SUPREME COURT OF THE STATE OF RHODE ISLAND
M. P. No. 90-97

KAREN DOE and FRANCES DOE,
Plaintiffs-Respondents,
v.
MARC R. LaBROSSE, SR.,
Defendant-Petitioner.

BRIEF OF AMICI CURIAE

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On Certiorari from the Superior Court,
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CONSTITUTION, STATUTES AND RULES

Amici curiae respectfully submit this brief in support of plaintiffs' opposition to defendant's appeal from the Superior Court's denial of his motion for summary judgment, subject to the annexed Motion which sets forth the interests of amici curiae.

PRELIMINARY STATEMENT

This case arises out of the willful, systematic and violent abuse of two children by their father from early infancy through mid-adolescence. For plaintiffs Frances Doe and Karen Doe, the "privacy of their own home" was instead the confinement of a torture chamber. In this presumed haven, shrouded in secrecy, they were regularly assaulted, sexually violated and terrorized by the parent on whom they were most dependent.[1]

Inevitably, this father's criminal and tortious abuse of his authority and their trust resulted in serious and long-term psychological damage to his victims. Moreover, the specific psychological injuries asserted by Frances and Karen are predictable and even classic consequences of the kinds of abuse their father inflicted on them.[2] As discussed below, expert witnesses could testify at trial that these injuries generally

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1. The plaintiffs' mother suffered from serious mental disorders and periodic emotional breakdowns, resulting in their increased reliance and dependence upon their father. Complaint (hereafter "Comp.") at ¶4.

2. See generally Affidavit of Natalie S. Roskin dated December 18, 1989 (hereafter "Roskin Aff.") at ¶¶ 8-14; Affidavit of Diane Petrella dated December 18, 1989 (hereafter "Petrella Aff.") at ¶¶ 3-6, 8. The nature and significance of these psychological injuries are reviewed at Point I.A., below.

take many years to manifest themselves and, by their very nature, defy self-diagnosis. With the assistance of two therapists and with each other's support, however, Frances and Karen have managed to take the first steps toward recovery by identifying the nature and cause of their injuries. These critical discoveries occurred during and after February 1988, when the sisters were ages 31 and 30, respectively.

Less than a year later, Frances and Karen filed suit against their father, the defendant herein, in the Superior Court for the State of Rhode Island. The defendant moved for dismissal of their claims, asserting that each daughter's causes of action had been absolutely time-barred three years after she attained the age of 18. Amici curiae submit that this assertion was groundless because the courts of Rhode Island have long applied the discovery rule when hidden injuries or undetected causes of injury warrant postponed accrual of particular causes of action. (See Point I.C. of the Argument, below.) Accordingly, after converting defendant's motion to dismiss into a motion for summary judgment, Justice Rodgers denied the motion, finding on the basis of the pleadings and the evidence presented, that incestuous child abuse results in long-term damage which is difficult to detect and, therefore, that the accrual of each plaintiff's cause of action is a question of fact which she is entitled to attempt to prove at trial. Doe v. LaBrosse, No. WM 89-0062, slip op. at 1, 11-13 (Super. Ct. Washington Cty., Rodgers, J., Jan 9, 1990).

The lower court's application of the discovery rule in this case was clearly correct, and this tort, in particular, cries out for such relief. As the court below properly recognized, the policy behind Rhode Island's statutes of limitation is to prevent potential plaintiffs from sleeping on their rights. Doe v. LaBrosse, slip op. at 4. Where an injured party is ignorant -- rather than delinquent -- with respect to a cause of action, this Court has repeatedly articulated the paramount importance of preserving the opportunity for judicial relief, and has consistently applied the discovery rule. Moreover, the policy underlying Rhode Island's application of the discovery rule to specific negligence actions is even stronger in the context of a claim for incestuous child abuse, where the tortfeasor's secrecy, egregious conduct and criminal intent would exacerbate the unfairness of denying a remedy to the victims. Doe v. LaBrosse, slip op. at 9-10.

As demonstrated below, every one of the precedents, legal doctrines and equitable considerations that has warranted discovery-based accrual in prior Rhode Island cases applies to the particular circumstances surrounding this kind of tort. (See Point I.D. of the Argument, below.) By the same token, none of the principles or policy considerations that favor the strict interpretation of statutes of limitation in ordinary tort suits would be served by foreclosing a remedy in this case. The damage done to Frances' and Karen's mental faculties and perceptions was such as to make them blamelessly ignorant of their

injuries for many years after the incestuous incidents occurred. For this reason, they would be unjustly deprived of any opportunity to seek redress unless the discovery rule were applied to their causes of action.

This Court has established that under Rhode Island Law, the importance of avoiding a deprivation of this magnitude outweighs the tortfeasor's competing interest in being relieved of potential liability. E.g., Wilkinson v. Harrington 104 R.I. 224, 243 A.2d 745 (1968). This has been held to be so even where the causes of action were based in negligence, breach of warranty, res ipsa loquitur and strict product liability. Anthony v. Abbott Laboratories, 490 A.2d 43 (R.I. 1985). The defendant in the instant case not only engaged in a pattern of intentional criminal conduct, but also engaged persistently in conduct intended to thwart his victims' discovery and disclosure of their own injuries. His request that this Court now assist him in benefiting from his own wrongdoing should be denied.

ISSUES PRESENTED FOR REVIEW

1. Did the court below correctly hold that the discovery rule applied to the incestuous child abuse claims asserted in this case, where the plaintiffs alleged that (a) they did not discover and reasonably could not discover the nature and cause of their injuries until many years after the tortious acts occurred, and (b) their inability to make these discoveries was the direct result of the defendant's acts?

2. Did the court below correctly refuse to grant the defendant's motion for summary judgment where there were genuine issues of material fact concerning when the plaintiffs discovered or reasonably should have discovered their injuries and their injuries' cause?

ARGUMENT

I. THE COURT BELOW CORRECTLY APPLIED THE DISCOVERY RULE IN THIS CASE.

A. The Nature and Delayed Effects of Incestuous Child Abuse are Now Widely Recognized.

In every instance where this Court has applied the discovery rule to a cause of action for personal injury, its decision to do so has been based on a review of the precedents and policies relating to Rhode Island's statutes of limitation, informed by a careful analysis of the particular circumstances surrounding the injury complained of. See Anthony v. Abbott Laboratories, 490 A.2d 43 (R.I. 1985); Lee v. Morin, 469 A.2d 358 (R.I. 1983); Romano v. Westinghouse Electric Co., 114 R.I. 451, 336 A.2d 555 (1975); Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968).[3] To assist the Court in this analysis, what follows is an overview of the relevant circumstances that give rise to and characterize incestuous child abuse, frustrate its disclosure and, therefore, require application of the discovery rule. These circumstances are widely recognized and could be testified to by expert witnesses in this case.[4]

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3. These cases are discussed in Point I.C. of the Argument, below.

4. In addition, the effects of incest are exhaustively described in law review articles and psychological and medical literature. Amici have filed concurrently herewith an appendix of leading law review articles and clinical studies regarding incest in order to assist the Court in its consideration of the issues raised in this appeal. That appendix will be cited herein as follows: "App., Exh. ____, at ____."

1. Incestuous Child Abuse has Flourished in the Absence of Public Recognition or Legal Deterrence.

Twenty years ago, few of us realized that incestuous child abuse was a national problem.[5] In fact, the subject of incest had been effectively excluded from public discussion or attention by virtue of social attitudes that made the topic of incest "taboo".[6]

Sadly, our most cherished and humane beliefs -- about what family life should be like -- allowed the incest problem to reach almost epidemic proportions by obscuring our vision of what being at home really is like for the millions of victims of incestuous child abuse. For example, reporting of child sexual abuse, which is now required by law in many contexts,[7] has historically been discouraged and resolutely disbelieved.[8]

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5. Gelinas, "The Persisting Negative Effects of Incest", 46 Psychiatry 312, 312 (1983) (hereafter "Gelinas"). (A copy of this article has been filed with the Court at App., Exh. 3.)

6. B. Justice & R. Justice, The Broken Taboo: Sex in the Family 14 (1979); Note, Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy, 7 Harv. Women's L.J. 189 (1984) at 193 n.18 (authored by Melissa G. Salten) (hereafter "Civil Incest Suits"). (A copy of this note has been filed with the Court at App., Exh. 2.)

7. See, e.g., R.I. Gen. Laws § 40-11-3. See also Civil Incest Suits, App., Exh. 2, at 198 n.61.

8. Comment, Tort Remedies for Incestuous Abuse, 13 Golden Gate U.L. Rev. 609, 616 (1983) (hereafter "Tort Remedies"). (A copy of this comment has been filed with the Court at App., Exh. 1.) This unfortunate attitude toward incest is consistent with the insensitivity and lack of awareness that have historically been directed at all victims of rape and sexual assault. For example, no less an authority than Wigmore on Evidence urged that every complainant in a

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Until recently, even the legal community, which generally offers recourse to the injured, looked the other way while countless child abusers treated the protection of the law with the same irreverence that they had treated the protection of the home.[9] In short, the so-called "incest taboo" inhibited most people from even mentioning incest -- let alone working together toward a solution to the problem. It did not deter the commission of incestuous abuse.

Thus, while many of us may find it difficult to imagine that even one parent could commit the kinds of violations described in the Does' complaint, we now know that the sexual abuse of children occurs with alarming frequency -- particularly in their own homes. As of 1984, the American Psychological Association estimated that 12 million to 15 million American women had suffered incestuous abuse, and that approximately half

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8.(...continued)
sexual assault case should undergo psychiatric examination to determine whether she was fantasizing. 3A J. Wigmore, Evidence, Sec. 924a, at 737 (1970). The myth that both adults' and children's reports of such abuse were mere fantasies was perpetuated by suppression of substantial evidence regarding the prevalence of incestuous child abuse. F. Rush, The Best Kept Secret: Sexual Abuse of Children (1980), at 80-104; J. Masson, The Assault on Truth: Freud's Suppression of the Seduction Theory (1984). In addition, various authorities incorrectly insisted that the sexual abuse of female children was not necessarily damaging, (see, e.g., Kinsey, Pomeroy, Martin & Gobhard, Sexual Behaviour in the Human Female (1953)), and that incest was an extraordinarily rare occurrence. Civil Incest Suits, App., Exh. 2, at 192.

9. Summit, Recognition and Treatment of Child Sexual Abuse, in Coping With Pediatric Illness, at 126 (C. Hollingsworth ed. 1983) (hereafter "Summit, Recognition and Treatment"). See also discussion supra note 8.

of these cases involved father-daughter or stepfather-stepdaughter incest.[10] As one leading expert has written: "Sexual abuse is anything but exotic or rare. It is an everyday sort of experience for hundreds of thousands of children in every economic and cultural subgroup in the United States".[11]

The resistance in this country to acknowledging this serious problem has allowed it not only to continue unchecked, but even to flourish behind closed doors. For example, the repeatedly observed phenomenon of "generational cycling" in cases of incestuous abuse, in which the victim's children themselves become the victims of this kind of abuse,[12] strongly suggests that the growth in the incidence of incest has been exponential.

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10. Civil Incest Suits, App., Exh. 2, at 193 n.18. Adoptive fathers, grandfathers, brothers, half-brothers, uncles and cousins accounted for the rest of these cases. Id. Other studies have consistently suggested that over 90% of incest perpetrators are male and that 80%-90% of the victims are female. Gelinas, App., Exh. 3, at 313; J. Herman, Father-Daughter Incest 12-14, 18-19 (1981) (hereafter "Herman-1981"). See also Blume, The Walking Wounded: Post-Incest Syndrome, 15 SIECUS Report 5, 5 (Sex Information and Educational Council of the U.S., September 1986) (hereafter "SIECUS Report"). Collective references in this brief to the victims of such abuse will use the feminine pronoun and references to perpetrators will use the masculine pronoun.

11. Summit, Recognition and Treatment, supra note 9, at 117. Reporting on testimony received by the United States Senate Subcommittee on Children, Family, Drugs and Alcoholism in 1984, Senator Paula Hawkins related that "an estimated 100,000 to 500,000 American youngsters will be sexually molested" in a typical year. P. Hawkins, Children At Risk 58 (1986).

12. Gelinas, App., Exh. 3, at 325.

In those families in which generational cycling of incest occurs, the abused daughter generally does not go on to sexually abuse her own children, but rather marries a man who eventually does so.[13] In other words, the severe psychological damage done to the incest victim may manifest itself in her unwitting selection of a mate who is capable of, or even disposed toward, sexual assaults upon his own children.[14] This pathological inability to form appropriate relationships as she matures is one of the most significant of the victim's latent injuries -- both in terms of its cost to herself and in terms of its ultimate cost to society.[15]

2. The Incest Perpetrator Deliberately Thwarts Discovery and Disclosure.

Although incestuous child abuse occurs in all socio-economic classes, ethnic, racial and religious groups and geographic areas[16], the abusers' modi operandi are chillingly consistent from case to case. As expert witnesses would testify, the typical incestuous child abuser capitalizes on the

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13. Gelinas, App., Exh. 3, at 325. See also Summit, Recognition and Treatment, supra note 9, at 117; Swink and Leveille From Victim to Survivor: A New Look at the Issues and Recovery Process for Adult Incest Survivors, in The Dynamics of Feminist Therapy, 119, 120 (1986) (hereafter "Swink and Leveille").

14. Gelinas, App., Exh. 3, at 325.

15. The victim's inability to function as a healthy adult is not susceptible to early diagnosis. As discussed below, at Point I.A.3. of the Argument, this is only one example of the latent or delayed effects of the childhood sexual abuse.

16. Summit, Recognition and Treatment, supra note 9, at 117.

atmosphere of silence and incredulity surrounding incest to assist him in perpetrating a fraud upon his victim.[17] For his own protection, he tells her that their "relationship" is "normal" and even "good for" her, while insisting that it must be kept secret.[18] The victim, who is exploited from early childhood, has no basis to disbelieve or disobey him. Instead, the child is "entirely dependent on the intruder for whatever reality is assigned to the experience."[19] Moreover, the incest perpetrator frequently uses threats to reinforce the fraudulent message that his conduct is protective and beneficial rather than wrongful.[20] Systematically, he leads his victim to believe that there is no alternative to their incestuous relationship that would not prove even more dangerous and threatening to her. Repeatedly, he "warns" her of a terrifying chain of seemingly greater evils, each of which is linked to the breaking of secrecy:

> "Don't tell anybody." "Nobody will believe you."
> "Don't tell your mother . . . she will hate you."
> "She will hate me." "She will kill you."
> "She will kill me." "It will kill her."
> "She will send you away."

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17. R. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect: the International Journal 177, 181 (1983) (hereafter "Summit, Accommodation Syndrome"). (A copy of this article has been filed with the Court at App., Exh. 4.) See also Civil Incest Suits, App., Exh. 2, at 196.

18. De Young, The Sexual Victimization of Children 9, 38 (1982) (hereafter "De Young").

19. Summit, Accommodation Syndrome, supra note 17, at 181.

20. De Young, supra note 18, at 37-38; Herman-1981, supra note 10, at 88.

"She will send me away."
"It will break up the family and you'll all end up in an orphanage."[21]

The father may also threaten to abandon the family, which is dependent on his income, or to inflict severe bodily harm on the victim or one of her family members if she reveals the incest secret.[22]

In addition, there are marked consistencies in the overall structure of the victim's family that reinforce the abuser's persistent suggestions that the victim's mother is an unlikely or unreliable ally.[23] For example, the victim's mother is frequently disabled by physical or emotional illness.[24] She is peculiarly powerless within her own family,[25] nearly always estranged from her husband, and generally economically dependent upon him.[26] In many cases, she is hospitalized for extended periods of time or otherwise unavailable to her

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21. Summit, Accommodation Syndrome, App., Exh. 4, at 181.

22. Id. at 185.

23. Herman-1981, supra note 10, at 81-82. The incest victim's family is often characterized by the unchallenged supremacy of the father. In many cases, fathers in these households are physically and verbally abusive of other family members (besides the child incest victim). Civil Incest Suits, App., Exh. 2, at 194; Tort Remedies, App., Exh. 1, at 613. See generally Blake-White and Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, 66 Social Casework 394, 395 (1985) (hereafter "Blake-White and Kline").

24. Herman-1981, supra note 10, at 77; Tort Remedies, App. Exh. 1, at 613.

25. Tort Remedies, App., Exh. 1, at 613.

26. Herman-1981, supra note 10, at 72.

children.[27] Thus, the average child "never asks and never tells":

> Contrary to the general expectation that the victim would normally seek help, the majority of the victims in retrospective surveys had never told anyone during their childhood. Plaintiffs expressed fear that they would be blamed for what had happened or that a parent would not be able to protect them from retaliation.[28]

With his persistent threats, and by persuading her of the dangerousness of revealing the incest secret to her mother or anyone else, the incestuous father intentionally fosters the illusion that his child is a willing participant in his assaults. Insofar as he has persuaded her that there are greater evils out there, his victim will typically console herself with

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27. Id.

28. Summit, Accommodation Syndrome, App., Exh. 4, at 181. Tragically, most mothers are not aware of ongoing sexual abuse. Summit, Recognition and Treatment, supra note 9, at 131. This is especially true where the mother herself has been victimized. Id.

    Given this lack of awareness and the fact that most cases are not disclosed to the authorities while the abuse is ongoing, see Accommodation Syndrome, App., Exh. 4, at 181, it is not surprising that criminal prosecution and conviction are rare. Even after disclosing the abuse, moreover, the incest victim may be reluctant to testify against her abuser in a criminal proceeding. Note, Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform, 65 Wash. L. Rev. 189, 193 n.22 (1990). The lapse of time may also make it virtually impossible to meet the standard of proof required for criminal conviction. In any event, a conviction generally will not provide the incest victim with the means to secure the costly medical care and long-term psychotherapy that she (like the plaintiffs in this case) will so often require. A civil remedy for childhood sexual abuse, however, can provide appropriate and much-needed redress. See generally Civil Incest Suits, App., Exh. 2; Tort Remedies, App., Exh. 1.

the notion that she has made some kind of choice.[29] This belief in the myth of her own responsibility -- which the child victim eagerly adopts in an effort to assert some control over her life -- backfires tragically. Once she has adopted this belief, any hint that the incestuous contact is not normal will trigger tremendous anxiety and guilt.[30] This combination of helplessness and self-blame is frequently so overwhelming as to result in "blocking out", or "repression", of the victim's experiences and emotions.[31] As described below, such repression may be necessary for the child's survival during the period of abuse, but will inevitably become debilitating and inhibit recognition of her injuries later on in her life.[32]

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29. Summit Beyond Belief: The Reluctant Discovery of Incest, in Women's Sexual Experience (M. Kirkpatrick ed. 1982) at 127, 128 n.1 (hereafter "Summit, Reluctant Discovery").

30. De Young, supra note 18, at 39-40. In addition, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred which invites self-destructive behavior. Summit, Recognition and Treatment, supra note 9, at 128. For example, incestuous child abuse has repeatedly been linked to substance abuse and to prostitution. Herman-1981, supra note 10, at 99; Swink and Leveille, supra note 13, at 125-26. Indeed, a large number of runaway children who ultimately become involved in prostitution were escaping incestuous abuse when they left home. Summit, supra, at 128; Carmen and Reiker, A Psychosocial Model of the Victim-to-Patient Process: Implications for Treatment, 12 Psychiatric Clinics of N.Am. 431, 438 (1989) (hereafter "Carmen and Reiker").

31. Swink and Leveille, supra note 13, at 122.

32. Carmen and Reiker, supra note 30, at 434-38.

3. The Nature of the Injuries Results in Delayed Discovery of the Abuse.

Children who are subjected to incestuous abuse by their fathers typically develop a predictable constellation of psychological coping mechanisms -- or "defense mechanisms" -- enabling them to withstand an otherwise unbearable combination of physical and emotional trauma.[33] These classic responses to incest trauma approximate the effects of anesthesia, amnesia and denial.[34] Specifically, the typical victim "dissociates" from her own pain until she achieves the necessary degree of distance or numbness.[35] This psychic numbing can be either general or specific to particular parts of the body.[36] To the

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33. Id. See also Summit, Reluctant Discovery, supra note 29, at 133-36.

34. SIECUS Report, supra note 10, at 5, 6; Gelinas, App., Exh. 3, at 316.

35. Gelinas, App., Exh. 3, at 316. "Dissociation", also referred to as "disassociation", is an altered state of consciousness in which the child looks on as if from a distance at the child suffering the abuse. Summit, Recognition and Treatment, supra note 9, at 128. This distortion of the victim's awareness of the trauma frequently continues, and may first manifest itself, long after the abuse has ended. Blake-White and Kline, supra note 23, at 396.

36. Although "defense mechanisms" such as dissociative disorder may be relatively complex from a clinical or diagnostic point of view, the logic of them is relatively immediate from the child's point of view: "[One] patient described how she taught herself to thwart her stepfather by not feeling his beatings or the incestuous abuse. . . . She was eleven years old at the time and her stepfather was squeezing together the four fingers of one of her hands until she cried. She remembered looking straight into his eyes and holding her breath so that this time she wouldn't cry, telling herself not to feel her hand. . . . Later

(continued...)

extent this "defense" is insufficient, the victim may also proceed to repress any memory of the assaults and/or the suffering associated with them.[37] Finally, the child victim attempts to master her experiences by visualizing herself as being in control of every aspect of her family life -- including the pattern of assaults.[38] This results in profound self-blame which not only undermines her self-esteem, but also precludes her from properly assigning blame to her abusive parent.[39] Rather than suffering the unthinkable indignity of being wronged every moment of her life, the child refuses to identify the wrongfulness of her experience:

> If the very parent who abuses and is experienced as <u>bad</u> must be turned to for relief of the distress that the parent has caused, then the child must, out of desperate need, register the parent -- <u>delusionally</u> -- as good. Only the mental image of a good parent can help the child deal with the terrifying intensity of fear and rage which is the effect of the tormenting experiences . . . . So the bad must be registered as

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36.(...continued)
that night, the stepfather came into the bathroom and asked to see that hand. She put it down on the edge of the sink and he abruptly brought his fist down onto it. The patient states that during the short interval of time between the beginning of his motion and the impact, she had been able to 'not feel' her hand. Since that episode she has been able to induce and reinforce anesthesia when she felt she needed it." Gelinas, App., Exh. 3, at 316.

37. Swink and Leveille, <u>supra</u> note 13, at 122 (reporting that at least half of their incest patients had either partially or totally "blocked" the abuse).

38. Summit, <u>Accommodation Syndrome</u>, App., Exh. 4, at 184.

39. Summit, <u>Recognition and Treatment</u>, <u>supra</u> note 9, at 127.

> good. This is a mind-splitting or a mind-fragmenting operation.[40]

Breaking through the deep-rooted mechanisms described above requires a monumental psychological change. Generally, some triggering event is needed to force the repressed injuries into consciousness.[41] Most often this productive but painful process occurs in the course of professional counseling:

> When they are ready to begin facing the abuse, most victims will have dreams, nightmares and/or flashbacks of the abuse. If these had been totally blocked previously, they can be very frightening and confusing as they seem to be coming out of nowhere. It feels as if she is being further victimized as she relives these experiences but this time from within her own mind rather than from someone outside. It is most helpful to understand that these flashbacks come as a sign . . . that she is now ready to deal with this material . . . .[42]

Although some victims seek therapy as the result of a flashback or other partial discovery, more commonly, the victim presents

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40. Id. (quoting L. Shengold, "Child Abuse and Deprivation: Soul Murder", 27 J. Am. Psychoanalytic Ass'n 533, 599 (1979) (emphasis in original)). The potential extremity of this "mind-splitting" is evidenced by the fact that childhood sexual abuse is highly correlated with Multiple Personality Disorder in adult life. Civil Incest Suits, App., Exh. 2, at 201. In a 1983 study of patients with Multiple Personality Disorder, conducted by the National Institutes of Health, sixty-eight percent of a group of ninety-two women and eight men were found to have been victims of childhood incestuous abuse. Id. Another fifteen percent of these patients had been victims of extrafamilial sexual abuse during childhood. Id. at 201 n.88. See also SIECUS Report, supra note 10, at 6; Gelinas, App., Exh. 3, at 316.

41. Gelinas, App., Exh. 3, at 317-18. See also Civil Incest Suits, App., Exh. 2, at 202; Blake-White & Kline, supra note 23, at 400.

42. Swink and Leveille, supra note 13, at 123 (emphasis in original). See also SIECUS Report, supra note 10, at 7.

seemingly unrelated complaints that are only later linked to the childhood abuse.[43] Many incest-related injuries, moreover, are not only undiscovered by the victim, but also latent and, therefore, undiscoverable for an indefinite period of time. It is not unusual for these injuries to surface when the victim is well into her adulthood.[44]

4. The Facts of this Case Exemplify the Typical Pattern that Delays Discovery of a Cause of Action for Incestuous Child Abuse.

The uncontroverted facts on the record in this case -- which are deemed to be true for purposes of this proceeding -- confirm that the abuse of the plaintiffs herein conforms to the pattern described above: The defendant, Marc R. LaBrosse, Sr., is the natural and legal father of the plaintiffs, Frances Doe and Karen Doe. Comp. ¶ 1. For a period of more than thirteen years, the defendant continuously subjected each of his daughters to forced sexual relations on an average of two times per week. Comp. ¶ 9. These sexual assaults, which are described in

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43. Gelinas, App., Exh. 3, at 312. Unfortunately, these complaints may or may not be recognized as the incest victim's characteristic "disguised presentation". If this presentation is made the focus of treatment, therapy tends to be unsuccessful and the victim may become increasingly impaired. If, however, the clinician enables the victim to identify and disclose her experience, the "disguised presentation tends to recede and the underlying negative effects of incest begin to emerge and be available for treatment." Id.

44. Id., at 314-15 (citing Rosenfeld, Nagelson, Krieger, and Backman, Incest and Sexual Abuse of Children, 16 Journal of the American Academy of Child Psychiatry 327 (1979)). See also Petrella Aff. at ¶ 8.

greater detail in plaintiffs' complaint and sworn affidavits, were carried on in coerced secrecy, were accompanied by threats and physical force, and were perpetrated on a regular basis until plaintiffs' mother was awarded custody of Frances and Karen with her divorce from defendant in 1972. Comp. ¶¶ 2, 8-13; Affidavit of Frances Doe dated December 18, 1989 (hereafter "Frances Doe Aff.") ¶¶ 4, 5, 12, 13; Affidavit of Karen Doe dated December 18, 1989 (hereafter "Karen Doe Aff.") ¶¶ 4-9.

Defendant's practice of forcing himself sexually upon his daughters began as early as 1959, when Frances and Karen were ages two and one, respectively. (Comp. ¶¶ 2, 8.) He victimized them incessantly for as long as he lived with them (Comp. ¶¶ 8, 9), and persisted even afterwards on a less regular basis during parental visitation. Frances Doe Aff. ¶ 4; Karen Doe Aff. ¶ 4.

As a result of this abuse, Frances and Karen sustained a complex series of disabling psychological injuries, including dissociative disorders (or psychic numbing), repression, and misplaced guilt. Roskin Aff. ¶¶ 5, 7-14; Petrella Aff. ¶¶ 4-7. As discussed above, expert witnesses could testify at trial that these symptomatic injuries, which initially function as coping mechanisms, are predictable consequences of incestuous child abuse. (See Petrella Aff. ¶ 9.) Experts have also confirmed that such injuries are consistent with the diagnostic criteria for post-traumatic stress disorder (PTSD), and that they are particularly likely to occur in cases such as this one where the

victimization begins in infancy and is particularly severe in nature.[45]

For the very reason that the above-described defense mechanisms were effective in shielding Frances and Karen from the otherwise devastating effects of their experiences, Frances and Karen were unable to discover the injuries done to them by defendant prior to February 1988, when Frances first began to recollect the repressed assaults in the course of therapy. Frances Doe Aff. ¶ 7, Roskin Aff. ¶¶ 5, 6, 14; Petrella Aff. ¶ 7. At that time, Frances began to experience flashbacks and memories which she then explored with her sister, Karen. This, in turn, weakened Karen's defense mechanisms, ultimately triggering Karen's own discovery of the harm done to her. Karen Doe Aff. ¶¶ 12-13; Petrella Aff. ¶ 7.

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45. See, e.g., Petrella Aff. ¶¶ 4, 13; Roskin Aff. ¶ 9; Blake-White and Kline, supra note 23, at 395-96. In 1980, the American Psychiatric Association incorporated the term "Post-traumatic Stress Disorder" into its Diagnostic and Statistical Manual of Mental Disorders (herafter "DSM-III-R"). Am. Psychiatric Assoc., DSM-III-R § 309.89 at 247 (3rd rev. ed. 1987). See generally Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987) (application of the discovery rule held especially appropriate in cases of incestuous child abuse because of psychological effects of such abuse, including PTSD); Meiers-Post v. Schafer, 170 Mich. App. 174, 427 N.W.2d 606 (1988) (PTSD and other psychological effects of childhood sexual abuse would, in appropriate cases, toll statute of limitations under "insanity" provision in Michigan statute). See also Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) (PTSD and other psychological effects held to require application of discovery rule in case involving sexual abuse of patient by her therapist); Borough of Norwood v. Workmen's Compensation Appeal Board, 538 A.2d 143, 114 Pa. Commw. 157 (1988) (delayed discovery of PTSD held to justify delayed notice of claim for workers' compensation).

The fragmentation and blocking of plaintiffs' memories and emotions, which disabled them from recognizing their need to seek treatment or other relief, was itself an insidious and serious injury. This was not the full extent of the damage done to their mental health, however. Other injurious consequences alleged in the complaint and affidavits include chronic anxiety, depression, genital numbness, inability to function normally in social situations and relationships, fearfulness, and sexual dysfunction. Comp. ¶¶ 14, 15; Frances Doe Aff. ¶¶ 10, 14; Roskin Aff. ¶ 9; Karen Doe Aff. ¶ 14; Petrella Aff. ¶¶ 4, 7. All of these symptoms are consistent with the widely observed phenomenon of post-incest trauma.[46] As is typical in these cases, many of these symptoms did not even emerge until many years after the sexual abuse had ended. Petrella Aff. ¶¶ 4, 6-8.

Although Frances and Karen cannot entirely overcome or be fully compensated for these serious injuries, they have diligently sought to make the transition from victims to survivors by endeavoring to utilize the remedies available to them -- in counseling and at law. On February 2, 1989, within one year of their discoveries, they filed suit against their father, Marc LaBrosse, in Rhode Island Superior Court.

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46. The disorder resulting from the above-described pattern of experience -- "a cluster of predictable 'after effects' of child sexual abuse surrounded by an inability to remember the original stressor events" -- has been labeled "Post-Incest Syndrome," because it is observed to be most common to this kind of abuse, and has been proposed as a distinct diagnostic category. SIECUS Report, supra note 10, at 5.

B. The Decision in the Court Below Applied the Discovery Rule to Claims Arising from Incestuous Child Abuse.

Faced with the record described above, the court below applied the discovery rule and refused to grant the defendant's motion for summary judgment. Doe v. LaBrosse, slip op. at 12. In doing so, the court analyzed the statute of limitations in question, observing, as this Court had done previously, that the term "accrue" in R.I. Gen. Laws § 9-1-14 is not defined in the statute and is subject to judicial construction. Doe v. LaBrosse, slip op. at 3. See also Wilkinson, 104 R.I. at 228-29, 243 A.2d at 748-49. Focusing on the unique circumstances surrounding incestuous child abuse and the intentional nature of the offense, the lower court interpreted this Court's precedents as requiring application of the discovery rule to this cause of action. (See Point I.C. of the Argument, below.)

Justice Rodgers also conducted a careful review of comparable cases from other jurisdictions that had specifically addressed the issue of discovery-based accrual in incest cases. He concluded that the better reasoned decisions favored application of the discovery rule in factually similar cases. Doe v. LaBrosse, slip op. at 4-9. (See Point II of the Argument, below.) Moreover, he found that application of the discovery rule in incestuous abuse cases is required by basic principles of "fundamental fairness" and is entirely consistent with the

policies underlying statutes of limitations:

> "the policy behind a statute of limitations is to prevent a plaintiff from gaining an unfair advantage by carelessly or willfully sleeping on his rights, not to provide a strictly finite period of potential liability on which the tortfeasor may rely."

Id. at 4, quoting Romano, 114 R.I. at 461, 336 A.2d at 560. In addition, he observed that the balance of equities favoring protection of the plaintiffs' remedy was especially powerful in this case, where the egregious and criminal nature of defendant's conduct eliminates the state's interest in his repose. Doe v. LaBrosse, slip op. at 11.

Finally, Justice Rodgers acknowledged that the incidence of incestuous child abuse has reached nearly epidemic proportions (id. at 11), and observed, as this Court had observed in Anthony (490 A.2d at 48), that the discovery rule might also serve a deterrent function:

> Hopefully, making the perpetrators of such acts accountable to the victim for all injuries later discovered without the benefit of having legitimate claims suppressed because they were not filed by a definite date will have some impact in reducing the number of incestuous incidents. Doe v. LaBrosse, slip op. at 12.

As demonstrated below, this decision is supported by Rhode Island law and by judicial decisions and legislation in a majority of states that have considered the question.

C. Rhode Island has Applied a Liberal Discovery Rule to a Broad Variety of Cases.

As the court below correctly observed, the courts of Rhode Island have long applied the discovery rule to appropriate causes of action where adherence to the traditional date of injury rule would unfairly deprive the potential plaintiff of a meaningful opportunity to seek redress. Doe v. LaBrosse, slip op. at 3-4. Rhode Island's application of the discovery rule dates back more than twenty years to the widely cited decision of this Court in Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968).

In Wilkinson, this Court announced that the limitations period applicable to personal injury actions for medical malpractice would be governed by the discovery rule of accrual, 104 R.I. at 238, 243 A.2d at 753. This was so even though the conduct complained of in that case was not intentional and even though the defendants had in no way contributed to the delayed nature of the plaintiff's discovery or disclosure of her injury. 104 R.I. at 225-26, 243 A.2d at 747-48. In reaching this result, the Court relied upon the wording of the statute in question, the elusive and often delayed nature of the injuries likely to arise from negligent medical treatment, the public's interest in being protected from medical malpractice and, finally, the purposes and policies underlying statutes of limitations.

Section 9-1-14 of the General Laws of Rhode Island, at issue in Wilkinson, provided that all civil actions for injuries

to the person should be commenced "within two (2) years next after the cause of action shall accrue, and not after."[47] Because the commencement of the prescribed period was keyed to the date of "accrual", which was not defined and was not "unambiguous", the Court concluded that the applicable limitations period had been left open for judicial construction. 104 R.I. at 231, 243 A.2d at 748-49. The Court went on to observe that no other institution or forum would be as well suited as the courts to the determination of this kind of issue. Id.

After acknowledging and carefully considering the sound policy interests served by statutes of limitation, the Wilkinson court rejected the contention of the defense that these interests were incompatible with the application of the discovery rule to particular causes of action:

> When § 9-1-14, the statute of limitations for personal injury, is viewed with due allegiance being given to its intended purposes, the adoption of the discovery rule is virtually ineluctable. To construe the statute narrowly so as to prevent a person from obtaining a remedy simply because the wrong of which [she] was the victim did not manifest itself . . . is clearly inconsistent with the concept of fundamental justice . . . . No statute should be construed to bring about a patently inane result; moreover, we have often said the legislature could never be presumed to have intended to enact laws which are absurd, unjust, or unreasonable. 104 R.I. at 238-39, 243 A.2d at 753.

The rule in Wilkinson has since been expanded to apply

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47. 104 R.I. at 228, 243 A.2d at 748. This same section, as amended, is at issue in the instant case. Although this section now provides for a 3-year period from the time of accrual, the pertinent language of the statute has remained unchanged.

to a variety of causes of action,[48] culminating in the liberal tripartite discovery rule applied in Anthony v. Abbott Laboratories. See 490 A.2d 43 (R.I. 1985). In Anthony, this Court construed R.I. Gen. Laws § 9-1-14 in the context of a number of drug product liability actions. Notably, the defendants in Anthony conceded that the discovery rule adopted in Wilkinson should logically be extended to the causes of action against them. At issue was whether an even broader discovery rule was required under the more complicated circumstances of these DES cases. The defendants argued that the applicable statute of limitations had begun to run when the plaintiffs had discovered both their injuries and the cause of their injuries. Plaintiffs, on the other hand, contended that the statute did not begin to run until they had also discovered the wrongful conduct on the part of the defendant-manufacturers.

Observing that the plaintiff in Wilkinson had simultaneously discovered both the cause of her injury and the fact that it was the result of tortious conduct, the Anthony court agreed that the more liberal tripartite discovery rule was required where the injury, its cause, and the plaintiff's knowledge of the wrongful conduct had occurred at three substantially different times. See 490 A.2d at 46. As in Wilkinson

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48. The Wilkinson discovery rule was adapted and amplified to postpone accrual in Romano v. Westinghouse Elec. Co., 114 R.I. 451, 336 A.2d 555 (1975) (products liability) and Lee v. Morin, 469 A.2d 358 (R.I. 1983) (improvements to real property). In these cases, this Court construed the limitations periods applicable to causes of action arising from injuries to property under R.I. Gen. Laws § 9-1-13.

and its progeny, the Court in Anthony balanced the equities in favor of the prospective plaintiff's opportunity "to have her day in court to vindicate those rights that have been violated but have remained undiscovered or undiscoverable." Id. at 46-47. In doing so, the Court emphasized the importance of the plaintiff's subjective and objective circumstances, holding that the discovery rule requires the diligence of a "reasonable person in circumstances similar to plaintiffs'". Id. at 48 (emphasis added).[49] At the same time, the Court explicitly

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49. Because this Court has consistently applied the discovery rule where failure to do so would deny a plaintiff's reasonable access to the courts, amici curiae do not here include a thorough analysis of the constitutional arguments available to plaintiffs. However, it should be noted that protection of the blamelessly ignorant plaintiff's meaningful opportunity to sue is a matter of constitutional dimension under both state and federal law. See generally R.I. Const., art. I, §§ 2,5; Note, Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation, 50 Ohio State L.J. 753 (1989); Note, The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1683, 1694-95 (1983). Where no "countervailing state interest of overriding significance" exists, due process requires, at a minimum, that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Moreover, this opportunity must be granted "at a meaningful time and in a meaningful manner." Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The state's due process obligations to the individual incest plaintiff who has only recently identified her incest related injuries will not necessarily be satisfied by a procedure that protects other classes of plaintiffs in dissimilar circumstances: "Sometimes the grossest discrimination can lie in treating things that are different as though they were alike . . . ." Jenness v. Fortson, 403 U.S. 431, 442 (1971) quoted in Civil Incest Suits, App., Exh. 2, at 203 n. 94. Accord Boddie v. Connecticut, 401 U.S. 371, 379 (continued...)

observed that the justification for postponed accrual becomes even stronger where the longer period of potential liability may deter the undesirable conduct complained of and where the defendants cannot be presumed to be entirely surprised by the delayed consequences of their actions. Id. at 47-48.

Last year, the United States District Court for the District of Rhode Island was confronted with the question of whether the discovery rule should apply to a suit brought in 1988 arising from the alleged rape and molestation of a 15-year-old girl by an employee of her high school in 1977 and 1978. Doe v. St. George's School, No. 88-0676B, Report and Recommendation, slip op. (D.R.I., May 30, 1989).[50] According to the complaint, the plaintiff had been threatened into secrecy by her abuser and was unable to disclose the sexual abuse to anyone until 1986, when she described the incidents to her therapist. Doe v. St. George's School, slip op. at 3. Only then did she

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49.(...continued)
(1971). Cf. Mills v. Hablutzel, 456 U.S. 91 (1982) (Rehnquist, J.) (holding that one-year period of limitation for establishing paternity violated the equal protection clause in light of emotional and familial circumstances that would inhibit "timely" suit as defined by the Texas statute).

50. Cited in Doe v. LaBrosse, slip op. at 9. Stipulation of dismissal filed July 19, 1989. A copy of this opinion is attached as Exhibit A to Plaintiffs' Memorandum of Law In Support of their Opposition to the Petition for Writ of Certiorari ("Opp. Cert. Brief"), filed with this Court in the case at bar. At issue in this case was the construction of R.I. Gen. Laws § 9-1-14, the same statute of limitations at issue in Wilkinson and Anthony, and on this appeal.

discover the connection between the sexual abuse and her substantial psychological injuries.[51] See id.

Acknowledging that this was a case of first impression, the United States Magistrate observed that the very serious and sensitive nature of the allegations made this case entirely distinguishable from the "routine" general negligence case to which the date of injury rule would ordinarily apply. Id. at 6. Based on the "undiscovered and undiscoverable" nature of the plaintiff's injuries during the ordinary limitations period, the Magistrate found that the same legal principles requiring application of the discovery rule in Anthony required its extension to cases of child sexual abuse and, accordingly, denied the defendant's motion to dismiss. See id. at 7-8. The Magistrate, like other tribunals before him, perceived that Rhode Island law as it has evolved since Wilkinson, provides for application of the discovery rule where circumstances and fundamental fairness so require.

D. The Decision in the Court Below is Consistent with Rhode Island Law and Should Be Upheld.

In light of the precedents discussed above, the court below correctly held that the discovery rule applies in this case. As discussed above, Rhode Island's sophisticated and liberal discovery rule was judicially created and has consistently been expanded by the courts without legislative interven-

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51. The injuries alleged in the complaint included post-traumatic stress disorder, dissociative disorder, anorexia nervosa, bulimia nervosa and severe depression.

tion. See Wilkinson, 104 R.I. 224, 243 A.2d 745 (1968); Romano, 114 R.I. 451, 336 A.2d 555 (1975); Lee, 469 A.2d 358 (R.I. 1983); Anthony, 490 A.2d 43 (R.I. 1985).

Every factor that was important to the decisions in these earlier cases is present in this case. As in Anthony, the circumstances surrounding this tort are so complex, and the consequences so insidious, that the victim will nearly always require additional time to discover the necessary elements of her cause of action. 490 A.2d at 47-48. As in Wilkinson, the very nature of the injuries alleged typically renders them insusceptible to self-diagnosis in the absence of professional intervention.[52] As discussed above, the defense mechanisms of the child incest victim effectively block both her perception and her memory of the painful experiences. Those incest survivors who eventually succeed in breaking through these mechanisms are generally able to do so only in the course of professional counseling.

As the court below recognized, moreover, the policy reasons for applying the discovery rule in this case are even more compelling than those relied on in these earlier decisions. Doe v. LaBrosse, slip op. at 9-12. Here, the defendant's con-

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52. See Wilkinson, 104 R.I. at 237, 243 A.2d at 752 ("this thought becomes particularly disturbing when one realizes that the latent injuries arising from medical malpractice would very likely go undetected by the victim . . . . Even the physical symptoms which might herald future injury may well be beyond the comprehension or perception of the average layman.") See Point I.A.3. of the Argument, above.

duct was intentional and criminal. Also, his threats and misrepresentations, which are an element of the tort alleged were specifically intended to prevent disclosure of his wrongful conduct. In addition, the plaintiffs' inability to recognize their own injuries is an integral characteristic of the psychological harm complained of. Finally, given the seriousness of the offense and the helplessness of the victims, there is a pressing need to deter future incidents of incest. Application of the discovery rule may serve this function. Anthony, 490 A.2d at 48; Doe v. LaBrosse, slip op. at 12.

II. THE TREND IN COURTS AND LEGISLATURES NATIONWIDE IS TOWARD APPLICATION OF THE DISCOVERY RULE IN CASES OF INCESTUOUS CHILD ABUSE.

In light of the factors discussed above, it is not surprising that a majority of the other jurisdictions that have considered the question have concluded that application of the discovery rule is required in cases of incestuous child abuse.[53] See, e.g., Hammer v. Hammer, 418 N.W.2d 23 (Ct. App. 1987) rev.

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53. The same result has been reached in cases involving sexual abuse of patients by their therapists. Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Greenberg v. McCabe, 453 F. Supp. 765, 767 (E.D. Pa. 1978), aff'd, 594 F.2d 854 (3d Cir.), cert. denied, 444 U.S. 840 (1979). The basis of these decisions was that the psychological impact of the therapist's conduct prevented the victim from being able to recognize that she had been injured by the therapist's acts. Simmons, 805 F.2d at 1367-68; Greenberg, 453 F. Supp. at 772. In reaching its decision, the Simmons court explicitly analogized this situation to that of the child incest victim: "the sexual contact is ordinarily akin to engaging in sexual activity with a parent, and carries with it the feelings of shame, guilt and anxiety experienced by incest victims." 805 F.2d at 1367.

denied, 144 Wis. 2d 953, 428 N.W.2d 552 (1988); Anonymous v. Anonymous (Mass. Super. Ct. Suffolk Cty. June 21, 1988);[54] Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Hildebrand v. Hildebrand, 736 F. Supp 1512 (S.D. Ind. 1990); Evans v. Eckelman, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605, 609 (Cal. App. 1 Dist. 1990).[55]

In Hammer v. Hammer, the Court of Appeals of Wisconsin applied the discovery rule to a fact situation strikingly similar to that in the instant case. The plaintiff in Hammer alleged that she had been sexually abused by her father on an average of three times a week from the time she was five to fifteen years old. She further alleged that she was unable during the abuse and long after it had ended to perceive or know the existence or nature of her psychological and emotional injuries and, moreover, that this inability resulted from the severe psychological distress and distortion caused by the

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54. A copy of this opinion is attached as Exhibit B to Plaintiffs'-Respondents' Opp. Cert. Brief, filed with this Court in the case at bar.

55. In light of Evans, amici do not consider the earlier case of DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (Ct. App. 6 Dist. 1987), which had affirmed dismissal of an incestuous child abuse claim, to be representative of California's caselaw on this issue. Evans illustrates California's trend toward a common-sense rule in such cases by expanding upon the decision in Doe v. Doe, 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (Ct. App. 6 Dist. 1989), rev. granted, ____ Cal. 3d ____, 268 Cal. Rptr. 633, 788 P.2d 1155 (Cal. 1990), which itself had reversed a limitations-based dismissal. In any event, as discussed below, the California legislature has now expressly overruled the result in DeRose.

abuse. The affidavit of her psychological counselor, which had been accepted and considered by the trial court, confirmed that the plaintiff had been so traumatized by the abuse and isolation she had experienced as to be incapable of recognizing the injuries done to her.[56]

The defendant contended that the plaintiff had discovered her injury at or about the time the incidents occurred and that in any event the injury was or should have been discovered when the plaintiff was fifteen. He also argued that application of the discovery rule to her claims would effectively eliminate any statute of limitations in cases of incestuous child abuse and, therefore, that a "defendant would be defenseless against fraudulent or stale claims." Id. at 27.

Reversing the decision of the trial court, the Court of Appeals held "as a matter of law, that a cause of action for incestuous child abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of her injury." Hammer, 418 N.W.2d at 26. In reaching its decision, the appellate court specifically considered and rejected the defendant's arguments.

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56. Specifically, her therapist stated that the plaintiff was unable to make the requisite discovery because of (1) the duration and frequency of the abuse; (2) the isolation and secrecy her father had imposed upon her; (3) the depersonalizing effects of the abuse which had made her think of herself as an object to be used rather than a person with rights; (4) the father's allegations that his conduct was normal and within his rights; and (5) the fact that the repeated abuse by an authority figure on whom she was dependent had made her distrustful of other authority figures who might have helped her. Hammer, 418 N.W. 2d at 25.

As a threshold matter, it observed, as this Court has done, that a cause of action does not necessarily accrue when the first manifestations of injury occur, and that the definition of accrual is judicially determined. Id. at 26. See also Wilkinson, 104 R.I. at 228-29, 243 A.2d at 748-49; Anthony, 490 A.2d at 46. Moreover, the court concluded that the policy justifications for applying the discovery rule were particularly powerful in the case of incestuous child abuse, observing that "to protect the parent at the expense of the child [would work] an 'intolerable perversion of justice'." Hammer, 418 N.W.2d at 27, quoting Tort Remedies at 631. In addition, the court observed that the discovery rule would not benefit claimants who negligently or intentionally failed to file a timely claim insofar as the prescribed period of limitations would still apply, and would run from the date of discovery. Hammer, 418 N.W.2d. at 27. Finally, the plaintiff's burden of proof with respect to the time of discovery was recognized as affording additional protection to the defendant. Id. at 27.

Again, in Anonymous v. Anonymous, the Massachusetts Superior Court for the County of Suffolk was presented with a case of first impression regarding the application of the discovery rule to the tort of incestuous child abuse. After conducting a careful review of the literature concerning incestuous abuse, this court, too, concluded that the nature of the tort, the likelihood of its resulting in delayed or undetected harm, and the abuser's role in fostering the victim's

inability to discover her injuries clearly required application of the discovery rule:

> Typically, the abuser frightens the child into secrecy with threats of harm to the child or other family members, thus forcing the child to deal with the situation alone. Because the child must cope alone, he or she often internalizes his or her feelings of self-blame, anger, fear, confusion, and sadness resulting from the incest. This internalization or repression of anger and anxiety is a survival mechanism known as accommodation. . . . [and] may also lead to dissociation, where the victim is prevented from recognizing the nature and extent of the injuries she has suffered as a result of the incestuous abuse. . . . Typically, such an awareness occurs long after the wrongful acts were committed. . . . Failure to apply the discovery rule to this type of situation would only serve to further punish a plaintiff by holding such actions time-barred before the plaintiff reasonably could discover the cause of the harm she has suffered. Id. at 4-6 (citations omitted).

In fact, this conclusion is "virtually ineluctable" as is demonstrated by superceding legislation expressly overruling the results in all but one of the incest cases relied upon by defendant in this proceeding.[57] Wash. Rev. Code Ann. § 4.16.340 (Supp. 1989), overruling the result in Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986) (quoted at length by Defendant, Brief and Appendix on behalf of Defendant-Petitioner ("Defendant's Brief") at pages 7-10.); Mont. Code Ann. § 27-2-216 (1989), overruling the result in E.W. and D.W. v. D.C.H., 231 Mont. 481, 754 P.2d 817 (1988) (also quoted at length in

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57. In the single remaining jurisdiction relied upon by defendant, the statute of limitations at issue is clearly distinguishable from the case at bar inasmuch as it defined accrual as taking place "when the last element constituting the cause of action occurs." Lindabury v. Lindabury, 552 So. 2d. 1117, (Fla. Dist. Ct. App. 1989).

Defendant's Brief, at 10-11); Cal. Civ. Proc. Code § 340.1 (Deering 1990) (approved Sept. 29, 1990; effective Jan. 1, 1991), overruling the result in DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (Ct. App. 6 Dist. 1987) (also quoted at length in Defendant's Brief at 11-12.)[58]

This Court has clearly established that it will refuse to construe any Rhode Island statute as requiring so unfair and "patently inane" a result as that for which the defendant in this case has argued. Wilkinson, 104 R.I. at 239, 243 A.2d at 753. Moreover, the Court has specifically rejected the notion that it should leave the interpretation of "accrual" for the legislature's determination:

> The realities of the legislative process persuade us that courts should not defer questions to the enacting branch of state government merely because the questions may in some form or another relate to public policy. . . . For courts to adopt the approach suggested by [the defendant] would seriously retard the attainment of justice which, after all, is the true purpose of a court's existence. When presented with issues inextricably entwined with abstruse legalistic concepts and complex principles of law affecting the rights and duties of the public, there can be no doubt that the courts are the most suitable and logical forums for their determination. Id. at 749.

Based on its belief that a "creative judicial role" complements rather than competes with the legislative function (id.), this Court, as noted above, created Rhode Island's discovery rule and has consistently expanded it without legislative intervention. See Wilkinson, 104 R.I. 224, 243 A.2d 745 (1968); Romano, 114

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58. As discussed above, at note 55, the persuasive value of DeRose had already been undermined by subsequent California decisions.

R.I. 451, 336 A.2d 555 (1975); Lee, 469 A.2d 358 (R.I. 1983); Anthony, 490 A.2d 43 (R.I. 1985).

III. THE DECISION OF THE COURT BELOW WAS ALSO CORRECT FOR INDEPENDENT REASONS.

Section 9-1-20 of the Rhode Island General Laws, providing a statutory discovery rule for all actions involving active misrepresentation or other fraudulent concealment, provides an independent basis for the lower court's decision denying summary judgment in this case.[59] In representing to his daughters that his mistreatment of them was "good" for them and was proof of his "caring" for them, Karen Doe Aff. at 2 ¶¶ 8, 9 and 11, and also in threatening that harm would result if they revealed his conduct to others, Comp. at 3 ¶ 10, Frances Doe Aff. at 2 ¶¶ 12-13, the defendant clearly engaged in the kind of "actual misrepresentation" to which this statute was directed.[60]

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59. In addition, Rhode Island's estoppel doctrine does not allow a defendant to profit from a situation created by his statements, silence or inducements, where such profit would put a plaintiff at a disadvantage or would constitute a fraud. Caianello v. Shatkin, 78 R.I. 471, 476, 82 A.2d 826, 829 (1951); Gagner v. Strekouras, 423 A.2d 1168 (R.I. 1980). As discussed above, defendant's own acts not only silenced his daughters but also triggered the psychological mechanisms that kept them from suing him earlier. See also, John R. v. Oakland Unified Sch. Dist., 48 Cal. 3d 438, 256 Cal. Rptr. 766, 769 P.2d 948 (1989) (en banc) (remanding a teacher-student abuse case for findings of fact as to the applicability of estoppel where concealment and threats on the part of the abuser prevented the plaintiff from bringing suit within the limitations period ordinarily presented), reh. den. sub nom. Minor v. Oakland Unified Sch. Dist. (1989 Cal LEXIS 1733).

60. Defendant also engaged in constructive fraud within the scope of section 9-1-20. Where a fiduciary relationship (continued...)

See Luft v. Factory Mut. Liability Ins. Co., 53 R.I. 238, 242, 165 A. 776, 777 (1983) (construing predecessor to § 9-1-20). Under § 9-1-20, a factual inquiry is required to determine when plaintiffs discovered their causes of action. Bader v. Alpine Ski Shop, 505 A.2d 1162, 1167 (R.I. 1986).

IV. THE COURT BELOW CORRECTLY HELD THAT ISSUES OF FACT PRECLUDE DISMISSAL OF THIS CASE.

On a motion for summary judgment, the existence of a genuine issue of material fact requires denial of the motion. Rhode Island Hosp. Trust Nat'l Bank v. Boiteau, 119 R.I. 64,

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60.(...continued)
exists, concealment by the fiduciary constitutes fraud on the beneficiary. Beirne v. Barone, 529 A.2d 154, 157 (R.I. 1987) (nondisclosure by fiduciary can constitute fraud). See also Bourassa v. La Fortune, 711 F. Supp. 43, 45 (D. Mass. 1989) (construing comparable Massachusetts statute: "where there is a fiduciary relationship the mere failure to reveal the facts which form the basis of the cause of action may be fraudulent and toll the statute of limitations"). That the defendant owed fiduciary duties to his children is clear. This Court has held that, where one party had "placed trust and confidence in [her immediate relatives] for her care and support" during a period of several years, it could not "be disputed that a fiduciary relationship existed between these parties." Del Greco v. Del Greco, 87 R.I. 435, 442, 142 A.2d 714, 717 (1958). Other common-law jurisdictions have held that the parent-child relationship is a fiduciary or confidential one. See, e.g., Trunzler v. Trunzler, 431 So. 2d 1115, 1116 (Miss. 1983); Eaton v. Sontag, 387 A.2d 33, 36 (Me. 1978). Accord Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1524 (S.D. Ind. 1990) (in case of incestuous child abuse, where a reasonable jury could conclude that father's breach of fiduciary duty prevented daughter from discovering her cause of action against her father any sooner than she did, "the fraudulent concealment statute provides an independent basis for denying summary judgment").

66, 376 A.2d 323, 324 (R.I. 1977).[61] Having concluded that the discovery rule applies to this case, the court below properly held that the date or dates on which plaintiffs' causes of action accrued constitutes a question of fact to be determined by the fact-finder. Doe v. LaBrosse, slip op. at 13; Wilkinson, 104 R.I. at 228, 243 A.2d at 748 (Supreme Court does not "decide how the law is to be applied to the facts" in discovery-rule case); Anthony, 490 A.2d at 48 (factfinder determines when discovery should have been made). Insofar as the defendant disputes the plaintiffs' claims with respect to their delayed discovery of the causes of action herein, there exist genuine issues of material fact precluding entry of summary judgment. Superior Court Rules of Civil Procedure 56(c); accord Souza v. Erie Strayer Co., 557 A.2d 1226, 1226 (R.I. 1989).

As the Wilkinson court stated, each of the plaintiffs now "should have her day in court to show, if she can, that her suit was timely brought and that she is entitled to relief. Whether or not she will prevail must await a hearing on the merits in the superior court." 104 R.I. at 239, 243 A.2d at 753. See also Anonymous v. Anonymous, slip op. at 6-8. These plaintiffs, and other survivors of childhood incestuous abuse, should be permitted to prove the application of the discovery rule to the facts of their cases. A contrary decision would

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61. The court below was required to review the papers in the light most favorable to the non-moving party on the question of whether there exists a genuine issue of material fact. Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 867 (R.I. 1987).

lock the courtroom door before the injured party has had an opportunity to open it.

CONCLUSION

For all of the foregoing reasons, amici curiae respectfully request this Court to affirm the Superior Court's Order, denying defendant's Motion for Summary Judgment and refusing to dismiss the Complaint.

Dated this 18th day of December, 1990.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

SUPREME COURT OF THE STATE OF RHODE ISLAND
M. P. No. 90-97

KAREN DOE and FRANCES DOE,
Plaintiffs-Respondents,
v.
MARC R. LaBROSSE, SR.,
Defendant-Petitioner.

Melissa G. Salten, being duly sworn, deposes and says that she is over the age of eighteen years and is associated with Debevoise & Plimpton, attorneys for amici curiae. That on December 18, 1990 she served the within MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE; BRIEF OF AMICI CURIAE; and EXHIBITS FILED IN SUPPORT OF BRIEF OF AMICI CURIAE by Certified Mail, return receipt requested, upon the attorneys who have appeared for the parties herein at the addresses designated by them as follows:

Lise Iwon
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by depositing same securely enclosed in postpaid wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Melissa G. Salten

Sworn to before me this
18th day of December, 1990.

Karen L Chun
Notary Public

KAREN L. CHUN
Notary Public, State of New York
No. 41-4745323
Qualified in Queens County
Certificate Filed in New York County
Commission Expires November 30, 19 91