No. 57814-0-II

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

J.S., an individual,

Appellant,

and

G.M., an individual,

Plaintiff,

v.

OLYMPIA KIWANIS BOYS RANCH, a/k/a O.K. BOYS RANCH, a non-profit entity; KIWANIS INTERNATIONAL, 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 entities,

Petitioners.

KIWANIS PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

The Kiwanis entities ("Kiwanis") seek review by this Court of the published Court of Appeals opinion terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

Division II of the Court of Appeals filed an unpublished opinion reversing the trial court's dismissal of J.S.'s claims against Kiwanis for lack of evidence, after concluding that the case did not merit oral argument. A copy of the opinion is in the Appendix.

J.S. moved to publish the opinion, contending that publication under the criteria in RAP 12.3(e)[1] was critical

[1] RAP 12.3(e) 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

because litigants, including the State:

> are regularly involved in tort lawsuits arising from decades-old sexual abuse at group homes. As the record in this case and others demonstrates, the State has destroyed or lost decades worth of placement records or maintained incomplete or inaccurate records. As a result, multiple trial courts continue to face the same issue resolved by this Court: whether a plaintiff's sworn testimony that they resided at a particular group home creates a question of fact on that issue and, thus, whether the facility's operator owed them protective duties.

Mot. to publish at 1.

J.S. argued that the issue was recurring and Division II's decision would offer guidance in all such recurring cases. *Id*. at 1-2, 7-8. J.S. contended that this recurring issue was consequential, given the statute of limitations for childhood sexual assault victims, RCW 4.16.340. *Id*. at 2-8; reply on mot.

> or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

See also, RCW 2.06.040; *State v. Fitzpatrick*, 5 Wn. App. 661, 664, 491 P.2d 262 (1971), *review denied*, 80 Wn.2d 1003 (1972). A publication decision implicates RAP 13.4(b)(4) as to review by this Court.

to publish at 3. J.S. asserted that the issues in the case will "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." Reply on mot. to publish at 5. J.S. argued that a legal issue – duty – was at stake. *Id*. J.S. insisted that the case would have significant effect on other OK Boys Ranch cases. *Id*. at 8-9.

Division II agreed with J.S. that the criteria of RAP 12.3(e) were met and entered an order directing publication of its opinion on May 21, 2024. A copy of J.S.'s briefing on his motion to publish and Division II's order is attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Where a plaintiff bore the burden of proof on the elements of negligence, but failed to produce admissible evidence that he was actually present at a group home where he was allegedly abused, was the trial court correct in granting a summary judgment of dismissal where the plaintiff fully relied on government records as to his placement and those records specifically failed to reflect that he was placed at the group home?

2. Did Division II err in reversing the trial court and in adopting, according to respondent, a new principle on summary judgment that if government records might, but do not expressly show that a fact is true, summary judgment must be denied?

D. INTRODUCTION

J.S. sued a group of Kiwanis entities ("Kiwanis"), claiming he was abused as a foster child when the State of Washington allegedly placed him at the OK Boys Ranch Group Home ("OKBR") some thirty years ago. He *admitted* that he lacked personal knowledge regarding his time at OKBR, and he admittedly relied on Washington State Department of Social and Health Services ("DSHS") records to confirm when he was placed there. Those records showed that while he was placed at many group and foster homes, he was *never* placed at OKBR. J.S. came forward with no admissible evidence based on personal knowledge establishing that he ever lived at OKBR.

Because Kiwanis does not owe a duty of care to a child never placed in its care, the trial court properly granted summary judgment, following the civil rules which require admissible

evidence supported by personal knowledge to defeat summary judgment. Long-established precedent holds that conclusory, argumentative assertions merely disputing facts is insufficient to defeat summary judgment.

Review is merited in this case precisely for the reasons set forth in J.S.'s motion to publish at Division II, where J.S. argued that Division II's opinion establishes new principles of law that will affect trial courts across the state. The criteria for publication in RAP 12.3(e) make clear that this is a case meriting this Court's attention under RAP 13.4(b)(1), (2), (4).

E. STATEMENT OF THE CASE AND ARGUMENTS MADE BELOW

Division II's published opinion discusses the facts and procedures in this case, op. at 2-6, but it glossed over the crucial fact that J.S. never produced admissible evidence that he was ever placed at OKBR. Without this proof, Kiwanis owed no duty of care to J.S. as a matter of law.

J.S. was placed in foster care shortly after birth in 1974,

and he resided in many placements as a child, including several group homes. CP 170. For this lawsuit, he alleges he suffered compensable injuries while placed at OKBR at some time in the early or mid-1980s that he cannot remember, but records show *he was never placed at OKBR*. CP 160-61, 166.[2]

The record here is clear that J.S. failed to prove that he was ever at OKBR. J.S.'s second amended complaint contains no basis for finding Kiwanis breached a duty that caused J.S.'s damages because there is no admissible evidence that he was ever at OKBR – other than his unsupported testimony. He admitted his lack of personal knowledge, and that he would rely on records which show he is mistaken in his belief that he resided at OKBR. He stated in his tort form claim that "*the dates [of OKBR residency]* will be confirmed *or refined with the production of DSHS records*." CP 112 (emphasis added).

[2] Children's services formerly provided by DSHS are now administered through the Department of Children, Youth, and Families.

Likewise, his interrogatory answer states: "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*." CP 129 (emphasis added).

His deference to the undisputed evidence, *i.e.*, the State and OKBR's records, confirms that *J.S. never resided at OKBR*. Thus, his claims fail as a matter of law. "The existence and scope of a duty is a threshold inquiry in a negligence action," typically "a question of law." *Mathieu v. Dep't of Child, Youth, & Families*, 23 Wn. App. 2d 777, 787, 520 P.3d 1033 (2022), *review denied sub nom. Mathieu v. Washington Dep't of Child, Youth & Families*, 1 Wn.3d 1004 (2023) (quotation omitted). Kiwanis owed no duty, nor could it breach any duty owed, to a child never in its care. Similarly, there is no legal basis to hold Kiwanis liable for any abuse J.S. may have suffered at other group homes where he resided. The complaint contained no basis for such a conclusion. Given that J.S.'s complaint was entirely predicated on alleged abuse at OKBR, but the undisputed

records show that J.S. was never placed at OKBR, the trial court properly dismissed J.S.'s claims with prejudice.

A factor not addressed by Division II's published opinion is that any statements made by J.S. about his placement were ultimately inadmissible. J.S. lacked personal knowledge sufficient to sustain his testimony defeat summary judgment. CR 56(e) requires that the non-moving party defend against summary judgment with admissible evidence, based on personal knowledge, alleging specific facts, creating a genuine issue of material fact.[3] When a case rests on the plaintiff's testimony alone, a plaintiff cannot show a genuine issue of fact, sufficient

[3] The United States Supreme Court has likewise explained that when the moving party has carried its burden to show that no genuine issue of material fact exists, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Quoting the federal civil rule which contains the same requirement as our CR 56(e), the Supreme Court stated, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 587.

to preclude summary judgment if that plaintiff shows a "lack of personal knowledge concerning" a material issue. *Loss v. DeBord*, 67 Wn.2d 318, 321, 407 P.2d 421 (1965); *see also*, ER 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

This Court's *Loss* decision concerned the existence of double yellow lines on a roadway where an accident occurred. If the lines were present, plaintiff would have contributed to her accident as a matter of law by stopping in the roadway to illegally turn left across them.[4] Official records showed that the lines had been redrawn in that area a year prior, which witnesses corroborated. 67 Wn.2d at 320. The plaintiff initially could not remember whether double yellow lines were present, but later she submitted a statement to contradict the record claiming that they were "obliterated and imperceptible" based on a picture

[4] At the time *Loss* was decided, contributory negligence barred tort recovery in Washington.

allegedly taken months after the accident. *Id.* at 320.

This Court determined that summary judgment was appropriate, despite the changed statement because the plaintiff did not have "personal knowledge" sufficient to "show affirmatively that [she was] competent to testify in the matters stated therein." *Id.* at 320. Thus, her changed statement did not create a genuine issue of material fact sufficient to contradict the record showing the double yellow lines existed. *Id.* *See also, e.g., Farias v. Port Blakely Co.*, 22 Wn. App. 2d 467, 493, 512 P.3d 574 (2022) (injured worker did not have personal knowledge to testify that owner also acted as general contractor at jobsite and was thus the proper party to sue for unsafe working conditions).

Here, too, J.S. did not have personal knowledge competent to affirmatively create an issue of material fact. He expressly relied on DSHS records to show when he was placed at OKBR. They showed the opposite; he was *never* placed there. He could not recall basic facts about OKBR including what it looked like,

the names of any staff or roommates, and other basic facts about his alleged time at OKBR. He resided in many placements and group homes, and may have suffered abuse in those homes, but he could not demonstrate specific facts with respect to OKBR, merely speculating that DSHS records would confirm his placement there, which they did not.

But it is the documentary evidence that is crucial here, particularly where J.S. admitted that he could not recall where he had resided. J.S. could not establish a time he was placed at OKBR, and he admitted he would rely on these placement records which showed he was never placed at OKBR. CP 112, 129. J.S.'s tort claim form stated that "Claimant does not recall when he was placed at OKBR but believes he was about 8 or 9 years old. *It is anticipated the dates will be confirmed or refined with the production of DSHS records.*" CP 112 (emphasis added). J.S. was born on December 6, 1974, thus his belief would place his alleged residency at OKBR in 1983 or 1984, a time during which his placements were documented *elsewhere*.

CP 160-61.

DSHS produced "Child Placement and Legal History" documents, showing where J.S. resided from June 1981 through November 1988. CP 160-61. *He did not reside at OKBR during that time*. *See* Appendix (timeline of J.S.'s residences from DSHS records). Along with these placement records, DSHS also certified in sworn discovery answers that "there are no records that he was ever a resident at OKBR." CP 166.

J.S.'s second amended complaint alleged that he resided at OKBR "in or about 1982, and he remained there until approximately 1984." CP 122. But when answering written discovery, J.S. changed his story and again deferred to DSHS's placement records: "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.* Plaintiff believes he resided at OKBR between 1989-1993." CP 129 (emphasis added).

J.S.'s *guess* contradicted his prior sworn testimony; J.S. testified in a deposition for his separate lawsuit against the Secret

Harbor Group Home that he could not recall when he resided at OKBR, then testified that he lived at OKBR before he began living at Secret Harbor in July 1987. CP 134. J.S.'s Secret Harbor admission summary makes no mention of his having stayed at OKBR. CP 170-71. He also testified that he was at OKBR before he moved to the Deschutes Group Home in December 1986. CP 139. Finally, he testified that he resided at OKBR before he was a teenager. CP 154-56. J.S. turned 13 on December 6, 1987.

Although Division II states that J.S. "consistently" testified that he remembers residing at OKBR, op. at 8, his own testimony and all pertinent records contradict that testimony. In October 2022, J.S. candidly admitted that the dates of his OKBR residence as alleged in his complaint were *a complete fabrication* – "those are not factual dates," "that's what I came up with." CP 146-48. He did not remember attending OKBR at any particular time: "I ended up at the OK Boys Ranch. Exactly when or how, I don't recall." "[A]s far as specific times, dates and ages and

things like that, my mind doesn't remember things like that." CP 212.

The only evidence remotely connecting J.S. to OKBR is (1) an August 11, 1986 letter from OKBR's director to DSHS, stating that "we will be accepting [J.S.] into our agency for residential care at our next available opening in approximately two weeks;" CP 173; and (2) an August 18, 1986 letter from an OKBR residential caseworker to DSHS stating that OKBR is seeking justification to request "funding of a 40-hour/week staff member for [J.S.]," CP 175. But the Children's Orthopedic Hospital and Medical Center's discharge summary, dated December 1, 1986 (which also contains J.S.'s placement history consistent with DSHS's "Child Placement and Legal History") states that "[J.S.] was to have been placed at Okay Boy's Ranch in Olympia, but *placement has been suspended due to question of psychosis*." CP 178 (emphasis added). The record contains no other document linking J.S. to OKBR.

Ultimately, J.S. relied exclusively below on DSHS records

regarding his alleged placement at OKBR. CP 129. Long after his lawsuit was filed, in his summary judgment briefing, J.S. pointed to a 12-day gap in DSHS's placement history from December 18, 1986, to December 30, 1986, when he was placed in the Deschutes Center Group Home, claiming this must be when he was placed at OKBR. CP 256; RP 17; resp't br. at 9-10. Division II seized upon this gap to discern the existence of a fact issue, op. at 9, but in doing so, that court ignored the fact that this testimony contradicted J.S.'s own prior testimony that he went directly from foster care to the Deschutes Center Group Home, negating the gap in time and likely showing a scrivener's error in DSHS's records around Christmas of that year. CP 196.[5] Discharge summaries signed in early 1987 also did not mention any time for J.S. at OKBR, nor did *any other* record. CP 234-38.

[5] As Kiwanis explained, J.S. might have mixed up the name of a foster placement, but he *consistently* testified that he went from foster care directly to Deschutes, meaning there was no time that he could have lived at OKBR based on DSHS's records. CP 257-58.

J.S. has also argued that his story is corroborated by the fact that records show he was released into the custody of Bud O'Hair, a DSHS case manager, and O'Hair apparently placed some kids at OKBR. Resp't br. at 6. But *no record* shows that O'Hair placed J.S. at OKBR; in fact, there is no record of him placing any child at OKBR prior to 1990, several years after J.S. claims he was abused at OKBR. CP 242-46.

Aside from the placement records, admission summaries describe his history running away and being "very familiar with the Skagit Valley, Everett and Seattle area." CP 171. This reflects DSHS's "Child Placement and Legal History," which shows most of his placements in the Everett/Arlington area. CP 160-61. Conversely, OKBR was *in Olympia*, many miles away.

Finally, on top of not recalling the alleged OKBR residency dates and other conditions with state records, J.S. could not recall many other basic facts that would show he was ever placed at OKBR. CP 145-56. J.S. could not recall (1) what OKBR looked like because he "was in over 100 placements

growing up;" (2) the names of any OKBR employees; (3) whether any staff lived at OKBR; (4) his roommate's name, or whether he had more than one roommate; or (5) whether he was in school while allegedly at OKBR. CP 145-56.

Simply put, J.S. lacked personal knowledge to testify that he was placed at OKBR and deferred to state records that never showed him being placed there.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Division II's Published Opinion Upends the Normal Principles on Summary Judgment

Summary judgment avoids useless trials, trims away unsound claims, and prevents the waste of limited judicial resources. *See Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A defendant may move for summary judgment by pointing out that the plaintiff lacks sufficient evidence to support their case. *Guile v. Ballard*

Cmty. Hosp., 70 Wn. App. 18, 21, 851 P.2d 689, *review denied*, 122 Wn.2d 1010 (1993); *see also, Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

On summary judgment, J.S. as the non-moving party had to set forth specific facts, by admissible evidence, showing the existence of a genuine question of material fact. *Guile*, 70 Wn. App. at 25-26; *see also, Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998); CR 56(e) (nonmoving party must produce evidence and "may not rest upon the mere allegations or denials of a pleading").

"A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018) (quotation omitted); *W. Rivers Conservancy v. Stevens County*, 18 Wn. App. 2d 84, 92, 490 P.3d 249 (2021), *review denied*, 198 Wn.2d 1023 (2021) ("After a moving party submits sufficient evidence to justify summary judgment, relief

cannot be denied on the basis of speculation or argumentative assertions.").

Likewise, purely conclusory allegations with no concrete, relevant particulars, will not bar summary judgment. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied*, 114 Wn.2d 1023 (1990) ("the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues"); *Farias*, 22 Wn. App. 2d at 493 ("Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment."); *Fievez v. Dep't of Corr.*, 25 Wn. App. 2d 1055, 2023 WL 2368008 (unpublished), *8, *review denied*, 1 Wn.3d 1020 (2023) ("[A] speculative theory" cannot defeat summary judgment).

This case involves the more basic threshold question: did these parties ever even interact? Was there a duty even owed that could be breached? *Mathieu*, 23 Wn. App. 2d at 787 (existence

and scope of duty is a legal "threshold" question).

J.S. sued Kiwanis arguing that they did interact, thereby creating a duty of care, and *expressly* left it to DSHS records to confirm his recollection from when he was a foster child over 30 years ago. DSHS records *contradicted* his account, and he failed to show the personal knowledge necessary to create a genuine issue of fact that the abuse he recalls suffering occurred at OKBR. CR 56(e); ER 602. He could not recall basic dates, facts, or anything else beyond his speculation that his abuse occurred at a facility in Olympia, some 90 miles and several counties away from where he was predominantly placed during the 1980s when he recalls the abuse occurring. Under these circumstances, the trial court properly granted summary judgment.

Division II was wrong to conclude that uncorroborated, conclusory allegations from a plaintiff without personal knowledge cannot be dismissed on summary judgment and must result in a trial. In *Martin*, *supra*, for example, this Court affirmed a summary judgment dismissal even though a plaintiff

concluded in his declaration that his protected whistleblowing was a significant factor in his discharge from Gonzaga University. The *Martin* court noted "a paucity of evidence" insufficient to defeat summary judgment where the plaintiff's "own testimony" was not supported by the rest of the record. 191 Wn.2d at 727. *Accord*, *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993) (plaintiff claimed her husband was arrested by tribal officer, thereby potentially imposing liability beyond qualified immunity, but when the record refuted her claims that an arrest occurred, summary judgment was proper because her conclusive assertions were insufficient); *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 561, 96 P.3d 413 (2004) (plaintiff's conclusory statements that sheriff acted in "bad faith" processing a firearm application contrary to law were not enough to defeat summary judgment when record contradicted those conclusory allegations); *Becker v. Washington State Univ.*, 165 Wn. App. 235, 255-56, 266 P.3d 893 (2011), *review denied*, 173 Wn.2d 1033 (2012) (dismissed

Ph.D student's assertions that she did not receive sufficient due process prior to termination did not create a material issue of fact when the record showed she received sufficient process).

In sum, this Court has set a consistent standard for decades that "more than a scintilla of evidence" is necessary to carry a case to the jury. *Wold v. Jones*, 60 Wn.2d 327, 330-31, 373 P.2d 805 (1962) (dismissing because plaintiff's testimony lacked foundation and was contradicted by the record). Division II's published opinion upends the normal principles for addressing summary judgment and directly conflicts with decisions of this Court and the Court of Appeals on those principles. Review is merited. RAP 13.4(b)(1), (2).

(2) Division II's Opinion Creates an Entirely New "Uncertainty Principle" as to DSHS Records to Justify Denial of Summary Judgment in the Face of Entirely Contrary Evidence

Division II is correct that the issue in this case is not when J.S. was at OKBR, but whether he was there at all. Op. at 8. However, J.S. failed on his burden of proving that he was ever

placed at OKBR, as the unambiguous evidence, including DSHS records, clearly demonstrates. Bottom line: J.S. failed to prove that he *ever* resided at OKBR.

Critically, a point not to be overlooked, is that the burden was on J.S., not Kiwanis, to document his claim of negligence against Kiwanis. J.S., not Kiwanis, had to prove the traditional negligence elements – duty, breach, causation, and damages – *Meyers v. Ferndale Sch. Dist*., 197 Wn.2d 281, 287, 481 P.3d 1084 (2021).

For decades this Court has held that summary judgment is proper if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 3417, 322, 106 S. Ct. 2584, 91 L. Ed. 2d 265 (1986)). Kiwanis owed J.S. a duty of care *only* if he was actually placed at OKBR. Faced with a motion for summary judgment, he had the burden of producing admissible evidence to support

that key element of his claim. He failed to do so. Any uncertainty over proof of a material fact must cut against J.S. as the party having the burden of proof.

Notwithstanding the lack of evidence from J.S. of the DSHS records, as noted *supra*, Division II's opinion asserts that a fact issue exists in the case, in effect, because the DSHS records *might* document a 12-day gap in J.S.'s placement history. Op. at 9. That was plainly wrong on this record, as explained *supra*.

But J.S. doubles down on that "uncertainty principle" in his motion to publish arguing for what amounts to an entirely new approach to summary judgment – if records do not, but *might*, indicate that a fact is true because of alleged record-keeping deficiencies, then summary judgment must be denied. That is *not* the law of summary judgment in Washington, as described by this Court in cases like *Martin* and *Wold*, *supra*, and it creates unacceptable new opportunities for rank speculation in the face of actual evidence. And as J.S. *admitted* in his motion to publish, this new precedent will affect future cases, including

many against the State, in trial courts across Washington. Simply put, if appellate courts are going to impose a new summary judgment standard imposing extensive potential liability in many potential cases, this Court should be the one to decide such an issue of substantial public importance.

This Court should not allow Division II's published opinion so flagrantly departing from well-established procedural principles to stand. RAP 13.4(b)(4).[6]

G. CONCLUSION

This Court should grant review. J.S.'s conclusory testimony that he was placed at OKBR is unsupportable where the record documented that he made up dates, lacked personal knowledge about his placement at OKBR, and left it to DSHS records to confirm when he was placed there. Those government

[6] This Court has often granted review in the past to address the proper execution of court rules. *See, e.g.*, *Washburn v. City of Federal Way*, 178 Wn.2d 732, 749-52, 310 P.3d 1275 (2013) (whether appellate courts could review CR 50(a) motion if parties failed to file CR 50(b) motion).

records demonstrated that he was *never* placed at OKBR. DSHS records, to which J.S. deferred to prove the allegations in his complaint, show that he was never placed at OKBR. J.S. tries to call such records into question and to establish a wholly new "uncertainty principle," adopted by Division II in its published opinion, to defeat summary judgment. This Court should not allow settled law on summary judgment to be upended by Division II. Review is merited. RAP 13.4(b)(4).

Because J.S. failed to present admissible facts based on personal knowledge sufficient to defeat summary judgment dismissal was appropriate. Division II's contrary determination merits review. RAP 13.4(b)(1), (2).

This Court should grant review and affirm the trial court's dismissal of J.S.'s action.

This document contains 4,546 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 17th day of June, 2024.

Respectfully submitted,

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APPENDIX

CP 160-61:

From	To	Location
07/17/1981	**12/20/1983**	Luther Residential Treatment Program/Group Home
12/21/1983	**04/03/1986**	Children's Hospitalization Alternative Program (CHAPS) at Luther Child Center, and placed in a foster home with Suzanne and Jeff Songstad
04/04/1986	**04/06/1986**	Doris Brown, a receiving home
04/07/1986	**05/22/1986**	CHAPS, with foster parents Suzanne and Jeff Songstad
05/23/1986	**05/26/1986**	Doris Brown, a receiving home
05/27/1986	**06/03/1986**	Youth Outreach Crisis Residential Center in Everett
06/04/1986	**06/10/1986**	Dorothy Haase, a receiving home in Arlington
06/11/1986	**07/16/1986**	CHAPS, with foster parents Suzanne and Jeff Songstad
07/17/1986	**07/20/1986**	Dorothy Haase, a receiving home in Arlington
07/21/1986	**07/23/1986**	Sue Anderson, foster home in Granite Falls
07/23/1986	**07/29/1986**	Skagit Crisis Residential Center, Anacortes
08/04/1986	**08/16/1986**	Youth Outreach, a Crisis Residential Home, Everett
08/16/1986	**08/27/1986**	Skagit Crisis Residential Center
08/28/1986	**10/13/1986**	Youth Outreach Crisis Residential Center
10/13/1986	**12/01/1986**	Children's Orthopedic Hospital and Medical Center, Seattle and/or the Regional Crisis Residential Center

12/01/1986	**12/18/1986**	Inge Lopez, a foster home in Lynnwood
12/30/1986	**06/16/1987**	Deschutes Center Group Home
06/17/1986	**07/12/1987**	No placement: “on the run” or at a Crisis Residential Center
07/13/1987	**07/22/1987**	Bev Fazil, a foster home
07/22/1987	**11/03/1988**	Secret Harbor Group Home

Filed
Washington State
Court of Appeals
Division Two

April 9, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

G.M., an individual,

Plaintiff below,

J.S., an individual,

Appellant,

v.

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;

Respondents,

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, government entities; COMMUNITY YOUTH SERVICES, a non-profit entity; OUR HOUSE, a non-profit entity,

Defendants below.

No. 57814-0-II

UNPUBLISHED OPINION

Cruser, C.J. — JS was a foster youth for many years and recalls being abused at three placements, including at the Olympia Kiwanis' Boys Ranch (OKBR). He sued Kiwanis[1] for the abuse that he alleges occurred there. JS maintained throughout discovery that he resided at OKBR at some time during his youth but could not remember exact dates. Kiwanis moved for summary judgment, arguing that JS failed to show that it owed him any duty of care because he never resided at OKBR. The trial court granted summary judgment and dismissed JS's claims with prejudice.

JS now appeals, arguing that his testimony creates a genuine issue of material fact as to whether he resided at OKBR. Kiwanis argues that JS's testimony does not defeat summary judgment because it is contradicted by documentary evidence and because he testified inconsistently regarding the time period he recalls residing at OKBR. We reverse the trial court.

FACTS

I. BACKGROUND

JS was born in 1974 and entered foster care shortly thereafter. During his childhood, he resided at several placements including foster homes, group homes, and crisis resource centers. He recalls being sexually abused in at least three of those placements: Luther Child Center, Secret Harbor, and OKBR. He does not, however, remember exact dates of these childhood events.

II. LITIGATION

JS sued Kiwanis for gross negligence due to the abuse he recalls being subjected to at OKBR. He also sued the State and individual State defendants.[2] At the time JS filed his complaint,

[1] JS sued OKBR, Kiwanis Club of Olympia, and Kiwanis International. For the sake of simplicity, we refer to the Kiwanis defendants jointly as Kiwanis.

[2] The State was dismissed from this appeal upon JS's and the State's joint motion.

he could not recall the dates he resided at OKBR but alleged that he believed he was 8 years old and was placed there between 1982 and 1984.

Discovery followed. JS maintained in his answers to interrogatories that he did not recall the dates he resided at OKBR, but that he believed it was between 1989 and 1993. The State asserted in its answers that JS was never placed at OKBR. JS was deposed in October 2022 and testified at length about the details of the abuse he remembers happening at OKBR. However, he still could not recall the specific dates he resided there.

A. MOTION FOR SUMMARY JUDGMENT

Kiwanis moved for summary judgment. It argued that there was no genuine issue of material fact as to whether JS was placed at OKBR and that it was therefore entitled to dismissal as a matter of law because it owed him no duty. It argued it was entitled to dismissal "because there is no admissible evidence that he was ever at OKBR—other than his unsupported testimony." Clerk's Papers (CP) at 99. It drew the court's attention to discrepancies in JS's prior statements about when he believed he resided at OKBR.

JS argued in response that his testimony created a genuine issue of material fact precluding summary judgment. He emphasized that he had specific memories of being at OKBR notwithstanding that he could not remember exact dates. Both JS and Kiwanis submitted evidence including deposition transcripts, written discovery, and contemporaneous written records.

(1) JS's Deposition Testimony

Kiwanis submitted excerpts from JS's depositions taken in his separate lawsuit against Secret Harbor in February and April 2021. In those excerpts, JS testified he could not recall whether he resided at OKBR before or after residing at Secret Harbor. He described how he

remembered OKBR: he believed it was a two-story house on a hill and recalled that it was repainted at some time while he resided there. He also shared descriptive memories of the fighting at OKBR and recalled staff rewarding children for fighting with cigarettes and extra food.

Kiwanis and JS also submitted deposition excerpts from JS's deposition in this matter taken in October 2022. In that deposition, JS explained, "I cannot give you specific dates, but I do have specific memories of being at OK Boys Ranch." *Id.* at 193. He also testified, "I know that I've been there . . . 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." *Id.* at 148-49. He went on to testify, "I'm almost 50 years old, and I can't give you exact times and dates" but recalled, "I was only there maybe a couple of weeks, and then I ran away." *Id.* at 192, 206. He also described in detail the sexual abuse he remembers occurring at OKBR.

(2) Documentary Evidence

The parties submitted three letters from OKBR personnel to State personnel regarding OKBR's plans to accept JS as a resident. The first two letters were signed by Tom Van Woerden, the Director of OKBR. Van Woerden wrote that "we will be accepting [JS] into our agency for residential care at our next available opening in approximately two weeks." *Id.* at 230. Separately, he wrote that OKBR "will be accepting an 11 year old boy into care shortly" and identified JS by his birth date. *Id.* at 228. The third letter was from an OKBR caseworker to JS's State caseworker regarding "our request for funding of a 40-hour/week staff member for [JS]." *Id.* at 232. All three letters were written in August 1986.

The parties also submitted JS's discharge summary from a hospital indicating he was admitted on October 13, 1986, and discharged on December 1, 1986. This record states that JS was admitted to investigate "whether there is an underlying psychotic process." *Id.* at 234. It notes that JS "was to have been placed at [OKBR], but placement has been suspended due to question of psychosis." *Id.* at 235. It also provides, "If he is felt not to be psychotic, the [OKBR] has indicated they would consider him a candidate for placement." *Id.* at 234. Finally, it indicates that JS "[a]t no time" showed behavior suggesting "underlying psychotic process" during this evaluation. *Id.* at 237.

The discharge summary also describes a plan for JS's living situation: first, he was to be released to his State case manager, Bud O'Hair. Because no residential treatment placement was immediately available, he would stay temporarily at a crisis residential center and receive outpatient psychotherapy. The discharge plan indicates that a foster home could be considered "while awaiting residential placement." *Id.* at 238.

Finally, Kiwanis submitted JS's State placement record purporting to show his residences from June 1981 to November 1988. This handwritten document indicates that JS resided in crisis resource centers from July 23 to October 13, 1986. It shows that from October 13 to November 24, 1986, he was in the hospital. Then, from November 25 to 31, he was at a crisis resource center, and from December 1 to 18, he was in a foster home. After that, the record contains a gap from December 19 to 29, 1986.[3]

[3] The document also provides that he was at "CRC [and] on the run" from June 17, 1986 through July 12, 1987. CP at 161. However, the year 1986 appears to be a scrivener's error because immediately preceding this gap, he was placed at Deschutes Center from December 30, 1986 to June 16, 1987. Accounting for the scrivener's error, this creates another gap in placement from June 17 to July 12, 1987.

(3) Oral Argument

At oral argument, Kiwanis argued that its motion should be granted because "the only evidence that he was there is his own self-serving testimony that . . . is not corroborated by any documentation or any other people who would testify." Verbatim Rep. of Proc. at 7. It reiterated that JS's inability to stick to a consistent timeline made it unbelievable that he resided at OKBR at any time. It argued that to the extent JS remembered anything about the facility, those memories were incorrect, and that "it is certainly possible that he's thinking of a different facility." *Id.*

Furthermore, Kiwanis argued that there was "affirmative evidence" showing that JS was "never there." *Id.* It pointed to the hospital record, which according to Kiwanis showed that JS was never sent to OKBR because his placement there was "suspended due to psychosis." *Id.* at 10. Finally, it argued that JS's claims were a "waste of judicial resources and people's time and money." *Id.* at 13. The State, joining in the motion, argued that JS's sworn testimony was speculative and there was insufficient evidence to create a genuine issue of material fact.

JS argued that granting the motion would require the trial court to "improperly weigh the evidence and make a credibility determination" by discounting JS's testimony due to inconsistencies with his placement records. *Id.* at 15. He also pointed out that the placement history document was inaccurate in other ways so should not be taken as absolute truth.

(4) Outcome

The trial court granted summary judgment and dismissed the case. It considered the motion, response, and reply, as well as the declarations and exhibits attached.

JS now appeals.

DISCUSSION

I. SUMMARY JUDGMENT

JS argues that summary judgment was improper because it was his right to have a jury determine disputed factual issues and because his sole burden on summary judgment was to submit admissible evidence that created a disputed question of material fact. We agree.

A. LEGAL PRINCIPLES

We review summary judgment orders de novo. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018). We consider only the evidence and issues called to the trial court's attention. RAP 9.12.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). If reasonable minds can disagree on the facts controlling the outcome of the case, a genuine issue of material fact exists and summary judgment is inappropriate. *Reagan v. Newton*, 7 Wn. App. 2d 781, 789, 436 P.3d 411 (2019).

We view the evidence in the light most favorable to the nonmoving party and make all reasonable inferences in the nonmoving party's favor. *Martin*, 191 Wn.2d at 722. We take a nonmoving plaintiff's testimony as true, even if that testimony is self-serving. *Reagan*, 7 Wn. App. 2d at 806. Issues of fact may not be resolved on summary judgment unless, based on the evidence presented, reasonable minds can reach only one conclusion. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000).

B. APPLICATION

We conclude that the evidence presented by JS is sufficient to defeat summary judgment because reasonable minds could conclude that he resided at OKBR based on his testimony and the written records provided to the court. Whether JS resided at OKBR is a material fact relevant to the legal question of whether OKBR owed him a duty of care, and summary judgment is inappropriate in light of the conflicting evidence about this fact.

JS testified consistently in all his depositions that he remembers residing at OKBR. His testimony includes detailed descriptions of not only the events he remembers occurring at OKBR, but also its location and setting. Kiwanis argues that JS's testimony is insufficient to preclude summary judgment because it was speculative, conclusory, and contained argumentative assertions. But JS spoke directly about his time at OKBR; he did not argue legal conclusions or speculate about topics outside of his personal experience. And "we must treat the plaintiff's eyewitness testimony as true, even if it is self-serving." *Reagan*, 7 Wn. App. at 806. Because JS testified that he resided at OKBR, we must take that as true.

To 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. Importantly, the question of *when* JS resided at OKBR is distinct from the question of *whether* he resided there at all. JS's testimony about *when* he resided at OKBR includes inconsistencies, to be sure. But those inconsistencies are immaterial to the question of *whether* he resided there *at some time* in his youth. The legal question of whether Kiwanis owed a duty of care to JS does not turn on exactly when he was a resident, and the fact that he cannot recall exact dates does not make his testimony speculative.

Moreover, the documentary evidence does not contradict JS's testimony; indeed, it raises the reasonable inference that he *did* in fact reside at OKBR. Contemporaneous letters show that JS was accepted for placement at OKBR in August 1986. A few months later, his placement there was suspended while he was evaluated for psychosis. Kiwanis makes much of this suspension, but nothing in the record indicates the suspension was ever made permanent. The same record indicates OKBR still considered him a good candidate for placement if, after evaluation, he was found "not to be psychotic." CP at 178. He underwent evaluation and he "[a]t no time" showed behavior suggesting "underlying psychotic process." *Id.* at 237. Taken in the light most favorable to JS, we can infer that OKBR was willing to accept JS as a resident after his release from the hospital in December 1986, and that he moved into OKBR shortly thereafter.[4]

Finally, with respect to Kiwanis' policy arguments, it is not our role to weigh the judicial resources that will be spent hearing a case against its merits. We are bound by longstanding summary judgment jurisprudence not to decide factual issues at this stage unless reasonable minds can reach but one conclusion. *See Mortenson*, 140 Wn.2d at 579. Taking JS's facts as true, he has provided sufficient evidence to preclude summary judgment. We reverse.

ATTORNEY FEES

Kiwanis asserts that we should award fees on appeal under RAP 18.9 because JS's appeal is frivolous. We disagree and decline to award fees because JS has prevailed in this appeal.

[4] Kiwanis' evidence does not contradict this inference because shortly after JS was discharged, his placement record contains a gap from December 19 to 29, 1986.

CONCLUSION

We reverse the summary judgment order dismissing JS's claims and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

VELJACIC, J.

CHE, J.

Filed
Washington State
Court of Appeals
Division Two

April 9, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

G.M., an individual, Plaintiff below, J.S., an individual, Appellant, v. 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; Respondents, 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, government entities; COMMUNITY YOUTH SERVICES, a non-profit entity; OUR HOUSE, a non-profit entity, Defendants below.	No. 57814-0-II UNPUBLISHED OPINION

Cruser, C.J. — JS was a foster youth for many years and recalls being abused at three placements, including at the Olympia Kiwanis' Boys Ranch (OKBR). He sued Kiwanis[1] for the abuse that he alleges occurred there. JS maintained throughout discovery that he resided at OKBR at some time during his youth but could not remember exact dates. Kiwanis moved for summary judgment, arguing that JS failed to show that it owed him any duty of care because he never resided at OKBR. The trial court granted summary judgment and dismissed JS's claims with prejudice.

JS now appeals, arguing that his testimony creates a genuine issue of material fact as to whether he resided at OKBR. Kiwanis argues that JS's testimony does not defeat summary judgment because it is contradicted by documentary evidence and because he testified inconsistently regarding the time period he recalls residing at OKBR. We reverse the trial court.

FACTS

I. BACKGROUND

JS was born in 1974 and entered foster care shortly thereafter. During his childhood, he resided at several placements including foster homes, group homes, and crisis resource centers. He recalls being sexually abused in at least three of those placements: Luther Child Center, Secret Harbor, and OKBR. He does not, however, remember exact dates of these childhood events.

II. LITIGATION

JS sued Kiwanis for gross negligence due to the abuse he recalls being subjected to at OKBR. He also sued the State and individual State defendants.[2] At the time JS filed his complaint,

[1] JS sued OKBR, Kiwanis Club of Olympia, and Kiwanis International. For the sake of simplicity, we refer to the Kiwanis defendants jointly as Kiwanis.

[2] The State was dismissed from this appeal upon JS's and the State's joint motion.

he could not recall the dates he resided at OKBR but alleged that he believed he was 8 years old and was placed there between 1982 and 1984.

Discovery followed. JS maintained in his answers to interrogatories that he did not recall the dates he resided at OKBR, but that he believed it was between 1989 and 1993. The State asserted in its answers that JS was never placed at OKBR. JS was deposed in October 2022 and testified at length about the details of the abuse he remembers happening at OKBR. However, he still could not recall the specific dates he resided there.

A. MOTION FOR SUMMARY JUDGMENT

Kiwanis moved for summary judgment. It argued that there was no genuine issue of material fact as to whether JS was placed at OKBR and that it was therefore entitled to dismissal as a matter of law because it owed him no duty. It argued it was entitled to dismissal "because there is no admissible evidence that he was ever at OKBR—other than his unsupported testimony." Clerk's Papers (CP) at 99. It drew the court's attention to discrepancies in JS's prior statements about when he believed he resided at OKBR.

JS argued in response that his testimony created a genuine issue of material fact precluding summary judgment. He emphasized that he had specific memories of being at OKBR notwithstanding that he could not remember exact dates. Both JS and Kiwanis submitted evidence including deposition transcripts, written discovery, and contemporaneous written records.

(1) JS's Deposition Testimony

Kiwanis submitted excerpts from JS's depositions taken in his separate lawsuit against Secret Harbor in February and April 2021. In those excerpts, JS testified he could not recall whether he resided at OKBR before or after residing at Secret Harbor. He described how he

remembered OKBR: he believed it was a two-story house on a hill and recalled that it was repainted at some time while he resided there. He also shared descriptive memories of the fighting at OKBR and recalled staff rewarding children for fighting with cigarettes and extra food.

Kiwanis and JS also submitted deposition excerpts from JS's deposition in this matter taken in October 2022. In that deposition, JS explained, "I cannot give you specific dates, but I do have specific memories of being at OK Boys Ranch." *Id.* at 193. He also testified, "I know that I've been there . . . 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." *Id.* at 148-49. He went on to testify, "I'm almost 50 years old, and I can't give you exact times and dates" but recalled, "I was only there maybe a couple of weeks, and then I ran away." *Id.* at 192, 206. He also described in detail the sexual abuse he remembers occurring at OKBR.

(2) Documentary Evidence

The parties submitted three letters from OKBR personnel to State personnel regarding OKBR's plans to accept JS as a resident. The first two letters were signed by Tom Van Woerden, the Director of OKBR. Van Woerden wrote that "we will be accepting [JS] into our agency for residential care at our next available opening in approximately two weeks." *Id.* at 230. Separately, he wrote that OKBR "will be accepting an 11 year old boy into care shortly" and identified JS by his birth date. *Id.* at 228. The third letter was from an OKBR caseworker to JS's State caseworker regarding "our request for funding of a 40-hour/week staff member for [JS]." *Id.* at 232. All three letters were written in August 1986.

The parties also submitted JS's discharge summary from a hospital indicating he was admitted on October 13, 1986, and discharged on December 1, 1986. This record states that JS was admitted to investigate "whether there is an underlying psychotic process." *Id.* at 234. It notes that JS "was to have been placed at [OKBR], but placement has been suspended due to question of psychosis." *Id.* at 235. It also provides, "If he is felt not to be psychotic, the [OKBR] has indicated they would consider him a candidate for placement." *Id.* at 234. Finally, it indicates that JS "[a]t no time" showed behavior suggesting "underlying psychotic process" during this evaluation. *Id.* at 237.

The discharge summary also describes a plan for JS's living situation: first, he was to be released to his State case manager, Bud O'Hair. Because no residential treatment placement was immediately available, he would stay temporarily at a crisis residential center and receive outpatient psychotherapy. The discharge plan indicates that a foster home could be considered "while awaiting residential placement." *Id.* at 238.

Finally, Kiwanis submitted JS's State placement record purporting to show his residences from June 1981 to November 1988. This handwritten document indicates that JS resided in crisis resource centers from July 23 to October 13, 1986. It shows that from October 13 to November 24, 1986, he was in the hospital. Then, from November 25 to 31, he was at a crisis resource center, and from December 1 to 18, he was in a foster home. After that, the record contains a gap from December 19 to 29, 1986.[3]

[3] The document also provides that he was at "CRC [and] on the run" from June 17, 1986 through July 12, 1987. CP at 161. However, the year 1986 appears to be a scrivener's error because immediately preceding this gap, he was placed at Deschutes Center from December 30, 1986 to June 16, 1987. Accounting for the scrivener's error, this creates another gap in placement from June 17 to July 12, 1987.

(3) Oral Argument

At oral argument, Kiwanis argued that its motion should be granted because "the only evidence that he was there is his own self-serving testimony that . . . is not corroborated by any documentation or any other people who would testify." Verbatim Rep. of Proc. at 7. It reiterated that JS's inability to stick to a consistent timeline made it unbelievable that he resided at OKBR at any time. It argued that to the extent JS remembered anything about the facility, those memories were incorrect, and that "it is certainly possible that he's thinking of a different facility." *Id.*

Furthermore, Kiwanis argued that there was "affirmative evidence" showing that JS was "never there." *Id.* It pointed to the hospital record, which according to Kiwanis showed that JS was never sent to OKBR because his placement there was "suspended due to psychosis." *Id.* at 10. Finally, it argued that JS's claims were a "waste of judicial resources and people's time and money." *Id.* at 13. The State, joining in the motion, argued that JS's sworn testimony was speculative and there was insufficient evidence to create a genuine issue of material fact.

JS argued that granting the motion would require the trial court to "improperly weigh the evidence and make a credibility determination" by discounting JS's testimony due to inconsistencies with his placement records. *Id.* at 15. He also pointed out that the placement history document was inaccurate in other ways so should not be taken as absolute truth.

(4) Outcome

The trial court granted summary judgment and dismissed the case. It considered the motion, response, and reply, as well as the declarations and exhibits attached.

JS now appeals.

DISCUSSION

I. SUMMARY JUDGMENT

JS argues that summary judgment was improper because it was his right to have a jury determine disputed factual issues and because his sole burden on summary judgment was to submit admissible evidence that created a disputed question of material fact. We agree.

A. LEGAL PRINCIPLES

We review summary judgment orders de novo. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018). We consider only the evidence and issues called to the trial court's attention. RAP 9.12.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). If reasonable minds can disagree on the facts controlling the outcome of the case, a genuine issue of material fact exists and summary judgment is inappropriate. *Reagan v. Newton*, 7 Wn. App. 2d 781, 789, 436 P.3d 411 (2019).

We view the evidence in the light most favorable to the nonmoving party and make all reasonable inferences in the nonmoving party's favor. *Martin*, 191 Wn.2d at 722. We take a nonmoving plaintiff's testimony as true, even if that testimony is self-serving. *Reagan*, 7 Wn. App. 2d at 806. Issues of fact may not be resolved on summary judgment unless, based on the evidence presented, reasonable minds can reach only one conclusion. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000).

B. APPLICATION

We conclude that the evidence presented by JS is sufficient to defeat summary judgment because reasonable minds could conclude that he resided at OKBR based on his testimony and the written records provided to the court. Whether JS resided at OKBR is a material fact relevant to the legal question of whether OKBR owed him a duty of care, and summary judgment is inappropriate in light of the conflicting evidence about this fact.

JS testified consistently in all his depositions that he remembers residing at OKBR. His testimony includes detailed descriptions of not only the events he remembers occurring at OKBR, but also its location and setting. Kiwanis argues that JS's testimony is insufficient to preclude summary judgment because it was speculative, conclusory, and contained argumentative assertions. But JS spoke directly about his time at OKBR; he did not argue legal conclusions or speculate about topics outside of his personal experience. And "we must treat the plaintiff's eyewitness testimony as true, even if it is self-serving." *Reagan*, 7 Wn. App. at 806. Because JS testified that he resided at OKBR, we must take that as true.

To 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. Importantly, the question of *when* JS resided at OKBR is distinct from the question of *whether* he resided there at all. JS's testimony about *when* he resided at OKBR includes inconsistencies, to be sure. But those inconsistencies are immaterial to the question of *whether* he resided there *at some time* in his youth. The legal question of whether Kiwanis owed a duty of care to JS does not turn on exactly when he was a resident, and the fact that he cannot recall exact dates does not make his testimony speculative.

Moreover, the documentary evidence does not contradict JS's testimony; indeed, it raises the reasonable inference that he *did* in fact reside at OKBR. Contemporaneous letters show that JS was accepted for placement at OKBR in August 1986. A few months later, his placement there was suspended while he was evaluated for psychosis. Kiwanis makes much of this suspension, but nothing in the record indicates the suspension was ever made permanent. The same record indicates OKBR still considered him a good candidate for placement if, after evaluation, he was found "not to be psychotic." CP at 178. He underwent evaluation and he "[a]t no time" showed behavior suggesting "underlying psychotic process." *Id.* at 237. Taken in the light most favorable to JS, we can infer that OKBR was willing to accept JS as a resident after his release from the hospital in December 1986, and that he moved into OKBR shortly thereafter.[4]

Finally, with respect to Kiwanis' policy arguments, it is not our role to weigh the judicial resources that will be spent hearing a case against its merits. We are bound by longstanding summary judgment jurisprudence not to decide factual issues at this stage unless reasonable minds can reach but one conclusion. *See Mortenson*, 140 Wn.2d at 579. Taking JS's facts as true, he has provided sufficient evidence to preclude summary judgment. We reverse.

ATTORNEY FEES

Kiwanis asserts that we should award fees on appeal under RAP 18.9 because JS's appeal is frivolous. We disagree and decline to award fees because JS has prevailed in this appeal.

[4] Kiwanis' evidence does not contradict this inference because shortly after JS was discharged, his placement record contains a gap from December 19 to 29, 1986.

CONCLUSION

We reverse the summary judgment order dismissing JS's claims and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

VELJACIC, J.

CHE, J.

FILED
Court of Appeals
Division II
State of Washington
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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 MOTION TO PUBLISH

Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832
Kevin M. Hastings, WSBA No. 42316
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PFAU COCHRAN
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ATTORNEYS AT LAW

I. Identity of Moving Parties

Appellant J.S. moves under RAP 12.3(e) for publication of the Court's opinion in this case. Appellants' counsel as well as other current and former parties to this case, including the State of Washington, are regularly involved in tort lawsuits arising from decades-old sexual abuse at group homes. As the record in this case and others demonstrates, the State has destroyed or lost decades worth of placement records or maintained incomplete or inaccurate records. As a result, multiple trial courts continue to face the same issue resolved by this Court: whether a plaintiff's sworn testimony that they resided at a particular group home creates a question of fact on that issue and, thus, whether the facility's operator owed them protective duties.

Publication of this opinion will provide valuable guidance to trial judges dealing with this recurring issue and will ensure consistency in the application of the rule of

law in these types of cases. Such guidance will be beneficial not only in matters involving the parties but also in matters relating to other entities' failure to protect children from sexual abuse decades ago.

II. Statement of Relief Sought

Appellant asks the Court to publish its unanimous decision in *J.S. v. Olympia Kiwanis Boys Ranch*, et. al, No. 57814-0-II (Apr. 9, 2024). **Appendix 1-10**.

III. GROUNDS FOR RELIEF AND ARGUMENT

The Court's opinion should be published because it is of general public importance to recurring issues facing trial courts. Victims of sexual abuse have the right to sue institutions or entities that had a duty to protect them and failed to do so. *See H.B.H. v. State*, 192 Wn.2d 154, 1580, 429 P.3d 484 (2018); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 721, 985 P.2d 262 (1999).

In turn, Washington's statute of limitations for childhood sexual abuse, RCW 4.16.340, authorizes

plaintiffs in many cases to sue for sexual abuse that occurred many decades ago. *See*, e.g., *C.J.C.*, 138 Wn.2d at 705, 713-14 (statute applied to claims arising from sexual abuse occurring as early as 1970). A 2020 report by the State of Washington has concluded that the statute of limitations for such claims is "[e]ffectively [u]nlimited." **Appendix 26**; **28-29** (noting claims arising from sexual abuse occurring from the 1950s to the 1990s asserted between 2015 and 2020).

The State of Washington, through a designated CR 30(b)(6) representative, has testified in other litigation that, prior to 2010, it retained records regarding services provided to foster children and licensed group homes only six years after closure of the child's foster care file or the facility. **Appendix 99; 101;** *see also* CP 165. Additionally, all records prior to 1990 existed only in hard copy format. **Appendix 101**. When the State created document destruction logs, it only retained them for up to two years.

Appendix 100, 102. Even when policies should have led to the preservation of records, the State has failed to locate them, presumably having lost or destroyed them. **Appendix 102.** And even when some records may exist, as the Court's opinion in this case observed, they may be fragmentary or inaccurate. **Appendix 5, n. 3.**

The end result is that plaintiffs are deprived both of records corroborating their testimony as well as any evidence that such records ever existed. **Appendix 100**; **102-103**; *see also id.* **28** (noting that in "old cases" such as those involving "the Kiwanis' OK Boys Ranch facility," "[d]ocuments have been destroyed pursuant to state retention schedules" and "[i]n some cases, the only evidence of the alleged abuse is the plaintiff's own testimony.").[1]

[1] That such documentary evidence may also be unavailable to defendants should not concern the Court. RCW 4.16.340's 1991 amendments expressly overruled earlier cases applying a strict limitations period to

Additionally, in 2010 the State began digitization efforts for paper records that had not already been

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childhood sexual abuse claims, including *Tyson v. Tyson*. LAWS OF 1991, ch. 212 § 1 ("It is still the legislature's intention that *Tyson v. Tyson*, 107 Wn.2d 72, 80 (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."). *Tyson* had justified applying a strict limitations period to childhood sexual abuse claims based on policy concerns regarding potential loss of evidence and potential difficulty in defending such claims. 107 Wn.2d at 80 ("A person would have an unlimited time to bring an action, while the facts became increasingly difficult to determine. The potential for spurious claims would be great and the probability of the court's determining the truth would be unreasonably low.").

In overruling *Tyson*, the legislature chose a different policy of allowing childhood sexual abuse claims to proceed even where the passage of time may have affected the availability of evidence. As the Court's opinion in this case correctly noted, such policy decisions are not for courts. **Appendix 9;** *see also Miller v. Washington State Dep't of Revenue*, 27 Wn. App. 2d 415, 439, 532 P.3d 187 (2023). (where the legislature has "clearly acted," "it is the legislature that must act to change course").

Finally, Appellant notes that subsequent legislative history demonstrates the legislature has reiterated that policy decision. In 2024, it passed legislation completely abolishing the statute of limitations for claims based on childhood sexual abuse occurring on or after June 6, 2024. LAWS OF 2024, ch. 253, § 1.

destroyed. **Appendix 101-102.** However, those efforts have been inconsistent. For example, a State CR 30(b)(6) representative testified that it either lost or destroyed placement records that it should have retained and digitized, depriving the plaintiffs in that case of such evidence. **Appendix 102.**

As a result, survivors of childhood sexual abuse often are left with nothing but their own recollections and sworn testimony to support that they were within the care of certain entities or facilities that failed to protect them from abuse. **APPENDIX 28; 102-103.**

As a result, such plaintiffs regularly face the same argument rejected by this Court's opinion: that their sworn testimony, without records or other evidence affirmatively supporting it, is insufficient to create a question of fact regarding whether they were within the care of the entities or facilities at issue because it is "conclusory," "speculative," or "self-serving." **Appendix 105-107, 111;**

117-118. Defendants' reliance on those out-of-context labels has so vexed some trial courts that they, like the trial court here, granted summary judgment only to deny it on reconsideration. **Appendix 115-116**. And authoritative appellate resolution of the issue has been of such importance to the State that it has sought RAP 2.3(b)(4) certification of it. **Appendix 129, 138-139**

The Court's opinion is of general public importance because it clarifies the application of Washington's summary judgment rules and precedent to such cases. It provides valuable, binding[2] guidance to trial courts,

[2] One of the cases included in the appendix illustrates the benefits of a binding, published opinion. In an another unpublished opinion, this Court held that the doctrine of laches is inapplicable to claims asserted under the childhood sexual abuse statute of limitations. *K.C. v. State*, 10 Wn. App. 2d 1038, 2019 WL 4942457, at *9 (Div. Two Oct. 8, 2019). Yet the State of Washington subsequently argued on summary judgment that laches applies to bar such claims. **Appendix 107, 111-114.** In fact, the same attorney for the State asserted the argument both times. *K.C.*, 2019 WL 4942457, at *1;

plaintiffs, and defendants regarding the recurring issue of whether a triable issue of fact exists regarding a child's placement and, thus, whether duties were owed to them. More broadly, it provides guidance to all trial courts addressing claims arising under RCW 4.16.340 and the sufficiency of evidence required to create triable issues of fact regarding events that occurred decades ago.

IV. CONCLUSION

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

Appendix 107 n. 2.

Technically, no rule foreclosed such conduct. Unpublished opinions are, of course, persuasive only and not binding. GR 14.1. But this example illustrates that an unpublished opinion will not deter parties and counsel from reiterating arguments already squarely rejected by the Court of Appeals in indistinguishable cases. A published opinion best serves judicial economy and consistent results at the trial court and appellate levels by providing binding authority on recurring issues and fact patterns.

Dated and signed under penalty of perjury: April 15, 2024.

The undersigned certifies that this motion consists of 1,389 words in compliance with RAP 18.17(b) and .17(c).

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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 15, 2024, I delivered via ECF a true and correct copy of the above document, directed to:

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DATED this 15th day of April 2024.

/s/ Sarah Awes
Sarah Awes
Legal Assistant

Filed
Washington State
Court of Appeals
Division Two

May 21, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

G.M., an individual, Plaintiff below, J.S., an individual, Appellant, v. 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; Respondents, 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, government entities; COMMUNITY YOUTH SERVICES, a non-profit entity; OUR HOUSE, a non-profit entity, Defendants below.	No. 57814-0-II ORDER GRANTING MOTION TO PUBLISH

Appellant, JS, filed a motion to publish the Court's unpublished opinion filed in this matter on April 9, 2024. After consideration, the court grants the motion. It is now

ORDERED that the opinion will be published.

PANEL: Jj. Cruser, Veljacic, Che

FOR THE COURT:

CRUSER, C.J.

DECLARATION OF SERVICE

On said day below I electronically served via the appellate portal and email a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 57814-0-II to the following parties:

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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: June 17, 2024 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

June 17, 2024 - 9:48 AM

Transmittal Information

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Petition for Review

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