

A10-1951

STATE OF MINNESOTA
IN SUPREME COURT

John Doe 76C,

Respondent,

vs.

Archdiocese of St. Paul and Minneapolis
and Diocese of Winona,

Appellants.

**BRIEF AND APPENDIX OF *AMICUS CURIAE*
MINNESOTA SCHOOL BOARDS ASSOCIATION**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE ISSUES, CASE AND FACT..... 2

ARGUMENT

I. DOE’S ATTEMPT TO EXTEND THE STATUTE OF
LIMITATIONS FOR SEXUAL ABUSE CASES BASED
UPON REPRESSED AND RECOVERED MEMORIES
ASKED THE COURT TO DO WHAT THE LEGISLATURE
HAS FAILED TO DO SINCE 2002 2

 A. Introduction 2

 B. Extending the Statute of Limitations Could Penalize
 School Districts..... 7

 C. Statutes of Limitation are in the Domain of the Legislature 8

II. A SUBJECTIVE STANDARD SHOULD NOT BE APPLIED
TO DOE’S FRAUD CLAIM 9

CONCLUSION 13

TABLE OF AUTHORITIES

Federal Cases

<i>Hope v. Klabal</i> , 457 F.3d 784 (8th Cir. 2006)	12
--	----

Minnesota State Cases

<i>Blackowiak v. Kemp</i> , 546 N.W.2d 1 (Minn. 1996)	6
<i>Bustad v. Bustad</i> , 263 Minn. 238, 242, 116 N.W.2d 552, 555 (1962).....	10
<i>Entzion v. Illinois Farmers Ins. Co.</i> , 675 N.W.2d 925 (Minn. Ct. App. 2004)	2
<i>First Nat'l Bank of Shakopee v. Strait</i> , 71 Minn. 69, 73 N.W. 645 (1898).....	10
<i>H.D. v. White</i> , 483 N.W.2d 501 (Minn. Ct. App. 1992)	3
<i>Hydra-Mac, Inc. v. Onan Corp.</i> , 450 N.W.2d 913 (Minn. 1990)	11
<i>Jane Doe 43C v. Diocese of New Ulm</i> , 787 N.W.2d 680 (Minn. Ct. App. 2010)	11
<i>Johnson v. Winthrop Lab. Div. of Sterling Drug Inc.</i> , 291 Minn. 145, 190 N.W.2d 77 (1971)	9
<i>Western Union Telegraph Co. v. Spaeth</i> , 232 Minn. 128, 44 N.W.2d 440(1950)	6

Statutes

Minn. Stat. § 541.05, Subd. 1(6)	11
Minn. Stat. § 541.073 (1989)	3
Minn. Stat. § 541.073 (1991)	<i>passim</i>
Minn. Stat. § 645.17 (2010)	6

INTEREST OF THE *AMICUS CURIAE*

The Minnesota School Boards Association (“MSBA”) is a voluntary nonprofit association of public school boards in the State of Minnesota.¹ MSBA represents school districts throughout the State in public forums, such as the courts and the State Legislature. MSBA also provides information and services to its members and coordinates their relationships with other public and private groups. In addition, MSBA provides advice and guidance to its member school districts in a wide variety of areas, including policy matters, public finance and legal issues.

Many of the activities of MSBA on behalf of its members are explicitly sanctioned or recognized by the Legislature. *See, e.g.*, Minn. Stat. § 18B.095 (requiring the commissioner to consult with MSBA to establish and maintain a registry of school pest management coordinators and provide information to school pest management coordinators); Minn. Stat. § 121A.67, Subd. 1 (calling for input from MSBA on rules governing aversive and deprivation procedures); Minn. Stat. § 123B.09, Subd. 2 (requiring school board members to receive training in school finance and management developed in consultation with MSBA); Minn. Stat. § 125A.023 (requiring that MSBA appoint one member to the interagency committee to develop and implement an interagency intervention service system for children with disabilities); Minn. Stat. § 179A.04, Subd. 3 (requiring MSBA, as the representative organization for Minnesota

¹ Rule 129.03 Certification: No party to this proceeding authored this brief in whole or in part. Further, no person or entity other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

school districts, to provide a list of names of arbitrators to conduct teacher discharge or termination hearings to the Bureau of Mediation Services); and Minn. Stat. § 354.06 (requiring that one member of the board of trustees of the Teachers Retirement Association be a representative of the MSBA).

MSBA has an ongoing relationship with the public school districts in the State of Minnesota. As *Amicus Curiae*, MSBA seeks to provide the perspectives of the public school districts in this state that will be affected by this decision.

STATEMENT OF THE ISSUES, CASE AND FACTS

The statement of the issues, the case and the facts are set forth in the Appellants' brief.

ARGUMENT

I. DOE'S ATTEMPT TO EXTEND THE STATUTE OF LIMITATIONS FOR SEXUAL ABUSE CASES BASED UPON REPRESSED AND RECOVERED MEMORIES ASKED THE COURT TO DO WHAT THE LEGISLATURE HAS FAILED TO DO SINCE 2002.

A. Introduction.

The purpose of a statute of limitations is to prescribe a period within which a right may be enforced and after which a remedy is unavailable for reasons of private justice and public policy. *See Entzion v. Illinois Farmers Ins. Co.*, 675 N.W.2d 925, 928 (Minn. Ct. App. 2004) (internal citations omitted). A statute of limitations discourages fraud and endless litigation. It "prevents a party from delaying an action until papers are lost, facts are forgotten, or witnesses are dead." *Id.* "A statute of limitations is based on the proposition that it is inequitable for a plaintiff to assert a claim after a reasonable lapse of

time during which the defendant believes no claim exists.” *Id.* Finally, a statute of limitations “protect defendants and the court from litigating stale claims in which the search for truth may be seriously impaired by the loss of evidence, the death or disappearance of witnesses, fading memory and the disappearance of documents.” *H.D. v. White*, 483 N.W.2d 501, 503 (Minn. Ct. App. 1992).²

In 1989, the Legislature passed a law giving victims of childhood sexual abuse more time than plaintiffs in other types of personal injury actions to file a claim for damages. More specifically, the law gave sexual abuse victims two years to file a claim based upon an intentional tort and six years to file a claim based on negligence from the moment they “knew or had reason to know that the injury was caused by sexual abuse.” *See* Minn. Stat. § 541.073 (1989) (A-1).³

² The MSBA and school districts empathize with those who have been subject to childhood sexual abuse and support imposing greater criminal and personal liability and providing a longer period of limitations with regard the perpetrators of such horrible acts so that they are less able to avoid liability. Contrary, however, to the perpetrator who has direct knowledge of the alleged misconduct and therefore has an opportunity to present a defense to the claims, school districts or any other organization that works with children would be subject to old claims for which the school district may have had no knowledge. As a result, school districts without any prior knowledge of the alleged abuse could effectively be punished as if they did have actual knowledge of the alleged abuse. Depending upon other factors that are present, a school district may be prevented from the ability to defend itself.

³ In 1989, 1991 and 1992 the Legislature adopted window periods through which previously time-barred cases were revived for a certain period of time. *See* 1989 Minn. Laws ch. 190, § 7; 1991 Minn. Laws ch. 232, § 5; and 1992 Minn. Laws ch. 571, art. 12, § 2. Additionally, in 1991 the Legislature extended the statute of limitations for an action against the abuser from two to six years. As a result, the statute of limitations for all claims based on sexual abuse became six years. Minn. Stat. § 541.073 (1991) (A-2).

Since the enactment of Minnesota Statutes Section 541.073 in 1989, numerous and consistent attempts have been made to amend the statute in order to enlarge the limitations period. In some cases, the proposed amendment sought to effectively provide an unlimited period of time in which to commence an action for sexual abuse. Notwithstanding those attempts, no amendment has been made to the statute since 1991. *See fn. 3.* A review of the subsequently proposed amendments reveals the legislative intent to not enlarge the statute of limitations, contrary to what Doe is attempting to do in the present case.

During the 2002 legislative session, House File No. (“HF”) 2843 and Senate File No. (“SF”) 2981 proposed that a victim could bring a sexual abuse action before the latest of (1) six years from the age of majority; or (2) six years from the discovery by the plaintiff of both the injury and the causal relationship between the injury and abuse. (A-3 to A-4.) This proposal was not enacted into law.

In 2003, HF 386 and SF 575 introduced amendments to Minnesota Statutes § 541.073 that would significantly increase the statute of limitations period for personal injury caused by childhood sexual abuse. More specifically, the proposed amendments initially provided that a plaintiff could bring her action “within 30 years of the date the plaintiff reaches the age of majority, or within six years of the date the plaintiff discovers both the injury and the causal relationship between the injury and the abuse, whichever is later.” (A-5 to A-6.) Both proposed amendments also defined what constituted “discovery” of the injury. *See id.* The First Engrossment of SF 575 removed the 30-year time frame and provided only the latter six-year period. (A-7.) In the First Engrossment

of HF 386, the timelines of 30 years from the age of majority or six years of discovery of both the injury and the causal relationship were replaced with timelines grounded upon reporting the abuse to law enforcement. (A-8.) Similar replacement language was included in the First Unofficial Engrossment of SF 575. (A-9.) The Senate and the House were unable to reach a final agreement in the conference committee and the proposed amendments did not proceed further.

Subsequently in 2005, proposed amendments in HF 1720 and SF 1681 created three limitations periods and provided that the period providing the latest date in time would apply. The three periods proposed were (1) six years from the age of majority; (2) six years from the time that the plaintiff reports the abuse to a law enforcement agency; or (3) six years from the time that the plaintiff fully comprehends the casual connection between the sexual abuse which occurred and the injury resulting from the abuse and the time of comprehension must be determined by medical or psychological testimony. (A-10 to A-13.) Under both (2) and (3) the plaintiff would be required to show that the entity either had constructive knowledge of the sexual abuse before it ended or failed to use ordinary care in supervising or retaining the alleged abuser. (*Id.*) The bill also created a new window period for actions that were time-barred under the present law. Effectively the new time periods set forth in (2) and (3) created the potential for an unlimited limitations period. These proposals did not proceed beyond introduction and the first reading.

A further attempt was made to amend Minnesota Statutes § 541.073 during the 2007 legislative session. The first proposed amendment contained in HF 1239 and

SF 1096 provided two periods of time in which a claim for personal injury caused by sexual abuse against a minor could be brought. (A-14 to A-17.) The proposed amendment provided that the action had to be commenced “within the later of”: (1) six years from the age of majority of the victim; or (2) six years from the time that the victim fully comprehends the causal connection between the sexual abuse and the injury resulting from the abuse.”⁴ (*Id.*) A few months later, the First Engrossment of HF 1239 and the First Engrossment of SF 1096 proposed repealing Minnesota Statutes § 541.073 and replacing it with a new statute. (A-18 to A-19.) The proposed new statutory provision would provide that an action against a person who negligently permitted the abuse to occur to a minor would need to be commenced before the victim reached age 35, and the limitations period in the statute did not apply to a claim based on vicarious liability or liability under the doctrine of respondeat superior. (*Id.*) Again, the attempt made by the initial proposal to create a subjective measure for the limitation period was not successful.

Notwithstanding the aforementioned consistent attempts to enlarge the limitations period contained in Minnesota Statutes Section 541.073, the statute has not changed since 1991. This demonstrates the Legislature’s firmness against enlarging the limitations period. It also reinforces this Court’s declaration that the statute of limitations is measured objectively and that, as a matter of law, the victim discovers his injury at the time of the abuse. *See Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996) (“as a matter

⁴ The later period “must be determined by a jury based on medical or psychological testimony.” (*Id.*)

is ‘injured’ if one is sexually abused”); *see also* Minn. Stat. § 645.17, *Western Union Telegraph Co. v. Spaeth*, 232 Minn. 128, 131-32, 44 N.W.2d 440, 441-42 (1950) (The “judicial construction of a statute, so long as it is unreversed, is as much a part thereof as if it had been written into it originally”).

B. Extending the Statute of Limitations Could Penalize School Districts.

The MSBA opposes Doe’s attempt to enlarge the statute of limitations through a claim of repressed and recovered memories for the same reasons that it opposed the previously proposed amendments to the statute. Such an extension would potentially place a school district in the position of not being able to defend itself. Such a result is contrary to the purpose of a statute of limitations.

As previously stated, Minnesota school districts hold the health and safety of their students to be of paramount importance. However, the potential ramifications of enlarging the statute of limitations are considerable. The ability of a plaintiff to commence an action against a school district 30 or 40 years after the abuse occurred would significantly affect the school district’s ability to defend itself in the action. For example, administrators and employee witnesses at the time the abuse occurred may no longer work for the school, may be retired or may have died; memories of those who are still employed may have faded or been lost; records of the minor student, potential witnesses or the alleged perpetrator may have been destroyed;⁵ it may be impossible for

⁵ It should be noted that in the immediate post-war period there were approximately 7,000 school districts in Minnesota, but today there are less than 350 as a result of consolidation and combination. Consequently, records have been moved and comingled over time as school districts have consolidated and combined.

the school district to determine whether it was insured at the time of the misconduct or the identity of the insurer, who may no longer be in business, subjecting the school district to increased monetary exposure; and a sizeable judgment against the school district would penalize current students who would likely suffer program cuts (to generate funds to pay the judgment) and penalize current residents by a levy on property taxes to pay the judgment. These potentially insurmountable roadblocks are exclusive to the school district employer. Although the MSBA can support personal liability upon an individual who committed the wrongful act, it cannot support imposing increased liability for the wrongful acts of an employee upon school districts.

C. Statutes of Limitations are in the Domain of the Legislature.

In the present case, Doe was allegedly subject to sexual abuse at the age of approximately 13 or 14. Consequently, under Minnesota Statutes § 541.073, he had until age 24, or approximately 1991, to file a timely action. Doe claims, however, that he was unable to file his action by 1991 because he had repressed memories of the abuse which were not recovered until approximately 2001. Doe filed the present action in 2006, which was within six years of when he discovered he was abused in 2001. Therefore, Doe alleges that this Court should confirm the timeliness of his action.

Minnesota Statutes § 541.073 does not explicitly provide a tolling provision for persons with repressed memories or childhood sexual abuse. The Legislature could have included a tolling provision for repressed memory, but it has not. While numerous attempts have been made, the Legislature has not chosen to do so.

This Court has recognized that statutes of limitation are within the legislative domain and the courts have no power to extend or modify the periods of limitation prescribed by statute. *See Johnson v. Winthrop Lab. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971). As shown through proposed legislative amendments over the past nine years to Minnesota Statutes § 541.073, a number of those amendments sought to lengthen the limitations period effectively for an unlimited period of time, but none of them were adopted into law. Allowing Doe to proceed in this case when his civil action was filed after the expiration of the sexual abuse statute of limitations would effectively nullify Minnesota Statutes § 541.073. Any such exception should be declared only by the Legislature. Therefore, the dismissal of Doe's cause of action for sexual abuse should be affirmed.

II. A SUBJECTIVE STANDARD SHOULD NOT BE APPLIED TO DOE'S FRAUD CLAIM

Doe's claims for fraud encompass two theories: (1) by assigning Father Thomas Adamson ("Adamson") to Risen Savior, the dioceses implied that Adamson was fit to serve; and (2) the dioceses failed to disclose Adamson's prior history of abuse. The statute of limitations for fraud in Minnesota is six years and the cause of action accrues upon discovery by the aggrieved party of the facts constituting the fraud. *See* Minn. Stat. § 541.05, Subd. 1(6).

This Court has addressed when the discovery of facts constituting fraud has occurred, thereby starting the limitations period, as follows:

The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered. The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation, if it appears that the failure sooner to discover it was the result of negligence, and inconsistent with reasonable diligence.

Bustad v. Bustad, 263 Minn. 238, 242, 116 N.W.2d 552, 555 (1962), citing *First Nat'l Bank of Shakopee v. Strait*, 71 Minn. 69, 72, 73 N.W. 645, 646 (1898). It also appears that the converse should be true. If a plaintiff affirmatively acts with reasonable diligence but does not discover the fraud, the statute of limitations will be postponed until discovery of the fraud.

Doe claimed that he did not discover that he had been defrauded or have any reason to believe the dioceses had defrauded him until 2002 or 2003. *See* Complaint ¶ 26 (Appellants' Appendix (AA63)). This date referred to Doe's recovered memories of the alleged abuse. Doe did not allege, and there is no evidence to support, that he made any earlier attempt to discover his claim.

The district court, however, found that media attention was given to Adamson in the 1980s and 1990s, his misconduct and the dioceses' knowledge of it. *See* Appellants' Addendum (Add. 59). The district court also referred to other instances where Doe discussed the accusations against Adamson with his mother (mid-1980s), his wife (1990s) and other family members (1980s and early 1990s). *Id.* Notwithstanding this information possessed by Doe, he failed to pursue any course of investigation related to Adamson's assignment to Risen Savior or his history prior to his assignment.

The court of appeals applied a different standard when it distinguished Doe's knowledge in the 1980s that Adamson "had been *accused* of sexually abusing *other* children" from notice to him "that *he* had a cause of action for fraud." (See Add. 73, emphasis in original.) The court of appeals acknowledged that if Doe "did not become aware that he had been abused until 2001 or 2002, he could not have known that he had a viable fraud claim until then." See *id.* This, however, is not a foregone conclusion. Consequently, the court of appeals' decision applied a subjective standard to Doe's knowledge as opposed to the objective standard contained in the law.

By applying Doe's subjective knowledge to the discovery of facts upon which the claim of fraud is based, the court of appeals effectively extended the six-year limitations period contained in Minnesota Statutes Section 541.05, Subdivision 1(6). The decision subjects school districts to the same disadvantages and penalties associated with enlargement of the sexual abuse statute of limitations and the ability to defend a claim as outlined above. It also creates an exception that has not been adopted by the Legislature. Therefore, it should be rejected.

In addition, the Court of Appeals' reliance on case law stating that "a party is under no duty to investigate a fraud it has no reason to suspect" was misplaced. *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 685 (Minn. Ct. App. 2010), citing *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913 (Minn. 1990). The facts in *Hydra-Mac* are clearly distinguishable from the present case. There the court found that the fraud was not discovered prior to 1977 (six years prior to the lawsuit filing in 1981). The record showed that although Hydra-Mac was on notice that there were some problems

with the engines it purchased, the seller had proposed to fix the problems and, with the amount of time it took to perform the fixes and see the results, Hydra-Mac could not have suspected at that time that ultimately the engine was irreparable.

Rather, the facts in the present case are more like those in *Hope v. Klabal*, 457 F.3d 784 (8th Cir. 2006). The Eighth Circuit Court of Appeals found that the plaintiff, a buyer of art, did not exercise reasonable diligence in discovering the sellers' alleged fraud related to the value of art purchased and her action was untimely. *Id.* at 793. During the period of time that Hope was purchasing the art in question, she was on notice that she could obtain full appraisals through the Art Dealers Association of America. Hope also admitted that she was able to hire independent experts to appraise the value of her purchases and, if she had engaged the services of an art appraiser earlier, she could have discovered that she was overcharged. *Id.* The court found that through the exercise of reasonable diligence by having the art appraised Hope could have discovered that she paid inflated prices for the artwork more than six years before she brought her claims.

Unlike *Hydra-Mac*, and consistent with *Hope*, Doe had notice in the mid-to-late 1980s and early 1990s of Adamson's history of sexual misconduct, including alleged abuse of a minor male during the time that he was at Risen Savior and that Adamson was removed from Risen Savior. Doe also knew that, during the time of Adamson's tenure at Risen Savior, Doe and his family attended the church and hosted Adamson in their home. Doe's mother even asked Doe whether he was a victim of Adamson. Notwithstanding all of this information, there is no evidence that Doe made any effort to investigate Adamson's assignment to Risen Savior or his prior history.

It is contrary to public policy that the discovery of a fraud claim be allowed to solely rest upon the plaintiff's subjective discovery of the claim notwithstanding objective evidence to the contrary. Additionally, the purpose of a statute of limitations is undermined by the litigation of stale claims which are impaired by the loss of evidence, the death or disappearance of witnesses, fading memories and lost or destroyed documents. Therefore, the Court of Appeals' extension of the statute of limitations based upon Doe's subjective discovery of facts supporting his fraud cause of action should be rejected.

CONCLUSION

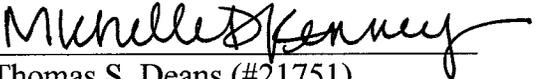
Amicus Curiae MSBA respectfully requests that this Court conclude that the statute of limitations for sexual abuse and fraud are not tolled by Doe's claim of repressed and recovered memories. It is solely within the purview of the Legislature to make such a determination. Allowing claims such as those in the present case to be brought long after the injury occurred subjects employers, including school districts, to claims that it may simply not be able to defend because witnesses, documents, and evidence is not available. In essence, this case will have a significantly detrimental impact upon the practices of public school districts and the educational system as a whole if Respondent were to prevail.

For all of the above reasons, as well as those cited by Appellant, the MSBA respectfully requests that this Honorable Court reverse the decision of the court of appeals and affirm the decision of the district court.

Dated: October 27, 2011

Respectfully submitted,

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