

No. A09-1728

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STATE OF MINNESOTA  
IN SUPREME COURT

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Mary Lickteig,

Appellant,

vs.

Robert Kolar, Jr.,

Respondent.

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RESPONDENT'S BRIEF AND APPENDIX

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LYNN, JACKSON, SHULTZ & LEBRUN, P.C.  
Richard D. Casey  
Rynland L. Deinert  
Dana Van Beek Palmer  
P.O. Box 2700  
Sioux Falls SD 57101  
(605) 332-5999  
ATTORNEYS FOR APPELLANT

MACK & DABY, P.A.  
John E. Mack, #65793  
P.O. Box 302  
New London MN 56273  
(320) 354-2045  
ATTORNEYS FOR RESPONDENT

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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<sup>1</sup>Ordinarily, one would not cite a non-legal publication. But this article is specifically referenced in *Tyson, infra*, and *Hoffman, infra*, also cites several non-legal articles to support its determination.

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LEGAL ISSUES

I.

IS THE TORT OF SEXUAL ABUSE AN INDEPENDENT TORT CREATED BY THE LEGISLATURE IN 1989 WHEN IT ENACTED MINN. STAT. § 541.073?

The Eighth Circuit submitted this as a question.

MOST APPOSITE STATUTES:

Minn. Stat. § 541.05

Minn. Stat. § 541.073

Minn. Stat. § 609.345

Minn. Stat. 645.21

MOST APPOSITE CASES:

*Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996)

*Brett v. Watts*, 601 N.W.2d 199 (Minn. App. 1999)

*Gromon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 433 (Minn. 2002)

*Kirschbaum v. Lowry*, 218 N.W. 461 (Minn. 1928)

II.

CAN THE STATUTE OF LIMITATIONS ON SEXUAL ABUSE "EXTENDER" BE APPLIED TO ANY ACT UPON WHICH THE STATUTE OF LIMITATIONS HAD RUN BY THE TIME OF ITS ENACTMENT?

The Eighth Circuit submitted this as a question.

MOST APPOSITE STATUTES:

Minn. Stat. § 541.05

Minn. Stat. § 541.073

Minn. Stat. § 541.15

Minn. Stat. § 609.345

MOST APPOSITE CASES:

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

*State v. Hungerford*, 697 A.2d 916 (N.H. 1997)

*State v. Mack*, 292 N.W.2d 764 (Minn. 1980)

*Talley by Talley v. Portland Residence, Inc.*,  
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III.

WAS MS. LICKTEIG'S CAUSE OF ACTION WAS BARRED BY THE INTERFAMILIAL TORT DOCTRINE AT THE TIME OF THE ALLEGED ABUSE?

The United States District Court answered in the Affirmative. The Eighth Circuit submitted this as a question.

MOST APPOSITE STATUTES:

Minn. Stat. § 541.07

Minn. Stat. § 541.073

MOST APPOSITE CASES:

*Silesky v. Kelman*, 161 N.W.2d 631, 632 (1968)

*Wills v. K-Mart Corp.* 354 N.W.2d 442 (Minn. 1984)

## STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case is essentially correct. It should perhaps be noted that the questions submitted by the Eighth Circuit Court of Appeals incorporate Respondent's statute of limitations issues, so that the question of whether they were properly before the Court is not relevant to the issues before the Minnesota Supreme Court. Neither is the claim that the District Court and its magistrate found against Mr. Kolar's statute of limitations claim, because the Eighth Circuit submitted the limitations as a question to be addressed by the Minnesota Supreme Court.

Because this case was decided without regard to either a trial or a motion for summary judgment, there are not many "hard and fast" facts before this Court. While it may be a bit unusual in a statement of the facts to note what "facts" are not known, it is important to detail these in this case. Mary Lickteig is 41 years of age, having been born in 1967. Robert Kolar is 49 years of age, having been born July 31<sup>st</sup>, 1960. Beyond this, it has not been determined (a) if sexual abuse occurred between Mr. Kolar and Ms. Lickteig; (b) if so, when it occurred;<sup>1</sup> and (c) when it ceased. With respect to the claim that Ms. Lickteig repressed memory of sexual abuse but recovered it in therapy, it

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<sup>1</sup>There is conflicting testimony here. Mr. Kolar notes that sexual abuse of his older sibling occurred when he was 13-15. Hence, he this would have been no later than 1975. Ms. Lickteig claims the abuse ceased when she was about 12. But this would have been 1969, by which time Mr. Kolar was a married adult.

has not been established (a) whether Ms. Lickteig's memory was repressed (as opposed to false); (b) when it was repressed; (c) if it was recovered; (d) how it was recovered; (e) whether the recovered memories are reliable. Ms. Lickteig was questioned in her deposition concerning these timelines:

Q. [w]hy is the August, 2005 date important to you? Why does that stick in your memory?

A. I had started having - I had started having issues sleeping at night. I couldn't sleep at night. I had actually went - and August of 2005 sticks because it was a year after I had surgery, gastric bypass surgery. And I know it was August of 2005. I can't remember an exact date, but it was -

Q. And you would have been 37 years old at that time.

A. And I'm 40 now, so 38 in '05.

(Mary Lickteig Deposition, p. 12; A-0104<sup>2</sup>)

And again:

Q. I'm asking you as your memory - as your memory recalls today, when was the last time that Bob abused you? Would he have been 14, 16, 16?

A. I would have been in - going into 6<sup>th</sup> grade when he started dating his wife.

Q. Okay. And at that point any sexual abuse stopped?

A. What I recall, yes.

A. And sixth grade, how old would you have been?

A. Twelve.

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<sup>2</sup>The "A-" references are to Ms. Lickteig's appendix to the Eight Circuit, which is retained here to avoid confusion. "Add" reference to Appellant's Addendum. "RR-" refers to Respondent's Appendix.

(Mary Lickteig Deposition, p. 13; A-0104)

So Ms. Lickteig would have reached the age of 18 in 1986 or 1987. She brought no lawsuit until February, 2007 (A-0070).

Ms. Lickteig alleges that at some time both before and after her twelfth birthday, Mr. Kolar, then a boy in his mid teens, would come into her bedroom and fondle her and her sisters (A-0059 ff). She states that she completely forgot about these events until 2004, when her therapist revived memories of these events (A-0106). Ms. Lickteig never reported any of these events to her father or her mother. However, her sister, Cindy did so, but stated that her mother ignored her (A-0065) and her father took a "boys will be boys" approach (A-0067). It is noteworthy that this family was involved with social services before Ms. Lickteig's 18<sup>th</sup> birthday and that the possibility of sexual abuse in the family was discussed - though not by Mary -- and social services could not confirm it (A-0067).

The "triggering event which caused Ms. Lickteig's memories to be "recovered" were allegedly nightmares she was suffering in 2005 (A-0056). She then told her sisters that she had recovered memories of Robert's alleged sexual abuse (A-0056) and brought this lawsuit.

I.

THE TORT OF SEXUAL ABUSE IS AN INDEPENDENT TORT CREATED BY THE LEGISLATURE IN 1989 WHEN IT ENACTED MINN. STAT. § 541.073.

The Eighth Circuit Court of Appeals ("Eighth Circuit") raised a question which neither party had directly confronted in their briefing: Whether a tort involving alleged sexual misconduct was a new tort created by the Courts and the legislature, or whether it was merely a species of the common-law tort of assault (Add-14). The Eighth Circuit appears to have been leaning toward concluding that it was a separate species of tort, but believed that determination was best left to the Minnesota Courts to determine (Add-8).

Neither party confronted this issue directly in their arguments, in large measure because the issues it involved were intimately intertwined with the two issues they did address: whether the interfamilial immunity doctrine was still viable in Minnesota, and whether the statute of limitations on a sexual misconduct action had run against plaintiff in this case. In particular, Mr. Kolar's argument - that the 1985 and 1987 amendments to the statute of limitations - created an extender which applied only to sex abuse and thus could not be applied retroactively to something which was not recognized at the time of the alleged tort - rests on a foundation very similar to the argument that the tort of sexual abuse did not exist before the 1985 and 1987 amendments.

Conceptually, not all cases of sexual abuse are batteries and not all batteries involve sexual abuse. A battery is an

intentional, uninvited and unwanted touching. *State v. Plath*, 428 N.W.2d 392 (Minn. 1988). But many forms of sexual abuse may be invited - in particular, a person three years older than a "protected" minor may engage in voluntary sexual contact with the "victim." It does not matter criminally - consent is not defense; and it almost surely does not matter civilly, either. See, e.g., *Brett v. Watts*, 601 N.W.2d 199 (Minn. App. 1999), which appears to hold that the tort of sexual abuse was separate from battery. On the other hand, consent is a defense to ordinary battery -- see *Kirschbaum v. Lowry*, 218 N.W. 461 (Minn. 1928). If one teenager invites another to squeeze his arm as hard as he can, it is doubtful that the former has a cause of action. This suggests that the tort of sexual abuse is *sui generis*.

Ms. Lickteig's brief appears to miss the point of the Eighth Circuit's concern. Mr. Kolar and the Eighth Circuit acknowledge that a cause of action in tort for sexual abuse now exists in Minnesota. For that matter, they both acknowledge that a cause of action in tort for sexual abuse has always existed in Minnesota where the sexual abuse was a battery, the most obvious example being a rape. But the questions addressed by the Eighth Circuit were (1) is there a tort of sexual abuse independent of the tort of battery; and (2) if so, when did it come into existence.

This matters in the instant case, because if the tort of sexual abuse is independent of the tort of battery, it did not come into existence until after any sexual abuse by Mr. Kolar was allegedly committed. Of course, Ms. Lickteig might still have had a cause of action under ordinary battery law if Mr. Kolar's abusive behavior also constituted a battery. But if Ms. Lickteig's cause of action is in battery, it is clearly barred by the statute of limitations. See Minn. Stat. § 541.07 subd. (1) and 541.15. On the other hand, if Ms. Lickteig's cause of action was based upon the independent tort of sexual abuse, then that tort did not exist at the time of Mr. Kolar's alleged action. While under some circumstances the legislature may retroactively extend a statute of limitations, it may not retroactively create a cause of action absent clear language that this is intended. See, Minn. Stat. § 645.21; *Gromon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 433 (Minn. 2002). Since the legislature did not even explicitly indicate that it was creating a new cause of action in 1987, it hardly indicated that the new tort would apply retroactively.

It is clear that sexual abuse, insofar as it is either not a battery or involves elements in addition to battery, is an independent tort. Minn. Stat. § 541.073 states:

Subd. 1. Definition. As used in this section, "Sexual abuse" means conducted described in sections 609.342 to 609.345

Subd. 2. (a) 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.

(b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury.

(c) the knowledge of a parent or guardian may not be imputed to a minor.

(d) This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.

Subd. 1 indicates that the elements of the tort of sexual abuse are the elements to be found in the criminal misconduct statutes. Consider the elements of Minn. Stat. § 609.345, since this statute sets forth the minimum requirements for conviction of a sexual misconduct crime, and hence of a sexual abuse tort:

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced.

None of the other subdivisions appear to apply to the tort set forth in Minn. Stat. § 541.073. Now notice how radically different the cause of action set forth in § 609.345 is from the ordinary tort of battery. First, contrary to the *Kirshbaum* principal, which applies to ordinary battery, "Neither ...

consent to the act by the complaint is a defense." Second, age limitations have nothing to do with battery, and never have had. If someone of any age - or at least the age of reason - hits and hurts someone, he or she has committed a civil battery. By contrast, the tort of sexual abuse depends critically upon the ages of principals involved.

Third, consider the Jury Instruction Guide, JIG 60.25:

A battery occurred if it is proved that defendant intentionally caused harmful or offensive contact with plaintiff or anything worn or held by or closely connected to plaintiff.

Contrast this with CrimJig 12.37 which is incorporated into Minn. Stat. § 541.073 by reference:

The elements of criminal sexual conduct in the fourth degree are:

First the defendant intentionally touched \_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_'s intimate parts....

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of defendant's act, \_\_\_\_ had not reached her thirteenth birthday.

Fourth, the defendant was not more than 36 months older than \_\_\_\_.

Consent is not a defense to this charge. It is immaterial whether or not the sexual contact was coerced.

Not a single element indicated in CrimJig 12.37 is an element of CivJig 60.25. Since the legislature did not set forth elements of the tort of sexual abuse separately from Minn. Stat.

§ 609.345, and since the District Judges Association did not set forth elements of sexual abuse separate from § 609.345 and § 541.073, it is clear that a new tort was created when the legislature incorporated § 609.345 and its neighbors into the tort of sexual abuse. Since § 541.073 created a new tort and did not expressly indicate that the new tort applied to actions which took place before it was enacted, it cannot be applied to any alleged sexual abuse by Mr. Kolar.

§ 541.073, grants the victim of sexual abuse a private cause of action by delineating its elements via § 609.354 et al. Prior to that, a prior cause of action could not be based upon Minn. Stat. § 609.345 and its siblings. As the Court said in *Minnwest Bank v. Molenaar* (2009 WL 3172164 (Minn. App. 2009)):

The courts do not recognize a private cause of action that does not exist at common law unless the legislature has provided for such an action, either in a statute's express terms or by clear implication. *Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn.2007); *Toth v. Arason*, 722 N.W.2d 437, 442 (Minn.2006); *Bruegger v. Faribault County Sheriff's Dept.*, 497 N.W.2d 260, 262 (Minn.1993). This court considers three factors to determine whether a cause of action may be implied from a statute: "(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment." *Mutual Serv. Cas. Ins. Co. v. Midway Massage, Inc.*, 695 N.W.2d 138, 142 (Minn.App.2005), review denied (Minn. June 14, 2005); see also *Becker*, 737 N.W.2d at 207 n. 4. We will imply a private cause of action only if all three factors are satisfied. *Dicks v. Minnesota Dept. of Admin.*, 627 N.W.2d 334, 336 (Minn.App.2001). The party seeking to invoke the statute bears the burden of

establishing that a statute implies a private cause of action. See *Mutual Serv. Cas. Ins. Co.*, 695 N.W.2d at 143.

(*Id.* at 2)

Since ordinary battery is governed by Minn. Stat. § 541.07 and § 541.15 and since Ms. Lickteig did not bring her action within a year of reaching the age of majority or before 1992, the statute of limitations had run before the present suit.

## II.

THE STATUTE OF LIMITATIONS ON SEXUAL ABUSE "EXTENDER" CANNOT BE APPLIED TO ANY ACT UPON WHICH THE STATUTE OF LIMITATIONS HAD RUN BY THE TIME OF ITS ENACTMENT.

Even if "sexual abuse" is not a tort independent of ordinary battery, Ms. Lickteig's case fails as a matter of law under the Minnesota statute of limitations. The principal problem with plaintiff's case is that the statute of limitations on her cause of action had expired before the Minnesota Legislature passed § 542.073, and prior to the passage of § 542.073, a plaintiff could not rely on a "recovered memory" extender to defeat the statute of limitations. Thus, this case involves not only the retroactive extension of the statute of limitations, which under some circumstances may be legally tolerable, but the creation of a new extender - recovered memory syndrome - which was not in existence at the time of the previous limitations statutes, and which is not legally tolerable.

Prior to the effective date of § 541.073 (May 20th, 1989), a victim of sexual assault's action was subject to the same

two-year statute of limitations which governed assaults and related intentional torts under § 541.07(1). Ms. Lickteig reached the age of 18 on or about January 1, 1985. See Lickteig deposition transcript, p. 13. The alleged assaults took place when Ms. Lickteig was about twelve years of age, so her right to sue would have expired by January 1, 1985 but for the "infancy" extension of Minn Stat. § 541.15 (a)(1).

Prior to the various "sexual misconduct" amendments to the Minnesota Statute of limitations, there was no independent statute or common law tort which dealt with sexual assault. Rather, sexual assaults which resulted from batteries, such as rape, were considered an assault or a battery for purposes of the statute of limitations. Minn. Stat. § 541.07 read:

Except where the Uniform Commercial Code otherwise prescribes, the following actions shall be commenced within two years:

(1) for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury....

In *Winkler v. Magnuson*, 539 N.W. 821 (Minn. App. 1995) the Minnesota Court of Appeals held that a claim against a church with regard to a sexual abuse action was barred by the statute of limitation for battery. Similarly, Ms. Lickteig would have had six years to bring an action in battery against Mr. Lickteig

after the sexual misconduct allegedly occurred,<sup>3</sup> or one year after reaching her eighteenth birthday under, § 541.15, whichever was later. So the last date upon which Ms. Lickteig could have brought suit under the old § 541.07 was January 1, 1986.

As noted, Minn. Stat. § 541.073 was passed in 1989. Under Minnesota law, a cause of action, once time-barred, cannot be revived by subsequent legislation unless the legislature manifests a clear intent that it do so. See *Donaldson v. Chase Security Corporation*, 13 N.W.2d 1 (Minn. 1943); *Gromon v. Northland Family Physicians, Ltd*, 645 N.W.2d 413 (Minn. 2002). In the case of sexual abuse claims, the legislature explicitly indicated that 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, which was extended by statute until 1992 (See Laws 1989, c. 190 para. 7, and Laws 1992 ch. 572 ar. 12 § 2, quoted *infra*).

So since Ms. Lickteig's action was once barred before August, 1989, it could not have been revived by the 1989 statute, and the subsequent "extenders" expired by 1992. Ms. Lickteig had not commenced her suit by that time. And, as argued below, these extenders trump the "knew or have reason to know" extender of

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<sup>3</sup>Her one year extension for minority under § 541.15(a) and the legislature's extension of the right to file sexual battery charges until 1992.

Minn. Stat. § 541.073 for actions extended by their ukase.

If Ms. Lickteig's right to sue had not been time-barred by the time Minn. Stat. §541.073 was passed, matters might have been different. In 1989, the legislature passed the first version of § 541.073 and Minn. Stat. § 541.07 was amended to except § 541.073 from the ordinary 2-year statute of limitations for intentional torts. The question of whether it did so retroactively has been addressed in the first part of this brief and will be discussed in the context of *Hoffman, infra*.

Ms. Lickteig argues that her right to sue is extended by the language of § 541.073 which does not require her to commence an action unless she "[k]new or had reason to know that the injury was caused by the sexual abuse." This, she claims, permits her to bring an action based upon the doctrine of recovered memory. The problem is that the "knew or had reason to know" language is the only basis upon which the recovered memory doctrine may be applicable, and the "knew or had reason to know" language dates from 1989, well after Ms. Lickteig reached the age of majority.

The legislature already gave victims of sexual abuse one form of relief by extending the statute of limitations until 1990 and then to 1992. It is doubtful if it intended two different extension periods to apply. If it had intended both the extension period and the "delayed discovery" rule to apply to a cause of action which had expired, it would have said so in the

extension statute. As it is, while Ms. Lickteig was entitled to a two-year retroactive extension, she is not entitled to a retroactive application of the delayed discovery rule.

The cases make it clear that any right to claim an extension of the statute of limitations based upon a suppressed memory arise solely from this clause of § 541.073. See, *Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996); *S.E. Shattuck-St. Mary's School*, 553 N.W.2d 628 (Minn. App. 1995). Prior to 1989, the only "extender" which related to mental condition was Minn. Stat. § 541.15(a)(2), which tolled the statute because of "the plaintiff's insanity." But § 541.15(a)(2) had been interpreted to mean total mental incompetence, not a mental illness or condition affecting a particular mental power, such as memory. In *Harrington v. Ramsey County*, 279 N.W.2d 791 (Minn. 1979), the Supreme Court made it clear that the term "insanity" means the substantial inability, by reason of mental defect or deficiency, to understand one's legal rights, manage one's affairs, and prosecute a claim. The test of insanity under *Harrington* did not go as far as *McNaughton*, but was close.

There is no way Ms. Lickteig would have been considered insane between 1985 and 1989 (or at any other time for that matter). Hence, her only "extender" as of 1985 was infancy, and that extension expired in 1986, three years before the statute which might have permitted her to raise a "recovered memory" was

enacted.

While the Federal District Court did not directly address the statute of limitations issue, its order contained language which is highly relevant to it:

Further, in enacting the delayed-discovery statute, the Legislature has generally directed that the conduct meeting the statutory definition of sexual abuse is compensable in an action for damages based on personal injury caused by sexual abuse, as long as the action is 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, subd. 1 ("sexual abuse" means conduct described in sections 609.342 to 609.345") *id.* subd. 2(a). The fact that the abuse took place inside a family does not necessarily bar the action. See, *Behnke v. Behnke*, No. A06-1004, 2007 WL 1412914, at (Minn.Ct.App. May 15, 2007) (holding that statute of limitations did not bar plaintiff's claim against father for child sexual abuse).

On the other hand, Lickteig's claim for damages attributed to physical pain and emotional distress arise not under Minnesota criminal statutes but solely under the common law. (See A. Comp. paras. 15, 18.) The fact that the Minnesota Legislature has enacted a special statute of limitations for common-law claims of this type does not necessarily compel a conclusion that the Legislature has abrogated or altered the common law as to whether a plaintiff may assert causes of action involving sexual abuse between unemancipated minor siblings.

(A-8)

Perhaps even more to the point, the fact that the Minnesota Legislature has enacted a special statute of limitations for common-law claims of this type does not necessarily compel a conclusion that the Legislature has abrogated or altered the common law as to whether a plaintiff may assert causes of action

involving sexual abuse which have expired under the statute of limitations.

It is not completely clear what the court meant when it spoke of a "common law claim" and that § 541.073 explicitly talks about an "[a]ction for damages based upon personal injury caused by sexual abuse...." As noted in the first section of this brief, what it meant was probably that § 541.073 created a new tort, for the reasons noted in Part I of this brief. But if it was not a new tort, if it was merely a clarification of the law of battery, then this simply buttresses Mr. Kolar's contention that all Ms. Lickteig had in 1986 was a § 541.07 action, and that a § 541.07 action became time-barred one year after she reached the age of majority.

Nothing in this analysis requires the consideration of anything factual except Ms. Lickteig's birthdate, which is admitted to be 1968. The rest is mathematics. Ms. Lickteig was 18 in 1986. Her "year of grace" expired in 1987. Her right to use "recovered memory" as an extender did not exist at the time her year of grace expired. § 541.073 was passed in 1989. Q.E.D.

This is the right result. Rather clearly, the District Court did not want to try this case (and the Eighth Circuit was notably hostile to it) and for good reason. The cause of action is 29 years old. Mr. Lickteig has built a business, raised a family, and built a life for himself upon which others depend.

The recent tendency of courts has been to expand limitations periods for criminal purposes, but to strictly apply them for civil purposes. See, e.g., *Special School Dist. No. 1 v. Dunham*, 498 N.W.2d 441 (Minn. 1993).

There is are several good reasons for this and all of them apply here. First, the propensity of memories to fade after 28 years is considerable. Second, the principle that a person should be permitted to "get on with life" once it becomes clear that another has waited half-a-lifetime and has brought no action is a good one. Third, the fact that a person who could have his livelihood stripped from him has built a new life for himself and his family in the meantime is important. Forth, the fact that the novel and questionable doctrine of recovered memory was never contemplated either at the time of the alleged act or at the time both Appellant and Respondent were well into adulthood argues against subjecting someone to junk-science-by-statute.

Against this, Ms. Likteig raises the case of *K.E. v. Hoffman*, 452 N.W.2d 509 (Minn. App. 1990). As the Eighth Circuit noted, since the Minnesota Supreme Court did not grant review of *K.E.*, it is not clear whether it represents the law of the State of Minnesota. Hence, with respect to the Supreme Court's interpretation of § 541:073, *Hoffman* is only as good as its analysis. This section of Mr. Kolar's brief will focus first upon the question of whether the Supreme Court should adopt the

Hoffman analysis, and secondly, upon the question of whether *Hoffman* applies to this case if it does.

Consider the question of whether *Hoffman* is good law.<sup>4</sup> First, it is important to note that the issue of whether there was an independent tort of sexual abuse was not litigated in *Hoffman*. Second, the Court of Appeals in *Hoffman* simply assumed that the words "knew or had reason to know that the injury was caused by sexual abuse" adopted the theory of recovered memory. Third, and closely related to the second question, the Court of Appeals did not address the issue of when a victim of sexual abuse "knew or had reason to know" and whether the statute of limitations begins to run if a plaintiff knew or had reason to know and subsequently forgot that she knew or had reason to know. To put it another way, does "forgetting" toll the statute of limitations? Fourth, the Court of Appeals did not consider, and was not asked to consider, the effect of the termination of the "grace period" enacted in 1989 and extended in 1992.

With respect to the first question, the Court of Appeals assumed, without analysis, that § 541.073 did not create a new right, but merely affected the remedy:

Moreover, section 541.07(1) is distinguishable from a

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<sup>4</sup>The Eighth Circuit considers itself bound by the decisions of the Minnesota Supreme Court with respect to the interpretation of Minnesota law. It does not consider itself bound by decisions, including published decisions, of the Minnesota Court of Appeals.

second class of statutes which creates both a cause of action and a limitation period within which the action must be brought. Instead, in this case, only the appellant's remedy against respondents, and not the parties' respective rights, was affected when the limitations period expired. A limitations statute which applies merely to a party's remedy does not create a vested right in respondents. See *Donaldson*, 216 Minn. at 276, 13 N.W.2d at 5. Accordingly, we hold the legislature did not impair respondents' due process rights by enacting section 541.073 which lifted the limitations bar and revived appellant's claim against them.

(*Id.* at 513)

But this begs the question, and the question is, "what rights did Ms. Lickteig have at the time the statute of limitations expired? She had the right to sue for assault and/or battery, of course. But this right expired in 1986, one year after her 18<sup>th</sup> birthday. And even if she did have the right to sue based upon some other tort theory (intentional infliction of emotional distress?) this would have been an "other tort, resulting in personal injury," and it would also have been subject to Minn. Stat. § 541.07 and § 541.15's two-year-plus-one-year-after-majority rule. So any such right would also have expired in 1986. And, as noted in the first part of this brief, she did not have a right to sue based on Minn. Stat. § 609.345 and its kin, because that tort action did not exist until 1989.

The second problem with the *Hoffman* analysis is that it assumes that recovered memory syndrome was written into Minn. Stat. § 541.073 without either evidence or argument. Actually,

all Minn. Stat. § 541.073 says is "[w]ithin six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse." There is no mention of recovered memory. This is good, because repressed memory syndrome has been the subject of considerable resistance in the Courts. See, e.g., *State v. Hungerford*, 697 A.2d 916 (N.H. 1997); *Clay v. Kuhl*, 696 N.E.2d 1245 (Ill.App. 1998), cert. den. 705 N.E.2d 435 (1998); *Doe v. Maskell*, 679 A.2d 1087 (Md. 1996), cert. denied, 519 U.S. 1093 (1997); *Lemmerman v. Fealk*, 534 N.W.2d 695 (Mich. 1995); *Ault v. Jasko*, 70 Ohio St. 3d 114, 637 N.E.2d 870, 875-76 (Ohio 1994); *Dalrymple v. Brown*, 701 A.2d 164 (Pa. 1997); *Commonwealth v. Crawford*, 682 A.2d 323 (Pa. Super. 1996); *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996); *S.V. v. R.V.*, 933 S.W. 2d 1, 17-18 (Tex. 1996); *John BBB Doe v. Archdiocese of Milwaukee*, 565 N.W. 2d 94 (Wis. 1997).

Repressed memory testimony was ruled inadmissible in: *Barrett v. Hyldburg*, 487 S.E.2d 803 (N.C. 1997); *Carlson v. Humenansky*, 2nd Dist., Ramsey Co., Minn., No. CX-93- 7260, Dec. 29, 1995; *Doe v. Maskell*, Circuit Ct., Baltimore City, MD, No. 9423601/CL18756, May 5, 1995, *aff'd Doe v. Maskell*, 679 A.2d 1087 (Md. 1996), cert. denied 519 U.S. 1093 (1997); *Logerquist v. Danforth*, Superior Ct., Maricopa Co., Arizona, No. CV 92-16309, June 11, 1998 following *Logerquist v. Danforth*, 932 P.2d 281 (Ariz. App. 1996).

The case of *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986) has an especially good analysis<sup>5</sup> of the problems with repressed memory syndrome:

Second, the testimony of treating psychologists or psychiatrists would not reduce, much less eliminate, the subjectivity of plaintiff's claim. Psychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence. The fact that plaintiff asserts she discovered the wrongful acts through psychological therapy does not validate their occurrence. Recent studies by certain psychoanalysts have questioned the assumption that the analyst has any special ability to help the subject ascertain the historical truth. See generally Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 Wash.L.Rev. 331 (1985). These studies show that the psychoanalytic process can even lead to a distortion of the truth of events in the subject's past life. The analyst's reactions and interpretations may influence the subject's memories or statements about them. The analyst's interpretations of the subject's statements may also be altered by the analyst's own predisposition, expectations, and intention to use them to explain the subject's problems. Wesson, 60 Wash.L.Rev. at 334-37, 349-50. Thus, the distance between historical truth and psychoanalytic "truth" is quite a gulf. From what "really happened" to what the subject or patient remembers is one transformation; from what he remembers to what he articulates is another; from what he says to what the analyst hears is another; and from what the analyst hears to what she concludes is still another.

(*Id.* at 78)

The *Hungerford* court has a another helpful analysis:

The extensive case law from other jurisdictions

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<sup>5</sup>*Tyson* was subsequently modified by the Washington legislature. A number of courts have indicated that this was a bad legislative act.

considering the admissibility of various types of refreshed recollection in civil and criminal cases is helpful to our inquiry. In the loosely analogous circumstance of offered testimony relying upon memory that has been enhanced, refreshed, or recovered by hypnosis, courts generally have divided into four groups: those that categorically accept such testimony, those that categorically reject such testimony, those that will admit the testimony only if rigid procedural safeguards have been met, and those that will admit the testimony only after a "totality of the circumstances" review of the reliability of the particular testimony. See, e.g., *State v. Brown*, 337 N.W.2d 138, 151 (N.D.1983) (hypnotically refreshed testimony admissible and subject to credibility challenge); *People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 272-73, 723 P.2d 1354, 1383-84 (testimony inadmissible under Frye test), cert. denied, 459 U.S. 860, 103 S.Ct. 133, 74 L.Ed.2d 114 (1982); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86, 96-97 (1981) (admissible if safeguards complied with); *Iwakiri*, 682 P.2d at 579 (testimony admissible if, under totality of circumstances, it is sufficiently reliable to merit admission). Limitations on the admissibility of eyewitness testimony are generally justified based upon the fact that inaccuracies can be injected into recall during the hypnotic process by suggestion, confabulation, and conflation of true memories with false memories, see *Iwakiri*, 682 P.2d at 576, and upon the inability of the adversarial process to ferret out such inaccuracies because of memory hardening, see e.g., *Hurd*, 432 A.2d at 95. See *Cressey*, 137 N.H. at 410, 628 A.2d at 701 (observing that psychologist's testimony of her interpretation of her evaluations was impenetrable by cross-examination). Outside of the preliminary question of whether to toll the relevant statute of limitations, e.g., *McCollum*, 138 N.H. at 289, 638 A.2d at 799, few cases involve the more novel question of the admissibility of repressed memories recovered spontaneously, or during or attendant to participation in psychological therapy. See *Crawford*, 682 A.2d at 327-28; *Quattrocchi*, 681 A.2d at 881-84.

A review of the psychological literature on the subject of memory repression and recovery convinces us that a case-by-case approach, tempered with skepticism, is most appropriate in this context. See, e.g., *The Reality of Repressed Memories*, supra at 530-32. See

generally Pezdek & Roe, *supra* (reviewing studies of suggestibility of children's memories); Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 *J. Consulting & Clinical Psychol.* 1167 (1994) (suggesting loss of memory of sexual abuse may be common).

We are especially concerned with the influence of therapy on the recovery of memory, as in the instant cases. The process of therapy is highly subjective, with its purpose "not the determination of historical facts, but the contemporary treatment and cure of the patient." *Tyson v. Tyson*, 107 Wash.2d 72, 727 P.2d 226, 229 (1986); see *Quattrocchi*, 681 A.2d at 882. This goal, along with the expectations and predispositions of both therapist and patient, tends to distort the "historical truth" of events in the patient's life. *Tyson*, 727 P.2d at 229; see Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 *Wash.L.Rev.* 331, 337-38 (1985). Within the environment of therapy, a patient may report memories in response to the perceived expectations of the therapist, see, e.g., *Taub*, *supra* at 191, or in response to other forces. See *Sleeping Memories*, *supra* at 138-39; Nelson & Simpson, *First Glimpse: An Initial Examination of Subjects Who Have Rejected Their Recovered Visualizations as False Memories*, 6 *Issues in Child Abuse Accusations* 123, 126-27 (1994). Observations like the following are troubling:

[T]he goal of therapy [is to] creat[e] a coherent "narrative truth" that accounts for the events in a patient's life but that does not necessarily make contact with the actual past. The goal is to account for the client's symptoms and allow the client to achieve closure with the past. But the truth of the past is not particularly important; instead, the patient "weaves together" a picture of the past that accounts for his symptoms and allows him to understand his life. Once the past has been reconstructed, however, the past is effectively changed and the original version is lost both for therapy and for all other purposes. The patient's memory will never be the same.

*Comment, Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66

U.Colo.L.Rev. 477, 511 (1995) (quotations, footnote, and brackets omitted) [hereinafter Call for Limitations]; see Loftus & Ketcham, *supra* at 265-67.

(*Id.* at 922, 923)

And the Tennessee Appellate Court said, in *Hunter v. Brown* Not Reported in S.W.2d, 1996 WL 57944 (Tenn.App. 1996):

As did Justice Wright, we find that there is simply too much indecision in the scientific community as to the credibility of repressed memory. In general, psychologists have not come to an agreement as to whether repressed memories may be accurately recalled or whether they may be recalled at all.FN6 Therefore, it goes without saying that the judiciary does not have the resources needed to make an accurate ruling on the validity of a psychological theory about which professionals in the field disagree. Also, there is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst. A California trial court recently upheld a jury award of \$500,000 to an accused sexual offender who had brought suit against his daughter's therapist who he alleged had planted false memories of childhood sexual abuse in her patient's mind. See Mark Hansen, *More False Memory Suits Likely*, Aug. 1994 ABA Journal 36.

FN6. For a listing of legal and psychological works debating this issue, see *Lemmerman v. Fealk*, 534 N.W.2d at 705 (concurring opinion). See also Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations In Cases of Memory Repression*, 84 J.Crim. L. & Criminology 129 (1993).

Inherent lack of verifiable and objective evidence in these cases distinguishes them from cases in which Tennessee courts have applied the discovery rule. See *Teeters v. Currey, supra* (applying the discovery rule to medical malpractice claims injury evidenced by pregnancy); *McCroskey v. Bryant Air Conditioning Co., supra* (defective furnace causing injury was verifiable evidence of a product defect) and *Potts v. Celotex Corp., supra* (mesothelioma as evidence of discovery of product defect). In those cases, there was an injury

that manifested itself in a verifiable form. In the repressed memory context, a plaintiff's allegations are evidenced by his or her own recollection. Given the uncertainty as to the reliability of this recollection, we decline to adopt the discovery rule in such cases. Like the *Lemmerman* Court we are unwilling to put the determination when the statute of limitations accrues solely in the hands of a plaintiff. The likelihood of abuse is simply too high. Further, we feel that an adoption of the position set forth in *Olsen and Bruen*, that the discovery rule will apply if there is corroborating evidence to support the allegation, is not sufficient to replace the policy behind statutes of limitations.

(*Id.* at 5)

To be sure, there are many courts which adopt the repressed memory syndrome. And there are courts which adopt it but require corroboration, legislatures which have explicitly incorporated repressed memory syndrome into the laws of the state, and states which have concluded that repressed memory syndrome is little more than witchcraft. In any event, the number of legal cases alleging repressed memory syndrome has dropped dramatically in recent years. See, e.g., Anita Lipton, "Recovered Memories in the Courts," in Taub, Shiela, *Recovered Memories of Child Sexual Abuse: Psychological, Social and Legal Perspectives on a Contemporary Mental Health Controversy* (Springfield, Ill: Charles C. Thomas, 1999) (R-25ff).

This is not the place to resolve the recovered memory issue. But it is the place to suggest that there was enough controversy surrounding recovered memory syndrome when the legislature enacted Minn. Stat. § 541.073 for the legislature to steer clear

of enacting recovered memory syndrome into law, opting instead to begin the running of the statute of limitations when the claimant knew or had reason to know she had suffered injury.

Ms. Lickteig would have known of some of the alleged sexual abuse at the time it happened, if it happened at all. If she really did suffer sexual abuse at Mr. Kolar's hands, she may not know all the injuries she suffered resulting from it for years, if ever.<sup>6</sup> If we apply the "knew" test too strictly, it would ordinarily equate the act itself with the time when the running of the discovery rule. If we apply the "knew" test too loosely, there would never be a time when the statute of limitations would clearly have run.

The "reason to know" language is helpful here, because a woman whose sisters had been abused and who was in constant contact with those children should have suspected something. Minnesota Courts have dealt in some depth with "delayed discovery" extenders of the statute of limitations in other contexts, usually under Minn. Stat. § 541.05. Forgetfulness or ignorance has never been an extender under other "discovery" statutes, such as Minn. Stat. § 541.05. See, *City of Coon Rapids v. Suburban Engineering Inc.*, 167 N.W.2d 493 (Minn. 1969).

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<sup>6</sup>Note the general rule that the statute of limitations begins to run on a "discovered injury" claim from the time the first injury is discovered. See *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580 (1968).

Rather, Cases such as *Buller v. A.O. Smith Harvester Products, Inc.*, 581 N.W.2d 537 (Minn. 1994) and *Olesen v. Retzlaff*, 285 N.W. 672 (Minn. 1931) make it clear that "reason to know" means "had the means available to be put on notice." The fact that one does not remember an incident is the weakest of all reasons to extend the statute of limitations, and § 541.073 does not do so.

However one resolves the "knew - had reason to know" issue, it is clear that the legislature used actual or constructive knowledge as the test of discovery, not memory. Thus, if Ms. Lickteig knew that Mr. Kolar had abused her prior to the expiration of the statute of limitations, the "discovery" statute begins to run - and there is nothing in Minn. Stat. § 541.073 that indicates it stops running during the time Ms. Lickteig has forgotten about it<sup>7</sup>. If the legislature had intended not to count the time during which Ms. Lickteig was "repressing" her memories of sexual abuse for statute of limitations purposes, it knew how to say so - and it did not.

If the Minnesota courts were to adopt any other rule, it

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<sup>7</sup>Minn. Stat. § 541.15 subd. (2) provides relief in the extreme case of insanity, but it is strictly limited. In the case of *Talley by Talley v. Portland Residence, Inc.*, 582 N.W.2d 590 (Minn. App. 1998), the Court of Appeals held that the time to sue is not extended even where a mentally retarded man was institutionalized. *Talley* works a much harsher result than Ms. Lickteig would suffer here. If "failing to be intelligent enough to discover one has a cause of action" is not enough to extend the statute of limitations, "failing to remember one has a cause of action" clearly is not enough to extend it.

would contradict what they have said regarding hypnosis in *State v. Mack*, 292 N.W.2d 764 (Minn. 1980):

We follow the best scientific authority, however, in rejecting as artificial and unprincipled any distinction between hypnotically-induced testimony offered by the defense to exculpate and that offered by the prosecution to make its case. Regardless of whether such evidence is offered by the defense or by the prosecution, a witness whose memory has been "revived" under hypnosis ordinarily must not be permitted to testify in a criminal proceeding to matters which he or she "remembered" under hypnosis.

(*Id.* at 771)

The problem is that the conjunction of disputable "science," when coupled with the natural self-interest of litigants, makes it virtually impossible to apply a workable statute of limitations where the availability of an extender depends upon a subjective, self-reported state of mind. Consider a hypothetical example. Suppose a person under 13 has been sexually abused at age 12. Suppose (a) that victim remembers the act until her 20<sup>th</sup> birthday, by which time she has suppressed her memory of it; (b) that between age 22 and 24 she has forgotten the abuse, but she suddenly remembers, and remembers it for two years; (c) that she takes no action, at which time she suffers a concussion and forgets it again until her 30<sup>th</sup> birthday; (d) that she remembers it again at age thirty, but takes no legal action until age 32; (e) that at age 32 she represses her memory again; (f) that at age 40 she consults a psychotherapist, who recovers her memory; and that (g) at age 45 she brings suit. When, if ever, does her

cause of action decay? At (a), because she knew about the abuse and took no action? At (b) because she remembers it for more than a year past her 18<sup>th</sup> birthday? At (c), because it is more than six years from the time she knew and has taken no action? At (d) because the total years during which she has had actual knowledge now exceeds six? At (e) because even though her memory is repressed, it has been "unrepressed" for more than six years? At (f), because she now remembers the event, and the total of the years she remembers when added to her current memory totals six; Or at (g), because she has six years to file from her last recovered memory?

"(g)" surely cannot be right. If it were, a litigant could remember an event 90% of her adult life and still maintain her right to sue until (e.g.) age 90. Not (f) either, because there is an superable problem of "adding up" years of awareness to total six: if someone has forgotten an event, she is unlikely to remember that there was a time when they had not forgotten the event. Forgetting an event and forgetting that an event was once remembered tend to go hand-in-hand, though not precisely. (This is why we tie strings around our fingers).

Not (e), because the victim will have a strong motive to self-describe her forgetfulness; because it is impossible to precisely add up days of remembrance and days of forgetfulness to come up with a solid total; (d) is a bit more sensible, but risks

a hopeless battle of the experts, not to mention epistemology. Are the days (days, weeks, months, hours) that the victim does not think about it counted as days of repression? How can we explore such a subjective mental state? At (c), because even though the victim has remembered the event more than six years, she cannot remember it now?

At (b), because even though she has more than six years of memory, she has not had six years of memory since she reached the age of majority? The problem with this is that § 541.073 simply states that the action must be brought within 6 years of the time the victim knew about the act, so while the victim has an additional year to bring the suit after her 18<sup>th</sup> birthday, her minority status does not abrogate her memory. Minors are legally deemed to lack the capacity to consent. They are not legally deemed to lack the capacity to remember events.

So (a) would seem to apply. The victim had until her 18<sup>th</sup> birthday + one year to bring an action if she remembers the event all during this time. Since the statute gives the victim a six-year grace period regardless of age, the six year extender controls over the one year minority extender, and under a literal interpretation of the statute, the time for the victim to sue should run out at age 20. And this is the correct reading of the statute. If a persons knows or has reason to know that sexual abuse occurred and knows it or has reason to know it for six (or

seven with the minority extender) years after the event, then that person "knew or had reason to know" of injury caused by sex abuse and must sue by the end of that six year period. Even if § 541.073 permits forgetfulness to extend a "live" cause of action, nothing in § 541.073 permits forgetfulness to review a cause of action which has expired under the terms of § 541.073 itself.

The problem is that none of this is automatically clear from the statute, none of these dates can be determined by any objective process, and these determinations take place in a highly charged emotional and political atmosphere. To conclude that the legislature intended to pull the courts into this morass when it made no reference to repressed memories, forgotten events, or therapeutic recovery is to conclude that it wanted to enshrine highly debatable science into the law. Once again, knowledge and memory are completely different things. We know things that we do not remember: we have either forgotten them permanently or temporarily, or we are not actively trying to "call them up." Conversely, remember things that we do not know. Since the legislature did not mention memory, forgetfulness, or repression when it enacted § 541.073, the Courts should not make potential fools out of the legislature by enacting such concepts it did not choose to utilize. *Hoffman* is bad law and threatens to enshrine junk science into our statute books.

Even if the Supreme Court were to adopt *Hoffman* without

limitation or interpretation, it is distinguishable from the present case. Importantly, the perpetrator in *Hoffman* was an adult at the time of the incident, while the alleged perpetrator and the alleged victim in this case were minors living in their parents' household. This will be discussed in more detail in the next part of the brief. Here, it should be noted that Hoffman was a fifth grade teacher and thus much more culpable than a teenager living in a household where sex abuse by others was allegedly common. Moreover, he was in a much better position to stop the running of any statute of limitations than the respondent here - Hoffman knew he had broken criminal and civil laws, while even if he had perpetrated sexual abuse while a teenager, Mr. Kolar could reasonably conclude that since the abuse had stopped before his eighteenth birthday and he had married, he had not committed any crime or actionable tort.

More importantly, the statutory period set forth in § 541.073 and its predecessor amendments had run well before Ms. Lickteig instituted her lawsuit. The 1989 version enacted an objective extender which expired in 1990:

Notwithstanding any other provision of the 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 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 sexual abuse.

This was amended in 1992:

Notwithstanding any other provision of law, a plaintiff whose claim would otherwise be time-barred under Minnesota Statutes 1990 has until August 1, 1992 to commence a cause of action for damages based on personal injury caused by sexual abuse if the action is based on an intentional tort committed against the plaintiff.

Note that neither of these provisions were in effect when *Hoffman* was commenced. Absent 541.073 subd. 2, Ms. Lickteig's cause action against Mr. Kolar would clearly have been time-barred in 1987 (reaching the age of majority in 1986; adding one year in 1989). Now either Ms. Lickteig consulted a lawyer between 1986 and 1989. If she did, she clearly knew about some of her injuries from the sexual abuse at that time, and her right to sue expired six years from the alleged abuse (plus one for minority). If she did not consult a lawyer, her "unextended" right to sue expired in 1987. So her claim would have been "otherwise time-barred under Minnesota Statutes 1990" was extended through August 1, 1992, when her right expired.

Whatever else Minn. Stat. § 541.073 is or is not, it is not both retroactive and prospective only. If it is retroactive, its limitations apply as well as its extensions. That is, if a victim knew or had reason to know that sexual abuse had occurred and did not act on that knowledge for at least six years plus the one-year "majority extender," her action is time barred, even though § 541.073 had not been enacted by the time it became time

barred. To put this another way, if a statute is retroactive, everything in the statute is retroactive. But if everything in § 541.073 is retroactive, then the 1990 and 1991 extenders applied to it, and these extenders required that a claim be placed in suit by August 1, 1992 - which Ms. Lickteig's was not.<sup>8</sup> Of course, if § 541.073 was prospective only, a cause of action by someone sexually abused in, e.g., September, 1989, would not be barred by the 1990 or the 1992 extenders, but § 541.073 would not apply to Ms. Lickteig's cause of action, either.

The *Hoffman* Court simply did not think through the implications of equating "knew or had reason to know" with

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<sup>8</sup>Of course, Ms. Lickteig will likely argue that her cause of action was not time-barred in 1990, because she had repressed her memory of the 1982 sexual abuse. But how do we know that, and how in the world can we ever discover this? Note that if the Minnesota Supreme Court rules in Ms. Lickteig's favor, the case will still have to proceed to trial in Federal Court. And Ms. Lickteig will still have the burden of proof to show that she did not know or have reason to know of the sexual abuse by 1987. If Ms. Lickteig herself is asked on the stand, "Did you remember the sex abuse in 1987?" her likely answer will be, "I don't remember." If she were to reply, "I remember now that I forgot in 1985," the Court should strike her testimony as self-serving and incredible. Absence a objectively traumatic event like a concussion, how does one remember when it was that one forgot something? If her therapist were to say that by 1987 she had forgotten the sexual abuse, her testimony would be self-serving. Her therapist does not address the issue of when Ms. Lickteig's memory became "repressed," or what the status of her memory was in 1989. And if she were to be permitted to do so now - i.e., if the case were to be returned for further discovery and trial - the waters of junk science would rise very high. Would the therapist employ hypnosis? This runs afoul of *Mack*, not to speak of *Daubert*. Would her "talk therapy" suddenly reveal a "fact" which was crucial to her victory in the case?

"forgot or had reason to forget." So even if the Supreme Court were to hold that under some circumstances, repressed memory syndrome could be used to extend the statute of limitations, it should be clear that a person claiming repressed memory must demonstrate that the memory became repressed during a period when the statute of limitations had not yet run, and must demonstrate it by objective evidence - i.e. something other than her own self-serving testimony or the testimony of her paid therapist. Better, it should simply hold that Minn. Stat. § 541.073 does not extend the statute of limitations for intentional torts occurring before 1989 or, at worst, 1992.

### III.

#### MS. LICKTEIG'S CAUSE OF ACTION WAS BARRED BY THE INTERFAMILIAL TORT DOCTRINE AT THE TIME OF THE ALLEGED ABUSE.

The respondent concedes that interfamilial tort immunity would likely not be held to be good law by this Court in 2009. But Ms. Lickteig was born in 1967 and the abuse happened, if at all, in the years from roughly 1979 through 1982. Most cases in which the Supreme Court overrules a longstanding doctrine are prospective only, so the question is, what was the status of the law of interfamilial immunity in, e.g., 1980? There is a powerful argument that the family immunity doctrine applied to this case in 1980.

*Silesky* was decided in 1968 and *Wills v. K-Mart Corp.*

354 N.W.2d 442 (Minn. 1984) was decided in 1984, and *Silesky* made it clear that its ruling was prospective only. It said:

The change in the rule of child-parent immunity announced herein is prospective only and is limited to causes of action arising on or after the date of the filing of this opinion, except that it is to be applicable to the instant case.

(*Id.* at 442)

Besides, *Silesky* made it clear that it applied only to the tort of negligence and only when insurance was involved:

While the existence of liability insurance does not create liability, its presence is of considerable significance in the case at bar. To persist in adherence to family harmony and parental discipline and control arguments when there is automobile liability insurance involved is in our view unrealistic. As stated in *Hebel*, 'If there is insurance there is small possibility that parental discipline will be undermined, or that the peace of the family will be shattered by allowance of the action.' 435 P.2d 15.

(*Id.* at 442)

And with regard to the nature of the torts for which interfamilial immunity was being narrowed, the court said:

On the balance we believe that the scales should be weighed in favor of affording the injured child a remedy in the instant case, subject to certain exceptions in accordance with the holding of the Wisconsin court in *Goller v. White, supra*. The traditional explanations which have been proffered in favor of parental immunity become less and less persuasive. As we see it, neither individually nor collectively do the arguments in support of the immunity rule outweigh the necessity of according the child a remedy for wrongful negligent injury to his person. This factor of **negligent** wrong is and must be of paramount significance. As was said in *Hebel v. Hebel*, 435 P.2d 15:

(*Id.* at 637; emphasis supplied)

...IT appears to us illogical to sanction property actions between unemancipated minors and their children; to allow an action if the child happens to be emancipated; to permit an action if the parent inflicts intentional harm upon the child; or if that harm is inflicted through negligence characterized as gross or wanton; to permit an action should the child happen to be injured in the course of the parent's business or vocation; to permit an action if the parent is deceased; but, on the other hand, to deny the unemancipated child redress for his personal injuries when caused by the negligence of a living parent.

While the existence of liability insurance does not create liability, its presence is of considerable significance in the case at bar. To persist in adherence to family harmony and parental discipline and control arguments when there is automobile liability insurance involved is in our view unrealistic. As stated in *Hebel*, "If there is insurance there is small possibility that parental discipline will be undermined, or that the peace of the family will be shattered by allowance of the action.

(*Id.* at 637, 638)

Needless to say, there is not insurance against sex abuse. While it is probably true that interfamilial harmony will not be much disrupted by a negligence claim covered by insurance, nothing is more likely to disrupt family harmony than an interfamilial claim of sexual abuse.

Prior to *Silesky*, interfamilial immunity with regard to parents and their children was absolute. Prior to 1984, after all Mr. Kolar's alleged sexual abuse had ceased -- there were several exceptions to the doctrine which would apply here. A

careful reading of *Silesky* indicates that the "prospectivity" which would govern a new cause of action is the date at which the tort occurs, not the date on which the action was commenced.

The closer case here is the issue of inter-sibling immunity. The *Silesky* Court said (at 635):

Suits are permitted among unemancipated siblings even though they remain in the family household. In Annotation, 81 A.L.R.2d 1155, 1157, the author states:

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

(*Id.* at 635)

Judge Magnuson was well aware of this *dicta*:

Lickteig points to language in *Silesky* where the court observed that in Connecticut "an unemancipated minor child could maintain an action against her unemancipated minor sister." (Pl.'2s Letter Mem. at 2 (citing *Silesky*, 161 N.W.2d at 634 (citing *Overlock v. Ruedemann*, 165 A.2d 335, 338 (Conn. 1960))). However, this is dictum. Further, Lickteig ignores that the injuries in all of these cases resulted from motor vehicle accidents and the holdings were based on public-policy determinations that persons injured in such accidents should be compensated, typically through insurance, regardless of their age or relation to the tortfeasor.

As the Court in *Silesky* stated:

While it appears to be conceded that abolition of parental immunity might increase litigation between children and their parents, nevertheless such

litigation is not of the type likely to threaten family peace, since the only significant source of litigation apparently feared among family members is personal injury resulting from the operation of the family automobile. It has never applied to or controlled property rights.

(A-6)

Again, the insurance issue is crucial. The family harmony disrupted by a claim of rape is orders of magnitude different from the minor disruption to family harmony caused by a negligence case covered by insurance.<sup>9</sup>

Unfortunately, *Silesky* and its progeny are never very clear, when they speak of "intra-family" immunity, whether they are speaking of actions between all family members, or whether their language only applied to parent-child litigation. After all, *Silesky* itself was a parent-child case, and did not have to address the sibling-sibling issue. *Silesky* left hints both ways concerning what it felt about the sibling case. Unfortunately, these hints go in both directions. The *dicta* quoted above suggests that the Court would not apply it in the sibling case. On the other hand, there is language suggesting that the Court's

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<sup>9</sup>Oddly, if this Court adopts Ms. Lickteig's statute-of-limitations theory, she would have a cause of action against her parents for negligently permitting Mr. Kolar to abuse her, and this action would not begin to run until her memories allegedly recovered in 2005. And this action might be covered under her parents' home owners policy - see the language "negligently permitting sexual abuse in Minn. Stat. § 541.073, subd. 3. Imagine the shock of the homeowner's insurer finding that it was being sued for an action taking place in 1982! Does Minnesota really want to subject its insurers to forty-year old claims?

analysis applied to all intra-family cases:

In the decisions touching upon intra-family immunity, it appears that the most common reasons given in support of the doctrine are that to permit such actions would contribute to the destruction of the family by promoting strife and disrespect among the family members involve; that it may lead to fraud being practiced; and that conflicts will be promoted which will threaten domestic stability.

(*Id.* at 634)

All three of these considerations apply with great force in sibling-on-sibling sexual abuse claims.

There is another important factor which the District Court did not discuss directly, but which appears to lie behind much of its analysis and which justifies it in a back-door sort of way. A minor child ordinarily has no right to sue in her own right; she must be represented as plaintiff in such a suit by a parent or guardian. *See, Murphy v. Bergo*, 400 N.W.2d 387 (Minn. App. 1987); Minn.R.Civ.P. 17.01. At least one reason for this rule relates to family harmony: one does not want a child to bring a suit over the objections of her family, and in particular, one does not want her to bring such a suit against family members against family desires. Hence, the law preserves family harmony by effectively placing the decision of whether to bring a suit on behalf of the child in the hands of her parents so long as the family is intact.

In the instant case, there is some indication that Ms. Lickteig's mother did not know that abuse had taken case and that

her father knew about it but did not care if it happened. So as a practical matter, this case could not have been brought until Ms. Lickteig reached the age of 18 anyway. Since it is not uncommon for a family in which sexual abuse occurs to be "in denial," or worse, the situation reported here would not be unusual. In practice, this left many victims of purported sexual abuse with one year to bring their lawsuit, and this is precisely why the legislature passed Minn. Stat. § 541.073 in 1989 and passed several statutes which retroactively extended that period for several years.

It can be fairly concluded that § 541.073 and the brief extensions of § 541.07 were intended by the legislature to be a partial solution to the "problematical parent" issue as it confronts children who are minors at the time of abuse. It is unclear in Minnesota that an adult sibling may sue another adult sibling for an act which occurred during the minority of those siblings. Although a fair reading of the spirit of *Silesky* indicates that they may now do so, the Minnesota Courts did not so indicate when insurance was involved, as was probably the case here with regard to a suit against Mr. and Mrs. Kolar.

And it is abundantly clear that a suit by an adult sibling against another adult sibling, if based upon an act occurring during those siblings' minority, is subject to the statute of limitations if an action lies is not barred by interfamilial

immunity.

The issues of interfamilial sexual abuse and the sexual abuse extender to the statute of limitations are intimately related. Many, and probably most, cases of sexual abuse arise in the interfamilial context: parent-on-child, stepparent-on-child, child-on-child. So unless a parent is willing to stand as the "natural guardian" of a child who wants to sue the other spouse or another child during the victim's minority<sup>10</sup>, a minor child is unlikely to obtain redress during his or her minority<sup>11</sup>. So leaving a child with effectively one year to sue for interfamilial sexual misconduct after she reaches the age of eighteen may not be very fair - but neither is permitting her an unlimited period of time to sue if she can utter the magic words, "I forgot."

Perhaps the way to handle the issue is to deal with it the way the statute indicates the legislature dealt with it - to give the victim of child sexual abuse whose abuse occurred before 1989 six years or until 1992 to bring a cause of action, whichever

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<sup>10</sup>And the situation where this is most likely to occur is during a hotly-contested divorce case - the sort of case the Courts need like a hole in the head.

<sup>11</sup>At the same time, this is a reason why intersibling abuse between minors may be a more problematical case for rejecting interfamilial immunity than parent-child cases. Parent-child sexual abuses cases often result in divorce, leaving on parent free to represent a child. But what parent wants to sue a child on behalf of another child?

occurred later, and to give a victim of child sexual abuse whose abuse occurred after 1989 six year after she knew or should have known (not "should have remembered") about the abuse, or one year after reaching the age of majority, whichever occurred earlier. But it is better to retain the "interfamilial immunity" doctrine as it applies to uninsured siblings than to allow a sibling an unlimited time to disrupt what little harmony remains within a family by bringing suit.

There is little doubt but that Ms. Lickteig was effectively barred from suing Mr. Lickteig during her minority anyway, not so much by the intra-familial immunity rule as by the need to have a parent or guardian sue on her behalf. Unless family service protective agencies became involved and the county obtained custody by way of a CHIPS petition, therefore, the courthouse doors were effectively closed to Ms. Lickteig until she reached the age of 18. This had precisely the same result as if she had been barred a sibling while a member of his household by the interfamilial immunity doctrine. The only difference between barring Ms. Lickteig's cause of action under the interfamilial immunity doctrine and the statute of limitations doctrine is that the former is an absolute bar while the latter is a bar which depends on the passage of time. But in this case they work the same result.

It is possible that the extenders passed by the Minnesota

legislature would have given her until 1992 to bring her action against Mr. Lickteig, and no longer. But this means that the presence or absence of interfamilial immunity is a "red herring" here. The question is not, did the interfamilial immunity doctrine bar Ms. Lickteig from relief. The question is, did Ms. Lickteig's family relationship affect the relief she was entitled to and when she was entitled to it? The answer to the latter is, interfamilial immunity or no, Ms. Lickteig only had until 1987 (or 1992 with the extenders) to bring her cause of action. Interfamilial immunity and the considerations which underlay it, might account for the legislature's extension of the statute of limitations. But it also accounted for the fact that it considered the age of majority the crucial issue after the child reached the age of majority, not "recovered memory." Ms. Lickteig's right to sue in propria persona began at the date when she turned 18. The statute of limitations began to run when she turned 18. Thus, her right to sue at this late date should be barred either by the doctrine of interfamilial immunity or statute of limitations or both, and for much the same reasons.

She may have been entitled to relief when she turned 18, particularly against her parents. But the relief to which she was entitled was subject to the statute of limitations. The one-year extension for minority which was in effect in 1986, and the extension periods for sexual abuse which were in effect until

1992 only apply to the cause of action Ms. Lickteig had in 1986 - viz., a battery claim or other tort existing in 1986. It does not apply to any new cause of action for sexual abuse which may have been created by § 541.073, for this would truly be retroactive legislation. Hence, except for the time extensions noted above, Ms. Lickteig's rights and obligations regarding the filing her cause of action in 1992 were exactly the same as her rights and obligations in 1986.

So the District Court was right when it concluded that considerations of family harmony barred the bringing of this action. It may have used a problematical analysis in reaching its conclusion, but its ultimate decision should be upheld.

CONCLUSION

For these reasons, the decision of Judge Magnuson was correct, and the Supreme Court should rule that the statute of limitations and the doctrines of interfamilial immunity bar recovery to Ms. Lickteig.

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MACK & DABY, P.A.



John E. Mack, Atty.Reg.No. 65973  
P.O. Box 302  
New London MN 56273  
(320) 354-2045  
ATTORNEYS FOR RESPONDENT