No. 1031807

THE SUPREME COURT OF THE STATE OF WASHINGTON

J.S., an individual;

Respondent,

vs.

OLYMPIA KIWANIS BOYS RANCH, et al.,

Petitioners

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. Identity of Respondent

Respondent J.S., a survivor of childhood sexual abuse at the Olympia Kiwanis Boys Ranch ("OKBR") group home, asks the Court to deny review.

II. Court of Appeals Opinion

The Court of Appeals reversed the trial court's summary judgment dismissal of J.S.'s claims. Citing RAP 9.12, it observed it could "consider only the evidence and the issues called to the trial court's attention." *G.M. v. Olympia Kiwanis Boys Ranch*, 548 P.3d 548 (2024).

The Court of Appeals reasoned "[w]hether JS resided at OKBR is a material fact relevant to the legal question of whether [Petitioners] owed him a duty of care." *Id.* at 552. It concluded J.S.'s "sole burden on summary judgment was to submit admissible evidence that created a question of fact." *G.M.*, 548 P.3d at 551.

It observed Petitioners' acknowledgement before the trial court that J.S.'s "'unsupported'" testimony was

"'admissible evidence'" of that fact. *G.M.*, 548 P.3d at 549-550 (quoting CP 99). It further observed J.S. consistently had testified in multiple depositions that he had resided at OKBR, including events that had occurred there and its location and setting. *Id.* It held that his sworn testimony was not "conclusory" or "speculative" because it "did not argue legal conclusions or speculate about topics outside his personal experience" and must be taken "'as true, even if it is self-serving.'" *Id.* at 552 (quoting *Reagan v. Newton*, 7 Wn. App. 2d 781, 789, 436 P.3d 411, *review denied*, 193 Wn.2d 1030 (2019)). Accordingly, it held that "summary judgment is inappropriate in light of the conflicting evidence about this fact." *G.M.*, 548 P.3d at 552.

The Court of Appeals also observed that "the question of *when* JS resided at OKBR is distinct from the question of *whether* he resided there at all." *Id.* Thus, it reasoned that "[t]o the extent JS could not recall the dates of his residence at OKBR, any inconsistency goes to his

credibility, a question not considered at summary judgment."[1] *Id.*

Finally, the Court of Appeals observed that "the documentary evidence does not contradict JS's testimony; indeed, it raises the reasonable inference that he *did* in fact reside at OKBR." *Id.* (emphasis in original). It concluded that "[t]aken in the light most favorable to JS," a jury could infer that he became an OKBR resident in December 1986. *Id.*

J.S. moved to publish the Court of Appeals' unpublished opinion citing RAP 12.3(e)(4)-(e)(5). The Court of Appeals granted the motion without specifying its grounds for publication.

[1] Given their reliance on alleged evidentiary inconsistencies regarding when J.S. resided at OKBR, Petitioners' concession that Division Two correctly held the issue in this case is not "when J.S. was at OKBR, but whether he was there at all" is fatal to their claims of error. PFR 22.

III. Restatement of Issues

1. Where Petitioners did not challenge the admissibility of J.S.'s sworn testimony that he resided at OKBR on summary judgment, did the Court of Appeals correctly hold his sworn testimony regarding facts, occurrences, and events within his personal experience created questions of fact requiring a jury's determination such as credibility, weight, and reasonable inferences to be drawn from the evidence as a whole?

2. Where well-established Washington summary judgment standards required that "any doubt" regarding the existence of a question of material fact must be resolved in J.S.'s favor, did the Court of Appeals correctly hold that reasonable inferences from the evidence when viewed in the light most favorable to J.S. precluded summary judgment?

IV. Introduction

The only facts "glossed over," PFR at 5, are by Petitioners. They omit their concession before the Court of Appeals that its "opinion is fully in line with prior appellate opinions." Respondent's Appendix ("RA") 4. They omit their concession that the opinion "does not articulate a new legal standard, but instead applies an existing legal

standard to facts using *de novo* review." RA 3. And they omit their concession that "by applying the well-established principles of summary judgment, the opinion does not address an issue of general public interest or importance." RA 4.

Petitioners' concessions to the Court of Appeals should end their request for review. There is no conflict with existing summary judgment precedent and no issue of "substantial" public interest in the Court of Appeals' application of well-established summary judgment standards to an evidentiary record. RAP 13.4(b)(1)-(2), (b)(4).

That is particularly true where Petitioners' many other omissions obscure the Court of Appeals' correct application of those standards. In requesting review of whether summary judgment was appropriate because J.S.'s sworn testimony was "inadmissible" for "lack of personal knowledge," Petitioners omit that they never

raised that evidentiary objection before the trial court, they acknowledged his testimony was admissible, and the Court of Appeals expressly stated that it could not consider such unpreserved issues.

In requesting review of whether J.S.'s sworn testimony that he resided at OKBR was insufficient because it was "unsupported" by any State records expressly stating he resided at OKBR, they omit the well-established summary judgment standards applied by the Court of Appeals: courts must consider all admissible evidence before them; view all evidence and reasonable inferences in J.S.'s favor; deny summary judgment if any evidence, whether direct or circumstantial, creates a material question of fact, *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014); and abstain from giving more weight to some evidence, resolving any evidentiary conflicts, or making credibility determinations.

On its own J.S.'s sworn testimony was enough to

preclude summary judgment. As the Court of Appeals observed, it also was supported by reasonable inferences from other evidence. No Washington precedent supports Petitioners' fictitious "admissible evidence plus additional, expressly corroborating evidence" burden. That is simply another name for giving some types of evidence—multiple documents and direct evidence—more weight and credibility than others—sworn testimony, circumstantial evidence, and reasonable inferences from the evidence. Under our state constitution, such determinations are a jury's province, not a court's.

In requesting review of whether J.S.'s sworn testimony was insufficiently "conclusory" to create questions of fact, Petitioners omit "the context of the particular facts, procedure, and legal arguments presented" in their cited precedent. *Norg v. City of Seattle*, 200 Wn.2d 749, 760, 522 P.3d 580 (2023). Each opinion they cite held that evidence is insufficiently "argumentative"

or "conclusory" only when it relays bald legal conclusions or speculation outside a witness's personal observations, unlike J.S.'s testimony about his own factual experiences, events, and occurrences.

In requesting review of whether the Court of Appeals erred in holding that the record "might"—a term not actually used in its opinion—demonstrate J.S. resided at OKBR, Petitioners omit the Court of Appeals ***actually*** held that "it raises the reasonable inference that he *did* in fact reside at OKBR." *G.M.*, 548 P.3d at 552 (emphasis in original). Similarly, Petitioners' uncited assertion that "[a]ny uncertainty over proof of a material fact must cut against J.S. as the party having the burden of proof," PFR 24, omits that "[a]ny doubts as to the existence of a genuine issue of material fact is resolved against the moving party"—here, Petitioners. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). There was nothing novel, incorrect, or of

substantial public interest in applying these well-established standards.

Petitioners omit critical facts and well-established law to obscure their real complaint: the Court of Appeals' application of these well-established standards simply was "wrong on this record." PFR 24. They "simply" request "*de novo* review of a summary judgment decision where" Petitioners "disagree[] with the [Court of Appeals'] assessment of the evidence presented for that purpose." RA 4.

According to Petitioners, such mere disagreement with the application of well-established summary judgment standards to an evidentiary record doesn't warrant a published appellate opinion. It certainly doesn't warrant review by the Court.

V. Restatement of the Case and Arguments Below

A. J.S. Was Sexually Abused at OKBR

From the age of four to six, the State of Washington placed J.S. in over 24 foster and group homes. CP 192. Even after these initial placements, J.S. continued to be passed around from different foster and group homes throughout his childhood.

Given his numerous foster care placements while he was a vulnerable minor, J.S. candidly admits he does not recall the specific dates he was placed at OKBR. CP 193. Contrary to Petitioners' misrepresentations, he stated only that he would defer to records ***for the exact dates*** of his residency. CP 112 ("It is anticipated the dates will be confirmed or refined with the production of DSHS records."); CP 129 ("Plaintiff does not recall the exact dates he was placed at O.K. Boys' Ranch and defers to his State and O.K. Boys' Ranch records.").

That does not mean he lacks specific memories about residing at OKBR ***at all***. CP 193. As he explained, "But as far as specific times, dates and ages and things like

that, my mind doesn't remember things like that. ***What my mind remembers is the terrifying things that happened and the abuse that happened***." CP 195. Consistent with that testimony, J.S. has testified in detail regarding the numerous physical and sexual assaults he endured while residing at OKBR, including being held down by multiple residents, beaten, and sexually assaulted, and multiple instances of being sexually assaulted in OKBR's bathrooms. CP 202-205

J.S. also consistently testified both to the fact that he resided at OKBR and that he was taken there by his State caseworker, Bud O'Hair.[2] CP 192, 200, 295. J.S. recalled that when O'Hair dropped him off at OKBR, he also was picking up another resident at the facility named Billy Creed. CP 200.

[2] State records establish that O'Hair was a caseworker who placed residents at OKBR. CP 238, 240, 242, 244, 246.

As the Court of Appeals correctly observed, the documentary evidence did not expressly contradict his testimony that he resided at OKBR and created reasonable inferences that he did. On August 11, 1986, when J.S. was 11 years old, OKBR's Director, Tom Van Woerden, wrote to DSHS requesting an exception to the age range for OKBR's group home license because OKBR was "accepting an 11 year old boy into care shortly" and identified J.S. by his birth date. CP 228. That same day, Van Woerden wrote another letter to DSHS stating that OKBR would be accepting J.S. as a resident and that he had "taken a great deal of time to consider this boy for care because of his history of sexual abuse and multiple placements." CP 230. About a week later, an OKBR residential care caseworker requested funding for a 40-hour/week staff member for J.S. CP 232.

A few months later, in October 1986, J.S. was admitted to the Children's Orthopedic Hospital to evaluate

whether he was "psychotic." CP 234. The Hospital's records stated that J.S. "was to have been placed at [OKBR] in Olympia, but placement has been suspended due to question of psychosis." CP 235. They further stated, "if [J.S.] is felt not to be psychotic, ***[OKBR] in Olympia has indicated they would consider him a candidate for placement***." (emphasis added). CP 234. The Hospital's evaluation determined that J.S. was not psychotic. CP 237.

On December 1, 1986, J.S. was discharged from the Hospital to the "custody of Bud O'Hair, DSHS Case Manager."[3] CP 234, 238. The Hospital's discharge

[3] The documentary evidence begins to contradict itself at this point. The State's placement records state that J.S. was discharged from the Hospital on November 24, 1986 and placed at the Everett Crisis Resource Center from November 25 to November 31. CP 161. Consistent with those records, J.S. testified that O'Hair placed him in OKBR after his placement in the Crisis Resource Center. CP 219.

summary stated that, because no residential treatment was immediately available, J.S. would stay temporarily at a crisis residential center, receive outpatient treatment and could be considered for placement at a foster home "while awaiting residential placement." According to state placement records, J.S. was placed in a foster home from December 1 to December 18.[4] CP 161.

As undisputed below, the State's records are silent regarding J.S.'s placement during the 12-day period between December 19, 1986 and December 29, 1986. CP 161. J.S. testified that it was around this time when he recalled being placed at OKBR by O'Hair. CP 211, 219. J.S. was only at OKBR for about two weeks before he decided to run away to try to escape from the abuse. CP

[4] Consistent with those records, J.S. testified that he also may have first been placed in an individual foster home for a few days before being taken by O'Hair to OKBR, but he could not definitively recall. CP 220.

206, 208.

After the 12-day gap in the State's placement records for J.S., they show that J.S. was placed at the Deschutes Center Group Home in Olympia from December 30, 1986 to June 16, 1987.[5] CP 160-61, 214. Consistent with these records, J.S. testified that he was placed at the Deschutes Center ***after*** running away from OKBR after being sexually abused there. CP 139.

B. Despite J.S.'s Sworn Testimony that He Had Resided at OKBR, the Trial Court Dismissed His Claims on Summary Judgment

On summary judgment, Petitioners argued that no documents expressly stated J.S. was placed by the State at OKBR. CP 94. They also argued that state documents demonstrated that J.S. had not resided at OKBR. CP 95.

[5] The Court of Appeals correctly observed that the State's placement records contradict themselves regarding the dates of J.S.'s placements, contain apparent scrivener's errors, and create a ***second*** gap regarding J.S.'s placement from June 17 through July 12, 1987. *G.M.*, 548 P.3d at 551 n. 3 (citing CP 161).

In opposition, J.S. relied on his sworn deposition testimony regarding his experiences of being placed and residing at OKBR. CP 248. Petitioners did not move to strike or exclude J.S.'s testimony for lack of personal knowledge or on any other ground. Instead, they acknowledged that his testimony was the only "admissible evidence" that he "was ever at OKBR." CP 99.

Nonetheless, Petitioners argued J.S.'s sworn testimony was insufficient to create a question of fact because it was "self-serving" and "unsupported" by other evidence. CP 99; RP 7. They continued that accepting J.S.'s testimony as true would require the trial court to "ignore all of the other paperwork." *Id.* 11.

But Petitioners also conceded that there was a "single gap, a 12-day gap that the [State's placement records] don't directly speak to, they speak elliptically to it." RP 10.

J.S. argued that Petitioners asked the trial court to

"improperly weigh the evidence and make a credibility determination . . . that . . . the State's placement records, or even lack thereof, are more believable than J.S.'s own testimony." RP 15. He also argued that his testimony regarding his OKBR residency was consistent with the documentary evidence and the 12-day gap in the State's placement records. RP 17-19.

The trial court's order granting summary judgment stated that it considered the declaration submitted in opposition to summary judgment "and any attachments thereto," including J.S.'s sworn testimony. CP 263.

C. The Court of Appeals Reversed on Appeal and Published Its Opinion

On appeal, the parties reiterated their arguments before the trial court. Additionally, for the first time Petitioners argued that J.S.'s testimony that he resided at OKBR was inadmissible for lack of personal knowledge. J.S. replied that Petitioners failed to preserve this issue.

Appellant's Reply Br. 9-13.

Contrary to Petitioners' misrepresentations, J.S. requested publication of the Court of Appeals' opinion because it "clarifies an 'established principle of law'—the application of established summary judgment standards to these recurring, material facts." RA 16 (quoting RAP 12.3(e)(4)). J.S. also requested publication because a binding, published opinion on a recurring fact pattern within Division Two's trial courts was of "'general public interest or importance.'" RA 12-13, 15-16 (quoting RAP 12.3(e)(5)).

VI. Argument

A. As Petitioners conceded, the Court of Appeals' opinion applying "well-established" summary judgment standards to the evidentiary record was "fully in line with prior appellate precedent"

As a threshold matter, the Court of Appeals properly refused to determine for the first time on appeal whether J.S.'s testimony was inadmissible for lack of personal

knowledge. RAP 9.12 limits review of summary judgment orders to "consider[ation] only of evidence and issues called to the attention of the trial court."

This limited role on review includes evidentiary objections. Lack of personal knowledge is an evidentiary objection to the admissibility of a witness's testimony that must be raised before the trial court. *Accord Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483 n .1, 260 P.3d 915 (2011) (party failed to preserve argument that affidavits were inadmissible due to lack of personal knowledge by failing to object or move to strike on that basis below). Parties must object and move to strike arguably improper evidence before the trial court on summary judgment. See *Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (failure to make a motion to strike affidavit in opposition to summary judgment waives any claim of deficiency).

Conversely, where evidence "was considered by the trial court" on summary judgment, and "the trial court made no ruling on the admissibility of this evidence to which any error has been assigned, the evidence constitutes part of the record before the trial court in ruling on the motion and is, consequently, properly before [an appellate] court." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 756, 162 P.3d 1153 (2007)

The Court of Appeals properly observed that it could not consider issues not called to the trial court's attention. Petitioners conceded to the trial court that J.S.'s testimony was admissible rather than moving to strike or object to it based on lack of personal knowledge. And the trial court's summary judgment order stated that it considered all documents J.S. submitted in opposing summary judgment,

including his deposition testimony. Accordingly, the Court of Appeals properly considered his testimony on review.[6]

[6] Even had Petitioners preserved their objection, personal knowledge means "facts [that a witness] has personally observed." *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Testimony should not be excluded for lack of personal knowledge unless "if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge." *Vaughn*, 101 Wn.2d at 611.

J.S.'s testimony regarding his own experience of living and residing at OKBR was sufficient to demonstrate personal knowledge of those facts. Indeed, "it is difficult . . . to imagine a scenario where additional information would be required to lay a proper evidentiary foundation for testimony based on one's lived experience and direct perceptions of their own residence." *State v. Broussard*, 25 Wn. App. 2d 781, 789, 525 P.3d 615 (2023).

As the Court of Appeals correctly observed, Petitioners' arguments regarding J.S.'s lack of certainty regarding ***when*** he resided at OKBR or inability to recall other details do not demonstrate that J.S.'s testimony was inadmissible speculation. Rather, his "degree of certainty . . . affects only the weight of his testimony and not its admissibility." *Broussard*, 25 Wn. App. 2d at 789. As the Court of Appeals correctly held, such factual questions are for determination by a fact finder, not a court. *G.M.*, 548 P.3d at 552.

The only issue for review, then, is whether the Court of Appeals adhered to well-established Washington summary judgment precedent in holding that J.S.'s sworn, admissible testimony that he resided at OKBR created a question of material fact regarding whether Petitioners owed him a legal duty.[7]

It did. Our summary judgment standards are more than the product of a court rule. They are constitutionally required:

> Our summary judgment standard precludes resolution of issues of material fact because our constitution protects the right to have factual issues decided by a jury. Specifically, article I, section 21 of our state constitution holds sacred the right to trial by jury, which "guarantees litigants the right to have a jury resolve questions of disputed material facts." [*Davis v. Cox*, 183 Wn.2d 269, 289, 351 P.3d 862 (2015), *abrogated on other grounds by Maytown Sand & Gravel, LLC v.*

[7] *Loss v. DeBord*, 67 Wn.2d 318, 321, 407 P.2d 421 (1965) is inapposite because Petitioners concede it involved testimony insufficient to create a question of fact due to lack of personal knowledge. PFR at 9-10.

> *Thurston County*, 191 Wn.2d 392, 423 P.3d 223 (2018)]. This right is fundamental in our judicial system. As our Supreme Court has explained, adjudication by the trial court on the merits of nonfrivolous factual issues invades the role of the jury and violates the right to a jury trial. *Davis*, 183 Wn.2d at 294, 351 P.3d 862.

Haley v. Amazon Services, LLC, 25 Wn. App. 2d 207, 218, 522 P.3d 80 (2022).

Accordingly, summary judgment's "purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). "Because the purpose of summary judgment is to determine whether evidence exists . . . , the trial court ***must*** consider all admissible evidence presented to it." *Haley*, 25 Wn. App. 2d at 220 (emphasis added).

Additionally, "[t]he function of a summary judgment proceeding . . . is to determine whether or not a genuine issue of fact exists, not to determine issues of fact." *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962). Trial courts also must not "weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact." *Id.* at 217 (citing *Davis*, 183 Wn.2d at 290; *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019)); *see also Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009); *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006)). "Rather than weighing the evidence, the court must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Haley*, 25 Wn. App. 2d at 217.

"The corollary of this rule is that 'on summary judgment a nonmoving party's'" testimony "'***must*** be taken as ***true***.'" *Id.* at 224 (emphasis added) (quoting *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 575, 459 P.3d 371, *review denied*, 195 Wn.2d 1031 (2020)). A court may not disregard a party's sworn testimony "simply because it believes the testimony to be 'self-serving,'" in conflict with other types of evidence, or uncorroborated by other evidence. *Haley*, 25 Wn. App. 2d at 224. A plaintiff is "not required to corroborate his testimony or prove himself credible" in order to defeat a summary judgment motion. *Id.* at 223. Their sworn testimony, standing alone, is enough to create a question of fact precluding summary judgment. *Id.* at 216-17.

For example, in *Haley*, the plaintiff's sworn declaration describing communications regarding his repudiation of the agreement at issue created a question of fact despite the absence of corroborating documentary

evidence. *Id.* at 213-14; *see also Reagan*, 7 Wn. App. 2d at 806-07 (plaintiff's "self-serving" sworn deposition testimony regarding conduct of medical examiner sufficient to create inference and question of fact regarding medical battery claim); *Mackey*, 12 Wn. App. at 574-77 (plaintiff's sworn testimony about her previous complaints about workplace discrimination close in time to her termination "must be taken as true" and creatde questions of fact regarding retaliatory discharge claim even where "self-serving," "unsubstantiated," and uncorroborated).

Tellingly, Petitioners ignore these opinions, do not contend they conflict with other precedent, and conceded that the Court of Appeals' opinion was "fully in line" with Washington summary judgment precedent. Their concession was appropriate because the opinions on which Petitioners rely are not to the contrary. They "rest[] on the distinction between ultimate facts" such as "due diligence" and "reasonableness" and the "predicate facts"

necessary to support such conclusions. *Haley*, 25 Wn. App. 2d at 227, 229. And they stand for the unremarkable proposition that a plaintiff's sworn statements may not create a question of fact by making argumentative, speculative, or conclusory assertions of the legal elements or "ultimate facts" of a claim or defense devoid of the "predicate facts that, if true, would establish the ultimate fact." *Id.* at 234; *accord Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (evidence of "facts" sufficient to preclude summary judgment are statements of "an event, an occurrence, or that which took place"; speculation, opinion, ultimate facts, or conclusory statements are insufficient); *see also Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 715-16, 727, 425 P.3d 837 (2018) (plaintiff's conclusory, argumentative declaration regarding employer's motivation for terminating him insufficient to create question of fact regarding retaliatory discharge); *Becker v. Washington State Univ.,* 165 Wn. App. 235, 255-

56, 266 P.3d 893 (2011) (plaintiff's argumentative, conclusory assertion that notice was not "clear" insufficient to create question of fact regarding procedural due process); *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993) (plaintiff's mere "allegations" as opposed to admissible evidence that police officer arrested her husband outside her presence insufficient to create question of fact regarding wrongful arrest); *Deschamps v. Mason Cnty. Sheriff's Office*, 123 Wn. App. 551, 561, 96 P.3d 413 (2004) (plaintiff's "bare assertions" of "bad faith" and conclusory allegations of statutory violations "instead of proffering evidence" of predicate facts supporting those conclusions failed to create a question of fact).

Similarly, *Wold v. Jones*, 60 Wn.2d 327, 330, 373 P.2d 805 (1962) (internal quotation omitted) (emphasis added), held that more than a "scintilla of evidence" is required in the context of observing that there must be "substantial evidence adduced at the trial which is ***legally***

sufficient to support a jury verdict in favor of the party opposing a motion for directed verdict." There, in a negligent driving case, the appellant admitted that his testimony regarding the location of the vehicles at issue ***before*** the collision was based on his observations of his car ***after*** the collision and his testimony was "directly contradicted by three witnesses and by physical evidence." In other words, because his conclusory, speculative testimony that he had not crossed the road center line before the collision was not supported by his own personal observations at the relevant time or any other evidence, it was legally insufficient to create a question of fact. *Id.*

Here, J.S.'s testimony did not assert conclusory, ultimate facts or legal elements of his claims, such as "Petitioners were negligent." Rather, his testimony asserted underlying, predicate facts within his personal experience regarding "an occurrence" and "that which took place" necessary to prove his claims—that resided at

OKBR, who placed him there and how, and the sexual abuse he suffered there.

As *Haley*, *Mackey*, and *Regan* held, such testimony alone is sufficient to create a question of fact. *Haley*, 25 Wn. App. 2d at 216-17; *Mackey*, 12 Wn. App. 2d at 575; *Regan*, 7 Wn. App. 2d at 806. And as *Haley*—and the litany of precedent *Haley* cited—held, it was a jury's constitutionally protected task to weigh his testimony against the documentary evidence, resolve any conflicts, determine what inferences to make, and determine evidence's credibility. *Haley*, 25 Wn. App. 2d at 217.

As Petitioners admitted to the Court of Appeals, its application of these standards was "fully in line" with Washington summary judgment precedent. Review is unwarranted.

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B. The Court of Appeals' Application of "Well-Established" Summary Judgment Standards to an Evidentiary Record is Not an Issue of <u>Substantial</u> Public Importance

Petitioners further argue that the Court of Appeals' opinion adopted a new "uncertainty" summary judgment standard and J.S. moved for its publication because it "establishes new principles of law," creating an issue of substantial public importance warranting review. PFR 5, 22. None of these misrepresentations are well-taken.

Contrary to Petitioners' misrepresentations, "[a]ny doubts as to the existence of a genuine issue of material fact is resolved ***against the moving party***." *Atherton Condo.*, 115 Wn.2d at 516. And the Court of Appeals held that the record "raises the reasonable inference that [J.S.] *did* in fact reside at OKBR." *G.M.*, 548 P.3d at 552.

Application of these well-established summary judgment standards was not novel. Indeed, J.S. moved to publish because the opinion clarified established principles

of law. RA 16. Petitioners conceded to the Court of Appeals that is all its opinion did. RA 3-4.

Similarly, Petitioners conflate a "decision . . . of ***general*** public interest or importance" warranting ***publication*** with issues of "***substantial*** public interest" requiring this Court's ***review***. RAP 12.3(e)(5); RAP 13.4(b)(4) (emphasis added); *State v. George,* 160 Wn.2d 727, 735, 158 P.3d 1169 (2007) (court rules must be interpreted like statutes); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (courts presume when statutes use different terms, they intend different meanings).

Providing both error correction and binding clarification of the application of established legal principles to a fact pattern troubling Division Two's trial courts was of general public interest and importance.

But now its trial courts have a published, binding opinion to follow in applying these existing standards to this

particular fact pattern that is “fully in line” with established precedent, as Petitioners conceded. An opinion from this Court going through the same exercise of applying those same standards—on which our appellate courts agree—to this case’s record would resolve no conflicts in the law, address no novel issues, and add nothing to Washington precedent that isn’t already there—particularly where the same result reached by the Court of Appeals is inevitable. No issues of substantial public importance exist. Review is unwarranted.

VII. Conclusion

For these reasons, the Court should deny review.

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Respectfully submitted this 17th day of July 2024.

The undersigned certifies that this brief consists of 4,999 words in compliance with RAP 18.17(c)(10).

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CERTIFICATE OF SERVICE

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on July 17, 2024, I delivered via ECF a true and correct copy of the above document, directed to:

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DATED this 17th day of July 2024.

/s/ Sarah Awes_____
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INDEX TO RESPONDENTS' APPENDIX

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

J.S., an individual, Appellant, v. OLYMPIA KIWANIS BOYS RANCH, et al., Respondents.	No. 57814-0-II OPPOSITION TO MOTION TO PUBLISH

A. INTRODUCTION

Without bothering to discuss the criteria governing publication of a Court of Appeals opinion set forth in RAP 12.3(d) in any detail, appellant J.S. seeks publication of the Court's unpublished opinion filed on April 9, 2024. Because J.S. fails to meet the criteria for publication in RAP 12.3(d) and the applicable case law, this Court should deny the motion.

B. ARGUMENT WHY PUBLICATION SHOULD BE DENIED

RAP 12.3(d) incorporates the criteria for publication of an opinion first articulated in *State v. Fitzpatrick*, 5 Wn. App. 661, 664, 491 P.2d 262 (1971), *review denied*, 80 Wn.2d 1003 (1972),

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a case that interpreted RCW 2.06.040. The rule provides that publication is governed by the following criteria:

> (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

J.S.'s motion neither acknowledges nor addresses these criteria.[1]

In fact, the core of J.S.'s motion supports *denial* of its motion. J.S. nowhere indicates how the Court plowed new legal ground in its opinion. He does not suggest the Court's opinion, filed without oral argument, determines an unsettled or new issue of *law*. The opinion certainly does not modify or clarify an established principle of *law*. It is not, in J.S.'s view, in conflict with prior Court of Appeals precedent. J.S. could not do so

[1] RAP 12.3(e) specifically mandates that J.S.'s motion address certain questions ("The motion *must* be supported by addressing the following criteria") (emphasis added).

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because the Court's opinion did not cite any authority on the substantive law at issue. Op. at 8-9.

The only basis for publication is J.S.'s lengthy excursion into a discussion of State recordkeeping practices, motion at 3-7, a matter on which the Court's opinion never directly opined. In fact, the Court's opinion resolved a *fact-driven* issue – whether J.S. was ever at OK BR, concluding that a fact issue existed on summary judgment as to that point; the opinion does not articulate a new legal standard, but instead applies an existing legal standard to facts using *de novo* review.

Moreover, J.S.'s assertion, motion at 2-3, 8, that this opinion impacts the interpretation of RCW 4.16.340 is a reach when the Court's opinion *nowhere* addresses that statute.

In *Fitzpatrick*, Division II articulated criteria as to when an opinion should *not* be published:

> (1) Where an affirmance is based upon the conclusion that the evidence is sufficient to sustain the findings of fact of the trial court, except where the issue of sufficiency involves a novel or important question of law. (2) *Where*

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> *the decision, whether an affirmance or reversal, is determined by following a legal principle or principles well-established by previous decisions.* (3) Where the decision, whether an affirmance or reversal, is based upon a question of practice or procedure, except where the question is one of such importance in the administration of the law that it should be settled by an authoritative pronouncement.

5 Wn. App. at 669. Thus, this case falls within criterion (2) above. The Court's opinion is fully in line with prior appellate legal decisions.

The opinion is simply *de novo* review of a summary judgment decision where this Court disagreed with the trial court's assessment of the evidence presented for that purpose. The principles that govern such summary judgment determinations are well-established, even if reasonable minds can and do disagree when applying them from time to time.

Finally, by applying the well-established principles of summary judgment, the opinion does not address an issue of general public interest or importance – it is *fact-driven*, affecting

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only J.S. based on the evidence put forth for the specific purpose of summary judgment. RAP 12.3(d)(3).

B. CONCLUSION

After considering this case without oral argument, the panel determined that resolution of the issues by an unpublished opinion was appropriate. Based on the criteria of RAP 12.3(d), J.S. has failed to establish a basis for publication. J.S. fails to articulate grounds meriting alteration of the wisdom of the panel's decision to file an unpublished opinion, particularly when the Court never heard argument on the case, applying well-established standards that govern summary judgment.

This Court should deny J.S.'s motion to publish.

This document contains 724 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of April, 2024.

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 29, 2024 at Seattle, Washington.

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April 29, 2024 - 12:06 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57814-0
Appellate Court Case Title:	G.M. & J.S., v. Olympia Kiwanis Boys Ranch, et al., Respondents
Superior Court Case Number:	20-2-07324-1

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No. 57814-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

J.S., an individual;

Appellant,

vs.

OLYMPIA KIWANIS BOYS RANCH, et al.,

Respondents

APPELLANT'S REPLY IN SUPPORT OF MOTION TO PUBLISH

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I. REPLY

The Kiwanis Respondents concede that publication of the Court's opinion is warranted where it is "'a decision . . . of general public interest or importance'" or "'clarifies or reverses an established principle of law'" Response at 2 (quoting *State v. Fitzpatrick*, 5 Wn. App. 661, 664, 491 P.2d 262 (1971), *review denied*, 80 Wn.2d 1003 (1972)). Disingenuously, however, they argue that Appellant "neither acknowledges nor addresses these criteria." Response at 2.

The Kiwanis Respondents' argument is borderline frivolous. Even a cursory review of Appellant's motion dispels it as pure falsehood. *See*, e.g., Response at 2 (Court's opinion "is of general public importance to recurring issues facing trial courts"); 7 ("Court's opinion is of general public importance because it clarifies the application of Washington's summary judgment rules and precedent to" recurring, materially identical fact patterns

and would provide "valuable, binding guidance to trial courts, plaintiffs, and defendants regarding the recurring issue of whether a triable issue of fact exists regarding a child's placement"); RAP 12.3(e)(4) (publication warranted where "the decision . . . clarifies . . . an established principle of law"); RAP 12.3(e)(5) (publication warranted where "the decision is of general public interest or importance").

The Kiwanis Respondents' arguments further devolve into misdirection and misrepresentation with their passing, conclusory contentions that the Court's opinion is not of "general interest or importance" because it is "*fact-driven*, affecting *only J.S.* based on the evidence put forth for the specific purpose of summary judgment" and that the opinion does not clarify an established principle of "law." Response at 2, 4-5 (emphasis in original). But the material facts "driving" the ***question of law*** addressed by the Court's opinion—the "legal question" of whether the Kiwanis Respondents owed him a "duty of care,"

Appendix 8—were whether a plaintiff's sworn testimony that they resided at a particular facility decades ago can demonstrate such a duty in the absence of corroborating placement records or the presence of contrary records.

The Kiwanis Respondents utterly fail to acknowledge the reality that question of law is a ***recurring*** one given the facts that RCW 4.16.340 permits lawsuits for childhood sexual abuse occurring decades ago at such facilities; from 2016 to 2020, the State of Washington had faced 231 such lawsuits for abuse occurring between the 1960s and 1990s; as of 2020, 20 such lawsuits existed in our court system; and a "substantial number of those" lawsuits "have their genesis in the 1970s, 1980s, and 1990s"; and the State of Washington has admitted that, due to its placement records destruction, in many cases "the only evidence of the alleged abuse is the plaintiff's own testimony." **Appendix 28**.

The Kiwanis Respondents fail to address that these

realities can and do cause the same material facts "driving" this Court's opinion and the ***legal issue*** it addressed to recur: whether a plaintiff's sworn testimony about decades-old events on its own can satisfy summary judgment standards and the ultimate "legal question" of whether a duty of care was owed. **Appendix 28.** And they fail to respond to the fact that trial courts have struggled with applying these principles of law to materially identical facts as recently as last year. **Appendix 106-07; 115-16** (trial court reversed on reconsideration earlier grant of summary judgment dismissal where no placement records corroborated plaintiff's sworn testimony regarding when he resided at Remann Hall in 1974); **Appendix 117-18** (opposing reconsideration of denial of summary judgment where no state placement records corroborated plaintiff's sworn testimony that he resided at Jessie Dyslin Boys

Ranch ("JDBR") group home).[1] Contrary to the Kiwanis Respondents' misrepresentations, this same issue has affected and continues to affect many more litigants than J.S. and the trial courts dealing with it—making it of public interest and importance to similarly-situated litigants and trial courts. And the Court's opinion clarifies an "established principle of law"—the application of established summary judgment standards to these recurring, material facts in determining the ultimate ***legal question*** of duty—where trial courts have struggled with that same issue. Both warrant publication. RAP 12.3(e)(4)-(5).

The Kiwanis Respondents do not respond to the ***actual*** grounds warranting publication because they cannot. Instead, they largely argue against ***alternative***

[1] The State's 2020 tort claim report noted that. At the time, four lawsuits were pending regarding childhood sexual abuse at JDBR. **Appendix 28**.

RAP 12.3(e) grounds for publication nowhere argued by Appellant. Response at 2-3 (arguing publication not warranted under RAP 12.3(e)(1)(3) and (1)(6); RAP 12.3(e) (listing criteria for publication with the disjunctive "or").

Of course, Appellant does not argue in support of RAP 12.3(e) grounds for publication on which he does not rely, as satisfying ***any*** of RAP 12.3(e)'s disjunctive criteria warrants publication. *State v. Hecht*, 173 Wn.2d 92, 95, 264 P.3d 801 (2011) (disjunctive statutory term "or" means "any" criteria may be satisfied); *Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 912, 401 P.3d 381 (2017) (courts interpret court rules "in the same way as we interpret statutes"). Rather, the Kiwanis Respondents waste this Court's time and Appellant's by deliberately misreading the rule to require satisfaction of ***each*** of its grounds to warrant publication and railing against the resulting strawman.

Worse, the Kiwanis Respondents rely on *Fitzpatrick*'s 1972 criteria for not publishing an opinion. Response at 3-5. Much like they did in recently opposing a pending motion to modify in *M.A. v. Kiwanis International, et al.,* No. 58574-0-II, the Kiwanis Respondents and their same appellate counsel fail to mention the RAPs' 1976 adoption. The RAPs supersede previous appellate procedure and did not adopt *Fitzpatrick*'s criteria for not publishing opinions. *State v. Kelly*, 19 Wn. App. 2d 434, 450, 496 P.3d 1222 (2021). The Kiwanis Respondents' inability to meaningfully respond with arguments against the actual grounds for publication—clarification of "well established principles of law" under RAP 12.3(e)(4) and "general public interest or importance" under RAP 12.3(e)(5)—rather than their continuing misdirection to outdated, superseded appellate standards demonstrates the absence of any cogent, credible reason not to publish the Court's opinion.

Finally, the Kiwanis Respondents omit the likely reason for filing a misleading, legally unsupported opposition to publication of the Court's opinion: financial self-interest. The 2020 State of Washington tort claim study noted that "[t]he state is still receiving claims that arose in the Kiwanis' OK Boys Ranch facility which closed in 1994." **Appendix 28**. The Kiwanis Respondents continue to be named as defendants in such lawsuits (such as this one) because, since 1995, Washington courts consistently have ruled that the Kiwanis respondents are vicariously liable under an agency theory for childhood sexual abuse occurring at Kiwanis-branded and controlled group homes like OKBR. **Reply Appendix ("RA") 1-3** (court order ruling as a matter of law the Kiwanis Respondents were vicariously liable for its agent, OKBR, negligent failure to protect against childhood sexual abuse); **RA 6-10** (detailing evidence that OKBR was an agent of Kiwanis Respondents where they controlled

membership of OKBR's board of directors and had authority to fire OKBR's executive director). Indeed, in *A.B. v. Kiwanis International, et al.,* No. 57207-9-II, the Court heard oral argument ***today*** on the issue of whether the Kiwanis Respondents are vicariously liable under an agency theory for childhood sexual abuse at the "Kiwanis Vocational Home" under similar facts.[2]

The Kiwanis Respondents' insistence that the Court not publish its opinion is nothing more than a cynical ploy to continue to argue that trial courts may ignore it as merely "persuasive" authority and reach a contrary, erroneous result in other lawsuits. Forcing parties, trial courts, and this Court to relitigate the issues already resolved by this Court's opinion only serves the Kiwanis Respondents' interests, not the public's. Conversely, precluding the

[2] The Kiwanis Respondents are represented by the same appellate counsel in *A.B.*

regurgitation of already-rejected arguments—and, worse, the potential erroneous ***dismissal*** of claims based on such arguments—in materially identical cases serves judicial economy, the public interest, and the interests of justice. RAP 12.3(e)(5); RAP 1.2(a) (RAPs "will be liberally interpreted to promote justice").

II. CONCLUSION

For all the above reasons, Appellant respectfully requests that the Court publish its opinion in this case.

Dated and signed under penalty of perjury: April 30, 2024.

The undersigned certifies that this motion consists of 1,347 words in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I, Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on April 30, 2024, I delivered via ECF a true and correct copy of the above document, directed to:

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DATED this 30th day of April 2024.

/s/ Sarah Awes_____
Sarah Awes
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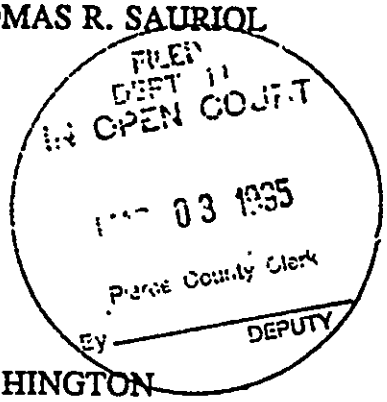
THE HONORABLE THOMAS R. SAURIOL



SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THURSTON COUNTY

TERENCE MULLINS,

Plaintiff,

vs.

O. K. BOYS RANCH, et al.,

Defendants.

NO. 93-2-00224-3

ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON VICARIOUS LIABILITY

This matter came before the Court on plaintiff's motion for partial summary judgment on the issue of vicarious liability of the defendant Kiwanis for the activities of Kiwanis' agents OK Boys Ranch and the directors thereof. The Court has reviewed the following matters in connection with the Motion for Partial Summary Judgment, in addition to the other files and pleadings on record in this case:

(1) Kiwanis' Motion for Summary Judgment, with all exhibits and attachments;

(2) Plaintiff's Cross-Motion and Response to Kiwanis' Motion for Summary Judgment, with all exhibits and attachments;

(3) Kiwanis' Response to Plaintiff's Motion for Partial Summary Judgment on Vicarious liability and Kiwanis' Cross-Motion for Summary Judgment.

(4) Kiwanis' Objections to Declaration of Douglas Poppen;

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(5) Plaintiff's Reply Memorandum and Rebuttal to Defendant Kiwanis' Response and Cross-Motion, with Declaration of Counsel and attachments.

Based on review of these materials, on the oral presentations by counsel, on review of the statutes and case law relied upon by the parties, and on all the files and exhibits in this matter, it appears that the Plaintiff is entitled to, and hereby shall be awarded, partial summary judgment as follows:

(1) That Defendant Kiwanis is vicariously liable for the negligence of its agent, the Olympia Kiwanis Boys Ranch, during the period of Plaintiff's residence at the Olympia Kiwanis Boys Ranch; and

(2) That no genuine issue of fact exists on which reasonable minds could differ as to whether the Olympia Kiwanis Boys Ranch Standing Committee functioned as a committee of the Olympia Kiwanis Club during the time period in which Plaintiff resided at the Olympia Kiwanis' Boys Ranch; and

(3) That the Olympia Kiwanis Club controlled the Olympia Kiwanis Boys Ranch Board by nominating, electing, and retaining the power to remove its directors; and

(4) That Defendant Kiwanis shall be held liable for all the acts and omissions of its Boys Ranch Standing Committee as provided in RCW 24.03.115; and

~~(5) Defendant Kiwanis' Motion for Summary Judgment Dismissing Plaintiff's Claim of Alter Ego is denied.~~

IT IS SO ORDERED.

DONE in open Court this 3rd day of March, 1995.

FILED
DEPT. 11
IN OPEN COURT
MAR 03 1995
Pierce County Clerk
BY DEPUTY

THOMAS R. SAURIOL
JUDGE THOMAS R. SAURIOL

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THE HONORABLE GRETCHEN LEANDERSON

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

G.M., an individual; J.S., an individual,

Plaintiffs,

vs.

OLYMPIA KIWANIS BOYS RANCH, a/k/a O.K. BOYS RANCH, a non-profit entity; KIWANIS INTERNATIONAL, a non-profit entity; KIWANIS PACIFIC NORTHWEST DISTRICT, a non-profit entity; KIWANIS, a non-profit entity; KIWANIS CLUB OF OLYMPIA, a non-profit entity; MARK S. REDAL, an individual; KRISTY GALT, an individual; STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CHILD PROTECTIVE SERVICES, and DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES, governmental entites; COMMUNITY YOUTH SERVICES, a non-profit entity; OUR HOUSE, a non-profit entity,

Defendants.

NO. 20-2-07324-1

PLAINTIFF'S OPPOSITION TO KIWANIS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFF G.M.

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I. RELIEF REQUESTED

Plaintiff G.M. was a young teenager when he was sexually abused at a group home called "Our House," which was formerly known as the Olympia Kiwanis Boy's Ranch ("OKBR").

For nearly three decades, the OKBR has been sued as an agent of Kiwanis. The genesis of these lawsuits dates back to a 1995 ruling by the Honorable Judge Thomas R. Sauriol that Kiwanis were liable under an agency theory for allowing atrocious sexual abuse to occur at OKBR.[1] Here, the undisputed facts show that Kiwanis worked for years to create and maintain a culture at the OKBR that was defined by neglect, abuse, fraud, and coverups. The Kiwanis Defendants made the OKBR a standing committee and elected its board of directors, thereby creating an express relationship of principal and agent with Kiwanis vicariously liable for the torts of its agent. Even after the OKBR was shut down for its atrocities, the Kiwanis Defendants continued to maintain control over the group home—renamed "Our House"—by placing one of its Kiwanis Club of Olympia members, Charles Shelan, as the new director of the home.

The Kiwanis Defendants are asking the Court to dismiss G.M.'s claims that he "was abused at OKBR."[2] It is unclear from their motion whether the Kiwanis Defendants are also asking the Court to dismiss Plaintiff G.M.'s claims against the Kiwanis Defendants regarding his abuse at Our House, as stated in his Second Amended Complaint. "It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). It is also "incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *Id.* The Kiwanis Defendants fail to clearly state in their motion that they seek to dismiss claims predicated on the abuse at Our House, and they cannot prevail on a motion based on issues not raised. *Admasu v. Port of Seattle*, 185 Wn.

[1] Cochran Decl. at Exs. 1, 2.

[2] The State Defendants also filed a "joinder" where they are seeking to dismiss all claims "arising from allegations related to OKBR." The State Defendants do not make any argument that Plaintiff G.M.'s claims arising from his placement and abuse at Our House should also be dismissed.

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App. 23, 40, 340 P.3d 873 (2014). To the extent the Kiwanis Defendants are asking the Court to dismiss all of Plaintiff G.M.'s claims against the Kiwanis Defendants, including claims predicated on his abuse at Our House, summary judgment should be denied.

II. RELEVANT FACTS

A. The Kiwanis Defendants Established and Created the OKBR/Our House.

The uncontroverted evidence in this case establishes that OKBR was always part and parcel of the Olympia Kiwanis Club. The Kiwanis filed government statements under oath which established that they were in the business of running a home for delinquent boys. As early as 1981, the Kiwanis stated to the Corporations Division of the Secretary of State's office, through the sworn testimony of Kiwanis president, Max Milsap, that the "Affairs which Kiwanis was actually conducting in the State of Washington" was a "Home for Dependent Boys."[3] This is consistent with the official record of the Olympia Board of Adjustment (dated October 22, 1969) in which Patrick Sutherland approved the OKBR application for a conditional use permit to construct a group home in Olympia.[4]

Minutes of the OKBR for June 1979 prove that the president of Kiwanis met with State DSHS officials regarding developing a DSHS referral base for the Ranch. Of interest, there was not a single representative of the Ranch's Board of Directors at the meeting; only the Kiwanis president was present.[5]

The Kiwanis had eight subcommittees, and OKBR was one of them.[6] The Kiwanis Bylaws further stated: "The committee on the O.K. Boys' Ranch shall perform all duties and responsibilities set forth in the Ranch's articles of incorporation and the corporate bylaws."[7] The Kiwanis Bylaws further provided that

[3] Cochran Decl. at Ex. 3.
[4] Cochran Decl. at Ex. 4.
[5] Cochran Decl. at Ex. 5.
[6] Cochran Decl. at Ex. 7.
[7] Cochran Decl. at Ex. 7.

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> All members of a committee shall be appointed by the president and shall be subject to removal by the president. Each committee shall be responsible to the President and shall make such reports as he/she may direct.[8]

According to the organizational structure which the Kiwanis designed and implemented, the club acted through its several committees. Mr. Don Powell had been the secretary-treasurer of the Kiwanis Club of Olympia continuously for years.[9] In this capacity, he served through the terms of several presidents. He was the corporate representative for the Kiwanis with the longest tenure. He also wrote, edited, and retained the minutes in order to retain an "institutional memory" for the organization.[10]

Mr. Powell testified that the committees are the way that the Kiwanis do or transact most of their business.[11] It is "really essential to the operation of the [Kiwanis] club that we understand what the committees are doing."[12] In the most clear-cut question and answer, Mr. Powell admitted:

Q: Was the O.K. Boys' Ranch functioning as a committee of Kiwanis?

A: Yes.[13]

According to the deposition of Judge Sue Dubuisson, a member of both Kiwanis and the OKBR Board of Directors, the Ranch committee was always a committee of Kiwanis since she became a member of the OKBR Board in September 1987.[14]

Ranch Board minutes from December 1983 also prove that OKBR wanted to be designated as a standing committee in the Olympia Kiwanis Club.[15] The Olympia Kiwanis confirmed this again in 1988 when the "Kiwanis Board approved the formation of the Boys' Ranch committee. Attendees will receive participation credits and will be able to exert additional

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[8] Cochran Decl. at Ex. 7.

[9] Cochran Decl. at Ex. 6 at 4:2-8.

[10] Cochran Decl. at Ex. 6 at 44:19-25.

[11] Cochran Decl. at Ex. 6 at 124:3-7.

[12] Cochran Decl. at Ex. 6 at 134:25-135:1.

[13] Cochran Decl. at Ex. 6 at 145:9-12.

[14] Cochran Decl. at Ex. 8 at 13:19-14:3.

[15] Cochran Decl. at Ex. 9.

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political muscle for the Ranch's benefit."[16] OKBR is, and always was, a standing committee of the Olympia Kiwanis Club.

With the OKBR as a standing committee of the Olympia Kiwanis Club, the Kiwanis Club of Olympia was also involved in nominating and electing the Board of Directors of the OKBR. Olympia Kiwanis Club secretary-treasurer Mr. Powell testified:

> A. The Kiwanis would . . . have an election at one of our Monday meetings in September for the Boys' Ranch Board.
>
> Q: Who voted to elect people to the Board of the O.K. Boys' Ranch?
>
> A. The membership of the Kiwanis Club.[17]

In addition to nominating and electing the Board of Directors, the Olympia Kiwanis Club also had the ability to review the OKBR director's performance,[18] and they ultimately participated in the decision to fire the OKBR Executive Director Tom Van Woerden.[19]

In 1994, as the State began to investigate OKBR and the history of the severe problems at OKBR became public, including incidents of sexual abuse, the Olympia Kiwanis Club decided that rather than shutting down the facility they would keep it open. This was due in part to "the continuing need for residential care for young boys and because of the *strong commitment of the Kiwanis members*."[20] In an effort to keep the facility open, members of the Olympia Kiwanis Club approached Olympia Kiwanis Club member, Charles Shelan, who was the Executive Director of Community Youth Services (CYS) and asked him and CYS to take over the group home facility.[21] Shelan first became a member of the Olympia Kiwanis Club in 1981[22] and he even served as present of the Olympia Kiwanis Club in 1989.[23] After this meeting, Shelan and

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[16] Cochran Decl. at Ex. 10.

[17] Cochran Decl. at Ex. 6 at 90:12-18.

[18] Cochran Decl. at Ex. 11.

[19] Cochran Decl. at Ex. 6 at 62:15-64:5; Cochran Decl. at Ex. 12 at 48:19-49:12.

[20] Cochran Decl. at Ex. 13. Emphasis added.

[21] Cochran Decl. at Ex. 14 at 53:4-54:14.

[22] Cochran Decl. at Ex. 14 at 17:10-15; 18:12-14.

[23] Cochran Decl. at Ex. 14 at 24:3-17.

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CYS ultimately agreed to take over the OKBR facility.[24] In doing so, Shelan informed Olympia Kiwanis Club member Jane Skinner that he "would still like to see active involvement and support from Kiwanis and the Kiwanis Wives"[25] and that he "respect[ed] the tremendous efforts that Kiwanis has put into the Ranch. CYS would like to see some tie-in such as volunteer help, contributions, and continued involvement of the Kiwanis wives' organization."[26]

On September 30, 1994, OKBR and CYS entered into an agreement where OKBR conveyed the property and all assets to CYS.[27] In exchange, CYS was to use the property "in a manner consistent with the mission statement or amended mission statement of CYS so long as it relates to serving the needs of youth-at-risk."[28] CYS further agreed that if it ceased to exist as a not-for-profit corporation or agency or ceased to use the principal in a manner consistent with its mission statement or amended mission statement, then all the principal would be given back to the Olympia Kiwanis Club.[29]

With Olympia Kiwanis Club member Shelan at the helm, the OKBR facility was renamed "Our House."[30] Some of the same boys who had previously resided at OKBR returned to the facility as Our House group home residents.[31] During Our House's operation, community members continued to have concerns about the facility and the continued Kiwanis involvement. Olympia Police Department Sergeant Nancy Gassett stated during an interview, "[t]he Director, Charles Shelan, is just as politically connected as Van Woerden. The OKBR, now called "Our House" is still having some of the same problems . . . Charles Shelan is still connected to the Kiwanis, and [Sergeant Gassett] feels this is a problem."[32] During the period of time that Our

[24] Cochran Decl. at Ex. 15.
[25] Cochran Decl. at Ex. 16.
[26] Cochran Decl. at Ex. 15.
[27] Cochran Decl. at Ex. 17.
[28] Cochran Decl. at Ex. 17.
[29] Cochran Decl. at Ex. 17.
[30] Cochran Decl. at Ex. 18; Ex. 19; Ex. 20.
[31] Cochran Decl. at Ex. 20; Cochran Decl. at Ex. 14 at 114:24-115:11.
[32] Cochran Decl. at Ex. 21.

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House was open, there were repeated reports and concerns that (1) staff failed to protect children from neglect;[33] (2) staff failed to adequately report incidents;[34](3) staff inadequately supervised residents;[35] and (4) there was an increased frequency of aggressive/assaultive behavior.[36] Our House ultimately closed in 1997 due in part to the fact that Our House did not have "the staffing levels necessary to supervise and care for these severely troubled teen boys . . ."[37]

B. Plaintiff G.M. Was Sexually Abused at Our House.

Plaintiff G.M. testified that he was placed at the group home facility in or around 1995.[38] At this time, the former OKBR facility had been renamed Our House.[39] While at Our House, Plaintiff G.M. was sexually abused.[40] During one incident, Plaintiff G.M. was forced to the ground by residents with a blanket over his head, while a staff member raped him.[41] During another incident, Plaintiff was held in a food storage area, threatened with a knife, and forced to perform oral sex on the same staff member.[42]

III. EVIDENCE RELIED UPON

This response motion relies upon the Declaration of Darrell L. Cochran in Support of Plaintiff's Opposition to Kiwanis Defendants' Motion for Summary Judgment Regarding Plaintiff G.M., as well as the existing pleadings and documents already on file in this matter.

IV. LEGAL ARGUMENT

Summary judgment is not appropriate unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

[33] Cochran Decl. at Ex. 22.
[34] Cochran Decl. at Ex. 22.
[35] Cochran Decl. at Ex. 23.
[36] Cochran Decl. at Ex. 24; Ex. 25.
[37] Cochran Decl. at Ex. 26; Cochran Decl. at Ex. 27.
[38] Cochran Decl. at Ex. 28 at 100:4-8; 100:19-25.
[39] Cochran Decl. at Ex. 18; Ex. 19; Ex. 20.
[40] Cochran Decl. at Ex. 28 at 106:18-20.
[41] Cochran Decl. at Ex. 28 at 106:25-108:25.
[42] Cochran Decl. at Ex. 28 at 121:12-19.

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matter of law." CR 56(c). The trial court views the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

The Kiwanis Defendants fall far from establishing that there is no genuine issue as to any material fact, and it is unclear from their motion which claims they are seeking to dismiss. "It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Ctr., Inc., P.S.,* 61 Wn. App. 163, 168, 810 P.2d 4 (1991). It is also "incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *Id.* If the moving party fails to do so, it may either strike and refile its motion for summary judgment or raise the new issues in a new filing at a later date, but the moving party cannot prevail on the original motion based on issues not raised therein. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873 (2014). Further, "[a]llowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." *Id.*

In their motion for summary judgment, the Kiwanis Defendants appear to seek to just dismiss Plaintiff G.M.'s claims related to abuse at the OKBR. The Kiwanis Defendants' sole argument is premised on the assertion that Plaintiffs' "First Amended Complaint is entirely predicate on alleged abuse at OKBR, and the definitive proof that G.M. never attended OKBR." Kiwanis Defs. Mot at 1, 5. However, since the time that the Kiwanis Defendants filed their summary judgment motion, Plaintiffs' Complaint has been amended to include claims predicated on Plaintiff G.M.'s abuse at Our House, located at the former OKBR facility. *See* Second Amended Complaint. Plaintiffs agree with the Defendants that Plaintiff G.M. was placed at the Our House facility (formerly known as OKBR) and not OKBR, therefore, any claims that Plaintiff G.M. was abused at OKBR should be dismissed.

However, to the extent that the Kiwanis Defendants' motion also seeks to dismiss Plaintiff G.M.'s claims against the Kiwanis Defendants predicated on his abuse at Our House,

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this motion should be denied. The Kiwanis Defendants fail to clearly state in their motion that they seek to dismiss claims predicated on the abuse at Our House, and they cannot prevail on a motion based on issues not raised. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873 (2014). The Kiwanis Defendants do not make any legal argument related to why they cannot be held liable for abuse that occurred at Our House, and the evidence establishes that the Kiwanis Defendants' exposed Plaintiff G.M. to a foreseeable high degree of risk of harm at Our House and maintained control over Our House. A duty exists where the actor's own affirmative act creates a recognizable high degree of risk of harm. *E.g.*, *Washburn v. City of Federal Way*, 178 Wn.2d 732 (2013); *Robb v. City of Seattle*, 176 Wn.2d 427 (2013); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 230 (1991); *Kim v. Budget Rent A Car Syss. Inc.*, 143 Wn.2d 190, 196–98 (2001); *Parilla v. King County*, 138 Wn. App. 427 (2007). "Actors have a duty to **exercise reasonable care** to avoid the **foreseeable consequences** of their acts." *Washburn*, 178 Wn.2d at 757 (emphasis added). "This duty requires actors to avoid exposing another to harm from the foreseeable conduct of a third party." *Id*. Specifically, under RESTATEMENT (SECOND) OF TORTS § 302B "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." "The duty to protect against the criminal acts of third parties can arise 'where the actor's own **affirmative act** has **created** or **exposed** the other to a **recognizably high degree of risk of harm** through such misconduct.'" *Id*. at 757-58 (quoting RESTATEMENT § 302B); *Robb*, 176 Wn.2d at 433 (citing *Hutchins.*, 116 Wn. 2d at 230).

The Kiwanis Defendants also can be held vicariously for the torts at issue in this lawsuit that occurred at Our House. Under the rules of agency, "[a]n express or implied agency relationship may exist when one party acts at the instance of and, in some material degree, under the direction and control of another." *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 607 (1991).

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Here, the Kiwanis Defendants took active measures to keep the group home up and running and manifested their control by participating in the creation of Our House. Members of the Olympia Kiwanis Club met with Charles Shelan and CYS to ask them to take over the OKBR group home facility. Various means and methods were employed to achieve the result that the facility remained open, and that Olympia Kiwanis Club members, like Shelan, were still in control and involved in running the facility. This institution that the Kiwanis first created with OKBR, and then Our House, had such deep roots that poisonous fruit persisted for years after. The toxic environment they created was the framework that made sexual abuse at Our House a foreseeable high degree risk of harm. Therefore, to the extent that the Kiwanis Defendants are asking the Court to dismiss all of Plaintiff G.M.'s claims against the Kiwanis Defendants, including claims predicated on his abuse at Our House, summary judgment should be denied.

V. CONCLUSION

For the foregoing reasons, the Kiwanis Defendants' motion for summary judgment should be denied.

RESPECTFULLY SUBMITTED this 26th day of September, 2022.

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CERTIFICATE OF SERVICE

I, **Jessica Gott**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via **Email** by directing delivery to the following individuals:

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July 17, 2024 - 1:36 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,180-7
Appellate Court Case Title:	G.M. & J.S. v. Olympia Kiwanis Boys Ranch, et al.
Superior Court Case Number:	20-2-07324-1

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