 910, “we conclude that, in and of itself, a bankruptcy debtor's failure to schedule an asset does not sufficiently involve the court so that the debtor’s position becomes a position accepted by the court.”

As the Seventh Circuit Court of Appeals observed in *Levinson v. U.S.*, 969 F.2d 260 (7th Cir. 1992), “Judicial estoppel is applied with caution to avoid impinging on the truthseeking function of the court . . . [and] cannot apply without some decision or admission’ as to whether a party actually engaged in alleged misconduct. *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1218-19 (6th Cir. 1990).”

⁴ The debtor broke his tooth while biting into a MacDonald’s hamburger.

In the present case, Michael Miller was not deceitful, negligent or inadvertent in not listing a potential claim against Patrick Campbell in his 1998 bankruptcy filing. At that point in time, there was simply no claim to list.

C. Bankruptcy Courts Recognize the Effects of Sexual Abuse on a Victim's Cognizance of His or Her Claims.

The only published bankruptcy court decision to discuss the nature of sexual abuse claims is *Roman Catholic Archbishop of Portland in Oregon*, 2005 WL 148775 (Bankr. D. Or. 2005). (CP 52-56). In that case, the bankruptcy court appointed a Future Claims Representative to represent the interests of certain as yet unidentified individuals. These were persons with sexual abuse claims against the debtor Archdiocese of Portland that existed as of the commencement of the bankruptcy but as to which they were unaware of the causal connection between the abuse and their injuries. Because they had not yet learned of the connection between the sexual abuse and their injuries, they did not file their claims prior to the claims bar date set by the court. Rather than penalizing the individuals for failing to file timely claims, the bankruptcy court recognized that the nature of childhood sexual abuse may render the victim incapable of recognizing a compensable injury based upon the sexual abuse for a long period of time:

As I discussed above, the appointment of a FCR is appropriate, given that the tortious conduct at issue in this case does not consistently produce injury, and that when injury does result, it can take many years for it to become manifest. In addition, childhood sexual abuse can result in cognitive and psychological injuries making the injured person incapable of currently recognizing that he or she has been injured **or of identifying the causal connection between the abuse and the injury.**

Id. at *4 (emphasis added).

Oregon's childhood sexual abuse statute, like Washington's, provides an extended period for victims to assert claims in recognition that "decades may pass between the childhood abuse and the date the victim either manifests the injury or reasonably should have known of the causal connection between the abuse and the injury." *Id.* at *5; ORS 12.117(1); RCW 4.16.340.⁵

In the Chapter 11 case of the *Catholic Diocese of Tucson*, the Bankruptcy Court for the District of Arizona appointed an Unknown Claims Representative to represent "those persons who are of adult age whose claims currently exist but do not realize and who will not realize,

⁵ The only significant difference between the applicable portions of these two statutes is that the Oregon statute provides that the statute of limitation is "not more than three years from the date the injured person discovers or in the exercise of reasonable care should have discovered the injury or the causal connection between the child abuse and the injury, whichever period is longer" (ORS 12.117(1), while the Washington statute provides that the action must be brought "[w]ithin three years of the time the victim discovered that the act caused the injury for which the claim is brought." (RCW 4.16.340(1)(c)). The Washington statute requires *actual, subjective* knowledge of the causal connection.

prior to the ... deadline for filing claims, that they have claims against the estate[.]" *Roman Catholic Archbishop of Portland in Oregon*, 2005 WL 148775 (Bankr. D. Or. 2005) citing Case No. 4-04-bk-04721-JMM, Order Appointing an "Unknown Claims" Representative and a Guardian Ad Litem.

Likewise, in the Chapter 11 case of the *Catholic Bishop of Spokane a/k/a the Catholic Diocese of Spokane*, the Bankruptcy Court for the Eastern District of Washington appointed a Future Claims Representative to protect the interest of, among others, "[t]hose persons who know that they had an incident of sexual contact/touching, sexual abuse, or sexual misconduct by an alleged agent of the Diocese while the claimant was a minor yet, prior to any claims bar date established in this matter, fail to make the connection between such incident and injuries arising therefrom." United States Bankruptcy Court Eastern District of Washington, Case No. 04-08822-PCW11, Docket No. 550 at p. 2, ll. 4-9.⁶

In response to a previous summary judgment by the Estate seeking a determination that the statute of limitations barred Michael Miller's

⁶ This line of cases is not the first to protect claims which an individual may hold but of which he or she may not be cognizant. *In re Johns-Manville Corporation*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), the bankruptcy court held that the rights of future claimants who have been exposed to asbestos but have not as of the bankruptcy filing date manifested symptoms of asbestos disease had to be considered and represented in the bankruptcy. *Id.* at 747.

claims, Miller submitted substantial evidence showing that the connection between the sexual abuse and specific injuries, including Post Traumatic Stress Disorder and symptoms such as dissociation, was unknown to him until after his stepfather's death in November 2002, and that he had first remembered some of the sexual abuse episodes during and after the period of time that Campbell was dying. (CP 334-335). The trial court held that Michael Miller had presented a prima facie case sufficient to withstand summary judgment. (A 3).

D. To the Extent that Michael Miller May Have Been Aware at the Time of the Bankruptcy of Any of the Elements of His Current Claims Against the Estate, His Failure to List any Such Claims Was at Most Inadvertent.

At the time of the bankruptcy Michael Miller knew that Patrick Campbell had sexually and physically abused him during his childhood some 15 to 20 years before. Michael was 32 years old at the time he filed bankruptcy. He knew, as he had since the time he was abused, that the sexual abuse was hurtful. He knew that thoughts of the abuse sometimes intruded in his mind, and that he felt bad when they did. Michael knew that he was angry with Patrick Campbell because of the abuse and that he felt deep shame when he thought of the abuse. (CP 335). It is certainly not surprising that it did not occur to him to tell the trustee in his bankruptcy

case in 1998 that he had been sexually abused 15 to 20 years earlier. There is no evidence that he did this in any calculated or even knowing manner.

Many courts have held that the doctrine of judicial estoppel should only be applied in “situations involving intentional contradictions, not simple error or inadvertence.” *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002). *See also, New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)⁷, *In Re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999)⁸, *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990)⁹. The Ninth Circuit has held: “Judicial estoppel applies when a party's position is ‘tantamount to a knowing misrepresentation to or even fraud on the court.’ If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply.” *Johnson v. State Of Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998) (citations omitted).

Judicial estoppel “should not be used where it would work an injustice, such as where the former position was the product of

⁷ “Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is ‘to protect the integrity of the judicial process,’ by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment,’” (citations omitted).

⁸ “The doctrine is generally applied where ‘intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.’” (citations omitted).

⁹ “It is to be applied where ‘intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice,’...., to prevent litigants from ‘playing fast and loose with the courts.’” (citations omitted).

inadvertence or mistake, or where there is only an appearance of inconsistency between the two positions but both may be reconciled.”

Matter of Cassidy, supra, at 642.

There is absolutely no evidence that Michael Miller intentionally or even knowingly failed to list claims against Patrick Campbell based on Campbell’s sexual abuse of Michael during his childhood in his 1998 bankruptcy. There was no reason for it to occur to him that such claims could be made. The present claims against the Estate premised on recent understanding of the connection of the sexual abuse and particular harms and on recently remembered incidents of abuse did not exist and could not have been listed.

The “nonlisting” of potential claims against Campbell and the filing of this lawsuit against the Estate five years later are not inconsistent events. Michael Miller did not know all of the elements of his present claims. Some of the incidents of sexual abuse had been long forgotten, and could not have been described by him at the time of the bankruptcy. (CP 334, 427). Michael had no idea of major injuries caused by the sexual abuse. He had never mentioned the sexual abuse to anyone, and was deeply ashamed that it had occurred. (CP 333-334). This was far from an attempt to obtain an unfair advantage or commit a fraud on the court. Judicial estoppel is entirely inappropriate under the facts of this case.

E. No Cases under Washington Law or Federal Bankruptcy Law Have Applied Judicial Estoppel Under These Circumstances.

Michael Miller was unaware of his claims until years after his bankruptcy case was closed. Thus he lacked the knowledge necessary to schedule the claims. The Estate's assertion that Michael, who was unaware of the connection between the sexual abuse and his particular injuries and had not yet remembered some of the incidents of sexual abuse, had an obligation to disclose those instances of abuse that had terrorized him and tormented his thoughts to a bankruptcy trustee so that the bankruptcy trustee could be "afforded the opportunity to send Michael Miller for a forensic exam" is unsupported by any bankruptcy law and totally disregards the very nature of the effects of childhood sexual abuse.

Although Michael Miller does not dispute that the definition of a claim under 11 U.S.C. § 101(5) is broad,¹⁰ a debtor obviously cannot disclose what he does not know. In bankruptcy cases in which the court

¹⁰ "(5) The term "claim" means —

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

addresses a debtor's failure to disclose a cause of action, the debtor knew of the defendant's conduct, its own injury and, most importantly, the causal connection between the two.¹¹

The few cases under Washington law holding that a plaintiff who has failed to disclose a cause of action against a defendant is estopped from subsequently bringing that cause of action primarily involve personal injury and lender liability claims in which the debtor, in each case, was aware of the causal connection between the action by the defendant and its injuries during the pendency of the bankruptcy. *See, e.g., Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222 (2005); *DeAtley v. Barnett*, 127 Wn. App. 478 (2005); *Garrett v. Morgan*, 127 Wn. App. 375

¹¹ *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222 (2005) (debtor had filed a worker's compensation claim and had asserted personal injury counterclaim prepetition for the same cause of action which it did not disclose but later asserted); *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555 (9th Cir. 1992) (prepetition bank advised debtor to hire costly loan application preparer at a time when preparer was deeply indebted to bank and bank subsequently rejected debtor's loan application); *Hamilton v. State Farm Fire & Casualty Company*, 270 F.3d 778 (9th Cir. 2001) (debtor's attorneys had written defendant letters asserting claims prepetition); (*In re Heritage Hotel Partnership I*, 160 B.R. 374 (9th Cir. BAP 1993) (lender liability action arising out of prepetition lending relationship); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999) (lawsuit filed one week after petition filed); *Payless Wholesale Distributors, Inc. v. Culver*, 989 F.2d 570 (1st Cir. 1993) (lawsuit for conduct which debtor asserted caused it to file bankruptcy); *In re Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988) (action for lender's prepetition conduct which was a direct cause of the bankruptcy); *In re Envirodyne Indus. v. Viskase Corp.*, 183 B.R. 812 (Bankr. N.D. Ill. 1995) (debtor asserted claims for amounts due relating to environmental cleanup which debtor had completed prepetition); *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158 (S.D. Ind. 1987) (post-confirmation, debtor brought action against defendant for defendant's pre-petition termination of jobber contract and refusal to allow assignment which precipitated bankruptcy).

(2005); *Puget Sound National Bank v. Ferguson*, 102 Wn. App. 400 (2000).

F. The Purposes of Judicial Estoppel Are Not Served by Dismissing Michael Miller's Claims.

Judicial estoppel is an equitable remedy. *New Hampshire v. State of Maine*, 532 U.S. 742 (2001) quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). Its purposes include precluding a party from “gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.” *Hamilton v. State Farm Fire & Casualty Company*, 270 F.3d 778 (9th Cir. 2001). Additionally, judicial estoppel addresses the “‘general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the courts.’” *Id.* at 782 citing *Russell v. Rolfs*, 893 F.2d at 1037.

As specifically stated by the United States Supreme Court in *New Hampshire v. State of Maine*, these three factors -- clearly inconsistent positions; the court's adoption of the prior position; and unfair advantage to the party asserting the inconsistent positions or unfair detriment to the other party -- do not constitute “an exhaustive formula” for determining whether judicial estoppel is appropriate. *Supra* at 751. Rather,

“[a]dditional considerations may inform the doctrine's application in specific factual contexts.”

In this case, Michael Miller can hardly be accused of “playing fast and loose with the courts” because he failed to disclose a claim in his 1998 bankruptcy that he did not discover until four years later. The Estate’s unfounded assertion that Michael Miller was intentionally waiting until his stepfather died in 2002 to bring this action so that his stepfather would not be able to defend against or respond to the allegations blatantly ignores the evidence (previously recognized by the trial court in connection with the Estate’s unsuccessful summary judgment motion) that Michael Miller did not become aware of the causal connection between the abuse and his injuries until after November 2002 and thus could not have brought his action any sooner. Rather than attempting to “seek an advantage,” Michael Miller's filing of this action is a direct response to the discovery of his causes of action. Frankly, had the Estate not waived the Dead Man Statute (which Michael Miller could not have anticipated) the fact that Michael’s former stepfather is deceased would have made pursuing Michael’s claims far more difficult than if his former stepfather were alive. There simply was no tactical advantage to Michael Miller to wait until his former stepfather’s death to pursue legal action.

Judicial estoppel is designed “to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time.” *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194, rev. denied, 97 Wn.2d 1023 (1982), citing *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974); 2 L. Orland, Wash. Prac. § 382, at 434 (3d ed. 1972).

The fact that Michael Miller was psychologically unable to make the causal connection between the abuse and his injuries and did not remember all of the instances of abuse is a product of the type of abuse that was inflicted upon him. To now hold that this inability to disclose what he did not know he had somehow precludes him from seeking redress against his abuser would fly in the face of the equitable purposes of judicial estoppel as well as the express provisions of RCW 4.16.340 (*see supra*).

G. Michael Miller Presented Uncontroverted Evidence of Childhood Sexual Abuse and His Motion for Partial Summary Judgment as to Liability Should be Granted.

1. Michael Miller Presented Uncontested Facts Fully Supporting Liability as a Matter of Law.

Michael Miller moved for partial summary judgment as to liability for childhood sexual abuse. He supported his motion with declarations by Lisa Adriance, Ph.D. (his treating therapist) and himself and excerpts from his deposition. The Estate submitted no substantive evidence in response and moved to strike Miller's evidence on several grounds. Judge Downes denied the bulk of the Estate's motion, granting only a motion to strike as hearsay Michael Miller's testimony as to statements made to him by his brother. All other statements in the proffered declarations and deposition testimony were allowed.

RCW 4.16.340(5) defines childhood sexual abuse as follows:

"[C]hildhood sexual abuse" means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

The uncontroverted evidence before the court established the following facts: Michael Miller was sexually assaulted during his childhood by Patrick Campbell, his stepfather at the time. The sexual abuse included such things as Campbell fondling Michael's genital area

and rubbing his groin against Michael. He would frequently come into the bathroom and touch Michael's genitals, and expose himself and urinate in Michael's bathwater. Throughout Michael Miller's childhood, until he left home at age seventeen, he lived in constant fear of being assaulted by Patrick Campbell. (CP 333). Campbell's abuse constituted at least the crime of Indecent Liberties (RCW 9A.44.100, formerly RCW 9A.88.100).

Further, Michael Miller presented uncontraverted evidence that he had been injured by the sexual abuse. His therapist, Dr. Adriance, testified as follows:

Mr. Miller presented for treatment reporting that he had experienced severe and prolonged physical, sexual, and emotional abuse throughout his childhood. He was very angry about and disturbed by these experiences. He felt extreme shame and had a great deal of difficulty talking about his history, his symptoms, and his goals for treatment. Over the course of treatment, he acknowledged symptoms of depressed mood, inability to experience pleasure, poor concentration, low self-esteem, diminished activity, hopelessness, anger and guilt. He also reported high anxiety with hypervigilance, detachment from others, dissociation, isolation, hyperstartle response, flashbacks, intrusive memories, and nightmares in addition to other disturbing psychological experiences. Mr. Miller met DSM IV-R criteria for a diagnosis of Major Depressive Disorder and Posttraumatic Stress Disorder.

(CP 331).

Given the unrefuted evidence presented by Michael Miller in support of his motion for partial summary judgment as to liability, the motion should be granted as a matter of law.

2. Any Evidence Unavailable to the Estate Because Patrick Campbell is Deceased Will Never Be Available and Should Not be Considered as a Basis for Denying Michael Miller's Motion for Partial Summary Judgment.

ER 56(f) provides as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Estate did not request a continuance pursuant to ER 56 (f), nor did it indicate any evidence it wished to obtain in order to oppose the motion. Judge Downes *sua sponte* denied the motion on the grounds that evidence was not available to the Estate because Patrick Campbell, the only person in a position to possibly contravert Michael Miller's testimony, was dead and thus unavailable.

The purpose of an ER 56(f) continuance is to allow a nonmoving party time to conduct further discovery. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671, rev. denied, 150 Wn.2d 1017 (2003). The Estate presented no grounds for an ER 56(f) continuance, and did not request

one. Patrick Campbell is dead. He will never be available to testify. The motion for partial summary judgment should be granted.

CONCLUSION

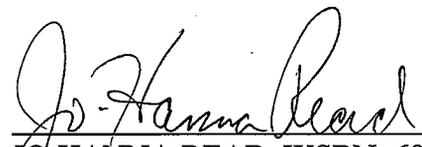
It would be a tragic injustice to bar Michael Miller's claims for sexual abuse by his former stepfather because he did not list those claims in a bankruptcy which occurred five years before he began to understand profound injuries caused by the abuse. The people of Washington, through their legislature, have recognized the pervasive and complex impact of childhood sexual abuse on its victims and have emphasized their intent to allow such victims to seek damages many years after the abuse if serious injuries are discovered over time. Application of judicial estoppel in this case would completely undermine that intent. Michael Miller had no way to know he had a potential claim against Patrick Campbell at the time of his bankruptcy, in part due to the very symptoms he did not recognize as stemming from the abuse until years later. His lawsuit is premised in part on incidents of abuse he did not even recall in 1998 when the bankruptcy was underway.

Judicial estoppel has developed as a mechanism to prevent people from affirmatively taking one position in a court proceeding and then later taking an inconsistent position in another proceeding. It should not be used

as a trap to prevent an innocent victim of childhood sexual abuse from bringing a claim against his abuser because he did not list a claim he could not know about in a bankruptcy proceeding years before bringing suit against his abuser. The trial court's dismissal of Michael Miller's claims on this basis should be reversed.

Summary judgment as to liability should have been granted in this case. No evidence was offered to controvert the evidence submitted by Michael Miller as to childhood sexual abuse inflicted on him by Patrick Campbell. The trial court's application of CR 56(f) was entirely inappropriate. Patrick Campbell's testimony will never be available, as he is dead. His unavailability is not grounds for denial of Michael Miller's motion for partial summary judgment.

DATED this 30th day of November, 2005.


JO-HANNA READ, WSNB: 6938
Attorney for Appellants

APPENDIX

- A. Order Denying Defendant's Motion for Summary Judgment A2-3
- B. Order on Motions for Summary Judgment A4-7

Honorable Larry McKeeman
Hearing Date: April 14, 2004 at 9:30 a.m.

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APR 16 2004

NEWTON+RIGHT L.L.P.

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF SNOHOMISH

MICHAEL MILLER,

Plaintiff,

v.

CHARLES W. CAMPBELL, as Personal
Representative of the Estate of PATRICK
W. CAMPBELL,

Defendant.

NO. 03-2-09818-1

Deny
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

APR 15 2004

THIS MATTER having come before the Court upon Defendant's Motion for
Summary Judgment pursuant to Civil Rule 56, and the Court having reviewed the records and
files herein, including:

1. Defendant's Motion for Summary Judgment and supporting documents;
2. Plaintiff's Response in Opposition to Defendant's Motion for Summary
Judgment and supporting documents; and

DENIED
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT - 1

CARNEY
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- 3. Plaintiff's Response ;
- 4. Declaration of Jo-Hanna Read ;
- 5. Declaration of Michael Miller ;
- 6. Declaration of Lisa Ordinance, Ph D ;
- 7. Defendant's Reply

and the Court having heard the oral argument of counsel,

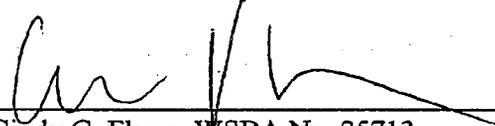
NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is ~~GRANTED~~ *Denied*

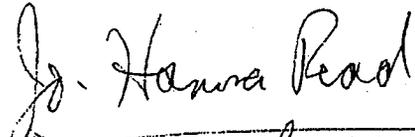
DONE IN OPEN COURT this 14 day of April, 2004.


HON. LARRY MCKEEMAN

Presented by:

CARNEY BADLEY SPELLMAN, P.S.

By 
Cindy G. Flynn, WSBA No. 25713
Attorney for Defendant


JO-HANNA READ, WSBA 6938
Attorney for Plaintiff

~~ORDER GRANTING DEFENDANT'S~~
Denied
MOTION FOR SUMMARY JUDGMENT - 2

**CARNEY
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FEB 17 2005

ENDRISS & READ PLLC

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL MILLER,

Plaintiff,

vs.

CHARLES CAMPBELL, as Personal
Representative of the Estate of PATRICK W.
CAMPBELL,

Defendant.

NO. 03-2-09818-1

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled court, the Court having considered the motion of Plaintiff for partial summary judgment, the motions of Defendant to strike materials submitted by Plaintiff in support thereof, and the motion of Defendant for summary judgment of dismissal, and the Court having considered the files and pleadings herein, including the following:

1. Plaintiff's Motion for Partial Summary Judgment.
2. Declaration of Jo-Hanna Read with Attachments.
4. Declaration of Michael Miller
5. Declaration of Lisa Adriance, Ph.D.
6. Defendant's Motion for Summary Judgment.
7. Declaration of Cindy Flynn with Attachments (11/23/04).
8. Plaintiff's Response to Defendant's Second Motion for Summary Judgment.
9. Defendant's Motion to Strike (12/10/04).
10. Defendant's Response in Opposition to Plaintiff's Motion.

Order on Motions for Summary Judgment - 1
2953.00

ENDRISS & READ, PLLC
2200 Sixth Ave., #1250
Seattle, WA 98121
(206) 441-1980
(206) 448-3393 Fax

- 1 11. Defendant's Motion to Shorten Time and Strike (12/15/04).
- 2 12. Declaration of Cindy Flynn (12/15/04).
- 3 13. Plaintiff's Reply to Defendant's Motion for Summary Judgment.
- 4 14. Declaration of Jo-Hanna Read in Support of Plaintiff's Reply.
- 5 15. Reply in Support of Defendant's Summary Judgment Motion.
- 6 16. Plaintiff's Response to Defendant's Motion to Shorten Time and Motions to
7 Strike.
- 8 17. Reply in Support of Defendant's Motion to Strike.
- 9 18. Declaration of Cindy Flynn (12/20/04).

10 NOW, THEREFORE, the Court orders and decrees as follows:

11 **I. As to Defendant's motions to strike:**

12 A. The motion to strike as hearsay Plaintiff's testimony as to statements
13 made to him by his brother, Erik Campbell, is granted.

14 B. The motion to strike the deposition of Michael Miller is denied.
15 Defendant introduced the entire deposition in support of Defendant's prior Motion for
16 Summary Judgment, and thus waived the protections of RCW 5.60.030 as to the deposition
17 and the subject matter discussed therein.

18 C. The motion to strike the declaration of Michael Miller pursuant to RCW
19 5.60.030 is denied. Defendant failed to object to submission of this declaration by Plaintiff in
20 opposition to Defendant's prior Motion for Summary Judgment, and thus waived the
21 protections of RCW 5.60.030 as to the declaration and the subject matter discussed therein.

22 D. The motion to strike portions of the Declaration of Lisa Adriance,
23 Ph.D., as inadmissible hearsay is denied. The statements in question fall under the ER
24 803(a)(4) exception to the hearsay rule, as they were statements made for purposes of medical
25 diagnosis or treatment.

26
27 **II. As to Defendant's Motion for Summary Judgment:**

28 Order on Motions for Summary Judgment - 2
2953.00

ENDRISS & READ, PLLC
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Seattle, WA 98121
(206) 441-1980
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1 The motion is denied. Defendant has waived the protection of RCW 5.60.030 as to the
2 deposition of Michael Miller and the declarations of Michael Miller and Lisa Adriance, Ph.D.,
3 and the subject matter discussed therein, for the reasons set out above. The Plaintiff has thus
4 produced evidence precluding summary judgment of dismissal.

5 **III. As to Plaintiff's Motion for Partial Summary Judgment:**

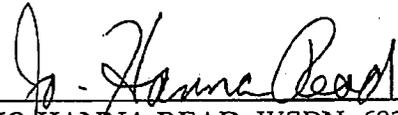
6 The motion is denied. The Court finds that Defendant is unable to procure opposing
7 affidavit evidence because the decedent is unavailable, and thus pursuant to CR 56(f) the Court
8 is denying the Plaintiff's motion.

9 DONE IN OPEN COURT this ____ day of February, 2005.

10
11 MICHAEL T. DOWNES

12 _____
13 JUDGE J. MICHAEL DOWNES

14 Presented by:
15 ENDRISS & READ, PLLC

16 
17 _____
18 JO-HANNA READ, WSBN: 6938
19 Attorney for Plaintiff

20 Approved as to Form:
21 CARNEY BADLEY SPELLMAN, P.S.

22
23 _____
24 Cindy G. Flynn, WSBN: 25713
25 Attorney for Defendant

26
27
28 Order on Motions for Summary Judgment - 3
2953.00

ENDRISS & READ, PLLC
2200 Sixth Ave., #1250
Seattle, WA 98121
(206) 441-1980
(206) 448-3393 Fax

1 The motion is denied. Defendant has waived the protection of RCW 5.60.030 as to the
 2 deposition of Michael Miller and the declarations of Michael Miller and Lisa Adriaance, Ph.D.,
 3 and the subject matter discussed therein, for the reasons set out above. The Plaintiff has thus
 4 produced evidence precluding summary judgment of dismissal.

5 **III. As to Plaintiff's Motion for Partial Summary Judgment:**

6 The motion is denied. The Court finds that Defendant is unable to procure opposing
 7 affidavit evidence because the decedent is unavailable, and thus pursuant to CR 56(f) the Court
 8 is denying the Plaintiff's motion.

9 DONE IN OPEN COURT this _____ day of February, 2005.

10
 11
 12 JUDGE J. MICHAEL DOWNES

13
 14 Presented by:
 15 ENDRISS & READ, PLLC

16
 17 JO-HANNA READ, WSNB: 6938
 18 Attorney for Plaintiff

19
 20 Approved as to Form:
 21 CARNEY BADLEY SPELLMAN, P.S.

22 
 23 Cindy G. Flynn, WSNB: 25713
 24 Attorney for Defendant

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 26
 27
 28 Order on Motions for Summary Judgment - 3
 2953.00

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No. 56736-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL MILLER,

Appellant,

vs.

CHARLES CAMPBELL, as Personal Representative
of the Estate of PATRICK W. CAMPBELL,

Respondent.

Appeal from the Superior Court for Snohomish County
The Honorable Michael T. Downes

CERTIFICATE OF SERVICE

Paul Kerbrat certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served by legal messenger a copy of this document entitled Appellant's Brief on the following individual:

ORIGINAL

FILED
COURT OF APPEALS, DIV. I
STATE OF WASHINGTON
2008 NOV 30 PM 4:00

Patricia Buchanan
Lee Smart Cook Martin & Patterson
701 Pike St., #1800
Seattle, WA 98101
Attorney for Defendant

DATED this 30th day of November, 2005, at Seattle, Washington.



PAUL KERBRAT