INTRODUCTION

Plaintiff Estate of Aaron Munoz ("Munoz") filed a complaint alleging the following claims: (1) Negligence against defendant Oregon Youth Authority (hereinafter "OYA"); (2) Negligence *Per Se* against defendants Lawhead, Jones, and John Does 1-3 through defendant OYA; (3) Wrongful Death against defendant Oregon Youth Authority; (4) Civil Rights Violation under 42 U.S.C. § 1983 for Deliberate Indifference to a Known Risk of Sexual Abuse against defendants Lawhead, Jones, and John Does 1-3; (5) Civil Rights Violation under 42 U.S.C. § 1983 for Danger Creation against defendants Lawhead, Jones, and John Does 1-3; and (6) Civil Rights Violation under 42 U.S.C. § 1983 for Action of Final Decisionmaker and Policy or Custom of Ignoring Reports against defendants Lawhead and John Doe 1.

The State Defendants (OYA, Lawhead, Jones, and John Does 1-3) have moved for summary judgment against all of Plaintiff's claims on the grounds that they are barred by the applicable statutes of limitation and that there is no admissible evidence with which to prove them. For the reasons set forth herein, and based on evidence being simultaneously filed by Estate of Munoz and other plaintiffs, the State Defendants' motion must be denied.

LEGAL STANDARD

Summary judgment shall only be granted "if 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 matter of law." FRCP 56(c). The party moving for summary judgment bears the initial burden of proving the absence of any issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256,

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106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Only when the moving party has made this showing does the burden shift to the non-moving party to produce admissible evidence sufficient to show the existence of a triable issue of fact. *Id*. at 256-57.

SUMMARY OF RELEVANT FACTS

A. Relevant Facts Regarding Munoz

Aaron Munoz ("Munoz") was born July 9, 1983. He was placed in the legal custody of the Oregon Youth Authority ("OYA") on or about November 25, 1996, and remained in OYA's legal custody until on or about May 6, 2003.

Michael Boyles was Munoz's OYA parole and probation officer from September 1996 – November 2002. Munoz was placed in a state-certified foster home operated by James Lyman during the period November 2, 1998 – January 15, 1999. Munoz was sexually abused by Boyles while Boyles was purportedly doing OYA business, and by Lyman when Lyman was serving as Munoz's foster parent.

Munoz put the abuse by Boyles out of his mind, telling no one about it, until he was contacted by Oregon State Police Detective Scott Sudaisar in 2004.

After his first two interviews with Detective Sudaisar, Munoz testified before the Multnomah County Grand Jury as to his abuse by Boyles and Lyman, and indictments were thereafter returned against Boyles and Lyman based solely on Munoz's testimony. Boyles and Lyman were subsequently reindicted at least once each, and on each occasion, charges arising from their abuse of Munoz were returned by the Grand Jury based solely on Munoz's testimony.

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In August 2004, Munoz wrote a letter to his attorney describing his abuse which was later read in part at Lyman's sentencing hearing by the prosecutor.

Aaron Munoz hung himself in a cell at the Oregon State Penitentiary on January 28, 2005, a week before his scheduled release, and prior to the trials of Lyman and Boyles. The charges against Lyman, Boyles, and others arising from their sexual abuse of Munoz were thereafter dismissed.

B. Relevant Facts Regarding State Defendants

Michael Boyles became a juvenile probation officer assigned to Multnomah County in December 1993. His supervisor until mid-1997 was John Powell, and from the fall of 1997 until 2003, was Floyd "Joe" Mesteth.

In April of 1995, Margaret Holland, the grandmother and court-appointed legal guardian of Daniel J. Brink, a boy in the custody of Children's Services Division (the predecessor agency to OYA), wrote to various CSD officials to complain about Michael Boyles' interaction with Daniel. In her letters, Mrs. Holland wrote that Daniel's probation officer, Michael Boyles, had taken Daniel to Boyles' personal residence, had touched Daniel inappropriately, and had attempted to limit contact between her and Daniel. She further wrote that Daniel was exhibiting signs that he had been sexually abused, and asked that he be evaluated. Finally, she asked that Boyles be removed as Daniel's probation officer. None of Margaret Holland's letters to CSD officials appear in CSD or OYA files, including Daniel Brink's file. Although one of the addressees, Gary Lawhead, promised to remove Boyles as Daniel's probation officer if Daniel and his attorney did not object, Boyles remained Daniel's probation officer until November of 1996. Daniel is a

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plaintiff in these consolidated cases, alleging he was sexually abused by Michael Boyles while Boyles was his probation officer between 1994 and 1996.

In 1998, Kelly Mills, the aunt and guardian of Aaron Munoz, a boy in the custody of the Oregon Youth Authority whose assigned probation officer was Michael Boyles, complained by phone to Boyles' supervisor, Joe Mesteth, that Munoz had spent the night with Boyles at Boyles' personal residence and that she believed Boyles was too enmeshed in Munoz's life. Mills further complained to Mesteth several times over the five-year period during which Boyles was Munoz's probation officer that Boyles would not allow her to have contact with Munoz. None of these complaints appear in either Munoz's OYA file or Boyles' personnel file, and the State defendants deny they were ever made.

Also in 1998, Mesteth received a complaint from Fereydoun Ejtehadi, a juvenile parole and probation officer in Clackamas County assigned to supervise J.D., a former probationer on Boyles' caseload. Ejtehadi's complaint was that the director of a program in which J.D. was participating had expressed confusion as to who J.D.'s probation officer was since Boyles was acting as though he was. J.D. had been removed from Boyles' caseload because Mesteth believed he was too enmeshed with J.D., although this information appears nowhere in either J.D.'s file or Boyles' personnel file. As a result of the documented complaint by Ejtehadi, Boyles received a written "letter of instruction" concerning his involvement with J.D., and was ordered to have no contact with J.D. or his family.

In 2001, Mesteth received a report from a juvenile court counselor that J.D. was staying with Boyles. Around the same time, another Multnomah County juvenile parole and probation

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supervisor, Havan Jones, received a similar report from J.D.'s younger brother, who was seeking permission to go visit his brother at Boyles' residence. By this time, J.D. was 18 years old. Neither Mesteth nor Jones documented this report until 2003, after Boyles was under investigation for sexually abusing a number of his probationers.

In November 2002, Boyles' behavior with J.D. was reported to a state senator during a meeting with some foster parents and the OYA director. Boyles was thereafter placed on administrative leave pending an investigation. During the brief investigation, John Powell told investigators that he had had recurring concerns regarding boundary issues that Mr. Boyles had with probationers. Powell provided an example of a juvenile on his caseload named D.G. with whom Boyles spent considerable time to the exclusion of other children on his caseload.

In April 2003 following a brief investigation by the Oregon State Police, Boyles was reinstated to his position but was assigned to administrative duties. Boyles was again placed on administrative leave in November 2003 when allegations of sexual abuse against one of his probationers resurfaced. He was arrested in February of 2004 on numerous felony sex offenses arising from his sexual abuse of minor probationers. OYA fired him in March 2004. He was convicted following a four-week jury trial in July 2005 of more than 20 counts arising from his sexual abuse of 4 probationers (including J.D., D.H.M., and Jeremy Duncan, all plaintiffs in this consolidated case) plus 40 additional related counts consisting of charges of Delivery of Marijuana to a Minor, Tampering with a Witness, and Official Misconduct. He was subsequently sentenced to more than 60 years imprisonment.

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At all times relevant, all employees of Children's Services Division ("CSD") and the Oregon Youth Authority ("OYA") were mandatory reporters of child abuse, which included not only physical and sexual contact, but also threatened harm to a child and mental cruelty. ORS 419B.005, 419B.010. Various policies were also in place for CSD and OYA employees relating to CSD and OYA employees' relationships with minors in their custody, including a policy governing "Relationships with Youth" that was effective as-of November 14, 1996. The "Relationship With Youths" policy included a section entitled "Supervisor's responsibility," which set forth a supervisor's obligations when learning of a relationship between an employee and a youth, and included a requirement that the supervisor "give direction in writing to the employee, with a copy placed in both the youth's file and employee's file."

ARGUMENT

I. Summary of Arguments

A. Statute of Limitations

Plaintiff agrees with the State Defendants that the Oregon Tort Claim Act's two-year statute of limitations, ORS 30.275(9), applies to its common law claims against the State Defendants inasmuch as the acts upon which the claims are based were within the scope of the State Defendants' employment.[1] Plaintiff's disagreement with the State Defendants comes from

[1] To the extent that the acts were outside the scope of employment, the applicable statute of limitations is ORS 12.117. As Plaintiff has previously noted, Plaintiff intends to amend its complaint further upon the completion of discovery to better frame its claims. *See Plaintiffs Estate of Aaron Munoz's and M.D.'s Response to State's "Stipulated Motion to Substitute the State of Oregon for Named Defendants"* (Docket No. 72). The State Defendants do not move for summary judgment for acts alleged that were not within the scope of their employment, and Plaintiff does not therefore brief it here.

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the latter's arguments that the "discovery rule" has no application to ORS 30.275(9) in the circumstances of his case, and their assertion that no other tolling provisions apply. Plaintiff also submits that the State Defendants are equitably estopped from asserting the statute of limitations due to their wrongful conduct.

Plaintiff also agrees with the State Defendants that ORS 12.110(1) is the applicable statute of limitations for its civil rights claims; that federal law governs when a claim accrues under 42 U.S.C. § 1983; and that state tolling rules apply, and therefore Plaintiff's claims are barred by ORS 12.110(1). Plaintiff diverges from State Defendants where they argue that no accrual or tolling rules apply, because Plaintiff submits that the application of discovery, equitable tolling, and equitable estoppel principles make Plaintiff's civil rights claims timely.

B. Admissibility of Evidence to Support Claims

State Defendants assert that none of Munoz's statements are admissible in evidence, and therefore, as a matter of law, Plaintiff is unable to sustain its burden of presenting evidence sufficient to create disputed material fact on the question of whether Munoz was sexually abused.

As a preliminary matter, State Defendants apparently forget that it is their burden, not Plaintiff's, to make a preliminary showing, and they have not done so.

Even if State Defendants have met their initial burden, Plaintiff submits that Munoz's statements to Detective Sudaisar, the Multnomah County Grand Jury, and a prior attorney are admissible because the State has previously manifest an adoption of their belief in the truth of the statements, and they are therefore admissible as admissions by a party-opponent pursuant to FRE 801(d)(2)(B).

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II. Plaintiff's Common-Law Claims Are Not Barred by the Oregon Tort Claims Act's Statute of Limitations, ORS 30.275(9).

A. Overview of Relevant Provisions of the Oregon Tort Claims Act

Since its effective date on July 1, 1968, the Oregon Tort Claims Act ("OTCA") has permitted lawsuits against public bodies, including the State of Oregon, "for its torts and those of its officers, employees and agents acting within the scope of their employment or duties. . ." ORS 30.265(1).

The OTCA has its own statute of limitations which applies in lieu of any other statute of limitations for claims within the scope of the OTCA. OTCA's statute of limitations states:

> Except as provided in ORS 12.120, 12.135, and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

ORS 30.275(9). The exceptions (ORS 12.120, 12.135, and 659A.875) are inapplicable to this case. The acts and omissions referred to in ORS 30.275(9) are those committed or omitted within the scope of employment.

B. The "Discovery Rule" Applies to Claims Brought Under the OTCA and to the Facts of Plaintiff's Common Law Claims.

Although the sexual abuse which underlies Plaintiff's claims occurred between 1996 and 2002 and his complaint was not filed until November 2005,[2] Plaintiff's lawsuit was brought within

[2] Plaintiff's claims, as personal representative, are viable only if Munoz's claims were viable at the time of his death:

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two years of Munoz's discovery of his cause of action against the State Defendants and is therefore timely. This is because the OTCA's statute of limitations, as interpreted and applied by Oregon's appellate courts for the past 26 years, includes a discovery rule. The discovery rule permits a claim to be filed within two years of the discovery of the cause of action, thereby delaying its accrual and tolling the operation of the statute of limitations until the time of discovery. The State Defendants assertion that the discovery rule is a "side issue" to the issue of the accrual of a cause of action evidences a fundamental misunderstanding of the operation of Oregon's discovery rule. "In general terms, a cause of action does not accrue under the discovery rule until the claim has been discovered or, in the exercise of reasonable care, should have been discovered." *FDIC v. Smith*, 328 Or 420, 428, 980 P.2d 141 (1999).

The statute of limitations for Plaintiff's claims began to run when its causes of action accrued. "A cause of action accrues when the party owning it has a right to sue on it." *Duyck v. Tualatin Valley Irrigation Dist.*, 304 Or 151, 161, 742 P.2d 1176 (1987). This is because a cause of action "consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment." *Duyck v. Tualatin Valley Irrigation Dist.*, *supra* at 161, quoting *U.S. National Bank v. Davies*, 274 Or 663, 666-67, 548 P.2d 966 (1976); *c.f.*

> Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, shall not abate upon the death of the injured person, and the personal representatives of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. . . .

ORS 30.075(1).

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Schiele v. Hobart Corp., 284 Or 483, 490, 587 F.2d 1010 (1978) (cause of action for negligence in occupational disease claim accrues "when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.").

The State Defendants argue that the discovery rule, even if it applies to claims covered by ORS 30.275(9), does not save Plaintiff's claims because Munoz's claims accrued at the time of the abuse and no tolling provision applies to extend the OTCA's statute of limitations. State Defendants ignore the Oregon Supreme Court's unequivocal statement in *Stephens v. Bohlman*, 314 Or 344, 350, 838 P.2d 600 (1992), that "the discovery rule applies to the Tort Claims Act..." (emphasis added). *See also Benson v. State of Oregon*, 196 Or App 211, 100 P.3d 1077 (2004) (noting same).

The two cases cited by the Court in *Stephens v. Bohlman* in support of its reaffirmation that the discovery rule applies to the OTCA were *Dowers Farms v. Lake County*, 288 Or 669, 607 P.2d 1361 (1980), and *Adams v. Oregon State Police*, 289 Or 233, 239, 611 P.2d 1153 (1980). Both *Dowers Farms* and *Adams* were negligence actions. In *Dowers Farms*, the Court analyzed whether the discovery rule applied to the OTCA statute of limitations as then written, which required an action to be commenced within "two years after the date of [the] accident or occurrence." 288 Or at 673. Referring to prior cases establishing a discovery rule, including *Berry v. Branner*, 245 Or 307, 421 P.2d 996 (1966), the court wrote:

> The logic of those cases requiring injury and a reasonable opportunity for discovery of the cause of the injury before the statute of limitations begins to run is equally applicable to the two

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> year limitation period in ORS 30.275(3)[3]. To hold otherwise would impose an unreasonably narrow construction on the limitation period of the Tort Claims Act that would contravene both the policy of our case law on limitations periods and the legislative policy in Oregon allowing citizens to seek redress for torts committed by their governments.

Dowers Farms, 288 Or at 681.

After concluding that the OTCA ‘’was intended to be remedial legislation, allowing all citizens to seek redress for any tort committed by their governments, except for the specific immunities listed in the statutes, . . .” *Id.* at 680, the Court held:

> There is no legislative history to tell us that the legislature intended the courts to apply different rules with respect to fixing the point in time when the limitation period commences to run in causes of action for damages for negligence under the Tort Claims Act than in such causes outside the Act.

Id.

The second case cited by the *Stephens* Court, *Adams v. Oregon State Police*, 289 Or 233, 611 P.2d 1153 (1980), applied the same analysis to the “loss or injury” language in OTCA’s notice requirement, holding that “the 180 day [OTCA notice] period and the period of limitations do[] not commence to run until Munoz has a reasonable opportunity to discover his injury and the identity of the party responsible for that injury.” *Adams v. Oregon State Police*, 289 Or at 239.

In reaffirming the holdings of *Dowers Farms* and *Adams,* the Court in *Stephens v. Bohlman* distinguished its prior holding in *Eldridge v. Eastmoreland General Hospital,* 307 Or 500, 769 P.2d 775 (1989). In *Eldridge*, the Court decided that the discovery rule did not apply to the statute of limitations for wrongful death under ORS 30.020(1). The difference between the

[3] ORS 30.275(3) has since been renumbered more than once, and is presently ORS 30.275(9).

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case before it and the *Eldridge* case, said the *Stephens* Court, was that the legislative history of ORS 30.020(1) made it clear that the discovery rule would not apply to that statute, while there was no such history for the OTCA's statute of limitations, ORS 30.275.[4]

The Court of Appeals reaffirmed *Adams* in 2004:

> The 180-day period does not begin to run until the Munoz knows or, in the exercise of reasonable care should know, facts that would make an objectively reasonable person aware of a substantial possibility that all three of the following elements exist: an injury occurred, the injury harmed one or more of the Munoz's legally protected interests, and the defendant is the responsible party. *Gaston v. Parsons,* 318 Or 247, 256, 864 P2d 1319 (1994); *Adams v. Oregon State Police,* 289 Or 233, 239, 611 P2d 1153 (1980). If the Munoz's actual or imputed knowledge falls short of the quantum necessary to establish one of the elements but that knowledge should trigger a duty to pursue a further inquiry, then the relevant date for starting the statutory period is not when the Munoz learns the necessary facts but when the inquiry that those facts should trigger would disclose the existence of the element. *Greene v. Legacy Emanuel Hospital,* 335 Or 115, 123, 60 P3d 535 (2002).

Benson v. State of Oregon, 196 Or App 211, 215, 100 P.3d 1077 (2004).

Plaintiff and the State Defendants do agree that if the discovery rule applies to the OTCA, it is defined by *Gaston v. Parsons*:

> "[T]he statute of limitations begins to run when the Munoz knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements (harm, causation, and tortious conduct) exists.

[4] The *Stephens* court also noted that when it interpreted a statute, "that interpretation becomes a part of the statute as if written into it at the time of its enactment." 314 Or at 350, n. 6 (citing *Walther v. SAIF*, 312 Or 147, 149, 817 P.2d 292 (1991)).

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Gaston v. Parsons, 318 Or at 256. However, the State Defendants argue that Plaintiff's negligence claims against them accrued at the time of the sexual contact by Boyles because a reasonable person would know that Boyles' sexual contact caused harm, and a reasonable person would infer by virtue of Boyles' employment with the OYA that the OYA and its supervisory employees were responsible for Boyles' conduct. As the Court in *Stephens v. Bohlman* noted, "Some persons might so infer, but we are not convinced that a reasonable person *must* so infer." *Stephens v. Bohlman*, 314 Or at 351 (reversing a trial court's grant of summary judgment on the grounds that there was a genuine issue of material fact as to whether the plaintiff should reasonably have discovered her cause of action sooner).

Where, as here, the allegations of sexual abuse which bring the claims against the State of Oregon within the parameters of the OTCA are not the sexual batteries themselves, but rather the negligent acts committed by state actors within the scope of their employment which resulted in the sexual batteries, the statute of limitations begins to run from the date Munoz discovered, or in the exercise of reasonable care should have discovered, that the injurious acts committed by the State Defendants within the scope of their employment were tortious. *Doe v. American Red Cross,* 322 Or 502, 513, 910 P.2d 364 (1996); *accord Adams v. Oregon State Police*, 289 Or at 239 (OTCA's notice and limitations periods do not begin to run "until plaintiff has a reasonable opportunity to discover his injury and the identity of the party responsible for that injury."); *Schiele v. Hobart Corporation*, 284 Or 483, 587 P.2d 1010 (1978) (statute of limitations begins to run when a reasonably prudent person perceives the role which the defendant has played in the plaintiff's injury); *c.f. U.S. Nat'l Bank v. Davies*, 274 Or 663, 548 P.2d 966 (1976) (statute of

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limitations tolled to such time as it appeared probable that plaintiff's "damage actually suffered" was caused by defendant); *Peterson v. Mult. Co. Sch. Dist. No. 1*, 64 Or App 81, 668 P.2d 385, *rev den* 295 Or 773 (1983) (cause of action did not accrue until plaintiff discovered the tortfeasor's negligent failure to require certain safety measures); and *Shaughnessy v. Spray*, 55 Or App 42, 637 P.2d 182 (1981), *rev den* 292 Or 589 (1982) (cause of action did not accrue until plaintiff discovered the defendant drug manufacturer's causal involvement).

The most helpful Oregon case in understanding the application of the discovery rule to Plaintiff's negligence claims against the State Defendants is *Doe v. American Red Cross, supra*, which analyzed whether summary judgment was properly granted in favor of defendants on their claim that plaintiff's claim was barred by ORS 12.110(1) when she knew more than two years prior to filing the complaint that her deceased husband was HIV-positive as a result of conduct of the Red Cross, but asserted she did not know whether the Red Cross's conduct was tortious. The State Defendants also cite to *Doe v. American Red Cross* in their memorandum, but suggest that its relevance to this case is in the Court's finding that "the plaintiff had received inquiry notice of an invasion of legally protected rights when advised that the blood was tainted. Accrual took place at the time notice was given concerning the blood. . ." State Defendants' Memorandum, p. 18. In fact, the Oregon Supreme Court reversed the grant of summary judgment because the defendants had not offered evidence on the issue of what the plaintiff would have learned had they inquired because "the existence of a duty to inquire does not foreclose the possibility of a factual dispute concerning the question of what the Does would have learned. Application of the discovery rule's 'knew or should have known' standard makes the issue of what the Does 'should

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have known' about the possibility of defendants' 'tortious conduct' an issue of material fact." *Doe v. American Red Cross*, 322 Or at 515. *See also Earle v. State*, 170 Vt. 183, 193, 743 A.2d 1101 (Vt. 1999) (discovery rule applied to accrual of plaintiff's claim against a state agency for sexual abuse perpetrated by fellow participant in state program because "there was no reason for plaintiff to suspect that [the state agency] owed him a duty at all until he knew that [the state agency] knew of [the fellow participant's] abuse of plaintiff.").

The Court further discussed the issue of inquiry notice in *Keller v. Armstrong World Industries*, 342 Or 23, __ P.3d __ (2006),[5] in which the discovery rule was analyzed in the context of a plaintiff's discovery of asbestos-caused lung disease. Relying heavily on *Gaston v. Parsons, supra*, *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 60 P.3d 535 (2002), and *Doe v. American Red Cross, supra*, the court stated that:

> the question whether plaintiff, in the exercise of reasonable care, should have discovered that he had an "asbestos-related disease" and "the cause thereof" will turn, among other things, on the evidence regarding the nature of that disease, the degree to which the disease remains latent after exposure, and the difficulty in diagnosing asbestos as the cause of plaintiff's conditions.

Keller v. Armstrong World Industries, 342 Or at 37.

Applying this analysis to the case of the sexual abuse of a minor by a trusted adult in a position of power and authority, the State Defendants have not met their burden of proving the absence of any issues of material fact in whether Plaintiff's delayed discoveries of his injury or the

[5] The State Defendants cited to the Court of Appeals' decision in *Keller v. Armstrong World Industries* in its memorandum, apparently unaware that the Supreme Court had issued its decision. The Supreme Court's opinion does not discuss the required level of proof of a plaintiff's knowledge.

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State Defendants' tortious conduct were reasonable under the circumstances. In the opinion of a Dr. Jon Conte, a respected psychologist who specializes in child sexual abuse issues whose declaration is filed herewith, a reasonable person of ordinary prudence who was sexually abused as a minor by a trusted adult in a position of power and authority would not have known of his injuries or of the substantial possibility that the State Defendants had engaged in "tortious conduct." *Doe v. American Red Cross,* 322 Or at 514, citing *Gaston v. Parsons*, 318 Or at 256.

Dr. Conte's opinion (which is also shared by Dr. Colistro) is supported by considerable research[6], and is based upon conclusions which have served as the underpinning for most of the states' amendment or abolition of statutes of limitation in cases of child abuse, including Oregon's.[7] Based on similar conclusion, the Nevada Supreme Court annulled the statute of

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[6] This research is summarized in Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 Wake Forest L.Rev. 1245 (1991), and includes, *e.g.*, Horowitz, Markham, Stinson, Fridhandler & Ghannam, *A Classification Theory of Defense,* in Repression and Disassociation 80 (J. Singer, ed. 1990) ("'Denial' is classified as 'the avoidance of awareness of some painful external reality . . . accomplished by withholding conscious understanding of the meaning and implications of what is perceived.").

[7] ORS 12.117, first enacted in 1989, currently gives child abuse victims until the later of age 24 or within three years of when they discover, or should in the exercise of reasonable care discover, the causal connection between the childhood abuse and the resulting harm. The evolution of ORS 12.117 from its original presentation in HB 2668 (1989) as an amendment to ORS 12.160, a statutory tolling provision, reflects the consensus of opinion on the disabling effects of childhood sexual abuse. *E.g.* "Staff Measure Summary" for HB 2668 (House Judiciary Committee) ("In child abuse and molestation cases, children and young adults are not able to psychologically bring themselves to commence an action against a stepparent, relative, friend, or neighbor. Often they are still dependent on their molester for shelter or support."); and Testimony of Jill Otey before the Senate Judiciary Committee in support of SB 234 (1993):

> [T]hese type of cases * * * [are] very much unique from other tort actions because of the psychological nature of the injuries. * * * [T]he more severe the abuse the less likely a person is to be able to

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limitations for child sexual abuse in cases in which there was clear and convincing evidence of the abuse by a named defendant:

> Unlike almost all other complainants subjected to statutes of limitation, child victims of sexual abuse ["CSA"] suffer from a form of personal intrusion on their mental and emotional makeup that interferes with normal emotional and personality development. As a result, the adverse effects of such abuse may perceptibly increase for prolonged periods, if not an entire lifetime. And, although physical trauma and injury present in other torts may result in a gradual physical deterioration with concomitant emotional distress, such actions usually are not complicated by the stigma, fear and depression associated with CSA.
>
> In short, adult survivors of CSA present unique circumstances and injuries that do not readily conform to the usual constructs upon which periods of limitations are imposed. In a sense, such survivors are analogous to victims of false imprisonment, where each new day of confinement creates a new cause of action. Unfortunately, however, CSA survivors are hostage to their own thought processes, implanted by their abusers, and from which they may never be totally released. Indeed, the mental and emotional dysfunction suffered by such victims may virtually prevent them from seeking relief against their tormentors until the period of limitations has long since expired. To place the passage of time in a position of priority and importance over the plight of CSA victims would seem to be the ultimate exaltation of form over substance, convenience over principle.

Petersen v. Bruen, 106 Nev. 271, 280-81, 792 P.2d 18 (Nev. 1990).

Furthermore, even if Munoz had inquired in 1996, 1997, 1998, 1999, 2000, 2001, or 2002 at the times of his abuse, his inquiry would have not revealed the State Defendants' negligence,

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> deal with that. The (sic) likely they are to deny it, to minimize it, and not to be able to come forward until quite a substantial amount of time has passed. [T]hey don't begin to deal with this until the later thirties, forties and sometimes in the later forties * * *.

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because the State Defendants successfully concealed their negligence until at least February of 2004, when Michael Boyles' arrest on charges of child sexual abuse was publicized. Indeed, as is apparent from their responses to Plaintiff's First Request for Admissions and their deposition answers, the State Defendants continue to attempt to conceal their negligence to this day.

The relationship between Munoz and the State Defendants at the time of the abuse is also a significant factor in a plaintiff's duty of reasonable inquiry in determining whether the discovery rule applies, because "the presence of a fiduciary relationship may be relevant to the determination of what a plaintiff should have known under the circumstances." *Oregon Life and Health v. Inter-Regional Financial*, 156 Or App 485, 493, 967 P.2d 880 (1997), *review withdrawn* 329 Or 10 (1999).[8] *See* II.C, *infra*, for additional discussion of the role of a special relationship in the application of statutes of limitation.

The State Defendants point to *Cooksey v. Portland Public School Dist. No. 1*, 143 Or App 527, 533-34, 923 P.2d 1328, *rev denied* 324 Or 394 (1996), to support their argument that a cause of action for child sexual abuse always accrues at the time of the sexual touching. However, the question of when the plaintiff first learned that the Portland Public School District had committed "tortious conduct" was not part of the briefing in *Cooksey*, nor was it addressed by the Court of Appeals. Moreover, the Court of Appeals' view of whether a cause of action for

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Senate Judiciary Committee, March 12, 1993, Tape 50, Side A.

[8] In support of this premise, the Court cited *Penuel v. Titan/Value Equities Group, Inc.*, 127 Or. App. 195, 201, 827 P.2d 28, *rev den* 319 Or 150 (1994) (despite reports showing that investments previously represented as secure were suffering financial difficulties, a broker's constant false reassurances that those investments were sound could be considered by jury in deciding what inquiry the Munoz reasonably should have made); and *Gaston*, 318 Or at 257 (in

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child abuse will accrue as a matter of law appears to have evolved between 1996, when it issued its decision in *Cooksey*, and 2001, when it decided *Jasmin v. Ross*, 177 Or App 210, 33 P.3d 725 (2001).

In *Jasmin v. Ross*, the Court of Appeals expressly rejected the defendant's argument that *Gaston v. Parsons* required the Court to find that the applicable statute of limitations had been triggered more than three years prior to the filing of the complaint when it concluded that regardless of whether it applied the definition of "injury" under ORS 12.117 or the definition as set forth in *Gaston v. Parsons*, *supra* (which applied the definition in the context of ORS 12.110), the result was the same: "We need not decide which, if either, of these definitions is correct, because under either, Plaintiff prevails if she presented any evidence from which a jury could find that she did not discover, nor in the exercise of reasonable care should she have discovered, facts creating a substantial possibility that her psychological or emotional injuries resulted from defendant's sexual abuse of her." *Jasmin v. Ross*, 177 Or App at 215.

Because it is a reasonable inference that Munoz did not discover his injuries or the causal connection between them and the negligent acts of the State Defendants, nor that the State Defendants had committed tortious conduct, until 2004, nor in the exercise of reasonable care should he have discovered these facts, Plaintiff's negligence claims against the State Defendants are timely.

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negligence case, holding that fiduciary relationship "may also have a bearing on whether a reasonable person would be aware of" the claim).

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C. Equitable Tolling Also Applies to Claims Brought Under the OTCA and to the Facts of Plaintiff's Common Law Claims.

The State Defendants assert in their memorandum that "the OTCA statute of limitations is tolled only by the three tolling provisions identified in the text [of ORS 30.275(9)]." State Defendants' Memorandum, p. 16. They make no reference to non-statutory tolling provisions, and Plaintiff submits that the principle of equitable tolling applies to the OTCA's statute of limitations.

Although no Oregon or Ninth Circuit cases addressing the applicability of equitable tolling to the OTCA's statute of limitations were located, the comments made by the Oregon Supreme Court concerning the purpose of the OTCA when implying a non-statutory discovery rule to the OTCA's statute of limitations are instructive:

> [T]he tort claims act was intended to be remedial legislation, allowing all citizens to seek redress for any tort committed by their governments, except for the specific immunities listed in the statutes. *Cf.*, W. Prosser, Law of Torts, § 131, pp. 984-987 (4th Ed 1971). A narrow statutory construction of the provisions of the Tort Claims Act would be contrary to its general remedial purposes.

Dowers Farms v. Lake County, 288 Or. 669, 680, 607 P.2d 1361 (1980). Application of principles of equity to the OTCA is consistent with its remedial purposes, and therefore, equitable tolling applies to the OTCA's statute of limitations.

Under Oregon law, the statute of limitations is equitably tolled when a defendant conceals material facts in order to prevent the discovery of his or her wrongdoing:

> [O]ne who wrongfully conceals material facts and thereby prevents discovery of his wrong or of the fact that a cause of action has accrued against him is not permitted to assert the statute of

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> limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered. * * *

Chaney v. Fields Chevrolet, 264 Or 21, 27, 503 P.2d 1239 (1972) (quoting Annotation, "What constitutes concealment which will prevent running of statute of limitations," 173 ALR 576 at 578 (1948)).

In order to defeat a statute of limitations challenge on equitable tolling grounds, a plaintiff "must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, *unless the relationship of the parties imposes a duty upon the defendant to make disclosure*." *Rutledge v. Boston Woven Hose & Rubber Co*., 576 F.2d 248, 250 (9th Cir. 1978) (emphasis added). Plaintiff has alleged such facts in his First Amended Complaint, which are summarized below.

The State Defendants falsely represented to Munoz that Boyles was not a risk to him, and would act in his best interests. They made these false representations not with words, but with their actions in assigning Boyles to be Munoz's parole and probation officer. The representations were false because, at the time, the State Defendants knew that Boyles had previously engaged in improper conduct and contact with other minor probationers, and they knew that Boyles was unmanageable. By virtue of their fiduciary obligations to Munoz, the State Defendants were obligated to disclose to him known risks of harm, and to protect him from those risks. A reasonable 13 year-old boy in the custody of OYA would conclude that he had no recourse

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against the OYA or its agents, because that is who placed Munoz in Boyles' care, and the only contact Munoz had with State Defendants was through their agent, Boyles.

The State Defendants concealed from Munoz their knowledge of Boyles' past misconduct and the risk that he posed to Munoz from the time of his assignment as Boyles' probationer until their concealment was exposed in 2004. Throughout that time frame, Munoz could reasonably believe that State Defendants, having vested Boyles with the power and authority to incarcerate him and control virtually every aspect of his life, would continue to support and credit Boyles' actions regardless of what Munoz told them. Munoz's belief was reasonable under the circumstances, as was his failure to further inquire of State Defendants. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 (9th Cir. 1977) (finding proper jury's determination of fraudulent concealment, and noting that even suspicion of wrongdoing "will not substitute for knowledge of facts from which fraud could reasonably be inferred.") (internal citation omitted).

The State Defendants continued to conceal Boyles' wrongdoing until, at the earliest, February of 2004, when certain of their actions were reported in the media. Because of the fear instilled in him by Boyles personally and based on his experiences in the justice system as a whole, Munoz did not believe Boyles could no longer harm him until 2004 at the earliest, when Munoz learned Boyles was under investigation by the State Police for sexual abuse.

Even if the court were to conclude that it was the State Defendants' *in*action that resulted in Munoz's abuse, such would be sufficient to toll the statute of limitations because of their special relationship with Munoz. A special relationship exists between a child in OYA custody and OYA, his legal guardian. *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 734 P.2d

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1326 (1987) (special relationship exists between a school and a student required to attend). This is because, as the Ninth Circuit has stated:

> A special relationship arises when "one party has authorized the other to exercise independent judgment in his or her behalf" and, as a result, the party owing the fiduciary duty must take care of certain affairs belonging to the other. *Conway v. Pacific Univ.,* 324 Or 231, 924 P.2d 818, 824 (1996). What makes a relationship special is not its name, but the roles assumed by the parties. *See Strader v. Grange Mut. Ins. Co.,* 179 Or App 329, 39 P.3d 903, 906 (2002).

Bird v. Lewis & Clark College, 303 F.3d 1015, 1023 (9th Cir. 2002). Munoz was in OYA custody by court order, and OYA was mandated by state law to care for him. ORS 420A.010.[9] State Defendants did not dispute these obligations during their depositions, although they feign confusion on the subject in their responses to Plaintiffs' First Request for Admissions. Nonetheless, there can be no reasonable dispute, therefore, that Munoz and OYA were in a special relationship imposing greater duties upon OYA for Munoz's welfare. *See also Buchler v.*

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[9] ORS 420A.010 provides, in salient part:

> (1) The Oregon Youth Authority * * * shall:
>
> * * *
>
> (d) Exercise custody and supervision over those youth offenders committed to the youth authority by order of the juvenile court and persons placed in the physical custody of the youth authority under ORS 137.124 or other statute until the time that a lawful release authority authorizes release or terminates the commitment or placement;
>
> (e) Provide adequate food, clothing, health and medical care, sanitation and security for confined youth offenders and others in youth authority custody;
>
> (f) Provide youth offenders and others in youth authority custody with opportunities for self-improvement and work; * * *

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Oregon Corrections Div., 316 Or 499, 504-505, 853 P.2d 798 (1993) (defendant's status as custodian of a prisoner raised his duty of care) and *Christensen v. Epley,* 36 Or. App. 535, 585 P.2d 416 (1978), *affirmed by an equally divided court* 287 Or. 539, 601 P.2d 1216 (1979) (special relationship between custodian and prisoner). Not only was it State Defendants' duty to inform Munoz that Boyles posed a risk to him, but it was State Defendants' duty to protect Munoz from that risk. By instead doing nothing, the State Defendants prevented Munoz from discovering their wrong, thereby tolling the statute of limitations until after their wrongdoing came to light in February 2004 following Boyles' arrest and subsequent termination by OYA. *See also Martinelli v. Bridgeport Roman Catholic Dio.*, 196 F.3d 409 (2nd Cir. 1999) (factual scenario existed involving Diocese of Bridgeport that supported fraudulent concealment tolling argument).

The actions of the State Defendants in concealing their knowledge that Michael Boyles was a risk to his minor probationers tolled the statute of limitations until their concealment began to be exposed in February of 2004.

D. Equitable Estoppel Operates to Bar the State Defendants from Asserting the OTCA's Statute of Limitations as a Defense.

Similarly, equitable estoppel applies in this case to prevent the State Defendants from benefiting from their own wrongdoing by asserting the statute of limitations as a defense:

> The doctrine of estoppel has long been accepted as one of the bulwarks of equity in Anglo-American jurisprudence. Estoppel to plead the statute of limitations is often invoked on the broad general ground that parties may not take advantage of their own wrongs. As a general rule, a defendant will be estopped from setting up a statute-of-limitations defense when its own prior representations or

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> conduct have caused the Plaintiff to run afoul of the statute and it is equitable to hold the defendant responsible for that result.

Allen v. A.H. Robins Co., Inc., 752 F.2d 1365, 1371-72 (9th Cir. 1985).

To invoke the doctrine of equitable estoppel, there must:

> (1) be a false representation; (2), it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it. * * *

Lyden v. Goldberg, 260 Or. 301, 304, 490 P.2d 181 (1971); *see generally*, Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy,* 12 Harv. Women's L.J. 206, 211-12 (1989). The false representations made by the State Defendants are set forth in II.C., *supra*, and are not repeated here.

The application of equitable estoppel to a state defendant was endorsed by the Florida Supreme Court under substantially similar circumstances to those presented in this case. After reviewing the long history of the doctrine of equitable estoppel, the court found it applied to Florida's tort claims act statute of limitations, stating in its conclusion:

> The law of this State does not bestow upon the department a special boon to betray the children in its charge, to flagrantly flout the law, to conceal its misdeeds, and then to invoke [the statute of limitations] as a shield for its actions.

Florida Dept. Health And Rehab. v. S.A.P., 835 So.2d 1091, 1100 (Fla. 2002). The doctrine is no less applicable to the circumstances of this case.

Boyles himself also made specific false representations to Munoz, which could reasonably believe and by which he was induced to remain silent about Boyles' abuse. Boyles' threats to

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Munoz were made with the intention that Munoz not disclose his abuse of Munoz. Munoz knew Boyles had the power to incarcerate him, and believed that if he reported Boyles' actions, no one would believe him, and he would end up being incarcerated or otherwise punished by Boyles or another agent of State Defendants. Munoz did not, therefore, disclose the abuse to anyone until after he was contacted by Detective Sudaisar in early 2004.

Boyles' threats to Munoz are imputed to the State Defendants under the doctrine of *respondeat superior*, because although Boyles' tortious acts against Munoz, including the threats, were not themselves within the scope of employment, the State Defendants are nonetheless vicariously responsible for them because the acts that led up to both the abuse and the threats were within the scope of Boyles' duties for OYA. *Fearing v. Bucher*, 328 Or 367, 376, 977 P.2d 1163 (1999).

The State Defendants should not be permitted to benefit from their own wrongdoing in failing to take action after receiving repeated warnings that Boyles was a risk to the children in their care, and in fact by concealing those repeated warnings. It is the State Defendants' actions, or those imputed to them, which caused Munoz's delay in bringing this lawsuit, and it is equitable to hold them responsible for those actions by denying them the right to assert the statute of limitations as a defense. *Allen v. A.H. Robins Co., Inc*., 752 F.2d at 1371-72. *See generally* 54 *C.J.S.* Limitations of Action § 40 ("Estoppel precludes a defendant from asserting the statute of limitations when the defendant's actions have wrongfully, fraudulently, or inequitably caused a plaintiff to delay commencing legal action until the relevant statute of limitations has expired, or when the defendant has done anything that would tend to lull the plaintiff into inaction."). This is

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especially so considering the State Defendants were in a fiduciary relationship with Munoz that obligated them to protect him and provide him with material facts pertinent to his well-being. *Philpott v. A.H. Robins Co., Inc.,* 710 F.2d 1422, 1425 (9th Cir. 1983) ("* * * Oregon courts have applied estoppel [ ] where there has been fraud on the part of a fiduciary in concealing material facts evincing a cause of action."); *see generally* 45 A.L.R. 3d 630 ("Fiduciary or Confidential Relationship as Affecting Estoppel to Plead Statute of Limitations").

III. Plaintiff's Civil Rights Claims Are Not Barred by the Applicable Statute of Limitations, ORS 12.110(1).

A. Overview of Law Governing Timeliness of Claims Brought Under 42 U.S.C. § 1983.

Because 42 U.S.C. § 1983 does not have its own statute of limitations, it borrows one from the forum state. After years of litigation over *which* state statute of limitations to borrow for § 1983 actions, the United State Supreme Court definitively decided the issue in 1989: "[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Owens v. Okure*, 388 U.S. 235, 250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). In Oregon, the applicable statute of limitations is ORS 12.110(1). *Sain v. City of Bend*, 309 F.3d 1134, 1136 (9th Cir. 2002); *Plumeau v. School District #40 Cnty. Of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

In addition to borrowing the forum state's statute of limitations for § 1983 actions, "closely related questions of tolling and application" are also governed by the forum state's law. *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). By borrowing state law, "federal law incorporates the State's judgment on the proper balance between the

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policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.* at 271. However, "Federal law determines when a cause of action accrues and [therefore when] the statute of limitations begins to run for a § 1983 action." *Elliott v. City of Union City*, 25 F.3d 800, 801-02 (9th Cir. 1994) (citation omitted). The relationship between accrual and tolling is often confused, particularly when state and federal law define or apply them differently, and especially where, as here, both are relevant to the application of the statute of limitations. Nonetheless, case law in this circuit is clear that Oregon's discovery rule applies equally to § 1983 claims, as do the equitable tolling and estoppel rules set forth in II. C and D, *supra.*

B. The Discovery Rule Tolls ORS 12.110(1) Under the Facts of This Case.

Regardless of whether it delays accrual or tolls the statute of limitations, Oregon's discovery rule applies to § 1983 claims, and in this case, renders timely Plaintiff's § 1983 claims.

The Ninth Circuit has characterized Oregon's discovery rule as a rule of delayed accrual. *Plumeau v. Yamhill County Sch. District #40*, 130 F.3d at 436 (citing *Gaston v. Parsons*, *supra*). However, the discovery rule operates as a tolling provision as well. *FDIC v. Smith*, 328 Or at 428 (discovery rule "has the effect of tolling the commencement of [statutes of limitation] under certain circumstances."); *Workman v. Rajneesh Foundation Intern.*, 84 Or App 226, 231 n. 4, 733 P.2d 908 (1987) (Oregon discovery rule "cases have treated the discovery rule as having a tolling effect, i.e. the statute does not begin to run until the plaintiff knows or reasonably should know the relevant facts.").

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In *Plumeau, supra*, the Ninth Circuit applied the discovery rule to the plaintiff's § 1983 claim in the context of case involving child sexual abuse. *Id.* at 438 ("The district court in this case apparently assumed a timely filing [of the civil rights claim]. We agree, since *the date of the discovery* was May 29, 1992, shortly following Amanda's attempted suicide.") (emphasis added). While one might argue that the Court in *Plumeau* was applying the federal accrual rule, under which discovery "of the injury which is the basis of the cause of action. . .," *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000), and not the discovery of the tortious conduct, triggers the statute of limitations, that argument is inconsistent with the facts in *Plumeau*, because Amanda Plumeau's sexual abuse by the defendant school district's janitor occurred between 1983 and 1987 – more than five years prior to her 1992 suicide attempt, and seven years before she filed suit. *Plumeau*, 130 F.3d at 433-436.

The Ninth Circuit has also applied a common law discovery rule as a tolling provision in just this context, i.e. when applying ORS 12.110(1) to a civil rights claim. In *Bibeau v. Pacific N.W. Research* Foundation, 188 F.3d 1105 (9th Cir. 1999), the Ninth Circuit applied the discovery rule to toll the accrual of the plaintiff's civil rights claims for nearly 40 years, concluding that the defendant had not met its burden of raising an issue of material fact as to whether a reasonable person would have connected the plaintiff's symptoms to radiation experiments conducted on the plaintiff's testicles while he was an inmate at the Oregon State Penitentiary in the 1960's. In doing so, the Court observed, "Because it is inequitable to bar someone who has no idea he has been harmed from seeking redress, the statute of limitations had generally been tolled by the 'discovery rule.' Under this rule, the statute only begins to run once a plaintiff has knowledge of

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the 'critical facts' of his injury, which are 'that he has been hurt and who has inflicted the injury.'" *Bibeau*, 188 F.3d at 1108 (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979), and citing *Gaston v. Parsons*, *supra*, in noting that the discovery rule is both a rule of Oregon law and a rule of federal law.). As did the Oregon Supreme Court in the case of *Doe v. American Red Cross*, *supra*, the Ninth Circuit ultimately concluded that the defendants had not met their burden of demonstrating the absence of disputed material facts on what a duty of inquiry would have revealed. *Bibeau*, *supra* at 1110 ("while we may determine what a 'reasonable person' would do, we cannot, without any evidence in the record, say what a normally competent doctor would do in this situation.").

The State Defendants have presented no evidence that an inquiry by Munoz in 1996-2002 of their responsibility for Michael Boyles' sexual abuse would have revealed their own tortious conduct. On the other hand, Plaintiff has submitted evidence that the State Defendants were then concealing, and have continued to conceal to this day, their knowledge of Michael Boyles' wrongdoing. The evidence of concealment by the State Defendants is one factor that distinguishes the facts of this case from those in *T.R. v. Boy Scouts of America*, 205 Or App 135, 133 P.3d 353 (2006).

In *T.R. v. Boy Scouts of America*, a former Explorer Scout sued the Boy Scouts, the City of The Dalles, and the program's advisor under the OTCA and 42 U.S.C. § 1983 for sexual abuse he was subjected to by the advisor over a three month period in 1996. Plaintiff filed suit in 2002 – well more than two years after the abuse. He successfully defeated a summary judgment motion filed by The Dalles challenging the timeliness of the action by arguing that he had not discovered

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that The Dalles was potentially responsible for the abuse until a grand jury hearing in 2001. The Oregon Court of Appeals agreed with The Dalles that Plaintiff's claims were barred because he had not filed them within two years of accrual, which occurred at the time of the abuse. In so holding, the Court of Appeals concluded that:

> More than two years before he filed this action, plaintiff knew sufficient facts to trigger the duty to discovery the parties that caused his injury. He knew that he was injured; he knew that sexual abuse inflicted by Tannehill was the physical cause of his injury; he knew that at least some of the abuse occurred while Tannehill was on duty; and he knew that Tannehill was a city employee. A reasonable person would have acted on those facts by "seeking advice in the medical and legal community."

T.R. v. Boy Scouts of America, 205 Or App at 142-43 (quoting *United States v. Kubrick*, 444 U.S. 111, 123, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). Here, however, there is evidence before this court that under the circumstances in which Munoz found himself, a reasonable person would not have acted on the facts available to him. Plaintiff's case is thus distinguishable from the *T.R.* case on that basis alone. Additionally, the plaintiff in *T.R.* did not argue that Oregon's discovery rule operated as a tolling provision, as Plaintiff argues here.

In *Vaughan v. Grijalva*, 927 F.2d 476 (9th Cir. 1991), the court applied a statutory discovery rule[10] to toll the forum state's general personal injury statute of limitations. The fact that Oregon's discovery rule is implicit in ORS 12.110(1) rather than explicit does not make it any less a tolling provision that the statutory tolling provision applied by the Ninth Circuit in

[10] The rule tolled the Arizona statute of limitations for personal injuries for prisoners "until such time as the person imprisoned *discovers the right to bring the action or with the exercise of reasonable diligence should have discovered the right to bring the action, whichever occurs first . . .* " V*aughan*, *id.* at 479 (emphasis in original).

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Vaughan. The Oregon Court of Appeals has stated that the statutory discovery provision for fraud claims in ORS 12.110(1) and the implicit discovery rule for all other claims are identical:

> [ORS 12.110(1)] creates two standards for determining when the limitations period commences: one for fraud and another for negligence. Each standard incorporates the so-called "discovery rule." For fraud claims, the second sentence of ORS 12.110 (1) itself integrates that doctrine into the limitations rule. For negligence claims, the Oregon Supreme Court in *Berry v. Branner,* 245 Or. 307, 312, 421 P.2d 996 (1966), engrafted that doctrine onto the first sentence of the statute. *Gaston v. Parsons,* 318 Or. 247, 254-55, 864 P.2d 1319 (1994).

Oregon Life and Health v. Inter-Regional Financial, 156 Or App at 492 (emphasis added); *see, e.g.*, *Robertson v. Jessup*, 117 Or. App. 460, 464, 845 P.2d 926 (1993) ("legal malpractice claim must be commenced within two years of its accrual, ORS 12.110 (1), but the limitation period is tolled until the client discovers, or reasonably should have discovered, that the attorney's negligence has caused him damages.).

Application of Oregon's discovery rule as a tolling provision is consistent with the rationale behind a federal statute's borrowing of a forum state's statute of limitations:

> In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, 421 U.S. 454, 464, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

Because Oregon's discovery rule is a tolling provision, and a forum state's applicable tolling provisions are borrowed along with its personal injury statute of limitations in § 1983 claims, Oregon's discovery rule applies to Plaintiff's civil right claims as well as its common law

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claims. Therefore, for the reasons set forth in II.B, *supra*, the application of Oregon's discovery rule to the facts of Plaintiff's civil rights claims renders those claims timely under ORS 12.110(1).

C. Principles of Equitable Tolling and Equitable Estoppel Also Apply to Plaintiff's Civil Rights Claims.

Ninth Circuit precedent leaves no doubt that a forum state's equitable tolling rules apply to § 1983 claims, including Oregon's equitable tolling rules. *Sain v. City of Bend*, 309 F.3d at 1138 ("The tolling rules that we take from state law, consistent with *Wilson [v. Garcia, supra*], are broad tolling rules. Such rules include . . . equitable tolling. . ."); *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) (applying California's equitable tolling rules to § 1983 claim); *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (same).

Where a state's equitable tolling principles contradict federal law or policy, a court can look to federal tolling principles. "Section 1983 generally borrows its statute of limitations from state laws . . . and incorporates equitable-tolling principles of either state or federal law in cases where a defendant's wrongful conduct, or extraordinary circumstances outside a plaintiff's control, prevented a plaintiff from timely asserting a claim." *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citations omitted).

Section 1983 is designed to compensate victims whose federal constitutional rights have been violated and to prevent future abuses of state power. *Robertson v. Wegmann*, 436 U.S. 584, 591, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978); *see also Burnett v. Grattan*, 468 U.S. 42, 53, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). It is a remedial statute that strives to give victims the opportunity to sue for relief. *Burnett v. Grattan*, *supra* at 55. In a case such as this, the remedial purposes of § 1983 are served by applying federal tolling principles to the application of ORS

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12.110(1) to the extent state tolling principles do not apply, because it would be inherently unfair to require a child to recognize and pursue a claim against an abuser when the child's pursuit of that claim is dependent upon the same adult guardians who were supposed to be protecting the child from such abuse in the first place. Such are the "extraordinary circumstances outside a plaintiff's control" that warrant the equitable tolling of the statute of limitations in this case. *Hilao*, *supra.*

Ninth Circuit precedent has also applied the doctrine of equitable estoppel to § 1983 claims. *E.g. Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006). The application of both equitable tolling and equitable estoppel to Plaintiff's civil rights claims is identical to those doctrines' application to Plaintiff's common law claims. Therefore, for the reasons set forth in sections II.C and D, *supra*, Plaintiff's civil rights claims are not barred by ORS 12.110(1).

IV. Plaintiff Can Make a Prima Facie Case Through Aaron Munoz's Statements Under FRE 801(d)(2)(B).

The State Defendants challenge Plaintiff's ability to present admissible evidence of abuse because the complaining witness is dead. The State Defendants state, "The only source of facts to prove that Boyles committed sexual abuse against Aaron Munoz are hearsay statements made by Munoz before he died." State Defendants' Memorandum, p. 19. It is true that the only source of facts to prove Munoz's sexual abuse are statements made before he died – statements to Oregon State Police Detective Scott Sudaisar, statements to the Multnomah County Grand Jury, and written statements to his then-civil attorney. However, it is not true that those statements are hearsay.

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"A statement is not hearsay if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth." FRE 801(d)(2)(B). The State, through its agent, Detective Scott Sudaisar, obtained statements from Munoz concerning Boyles' and others' abuse of him. Thereafter, the State, through state prosecutors, presented Munoz as a witness to the Multnomah County Grand Jury and asked the grand jury to return an indictment against Boyles and others based on Munoz's testimony – twice. *See* ORS 132.330 (prosecutor may submit an indictment to the grand jury when she "has good reason to believe that a crime has been committed which is triable within the county."). The Multnomah County Grand Jury did return indictments based on Munoz's testimony, concluding by its actions that in its judgment, "all the evidence before it, taken together, is such as * * * would, if unexplained or uncontradicted, warrant a conviction by the trial jury." ORS 132.390.

The charges in the indictment are consistent with the statements made by Munoz to Detective Sudaisar, and Munoz was the only witness to testify in support of the charges against Boyles arising from Boyles' abuse of him. This is significant, because "when [the grand jury] believes that other evidence within its reach will explain away the charge, it should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses." ORS 132.320(9). By its actions, the State has manifested a belief in the truth of Munoz's statements that he was sexually abused by Boyles.

The State also proffered Munoz's statements to Detective Sudaisar and Munoz's own written statements to the court in support of a sentencing argument, thereby manifesting a belief in their truth. Both the state prosecutor and Detective Sudaisar made impassioned arguments to

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the court at the sentencing of James Lyman that the court should consider Lyman's actions against Munoz in sentencing Lyman. The state prosecutor even read a portion of Munoz's letter, which the State Defendants argue is inadmissible hearsay. The State cannot present Munoz's statements as truth in one forum and then challenge them in another. It is for that reason that FRE 801(d)(2)(B) designates such statements as non-hearsay.

The Ninth Circuit has applied FRE 801(d)(2)(B) in both civil and criminal contexts, including recently in a civil context in *Sea Land Service v. Lozen Intern., LLC,* 285 F.3d 808 (9th Cir. 2002). In that case, the rule was held to apply to an e-mail forwarded by one of plaintiff's employees to another. By forwarding and remarking on the contents of the e-mail, the plaintiff's employee "manifested an adoption or belief in the truth of the information contained in the original e-mail." *Id.* at 821 (quoting FRE 801(d)(2)(B)). In support of its conclusion that the district court had abused its discretion in excluding the e-mail, the court also cited to 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 801.31[3][b], at 801 56(Joseph M. Laughlin ed., 2d ed. 2002) ("A party may adopt a written statement if the party uses the statement or takes action in compliance [with] the statement."); *cf. Alvord-Polk, Inc. v. F. Schumacher & Co.,* 37 F.3d 996, 1005 n. 6 (3d Cir. 1994) (holding that statements of company president, which were reprinted in company publications, were not hearsay but were instead admissible as adoptive admissions). *See also United States v. Ospina*, 739 F.2d 448, 451 (9th Cir. 1984) (possession of written instructions becomes an adoption of the contents when the person possessing them acts on them).

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The State also challenges the admissibility of Munoz's testimony before the Multnomah County Grand Jury, suggesting that the secrecy mandates in ORS 132.060 and 132.220 are absolute. Absolute grand jury secrecy has never been the rule in Oregon, and "disclosure of the testimony of witnesses called before the grand jury may be permitted in three instances: (1) when the testimony of a witness at a criminal trial may be inconsistent with his testimony before the grand jury, ORS 132.220(1); (2) when a witness is charged with perjury, ORS 132.220(2); and (3) when permitted by the court in furtherance of justice." *State ex rel Johnson v. Roth*, 276 Or 883, 886, 557 P.2d 230 (1977) (citing *Gowin v. Heider*, 237 Or 266, 286, 386 P.2d 1, 391 P.2d 630 (1964)). The first two exceptions to grand jury secrecy are statutory. The third exception is common-law:

> The "furtherance of justice" exception is not some recent judicial gloss upon ORS 132.220. That section comes from Deady, General Laws of Oregon, Criminal Code, § 58, which was considered by this court in this respect in *State of Oregon v. Moran*, 15 Or. 262, 14 P. 419 (1887). The issue was phrased by the court:
>
> > "It therefore becomes necessary to determine whether or not it is competent for the trial court, in the exercise of a sound judicial discretion, to allow a grand juror to testify as to matters which transpired before that body, when, in the opinion of the court, *the ends of justice require it."* (Emphasis added.)
>
> 15 Or at 273. Relying upon § 58 and cases from other jurisdictions and upon a quote from a treatise, this court resolved that the grand juror should be allowed to testify.
>
> In 1 Bishop on Criminal Procedure, § 859 (2d ed 1872), the author is concerned with the oath of secrecy taken by a grand juror and concludes the discussion as follows:

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> "* * * If we look at the principle on which this question rests, we have the following. The reasons which require the secrecy are of a nature looking to the public good; because, if the grand jury could leave their room and disclose what they are doing, defendants who had not been arrested could make their escape; and because, also, persons would be deterred from voluntarily going forward and informing of crime before them. But when the reasons for keeping the testimony private have passed away, the obligation of secrecy would seem to have ended also. Yet when, in addition to this, *the claims of public justice must go unsatisfied unless the disclosure is made*, the same reason which originally required secrecy requires that the secret be no longer kept. The result, on the whole, is, that, in matter of principle, the disclosure should never be made except in obedience to a duty; but, when, after the offender has been arrested, some demand is made on behalf of public justice, or there is some other call of duty of the like urgency, the obligation of secrecy should yield to the new claim. * * *" (Emphasis added.)
>
> It is seen, therefore, that the idea of piercing the veil of grand jury secrecy "in the furtherance of justice" is not new; it should not be startling.

State v. Hartfield, 290 Or 583, 587-88, 624 P.2d 588 (1981). No reasons remain for keeping Aaron Munoz's grand jury testimony private – those reasons "passed away" when Aaron Munoz did. His civil claims against the parties who caused his sexual abuse and his death are just the sort of "claims of public justice" which require disclosure.

For these reasons, Aaron Munoz's statements to Detective Sudaisar, to the grand jury, and to his former attorney are admissible non-hearsay. Furthermore, Munoz's testimony to the grand jury is available in this civil case because the reasons for secrecy have passed and justice requires its disclosure.

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CONCLUSION

Munoz, and therefore Plaintiff, did not discover, nor in the exercise of reasonable care could he have discovered, the facts needed to bring his claims prior to early 2004 at the earliest, and therefore his complaint filed in November 2005 was timely filed.

Additionally, the applicable statutes of limitation were equitably tolled under the circumstances of this case, and the State Defendants are estopped from asserting them as a defense, because the State Defendants did not report or investigate allegations that arose regarding sexual misconduct involving Boyles that occurred before the time that Boyles was sexually abusing Munoz, and the State Defendants concealed information from Munoz and his family that Boyles had documented problems maintaining appropriate boundaries with clients. State Defendants continued to conceal this information from Plaintiffs until approximately February of 2004, when Boyles was arrested, and should be estopped from benefiting from their concealment.

Finally, Plaintiff can present a *prima facie* case using statements that are admissible under FRE 801(b)(2)(B). For all these reasons, the State Defendants' motion for summary judgment must be denied.

DATED this 12th day of January, 2007.

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