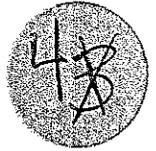


No. A09-1728



STATE OF MINNESOTA
IN SUPREME COURT

Mary Lickteig,

Appellant,

vs.

Robert Kolar, Jr.

Appellee.

BRIEF OF APPELLANT MARY LICKTEIG

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STATEMENT OF THE LEGAL ISSUES

The following issues were certified by the United States Court of Appeals for the Eighth Circuit:

- (1) Whether Minnesota recognizes a cause of action by one sibling against another sibling for “sexual abuse” that allegedly occurred when they were both minor children; and, if so, what are the elements of that cause of action?

D.M.S. v. Barber, 645 N.W.2d 383, 387 (Minn. 2002)

Bertram v. Poole, 597 N.W.2d 309 (Minn. Ct. App. 1995)

W.J.L. v. Bugge, 573 N.W.2d 677, 678 (Minn. 1998)

MINN. STAT. § 541.073

- (2) Whether intrafamilial immunity applies between siblings for a sexual abuse tort or battery tort committed when both were unemancipated minors living in the same household, where the lawsuit is not brought until both are emancipated adults living in separate households?

Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980)

Beaudette v. Frana, 173 N.W.2d 416, 419 (Minn. 1969)

Silesky v. Kelman, 161 N.W.2d 631, 634 (Minn. 1968)

MINN. CONST., Art. I § 8

- (3) Whether the statute of limitations, Minn. Stat. § 541.073, applies retroactively to Lickteig’s action, where she was allegedly “sexually abused” as a minor between 1974 and 1977, but, because of repressed memories, she alleged that she did not remember the abuse until 2005?

K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990)

MINN. STAT. § 541.073

STATEMENT OF THE CASE

Lickteig brought this diversity action in the United States District Court, District of Minnesota, against Kolar for the sexual abuse and assaults he committed upon her when they both were minors in Walnut Grove, Minnesota. (Appx. 2-5)¹ Kolar filed his Answer and Counterclaim, asserting claims against Lickteig for abuse of process and defamation. (Appx. 7-11) Lickteig filed a Motion to Amend her Complaint, seeking to add a claim for punitive damages. (Appx. 47-48) The District Court, the Honorable Janie S. Mayeron, United States Magistrate Judge, presiding, granted the Motion to Amend and Lickteig filed her Amended Complaint on or about February 26, 2008. (Appx. 78-85; 86-90)

Lickteig moved for Summary Judgment on Kolar's Counterclaim, and the District Court, the Honorable Paul A. Magnuson, United States District Court Judge, granted the Motion as to the abuse of process claim, but concluded the record was insufficient to make a determination as to the defamation claim, and denied the Motion as to that claim. (Appx. 119-122)

At the hearing on Lickteig's Motion for Summary Judgment, Judge Magnuson *sua sponte* raised the issue of whether Minnesota recognizes a cause of action against a sibling for acts committed when both were unemancipated minors, and requested that the parties file letter briefs on that issue. (Appx. 137-139) Lickteig filed a letter brief stating that she had a viable cause of action against Kolar. (Appx. 139) After the District Court

¹ Citations to the record will be denoted as "Appx.," followed by the appropriate page number.

directed Kolar to submit a response, he did so, indicating that he agreed that Lickteig could file a claim for civil sexual abuse/assault against him, but that the statute of limitations had run, arguing Iowa law applies. (Appx. 139)

By Memorandum and Order dated July 31, 2008, the District Court, Judge Magnuson presiding, dismissed the case *sua sponte*, concluding Lickteig had not stated a cause of action because it determined Minnesota does not recognize a cause of action involving sexual abuse between unemancipated siblings, and finding the intrafamilial immunity doctrine barred such an action. (Appx. 141-146) The District Court's opinion raised issues that had never been raised or addressed by Kolar.

Accordingly, Lickteig filed a Request to File a Motion to Reconsider on August 8, 2008, and requested that in the alternative, the District Court certify the issue to the Minnesota Supreme Court. (Appx. 150-151) Kolar filed a response, arguing the statute of limitations precluded Lickteig's action. (Appx. 152) The District Court denied Lickteig's Request to File a Motion to Reconsider on August 19, 2008, on the same basis as those expressed in its Memorandum and Order dismissing Plaintiff's Amended Complaint, and denied the request for certification. (Appx. 155-156) On August 26, 2008, Lickteig filed her Notice of Appeal from the District Court's Order dismissing her Amended Complaint, and from the District Court's Order denying her Request to File a Motion to Reconsider, with the United States Court of Appeals for the Eighth Circuit. (Appx. 157)

By Order dated September 17, 2009, the Eighth Circuit certified three questions to this Court, pursuant to MINN. STAT. § 480.065. (Addendum 13-14) By Order dated

September 28, 2009, this Court accepted the questions that were certified. (Addendum 15-16) Lickteig now respectfully submits this Brief in response to the certified questions.

STATEMENT OF THE FACTS

At the time of filing her Complaint, Mary Lickteig was a resident of Dell Rapids, South Dakota.² (Appx. 2) Kolar is a resident of Merrill, Iowa. (Appx. 2) Lickteig and Kolar are biological siblings who grew up together in Walnut Grove, Redwood County, Minnesota. (Appx. 3) Their family consisted of nine siblings, with Kolar being the third oldest child in the family, and approximately seven years older than Lickteig. (Appx. 3)

Lickteig has always remembered that Kolar sexually abused, raped and assaulted her sisters while Lickteig was in the same room. (Appx. 3) Kolar forced himself on his sisters, while they screamed. (Appx. 3) In approximately August 2005, Lickteig began remembering Kolar's sexual abuse and assault of her. (Appx. 3) This abuse of Lickteig began when she was in the third grade and continued for several years, from approximately 1974 to 1977. (Appx. 4) Kolar admits to sexually abusing two of his sisters, Twyla Kornschnabel and Cindy Kolar. (Appx. 97-98) Kolar testified he fondled two of his sisters' breasts, touched their genital areas, and masturbated on them. (Appx. 97-98) In addition, he admits to rubbing his penis against one of his sister's vagina. (Appx. 71)

On or about February 5, 2007, Lickteig served and filed her Complaint against Kolar in the United States District Court, District of Minnesota. (Appx. 1-5). Lickteig

² Lickteig now resides in Harrisburg, South Dakota.

asserted causes of action for civil sexual assault/abuse and battery, based on the sexual abuse perpetrated upon her by Kolar. (Appx. 1-5) Kolar answered and asserted counterclaims of abuse of process and defamation against Lickteig. (Appx. 7-11)

Lickteig filed a Motion to Amend Complaint, seeking to add a claim for punitive damages. (Appx. 47-48) In a Memorandum and Order dated February 25, 2008, the District Court, the Honorable Magistrate Judge Janie S. Mayeron, granted the Motion to Amend, allowing Lickteig to assert a punitive damages claim against Kolar. (Appx. 78-85) The District Court held the facts asserted by Lickteig supported a claim of battery and constituted “clear and convincing evidence.” (Appx. 82) The District Court held “under Minnesota law, punitive damages are granted in cases of sexual abuse.” (Appx. 82) (citing *Father A. v. Moran*, 469 N.W.2d 503, 507 (Minn. Ct. App. 1991)).

In ruling on the Motion to Amend, the District Court considered Kolar’s argument that the amendment would be futile because the statute of limitations bars Lickteig’s action. (Appx. 82) The District Court recognized that it can deny a motion to amend “when the proposed amendment would be futile.” (Appx. 82-83) (citing *Holloway v. Dobbs*, 715 F.2d 390, 392-93 (8th Cir. 1983)). The District Court further noted a “proposed amended complaint is futile if it fails to state a claim upon which relief can be granted.” (Appx. 83) (citing *United States v. Iowa*, 269 F.3d 932, 936 (8th Cir. 2001)) (“The denial of leave to amend based on futility means that the court found that the amended complaint failed to state a claim.”). The District Court determined that Lickteig had stated a cause of action and her proposed amendment was not futile, and therefore, granted the Motion to Amend. (Appx. 85)

Lickteig then filed a Motion for Summary Judgment as to Kolar's counterclaims. (Appx. 91) The District Court, the Honorable Paul A. Magnuson presiding, granted the Motion for Summary Judgment as to the abuse of process claim, but concluded the record was insufficient to make a determination as to the defamation claim, and denied the motion as to that claim. (Appx. 119-122)

At the hearing on Lickteig's Motion for Summary Judgment, the District Court, Judge Magnuson presiding, *sua sponte* raised the issue of whether Minnesota recognizes a cause of action against a sibling for acts committed when both were unemancipated minors, and requested that the parties file letter briefs on that issue. (Appx. 137-139) Lickteig filed a letter brief stating that she had a viable cause of action against Kolar. (Appx. 139) After the District Court directed Kolar to submit a response, he did so, stating that he agreed that Lickteig could file a claim for civil sexual abuse/assault against him, but that the statute of limitations had run, arguing Iowa law applies. (Appx. 139) Notably, Kolar never argued for dismissal based on failure to state a claim. (Appx. 140, 141)

By Memorandum and Order dated July 31, 2008, the District Court dismissed the case *sua sponte*, concluding Lickteig had not stated a cause of action because it determined Minnesota does not recognize a cause of action involving sexual abuse between unemancipated siblings, and finding the intrafamilial immunity doctrine barred such an action. (Appx. 141-146) The District Court's opinion raised issues that had never been raised or addressed by Kolar.

Accordingly, Lickteig filed a Request to File a Motion to Reconsider on August 8, 2008, and requested that in the alternative, the District Court certify the issue to the Minnesota Supreme Court. (Appx. 150-151) Kolar filed a response, arguing the statute of limitations precluded Lickteig's action. (Appx. 152) The District Court denied Lickteig's Motion for Permission to File a Motion to Reconsider on August 19, 2008, on the same bases as those expressed in its Memorandum and Order dismissing Plaintiff's Amended Complaint, and denied the request for certification. (Appx. 155-156)

On August 26, 2008, Lickteig filed her Notice of Appeal from the District Court's Order dismissing her Amended Complaint, and from the District Court's Order denying her Motion for Permission to File Motion to Reconsider with the Eighth Circuit Court of Appeals. (Appx. 157) In addition to some procedural issues, the following substantive issues were considered by the Eighth Circuit: (1) whether Minnesota recognizes a cause of action for sexual abuse; (2) whether intrafamilial immunity is a defense to a claim against a sibling; and (3) whether Lickteig's suit was timely. (Addendum 2-14) The Eighth Circuit determined the answers to all three questions were uncertain, and accordingly, certified these questions to the Minnesota Supreme Court. (Addendum 13-14)

STANDARD OF REVIEW

A certified question is a question of law that this Court reviews de novo. *See In re United Health Group Inc. Shareholder Derivative Litigation*, 754 N.W.2d 544, 550 (Minn. 2008) (citing *Clark v. Lindquist*, 683 N.W.2d 784, 785 (Minn. 2004)).

SUMMARY OF THE ARGUMENT

I. Minnesota recognizes a cause of action against an adult sibling for sexual battery. This is clear both from the legislative enactment of the statute of limitations that pertains specifically to a cause of action for sexual abuse, as well as from the Court's prior opinions discussing such claims. The elements of a claim for sexual abuse are simple and straightforward: (1) whether the defendant committed sexual abuse of the plaintiff, as defined in MINN. STAT. §§ 609.342-609.345, and (2) whether the plaintiff suffered personal injury, as defined in MINN. STAT. § 609.341, as a result.

II. There is simply no authority in Minnesota, or elsewhere, indicating that intrafamilial immunity has ever applied to a lawsuit between adult, emancipated siblings. Further, even if such immunity ever existed, it has been abrogated, along with all other forms of intrafamily immunities.

III. The statute of limitations for a claim of sexual abuse is six years from the date the plaintiff knows or has reason to know that her injuries were caused by the defendant's abuse of the plaintiff. This statute of limitations is to be applied retroactively and, therefore, applies to Lickteig's claim of sexual abuse against Kolar.

ARGUMENT

I. MINNESOTA RECOGNIZES A CAUSE OF ACTION BY ONE SIBLING AGAINST ANOTHER SIBLING FOR SEXUAL ABUSE THAT OCCURRED WHEN THEY WERE BOTH MINORS

A. Minnesota Recognizes a Cause of Action for Sibling Sexual Abuse

As to this first issue, the Eighth Circuit recognized that the Minnesota Court of Appeals in *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. Ct. App. 1999) (citing *Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996)), stated that “‘in light of reported cases and legislative references to this cause of action’ it is clear that Minnesota law ‘recognize[s] a civil cause of action for personal injury based on sexual abuse.’” (Addendum 9) Nonetheless, the Eighth Circuit found “‘it unclear whether a cause of action for personal injury caused by sexual abuse is indeed a separate tort from battery or a certain category of battery where the nature of the defendant’s conduct entitles the plaintiff to an extended statute of limitations; and if a separate cause of action for sexual abuse exists it is unclear what all of the elements of the tort are.” (Addendum 10)

With all due respect to the Eighth Circuit, Lickteig believes that it is clear that Minnesota recognizes a cause of action against a sibling for civil sexual abuse/assault. See MINN.STAT. § 541.073; *D.M.S. v. Barber*, 645 N.W.2d 383, 387 (Minn. 2002); *Bertram v. Poole*, 597 N.W.2d 309 (Minn. Ct. App. 1995); *W.J.L. v. Bugge*, 573 N.W.2d 677, 678 (Minn. 1998); *Behnke v. Behnke*, No. A06-1004, 2007 WL 1412914 (Minn. Ct. App. 2007) (unpublished disposition).

The most compelling evidence that such a cause of action exists in Minnesota is the fact that Minnesota has enacted a “delayed discovery statute,” which expressly recognizes a cause of action for sexual abuse. The statute provides in relevant part:

An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.

MINN.STAT. § 541.073 (emphasis added). Thus, the Minnesota Legislature clearly and explicitly recognizes a personal injury cause of action for sexual abuse. On this basis alone, Lickteig respectfully submits this Court should conclude that a cause of action for sexual abuse, whether against a stranger or against a sibling exists in Minnesota.

Further, numerous Minnesota cases implicitly recognize such a cause of action, and not a single Minnesota case expressly or implicitly has held otherwise. In *D.M.S.*, the plaintiff brought a personal injury action against his foster parent, as well as the association given supervisory responsibility over the foster parent placement (“PATH”). *D.M.S.*, 645 N.W.2d at 385. The only issue before the court on appeal was whether the statute of limitations had run on the plaintiff’s claims against PATH. *Id.* There was no claim, nor any discussion regarding whether a cause of action exists for sexual abuse. *Id.* Indeed, the claims against the foster parent were not at issue on appeal. *Id.* at 386 n.2.

In *Bertram*, two sisters brought suit against their uncle and his wife, claiming that their uncle sexually abused them and that his wife was aware of the abuse. *Bertram*, 597 N.W.2d at 311. The sisters alleged their memories of the abuse were repressed. *Id.* Recognizing, at least implicitly, that a civil cause of action exists for sexual abuse, the court in *Bertram* considered only whether the statute of limitations precluded the

plaintiffs' suit. *Id.* There was no claim by the defendants, nor any finding by the court, that such of cause of action did not exist. *Id.*

The court in *W.J.L.* also implicitly recognized a personal injury action may be brought against the perpetrator of sexual abuse. *W.J.L.*, 573 N.W.2d at 678-79. The plaintiff in that case brought a sexual battery claim against a teacher who had allegedly sexually abused the plaintiff. *Id.* Again, the court considered only whether the statute of limitations had run on plaintiff's sexual battery claim. *Id.*

In sum, there is no question that a cause of action exists in Minnesota for sexual battery. While none of the cases cited above are in the context of sibling-on-sibling sexual abuse, it is simply illogical and perhaps unconstitutional, to allow a victim of sexual abuse to sue her uncle, parent or teacher, as in the above cases, and prohibit a victim of sexual abuse to sue her brother. Further, as explained below, the elements of a cause of action for sexual battery have been set forth by the Court, and have been satisfied by Lickteig.

B. The Elements of a Cause of Action for Sibling Sexual Abuse

The elements of a cause of action for sexual abuse have already been elucidated by this Court and are simple and straightforward. *See W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998). In *W.J.L.* this Court held that in order for the delayed discovery statute, MINN. STAT. § 541.073, to come into play, "the complained of conduct must constitute sexual abuse as defined in Minn. Stat. § 541.073, subd. 1, which means it must be conduct described in Minn. Stat. §§ 609.342-609.345." *Id.* The Court further explained, "[u]pon establishing that the plaintiff was sexually abused, it must also be

determined whether the alleged sexual abuse resulted in ‘personal injury’ to the plaintiff.”

Id.

Therefore, under existing Minnesota law, the elements of a civil cause of action for sexual battery are:

- (1) The defendant committed “sexual abuse,” as defined in MINN. STAT. §§ 609.342-609.345, upon plaintiff; and
- (2) The plaintiff suffered “personal injury,” as defined in MINN. STAT. § 609.341, subd. 8, as a result of the sexual abuse.

See id. “Sexual abuse” is defined as “sexual penetration with another person” or “sexual contact with a person under 13 years of age.” “Sexual contact” includes, *inter alia*: the intentional touching by the actor of the complainant's intimate parts; the touching by the complainant of the actor's, the complainant's, or another's intimate parts; the touching by another of the complainant's intimate parts; or touching of the clothing covering the immediate area of the intimate parts. *See* MINN. STAT. § 609.341, subd. 11. “Personal injury” means “bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy.” MINN. STAT. § 609.341, subd. 8. “Bodily harm” is defined as “physical pain or injury, illness, or any impairment of physical condition.” MINN. STAT. § 609.02, subd. 7.

Lickteig has clearly alleged both elements to a cause of action for sexual battery. She alleged in her Complaint that “[b]etween approximately 1974 and 1977, Kolar engaged in unpermitted, harmful and offensive sexual conduct and contact upon the person of Lickteig” and that as a result, “Lickteig has suffered, and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of

emotional distress.” (Appx. 51) Accordingly, Lickteig has stated a cause of action for sexual battery under Minnesota law.

II. INTRAFAMILIAL IMMUNITY DOES NOT BAR A SUIT BETWEEN ADULT, EMANCIPATED SIBLINGS FOR SEXUAL ABUSE THAT OCCURRED WHEN THEY WERE UNEMANCIPATED MINORS

As to whether intrafamilial immunity bars Lickteig’s suit against Kolar, the Eighth Circuit recognized that this Court “has found traditional justifications, including the disruption of family peace or the proliferation of litigation, insufficient to support other intrafamilial immunities—such as between parent and child and between spouses—which Minnesota courts have completely abrogated.” (Addendum 10-11) (citing *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980); *Beaudette v. Frana*, 173 N.W.2d 416, 419-20 (Minn. 1969); *Silesky v. Kelman*, 161 N.W.2d 631, 634 (Minn. 1968)). As to this issue, the Eighth Circuit also stated the “public policy concerns of family peace may be even less at issue when, as here, a lawsuit involves adult siblings who no longer share the same household.” (Addendum 11) The Eighth Circuit further noted that this Court stated in *Silesky* that “[s]uits are permitted among unemancipated siblings even though they remain in the family household,” and that the Court cited to a Connecticut case holding that unemancipated minor siblings are not entitled to immunity in a suit arising out of an automobile accident. (Addendum 11) (citing *Silesky*, 161 N.W.2d at 634 and *Overlock v. Ruedemann*, 165 A.2d 335, 338 (Conn. 1960)).

Intrafamilial immunity is simply not a valid defense to Lickteig’s cause of action against her adult sibling. Significantly, Kolar has never cited to a single opinion applying

intrafamilial immunity in the context of a suit between siblings, and Lickteig has not discovered such a case.³ Indeed, those courts that have considered it have rejected its application. *See e.g. Smith v. Somera*, 389 So.2d 1080 (Fla. Ct. App. 1980) (per curiam) (reversing summary judgment and stating, “Appellee has not pointed to a single Florida (or any other) decision applying the [intrafamilial] doctrine in suits between adult siblings; arguments for application sub judice are negated by reference to the RESTATEMENT (SECOND) OF TORTS § 895H, [cmt. c] (1977), and to those cases collected at 81 A.L.R.2d 1155.”).

The RESTATEMENT (SECOND) OF TORTS § 895H plainly states, “[b]rothers and sisters or their kin are not immune from tort liability to one another by reason of that relationship.” The comments to this section explain that “[n]one of the justifications that have been advanced in the past for the immunity from tort liability between parent and child . . . has been regarded by any court as sufficient to justify extension of the immunity to other relations of kinship, notwithstanding whatever tendency the litigation might have to cause family disharmony among the other relatives. The immunity has not been

³ The law in effect at the time Lickteig’s cause of action arose is applicable. *See e.g. Carlson v. Ind. School Dist.*, 392 N.W.2d 216, 219-220 (Minn. 1986) (applying Human Rights Act in effect at the time the claims arose); *Greenwaldt v. Illinois Farmers Ins. Co.*, 526 N.W.2d 202, 204 (Minn. Ct. App. 1995) (applying comparative fault statute in effect at time of the collision). Under Minnesota law, Lickteig’s cause of action did not arise at the time the abuse “occurred.” Rather, a cause of action for sexual abuse accrues at the time of “discovery,” when the abuse victim “knew or had reason to know that the injury was caused by the sexual abuse,” which in this case was in 2005. *See* MINN. STAT. § 541.073. Thus, the state of the intrafamilial immunity doctrine, as it existed in 2005 when Lickteig’s cause of action accrued, is what is relevant here.

extended to these relations. **Thus, a brother has no immunity toward his sister. . . .**”

RESTATEMENT (SECOND) OF TORTS § 895H, cmt.c. (emphasis added).

One author notes:

Whereas in the field of parent-child and husband-wife relationships there has been a tradition, in the American courts at least, to deny the right of such parties to sue each other in tort – although the recent trend has been to liberalize this rule – **the arguments advanced in favor of precluding the maintenance of such actions between closely related parties have never found acceptance where the relationship involved was that of sibling, ancestor, or other collateral relative.**

Irwin W. Schiffres, Annotation, *Family Relationship Other than that of Parent and Child or Husband and Wife Between Tortfeasor and Person Injured or Killed as Affecting Right to Maintain Action*, 81 A.L.R.2d 1155 § 1 (1962) (emphasis added). The author further notes:

Defendants in many cases involving siblings have argued that the reasoning of the courts in parent-child or husband-wife case, namely, that to permit such actions would disrupt family harmony, encourage fraud and collusion, etc., should be applied to cases where plaintiff and defendants are members of the same family and household, living together under the same parental authority. **These arguments have been uniformly rejected.**

Id. and cases cited therein (emphasis added). The author cites to the Minnesota Supreme Court case *Routh v. Routh*, 97 N.W.2d 644 (Minn. 1959), where plaintiff and defendant were brothers. In finding against the plaintiff, the court determined only that there was no causal connection between the alleged tort and injury, but never held that the parties’ relationship in any way affected plaintiff’s right to recover. In fact, a search of Minnesota case law reveals no case in which the Minnesota courts have ever held the

intrafamilial immunity precludes a cause of action against a sibling. All indication is to the contrary.

Significantly, the Court in *Beaudette v. Frana*, 173 N.W.2d 416, 417 (Minn. 1969) (emphasis added), stated that “interspousal immunity is the **last vestige** of the judicially established rule of intrafamily immunity in actions for tort,” indicating that if sibling immunity ever existed, it was no longer a valid defense at the time that case was decided. Further, in *Silesky v. Kelman*, 161 N.W.2d 631, 634 (Minn. 1968), the Court analyzed the parent-child immunity doctrine and abrogated that immunity doctrine with only two exceptions (*Silesky* was later overruled on other grounds, **expanding** the abrogation so that there were no exceptions). See *Anderson v. Stream*, 295 N.W.2d 595, 600 (Minn. 1980). In partially abrogating the intrafamilial immunity doctrine, the court in *Silesky* stated “[s]uits are permitted among unemancipated siblings even though they remain in the family household.” *Silesky*, 161 N.W.2d 634. In so stating, the court cited the above annotation. See *id.* (quoting Annotation, 81 A.L.R.2d 1155 § 1). The *Silesky* court also discussed *Overlock v. Ruedemann*, 165 A.2d 335 (Conn. 1960), a Connecticut Supreme Court case, in which it was held that an unemancipated minor child could maintain an action against her unemancipated minor sister. *Id.* It makes no sense to allow an action by one sibling against another sibling living in the same household, as recognized by the Court in *Silesky*, yet bar such an action when the siblings are emancipated adults.

Moreover, the Minnesota Supreme Court recognizes that a “fundamental concept of our legal system and a right guaranteed by our state constitution, is that a remedy be afforded to those who have been injured due to the conduct of another.” *Anderson v.*

Stream, 295 N.W.2d 595, 600 (Minn. 1980) (citing *Nieting v. Bondell*, 235 N.W.2d 597 (Minn. 1975) and MINN. CONST., Art. I, § 8). The Minnesota Constitution provides:

Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

MINN. CONST., Art. I, § 8. Pursuant to that mandate, the court in *Anderson* completely abrogated the doctrine of parental immunity. See *Anderson*, 295 N.W.2d at 601.

In so doing, the court explained:

Our system of justice places great faith in juries, and we see no compelling reason to distrust their effectiveness in the parent-child context. Nor do the arguments relating to family discord and collusion require a different result than that reached herein. These claims, which were found to be unpersuasive in the initial decision abrogating intrafamilial immunity . . . are no more convincing today.

Id. at 600 (internal citations omitted). The court noted:

The argument that litigation by a parent against a child promotes discord is difficult to follow. Where a wrong has been committed of a character sufficiently aggravated to justify recovery were the parties strangers, the harm has been done. We believe the prospect of reconciliation is enhanced as much by equitable reparation as by denying relief altogether. . . .

Id. at 600 n.4.

Similarly, in abrogating interspousal immunity in its entirety, the Minnesota Supreme Court in *Beaudette*, 173 N.W.2d at 419, refuted the “conflicting social considerations,” explaining:

The favored rationale for abrogating any one of the family immunities, as adopted in *Balts*, is that the social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship.

Id. at 419 (citing *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966)).

Thus, any apprehension over “threaten[ing] family peace” is simply not an issue. Indeed, in this case, as in most cases of sexual abuse by a family member, the family peace has already been disrupted, if not ruined, by the abuse itself. Further, where as here, Lickteig and Kolar have no relationship with each other, no shared interests, no shared funds and no reason or opportunity for collusion, the rationale for intrafamilial immunity is simply inapplicable. *See e.g. Beaudette*, 173 N.W.2d at 419-420 (setting forth societal considerations for intrafamilial immunity). And, while the Court in *Silesky* considered the presence of liability insurance, it also importantly stated that “the scales should be weighed in favor of affording the injured child a remedy in the instant case” and that this factor “must be of paramount significance.” *Silesky*, 161 N.W.2d at 637.

There is also no concern over the potential of a “proliferation of litigation.” This Court already addressed and dismissed such an argument in *Balts*, finding such a concern to be unfounded. *Balts*, 142 N.W.2d at 73. The Court stated it was:

not persuaded that the removal of the immunity barrier will encourage a rash of vexatious lawsuits. On the other hand, in instances where serious harm has resulted from actionable negligence or from other torts of such an aggravated nature that a member of a family would have a right to recover or would be liable if the adversary were a stranger, **public policy, we believe, requires that the wrong be righted within the family group by suit or settlement.**

Id. (emphasis added).

Thus, even assuming intrafamilial immunity applies in the context of siblings, which is expressly denied, such immunity should be expressly abrogated, such that it no

longer has any applicability and no longer precludes a personal injury action against a sibling. For all these reasons, Lickteig respectfully submits that intrafamilial immunity does not preclude her cause of action against her brother for the sexual abuse he inflicted upon her.

III. THE STATUTE OF LIMITATIONS UNDER MINN. STAT. § 541.073 APPLIES RETROACTIVELY, SO THAT LICKTEIG'S CLAIM IS TIMELY

As to this final certified question, the Eighth Circuit noted that “[u]nder the plain language of § 541.073, as the magistrate judge found in this case, Lickteig’s complaint is timely, because she commenced suit within six years of when she alleged her repressed memories resurfaced in 2005, i.e. when she knew or had reason to know that her emotional and psychological injuries were caused by Kolar’s sexual abuse.” The Eighth Circuit pointed out that the Minnesota Court of Appeals in *K.E. v. Hoffman*, 452 N.W.2d 509, 512-13 (Minn. Ct. App. 1990), concluded that section 541.073 applies retroactively, so as to revive a previously stale claim for sexual abuse. (Addendum 13) However, without controlling precedent from this Court as to whether section 541.073 applies retroactively, the Eighth Circuit determined the better practice was to certify this question to this Court. (Addendum 13)

Kolar argues the statute of limitations the magistrate judge found applicable to Lickteig’s claims – MINN.STAT. § 541.073 – was not passed until 1989, after the previous statute of limitations applicable to such claims already expired. Kolar argues that under the previous statute of limitations – MINN.STAT. § 541.07 – Lickteig had only two years

to bring her cause of action for sexual assault, and that after reaching the age of majority, Lickteig was required to bring suit no later than January 1, 1986.

The flaw in Kolar's reasoning is that the statute of limitations for claims of sexual assault was intended to be retroactive. The Minnesota Court of Appeals in *K.E. v. Hoffman*, 452 N.W.2d 509, 511 (Minn. Ct. App. 1990), addressed this very argument. In that case, the plaintiff alleged he was abused by his teacher on two occasions during 1975. *Id.* The plaintiff had no memory of the abuse until he was enlisted in the Navy, sometime between 1983 and 1986, and brought suit against the teacher and the school for the abuse in 1988. *Id.*

As in this case, the defendants in *K.E.* argued plaintiff's claims were barred by the two-year statute of limitations set forth in MINN.STAT. § 541.07(1). *Id.* The trial court granted the defendants' motion for summary judgment and concluded the two-year statute of limitations applied, but that the running of the statute of limitations was tolled for one year after plaintiff's discharge from the Navy. *Id.* Thus, the trial court held plaintiff had until 1987 to bring suit. *Id.*

Following the trial court's decision, and pending appeal, the Minnesota Legislature enacted MINN.STAT. § 541.073 in 1989, which provides that a claim for sexual abuse does not arise until the victim knew or had reason to know of the abuse. *Id.* The Minnesota Court of Appeals reversed the grant of summary judgment, and defendants petitioned the Minnesota Supreme Court for review of the constitutionality and applicability of MINN.STAT. § 541.073. *Id.*

The court in *K.E.* held that section 541.073 was to be retroactively applied, and that such application did not deprive defendants of due process of law, as they had no private interest that was impaired by the limitations period. *Id.* at 512-13. The court also held that retroactive application of section 541.073 was not an unconstitutional hardship because the sexual abuse of plaintiff was not done “under the assumption the limitations period would continue in effect.” *Id.* at 513. The court also rejected defendants’ argument that section 541.073 was unconstitutional on its face, explaining:

The statute plainly reflects awareness of the difficulty sexual abuse victims have in identifying and recognizing their injuries immediately. Research shows victims of sexual abuse may repress the memory of such incidents, and not discover the actual source of their problems for many years. In acknowledging this problem, the legislature, by enacting section 541.073, limits the possibility of the general statute of limitation barring a claim of sexual abuse, and holds the sexual abuser liable for his offenses. Because we are not in the position to judge the wisdom of the legislation, where, as here, the statute has a reasonable relation to the state’s legitimate purpose of affording sexual abuse victims a remedy, we reject respondents’ due process claims.

Id. at 513-14. The court also held section 541.073 was not “special legislation,” finding it “applies to all individuals who claim damages for injuries arising out of sexual abuse” and “the distinction between victims of sexual abuse and victims of other torts is not arbitrary or fanciful.” *Id.* at 514. The court explained:

Sexual abuse victims are more likely to repress the memory of the abusive incident, and the psychological injuries caused by sexual abuse are different than for victims of other torts. . . . These differences reasonably justify the legislature’s decision to entitle sexual abuse victims to a specific statute of limitations. Finally, sexual abuse victims benefit from the discovery rule of section 541.073 because memory of the abusive incident is sometimes repressed, and consequently their claims are barred by the general statute of limitations.

Id. (internal citations omitted).

It is evident, therefore, that the six-year statute of limitations set forth in section 541.073 is retroactive and constitutional. Consequently, section 541.073 is applicable to Lickteig's claims of sexual abuse against Kolar, and Lickteig's action against Kolar was timely.

Kolar argues, however, that under the special proviso to the previous version of section 541.073, Lickteig had until 1990, at the latest, to bring a cause of action. That proviso stated:

Notwithstanding any other provision of law, a plaintiff whose claim is otherwise time-barred has until August 1, 1990, to commence a cause of action for damages based on personal injury caused by sexual abuse if the plaintiff proves by a preponderance of the evidence that the plaintiff consulted an attorney to investigate a cause of action for damages based on personal injury caused by sexual abuse within two years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.

MINN.STAT. § 541.073 (1989). However, as noted, the above proviso was contained in a prior version of section 541.073, and has since been amended so that the proviso is not contained in the 2007 version of the statute, which would be applicable to Lickteig's action. *See* MINN.STAT. § 541.073 (2007).

In any event, the proviso did not limit the time in which plaintiffs could assert claims of sexual abuse, as argued by Kolar. Rather, it allowed plaintiffs, whose claims would have been barred by previous statute of limitations, an additional amount of time to bring those claims, so long as they could demonstrate they had consulted with an attorney about doing so. In other words, a plaintiff who consulted an attorney about a

sexual abuse claim, but was told that the statute of limitations (then based on the occurrence of the abuse and not the discovery of it) precluded such a suit, would nonetheless have until August 1990 to file a cause of action for such abuse. Thus, even if the proviso were somehow still applicable, which is expressly denied, it in no way required that Lickteig file her suit by 1990.

In sum, the Minnesota statute of limitations is to be retroactively applied and is, therefore, applicable to Lickteig's action. The applicable statute of limitations gave Lickteig six years from the time she knew or had reason to know that her injuries were caused by Kolar's sexual abuse of her to file her suit. Lickteig asserts she first became aware that she was abused and that such abuse caused her injuries in 2005. Accordingly, under section 541.073, Lickteig's Complaint is timely.

CONCLUSION

Minnesota clearly recognizes a cause of action for sibling sexual battery, and to prove such a cause of action Lickteig merely needs to prove (1) that Kolar committed sexual abuse against her and (2) that she suffered personal injury as a result of such sexual abuse. Additionally, Lickteig's claim for sexual battery against her adult sibling is not barred by intrafamilial immunity, as that defense, if it ever applied to a claim between adult siblings, has been abrogated, along with all other forms of intrafamily immunities. Further, the statute of limitations enacted to apply specifically to claims of sexual abuse, is to be applied retroactively and, therefore, applies to Lickteig's claims against Kolar. As such, Lickteig's claims against Kolar are timely.

Respectfully submitted this 28th day of October, 2009.

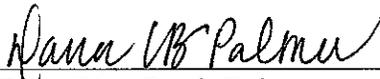
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CERTIFICATE OF COMPLIANCE

Pursuant to MINN. R. CIV. APP. P. 132.01, subd. 3, Dana Van Beek Palmer, one of the attorneys for the Appellant does hereby submit the following:

The foregoing brief was prepared using Microsoft Office Word 2003. The brief is 24 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates that there are a total of 6,384 words and 33,313 characters (no spaces) in the body of the brief.



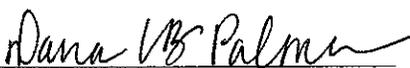
Dana Van Beek Palmer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the Appellant's Brief and two (2) copies of Appellant's Appendix in the above-entitled action were duly served by mailing true copies thereof by U.S. Mail, first class postage thereon prepaid, on the 28th day of October, 2009, to the following named persons at their last known post office addresses as follows:

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The undersigned further certifies that twelve (12) bound copies and two (2) unbound copies of the Appellant's Brief and twelve (12) bound copies and two (2) unbound copies of Appellant's Appendix, relative to the above-entitled matter were mailed to the Clerk of the Minnesota Court of Appeals, Office of the Clerk of the Appellate Courts, 305 Minnesota Judicial Center, St. Paul, Minnesota 55155, by U.S. Mail, first class postage thereon prepaid, the date above written.



Dana Van Beek Palmer