

STATE OF WISCONSIN
SUPREME COURT

Case No. 03-1416

Circuit Court Nos. 02CV011791, 02CV011792, 02CV011793,
02CV011794, 02CV011795

John Doe 67C, Jane Doe 67E, Jonathan Gillespie,
John Doe 67D and Jim Gillespie,
Plaintiffs-Appellants,

vs.

Archdiocese of Milwaukee, St. John the
Evangelist Church, Alias Insurance Company #1,
and Alias Insurance Company #2,
Defendants

Case No. 03-1417

Circuit Court Nos. 03CV002219, 03CV002220, 03CV002221,
03CV002222, 03CV002223

John Doe 67A, James Ahler, John Doe 67F,
Gregory Hudon, and John Doe 67B,
Plaintiffs-Appellants,

vs.

Archdiocese of Milwaukee, St. John the
Evangelist Church, Alias Insurance Company #1,
and Alias Insurance Company #2,
Defendants

Appeal From the Circuit Court of Milwaukee County
The Honorable Michael D. Guolee Presiding

**BRIEF OF AMICUS CURIAE LEADERSHIP COUNCIL
ON CHILD ABUSE & INTERPERSONAL VIOLENCE
IN SUPPORT OF APPELLANTS**

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ARGUMENT

I. **SEXUALLY ABUSED CHILDREN ARE FREQUENTLY INCAPABLE OF RECOGNIZING UNTIL WELL INTO ADULTHOOD THAT THEY WERE INJURED AND THAT THE LONG AGO SEXUAL ABUSE WAS THE CAUSE**

Wisconsin applies the discovery rule to claims of childhood sexual abuse. Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 338, 565 N.W.2d 94, 104 (1997). A court applying it must consider when the great majority of people who are sexually abused as children would discover that they had been injured and would discover the cause of that injury. Id., 340. That requires the court to examine the experiences of the great majority of people that are sexually abused as children.

Childhood sexual abuse is one of the most devastating crimes in our society. Sexual assault has been described as, “short of homicide ... the ‘ultimate violation of self.’” Coker v. Georgia, 433 U.S. 584, 597, 53 L. Ed. 2d 982, 992-93, 97 S. Ct. 2861, 2869 (1977) (quoting U.S. Dep't of Justice, *Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies 1* (1975)). Although the aftermath of sexual assault for an adult can be devastating and long-term, the impact on a child victim is often even more profound.¹

¹In addition to the profound effects on the victim, the economic, health care and cultural toll of childhood sexual abuse on Wisconsin has been great. In Wisconsin there

Hundreds of research studies have conclusively shown that sexual abuse can alter a child's physical, emotional, cognitive and social development and impact their physical and mental health throughout their lifetime.² A 2002 study by Elliot Nelson, M.D., et. al. reaffirmed that childhood sexual abuse has a profound negative impact throughout the victim's life. Nelson et. al., *Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study*, ARCH. GEN. PSYCHIATRY, 59(2), 139-45, available at http://genepi.qimr.edu.au/staff/nick_pdf/CV321.pdf (last visited February 13, 2005). This study examined both members of 1,991 same-sex twins (1,159 female and 832 male) in which one twin had been sexually abused, but the other had not. *Id.* at 139. Twins were used to separate the effects of childhood sexual abuse from possible negative effects factors the twins both experienced, such as parental alcohol abuse, parental conflict, physical abuse, and neglect. *Id.* at 143-44. The study found that a person with a history of childhood sexual abuse had an increased risk for subsequently

were approximately 4,890 substantiated cases of child sexual abuse in 2002. PREVENT CHILD ABUSE WISCONSIN, available at <http://www.preventchildabusewi.org/> (last visited February 13, 2005). It is estimated that childhood sexual abuse, along with other forms of child abuse and neglect in Wisconsin, cost the state \$789 million a year, or \$2.16 million a day. *Id.*

²The Leadership Council has chosen to discuss one study in detail because it was particularly well designed. However, the Council could have discussed hundreds of recent studies that all come to the conclusion that childhood sexual abuse has profound negative impacts on the abused child's life. Twelve such studies, their methodologies, and summary of results are presented for this Court in Table 1 at the end of this brief.

occurring adverse outcomes of:

major depression,
suicide attempt,
conduct disorder,
alcohol and/or nicotine dependence,
social anxiety,
rape after the age of 18 years old, and
divorce.

Id. at 142.

Of the women in the study, almost 50% who were abused as children suffered from major depression, compared to only 28% of those who were not abused. Id. at 143. For men in the study, almost 36% of those abused as children suffered from major depression, compared with only 20% of those who were not abused. Id. Over 13% of the women and men in the study who were sexually abused as children attempted suicide, whereas only about 2.6% that were not abused attempted suicide. Id. Resulting conditions like these make it very difficult for victims of childhood sexual abuse to discover that the sexual acts were abuse and to discover the cause of their injuries. Many simply struggle to survive the onset of the resulting major depression, suicide attempts, social anxiety, and drug abuse.

Often it is not until years after the sexual abuse that victims experience these negative outcomes. Clinician Mic Hunter observed:

Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop

crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.

MIC HUNTER, ABUSED BOYS 59 (1991). The twins study by Nelson et al., found the mean number of years between the end of the sexual abuse and the onset of the negative outcome to be:

8.9 years for suicide attempts,

10.3 years for major depressive disorder, and

10.5 years for alcohol dependence.

Id. at 141.

At the time children are sexually abused, they are often too young to appreciate the harmful nature of the acts. Years later, when the child does experience the harm from the childhood sexual abuse, the child is often not able to relate the harm to the abuse because of the length of time since the abuse happened. In contrast, a child that is in a car accident can relate the car accident to resulting injuries because the harm (broken bone, sore neck, etc.) usually occurs simultaneously, with the cause - the car accident.

Many other reasons prevent childhood sexual abuse victims from knowing that they were abused or injured, and from knowing the cause of their injuries, until well into adulthood. The following list is by no means exhaustive, but it contains many of those reasons:

Most sexual abusers are someone that the child knows and trusts. In fact, only 4% of child sex abusers are strangers. WISCONSIN COALITION AGAINST SEXUAL ASSAULT, CHILD SEX ABUSE,

available at <http://www.wcasa.org/resources/factsheets/childs.html>
(last visited February 13, 2005) (citations omitted).

Often abusers manipulate the child victim into thinking that the relationship is built on mutual love. See MAXINE HANCOCK & KAREN BURTON MAINS, CHILD SEXUAL ABUSE: HOPE FOR HEALING 33 (1987) (citations omitted).

Abusers may also manipulate the family into thinking that the abuser is someone who can be trusted and respected. A child may see how much their family respects and trusts the abuser.

Some abusers shower the child with attention and buy the child gifts, making the child feel special.

Children may be told by the abuser to keep the abuse a secret. See DALE ROBERT REINERT, SEXUAL ABUSE AND INCEST 34-35 (1997).

Sometimes abusers threaten the victims. See Rochelle F. Hanson et. al., *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 564 (1999).

Victims sometimes feel shame and embarrassment about the abuse, making the victim feel to blame for the abuse. Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCHOL. REV. 274-75 (2002).

Many children lack the cognitive ability to recognize that these acts were abuse and harmful. See MARGARET O. HYDE & ELIZABETH H. FORSYTH, M.D., THE SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 10 (1997).

Some children are very confused by the physical sensations that accompany physical acts. The body releases chemicals which tell it that the sexual acts are a good thing, something pleasurable.

For most victims, the sexual abuse is their first sexual experience and they have nothing to compare it with.

In the face of some or all of these things before, during or after the time of the abuse, victims may not even realize that the sexual acts are

abuse. See, Louise D. Sas & Alison H. Cunningham, Submission of London Fam. Ct. Clinic Inco. To Fam. Violence Prevention Div. Health Can., *Tipping the Balance to Tell the Secret: Public Discovery of Child Sexual Abuse* 1, 91-92 (1995). These experiences compound the difficulty created by the frequently delayed onset of emotional problems. They all make it difficult, if not impossible, for victims to realize that their problems are the result of the sexual abuse.³ See MIC HUNTER, ABUSED BOYS at 31, 59.

II. THE FOCUS OF THE DISCOVERY RULE SHOULD BE ON WHEN THE VICTIM KNEW OR SHOULD HAVE KNOWN OF THE INJURY AND ITS CAUSE, NOT ON WHETHER THE ABUSER INTENDED TO INJURE THE VICTIM OR WHETHER THE CHILD KNEW THAT THE PHYSICAL ACT OCCURRED.

Childhood sexual abuse is not only an intentional act, but an intentionally harmful act. The child, however, does not know that the abuser is intending to injure the child. The abuser does not tell the child about the severe emotional problems that will surface years later. Often sexual abuse does not hurt the way violent battering would. Many children

³In terms of discovery of injury, a childhood sexual abuse victim is arguably in a worse position than someone exposed to asbestos, because a child is charged with knowledge of the injury and its cause as soon as the sexual acts take place, even though the child could be five years old and not experience any injury until they are in their twenties. Compare Sopha v. Owens-Corning Fiberglas Corp., 230 Wis.2d 212, 601 N.W.2d 627 (1999) with Doe v. Archdiocese of Milwaukee, supra, 211 Wis. 2d at 342,

look up to the abuser and often the child's family respects the abuser. Even if a child knows a sexual touch is "bad," they cannot make sense of the circumstances, or understand why their bodies may feel pleasure when sexually abusive acts take place. Therefore, the mental state of the abuser, should be irrelevant in determining when a victim discovers the injury and its cause.

In addition, the discovery rule should not depend on whether the child understands the nature of the sexual acts in general. The child may know that such acts occurred, but usually the child has no knowledge that the acts constitute abuse, or that they will suffer a lifetime of harm from that abuse. See MIC HUNTER, ABUSED BOYS 31 (1991). If the discovery rule is triggered simply by the child's knowledge that a physical act occurred, the injuries will rarely be redressed. Children may repeat what they are taught - that a touch is "bad," but they simply do not understand why. Indeed, many victims do not even experience the harm until adulthood. It is difficult for many adults to conceive of a child being sexually abused, which means that adults sitting in judgment of kids impose their own standards on the evidence. If adults are looking at situations through their own eyes, rather than trying to put themselves in the child's place, they are failing children and exposing them to greater risk of harm.

III. THE DISCOVERY RULE SHOULD NOT BE CATEGORICALLY APPLIED TO CHILDHOOD SEXUAL ABUSE VICTIMS ON A MOTION TO DISMISS.

“A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances.”

Beloit Liquidating Trust v. Grade, 270 Wis.2d 356, ¶ 17, 677 N.W.2d 298, ¶ 17 (2004). Essentially, under Doe a child who is sexually abused does not even have the opportunity to prove delayed discovery, because their case will get dismissed on a motion to dismiss. See Doe v. Archdiocese of Milwaukee, supra, 211 Wis. 2d at 342, 565 N.W.2d at 105 (1997). This is so even if the plaintiff alleges delayed discovery in the complaint. This is what apparently happened in the case at bar. The Court of Appeals in this case held that children who are “sexually assaulted by a person in a position of trust are, as a matter of law, irrebuttably presumed to have discovered the injury and the cause thereof at the moment of the assault, regardless of whether the plaintiff repressed all memory of the assault or the plaintiff did not know and should not have reasonably known of the injury or cause thereof.”

This rule of law is contrary to the scientific evidence regarding childhood sexual abuse. Moreover, as a matter of policy this rule of law would effectively mean that “[t]he doors of the courthouse have again been

closed--this time to children.” Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund, 237 Wis.2d 99, ¶ 86, 613 N.W.2d 849, ¶ 86 (2000) (Crooks, J., dissenting) (involving a child’s right to bring a medical malpractice lawsuit). This rule would reward sex offenders for picking on immature victims who, by virtue of biology and emotional maturity, cannot know about the harm at the time of the abuse, because the harm has not even happened yet. See Nelson et. al., supra, at 141. Childhood sexual abuse victims need to age into sexual maturity, because only a mature person can appreciate the breach of trust, the intrusion into sexual autonomy and the violation of self.

Other states’ supreme courts that have adopted a common law discovery rule for causes of action based on childhood sexual abuse have held that the timing of discovery is a question of material fact and not appropriate as a basis to grant a motion to dismiss. See Callahan v. State, 464 N.W.2d 268, 271-73 (Iowa 1990) (adopting discovery rule in a childhood sexual abuse case and denying summary judgment because there was a material issue of fact under the discovery rule); Osland v. Osland, 442 N.W.2d 907, 908-09 (N.D. 1989) (affirming trial court’s use of the discovery rule in a childhood sexual abuse action and stating that discovery is a fact question); Dunlea v. Dappen, 924 P.2d 196, 202 (Haw. 1996) (adopting the discovery rule for cases of childhood sexual abuse and

holding that the time of discovery is a jury question).

CONCLUSION

The Leadership Council respectfully asks this Court to apply the discovery rule to this case and to other cases involving childhood sexual abuse in a manner which is consistent with the clinical and scientific research about childhood sexual abuse, and to allow childhood sexual abuse victims the opportunity to prove that they experienced delayed discovery.

Respectfully submitted,

Date: February 18, 2005



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TABLE 1: Non-Clinical Studies on the Association Between Childhood Sexual Abuse and Adverse Psychosocial Outcomes, Which Controlled For Family or Background Variables.

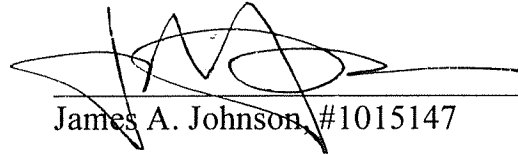
STUDY	METHOD	RESULTS
Boney-McCoy & Finkelhor (1995)	Random: Nationally representative probability sample of 2,000 youths aged 10-16 years	Significant associations were found between CSA and increased levels of PTSD symptoms and school difficulties.
Briere & Elliott (2003)	Random: Geographically stratified, general population sample of 1,442 adults	CSA was associated with a wide variety of psychological symptoms.
Brown et al. (1999)	Prospective: A cohort of 776 randomly selected children followed for 17 years	Compared with physical abuse and neglect, CSA was found to carry the greatest risk of depression and suicide.
Fergusson et al. (1996)	Prospective: Followed a birth cohort of 1,019 male and female youths until adulthood	Significant associations were found between CSA and higher rates of major depression, anxiety disorder, conduct disorder, substance use disorder, and suicidal behavior.

Fleming et al. (1999)	Random: Studied subsample of 710 women selected from a larger study involving women in Australia	Significant associations were found between CSA and higher reports of domestic violence, rape, sexual problems, mental health problems, low self-esteem, and problems with intimate relationships.
Johnson et al. (1999)	Prospective: Representative community sample of 639 youths	Significant associations were found between CSA and increased rates of personality disorders during early adulthood.
Kendler et al. (2000)	Co-twin: Twins discordant for CSA drawn from a sample of 1,411 adult female twins	The twin reporting CSA was consistently at higher risk for lifetime psychiatric and substance use disorders compared to their nonabused co-twin with odds ratios generally increasing with the severity of the abuse.
Levitan et al. (2003)	Community sample of 6,597 individuals 15-64 years of age in Ontario, Canada	A robust finding, consistent across all analyses, was a marked association between early sexual abuse and co-morbid depression and anxiety but not the 'pure' disorders.

Molnar, Berkman et al. (2001)	Nationally representative sample of 5,877 Americans aged 15 to 54 years	Among those sexually abused as children, odds of suicide attempts were 2-4 times higher among women and 4-11 times higher among men, compared with those not abused.
Molnar, Buka et al. (2001)	Nationally representative sample of 5,877 Americans aged 15 to 54	A strong, independent statistically significant relationship between childhood sexual abuse and the majority of mood, anxiety and substance abuse disorders. CSA victims were twice as likely as nonabused controls to suffer one or more mental disorders.
Mullen et al. (1993)	Random: Stratified, random community sample of 1,376 adult women in New Zealand	Significant associations were found between CSA and higher levels of psychopathology, along with higher rates of substance abuse and suicidal behavior.
Stein et al. (1988)	Random: Community sample of 3,132 male and female adults.	Significant associations were found between CSA and meeting diagnostic criteria for at least one lifetime psychiatric disorder, especially substance abuse disorders, major depression, phobia, panic disorder, and antisocial personality.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,624 words.



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holding that the time of discovery is a jury question).

CONCLUSION

The Leadership Council respectfully asks this Court to apply the discovery rule to this case and to other cases involving childhood sexual abuse in a manner which is consistent with the clinical and scientific research about childhood sexual abuse, and to allow childhood sexual abuse victims the opportunity to prove that they experienced delayed discovery.

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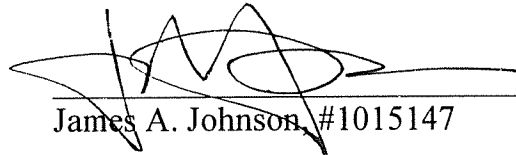
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