

COURT OF APPEALS, STATE OF COLORADO
Case No. 88CA1754

LYNN K. CASSIDY and SUSAN K. BALL,
Plaintiffs-Appellants,
vs.
EARL DEAN SMITH,
Defendant-Appellee.

BRIEF OF AMICI CURIAE

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Kinsey, Pomeroy, Martin & Gobhard, <u>Sexual Behavior in the Human Female</u> (1953).....	24
Kleiman, "The Last Taboo: Case on L.I. Pierces the Silence on Incest," N.Y. Times, Sept. 28, 1987, p. A1, col. 1.....	26
J. Masson, <u>The Assault on Truth: Freud's Suppression of the Seduction Theory</u> (1984).....	24
Moore, <u>Civil Remedies for Incest Survivors</u> , 9 Response to the Victimization of Women and Children: Journal of the Center for Women and	

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Peters, <u>Children Who Are Victims of Sexual Assault and the Psychology of Offenders</u> , 30 Am. J. of Psychotherapy 398 (1976).....	24
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Rush, <u>The Freudian Cover-up</u> , 1 Chrysalis 31 (1977).	24
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Sgroi, <u>Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault in Sexual Assault of Children and Adolescents</u> xv (A.W. Burgess, A.N. Groth, I.L. Holstrom, S.M. Sgroi, eds., 1978).....	25
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Summit, <u>Beyond Belief: The Reluctant Discovery of Incest, in Women's Sexual Experience</u> (M. Kirkpatrick ed. 1982).....	15
Summit, <u>Recognition and Treatment of Child Sexual Abuse, in Coping With Pediatric Illness</u> (C. Hollingsworth ed. 1983).....	24, 26
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Swink & Leveille, <u>From Victim to Survivor: A New</u>	

<u>Look at the Issues and Recovery Process for Adult Incest Survivors, in The Dynamics of Feminist Therapy</u> (D. Howard ed. 1986).....	15, 16, 17, 18, 27
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U.S. Comm'n on Civil Rights, <u>Under the Rule of Thumb: Battered Women and the Administration of Justice</u> (Jan. 1982).....	23
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D. Whitcomb, E. Shapiro & L. Stellwagen, <u>When the Victim Is a Child: Issues for Judges and Prosecutors</u> , National Institute of Justice, U.S. Dep't of Justice (1985).....	12, 13, 26, 28
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STATEMENT OF THE ISSUES AND THE CASE

Amici curiae incorporate by reference the statement of issues and statement of the case in Appellants' Brief.

ARGUMENT

I. UNDER COLORADO LAW, THE CAUSE OF ACTION ACCRUED WHEN PLAINTIFFS LEARNED OF THEIR INJURY AND ITS CAUSE; THEREFORE THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTIONS.

A. Colorado Has Adopted the Discovery Rule.

The Colorado courts and legislature have adopted the discovery rule for determining the date when a statute of limitations begins to run. Plaintiffs are entitled to go to trial to prove that under the discovery rule, their complaint was timely.

The history of the discovery rule in Colorado dates back at least 45 years, to Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).¹ In Rosane, the defendants had sewn a gauze pad into the plaintiff's body during an operation on the plaintiff in 1930. Despite the fact that she consulted several physicians because of constant pain, the plaintiff did not discover the gauze pad until a second operation, ten years after the first one. When the plaintiff brought suit, the defendants asserted that the claim was barred by the two-

¹ For cases applying discovery principles before Rosane, see Miller v. Goff, 100 Colo. 545, 68 P.2d 915 (1937) (fraud); Cliff v. Cliff, 23 Colo. App. 183, 128 P. 860 (1912) (constructive trust).

year statute of limitations for medical malpractice claims. The Colorado Supreme Court held that where a plaintiff knows of an injury but the defendant has concealed the cause of the injury from her, the statute of limitations would not begin to run until the plaintiff has discovered the wrong committed. 149 P.2d at 374-76.

The discovery rule was broadened in Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970), which applied the rule to a medical malpractice claim of negligent misdiagnosis. The court stated, "There is no difference, in our view, as far as the wronged plaintiff is concerned, whether the negligence of the defendants was concealed or for some other valid cause the plaintiff failed to learn of the negligence, unless, of course, the plaintiff, in the exercise of reasonable diligence, should have known of the negligence at the time of its occurrence." 474 P.2d at 605 (emphasis in original). The court held that the cause of action accrued when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered the alleged negligence of the defendants. 474 P.2d at 604, 607.

The rationale behind the discovery rule is that it "furthers the interest of justice in not foreclosing access to a forum to an injured plaintiff who may not reasonably understand or appreciate that actionable harm has been done

him.'" State v. Young, 665 P.2d 108, 110 (Colo. 1983), quoting Owens v. Brochner, 474 P.2d at 606.

Colorado courts have applied the discovery rule to a wide variety of factual situations and causes of action.² See, e.g., Criswell v. M.J. Brock and Sons, Inc., 681 P.2d 495 (Colo. 1984) (breach of warranty, breach of duty, and failure to disclose by builder vendor); State v. Young, 665 P.2d 108 (negligent misfiling of summons and complaint); Morris v. Geer, 720 P.2d 994 (Colo. Ct. App. 1986) (attorney malpractice); McKinley v. Willow Constr. Co., Inc., 693 P.2d 1023, 1025-26 (Colo. Ct. App. 1984) (breach of contract and negligence by construction company); Nitka v. Bell, 29 Colo. App. 504, 487 P.2d 379 (1971) (medical malpractice).

Like the Colorado courts, the Colorado legislature has indicated a strong preference for the discovery rule. Under C.R.S. 13-80-110(g) (1973), which controls this case (see

² The U.S. Court of Appeals for the Tenth Circuit, applying Colorado law, has also relied on the discovery rule in a broad variety of situations. See, e.g., Zurich v. First American Title Ins. Co., 833 F.2d 233 (10th Cir. 1987) (discovery rule applied to C.R.S. 13-80-110(g) (1973) in action for negligent misrepresentation, professional negligence, breach of contract, and breach of fiduciary duty); DeGette v. Mine Co. Restaurant, Inc., 751 F.2d 1143 (10th Cir. 1985) (discovery rule applied to C.R.S. 13-80-110(g) (1973) in copyright infringement and theft of trade secret suit); City of Aurora v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979) (discovery rule applied to C.R.S. 13-80-110 (1973) in action for professional malpractice against engineer or architect).

generally Appellants' Brief), cases are to be commenced within six years after the cause of action "accrues." The word "accrues" has been defined as the time the plaintiff discovers, or reasonably should discover, the actionable injury and its cause.³ Moreover, the very use of the word "accrues" in the statute of limitations has been interpreted as incorporating the discovery rule.⁴

In 1986, the Colorado legislature explicitly adopted and codified the Colorado judicial definition of the word "accrues". C.R.S. 13-80-108(1) (1987) now reads: "A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." Although this legislation was enacted subsequent to the

³ See, e.g., Morris v. Geer, 720 P.2d at 997 (cause of action under C.R.S. 13-80-110 (1973) "accrues at the time the client discovers, or through the use of reasonable diligence should have discovered, the negligent act of the attorney"); McKinley v. Willow Constr. Co., Inc., 693 P.2d at 1025-26 (cause of action under C.R.S. 13-80-110 "does not accrue until the plaintiff knows, or should know, in the exercise of reasonable diligence, all material facts essential to show the elements of that cause of action"; quoting City of Aurora v. Bechtel Corp., 599 F.2d 382).

⁴ See City of Aurora v. Bechtel Corp., 599 F.2d at 388 (applying C.R.S. 13-80-110); Owens v. Brochner, 474 P.2d at 606. See also DeGette v. Mine Co. Restaurant, Inc., 751 F.2d at 1145 (distinguishing Colorado statutes of limitations that use the word accrues, and thus to which the discovery rule applies, from those that do not).

accrual of the present cause of action, it is directly relevant to this case because it indicates the legislature's clear approval and endorsement of the case law discussed above. The new legislation clarifies but in no way changes Colorado law on the discovery rule.

B. The Trial Court Erred By Granting Defendant's Motions.

Under the discovery rule, the date a cause of action accrued is a question of fact, to be determined by the factfinder. Rauschenberger v. Radetsky, 745 P.2d 640, 643 (Colo. 1987); Mastro v. Brodie, 682 P.2d 1162, 1169 (Colo. 1984).

Plaintiffs have demonstrated that they did not discover and could not reasonably have discovered that they were injured and that Defendant caused their injury until 1985 or later, which is much less than six years before they filed suit. (See p.79-83; p.49 ¶9; p.54 ¶10.) Their inability to discover their injury and its cause earlier is confirmed by a wide variety of studies on the effects of incest. See generally Section II., infra. Defendant disagrees with Plaintiffs on the issue of when they learned or reasonably should have learned that they were injured by him. (See p.75-78). This creates a genuine issue of material fact.

Because of the existence of a genuine issue of material fact, Defendant's summary judgment motion should have been

denied.⁵ C.R.C.P. 56(c). On a motion for summary judgment, any doubts regarding the existence of a genuine issue of material fact must be resolved against the moving party. Rauschenberger v. Radetsky, 745 P.2d at 643.

In addition to the requirement that there be no genuine issue of material fact, C.R.C.P. 56(c) requires that the moving party be "entitled to a judgment as a matter of law" in order for summary judgment to issue. Given the contents of the affidavits filed by Plaintiffs, and given the flexible and evolving application of the discovery rule in Colorado law (see Section I.A., supra), it cannot be said that Plaintiffs' claim was untimely as a matter of law.

Plaintiffs are entitled to their day in court to prove how the discovery rule applies to the facts of their case. See Owens v. Brochner, 474 P.2d at 607. The trial court erred by granting Defendant's motion for summary judgment. A fortiori, the trial court erred by granting Defendant's motion for sanctions. See generally Appellants' Brief.

II. BECAUSE THE INHERENT NATURE OF CHILDHOOD INCESTUOUS SEXUAL ABUSE PREVENTS THE VICTIM FROM DISCOVERING HER INJURIES AND THEIR CAUSE UNTIL WELL INTO ADULTHOOD, APPLICATION OF THE DISCOVERY RULE IS PARTICULARLY APPROPRIATE IN INCEST CASES.

⁵ Although Defendant's motion was styled as a motion to dismiss, Plaintiffs submitted affidavits that were not excluded by the court, so Defendant's motion must be deemed a motion for summary judgment. C.R.C.P. 12(c).

A. Scholarly and Judicial Authorities Recognizing the Legal Implications of Delayed Discovery of Sexual Abuse Provide Persuasive Guidance for Applying the Discovery Rule in the Present Case.

Legal commentators who have examined the subject have been unanimous in strongly advocating application of the discovery rule to tort cases brought by survivors of childhood incest.⁶ Such commentators have exhaustively described the unique nature of incest, its impact on its victims, and its relationship to the discovery rule doctrine as developed in other tort contexts. See also Section II.B., infra.

Recently, the Wisconsin Court of Appeals, like the present Court, was confronted with the question of whether a discovery rule established in state law should be applied to a case arising from childhood incest. Hammer v. Hammer, 142

⁶ Allen, Tort Remedies for Incestuous Abuse, 13 Golden Gate U.L. Rev. 609 (1983); Anderson & Bedor, Statutes of Limitations in Sexual Abuse Actions, Minn. Trial Law. 9 (Minnesota Trial Lawyers Assoc. Summer 1988); Berkowitz, Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts -- Tyson v. Tyson, 10 U. Puget Sound L. Rev. 721 (1987); Boland, Civil Remedies for Victims of Childhood Sexual Abuse, 13 Ohio N.U.L. Rev. 223 (1986); DeRose, Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages, 25 Santa Clara L. Rev. 191 (1985); Handler, Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle, 15 Fordham Urb. L.J. 709 (1987); Moore, Civil Remedies for Incest Survivors, 9 Response to the Victimization of Women and Children: Journal of the Center for Women and Policy Studies 11 (1986); Salten, Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy, 7 Harv. Women's L.J. 189 (1984).

Wis. 2d 257, 418 N.W.2d 23 (Ct. App. 1987). As in the case at bar, the plaintiff in that case alleged that she was psychologically unable to discover her injuries and their cause until she entered psychological counseling during adulthood. The defendant moved to dismiss on the ground that the statute of limitations had elapsed. The court held "as a matter of law, that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury." 418 N.W.2d at 26.

Courts in Illinois, Massachusetts and Michigan have also applied the discovery rule to civil cases alleging child sexual abuse.⁷ Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988); N.P. v. G.E.C., No. 81852 (Mass. Super. Ct. June 21, 1988) (reported at 31 ATLA L. Rep. 389 (Nov. 1988), attached as appendix to Appellants' Brief); Meiers-Post v. Schaefer, 170 Mich. App. 174, 427 N.W.2d 606 (1988).

The leading decision refusing to apply the discovery

⁷ The same result has been reached in cases involving sexual abuse of a patient by a therapist. Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Greenberg v. McCabe, 453 F. Supp. 765 (E.D. Pa. 1978), aff'd, 594 F.2d 854 (3d Cir.), cert. denied, 444 U.S. 840 (1979). The basis of both 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. The psychological impact of sexual abuse by a therapist is directly analogous to that of incestuous abuse by a father figure. Simmons v. United States, 805 F.2d at 1365, 1367.

rule to childhood sexual abuse, Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986), is readily distinguishable from the case at bar.⁸ In that case, the majority decision rested on the difficulty of verifying the plaintiff's allegations after many years had elapsed. In the present case, Defendant himself admitted his acts of sexual abuse to the Plaintiffs' mother in 1985. (p.63 ¶14; p.66 ¶10.) Justice Pearson's well-reasoned, thoroughly documented and persuasive dissent in Tyson provides a valuable and instructive model for deciding the case at bar. 727 P.2d at 230-37.

- B. Recent Research in Medicine and Related Fields Has Documented The Reasons for Incest Victims' Delayed Discovery of Their Injuries and the Injuries' Cause.

Application of the discovery rule must expand in response to new scientific information and resulting shifts

⁸ In addition to being distinguishable, amici curiae submit that the opinion of the court in Tyson is poorly reasoned and wrongly decided. The credibility of a plaintiff's allegations must be left to the finder of fact and has no bearing on whether a claim is barred by the statute of limitations as a matter of law. See Berkowitz, supra n. 6, at 735.

Moreover, Tyson was a 5-4 decision in which the concurring justice actually approved of the dissenters' arguments but voted with the majority because of his view that the scope of the discovery rule must be defined by the legislature. 727 P.2d at 230 (Goodloe, J., concurring). As noted in Section I.A., supra, the Colorado legislature has explicitly adopted the discovery rule.

The precedential value of Tyson was further undercut by the passage of superseding legislation expressly providing for the discovery rule in incest cases. Wash. Rev. Code Ann. §4.16.340 (Supp. 1989).

in public policy. See, e.g., Rosane v. Senger, 149 P.2d at 374 (noting large number of incidents of surgeons leaving foreign objects in closed incisions; court proceeded to apply discovery rule to such cases). The following discussion is based on recent research in psychiatry, psychology, social work, marriage and family therapy, and related fields. Such research has conclusively demonstrated that childhood incestuous abuse causes severe and lasting harm but that the dependency of the child on the abuser, the fact that psychological denial is a natural consequence of incest, and the fact that many of the symptoms caused by incest do not manifest themselves until well into adulthood, all combine to prevent the victim from recognizing her injuries and their cause until long after the abuse took place.

1. The actions of the abuser and vulnerability of the child prevent the victim of childhood incest from discovering that she has been injured by the abuser's conduct.

The unique relationship of authority and trust that an adult caregiver bears to a child prevents the child victim of incestuous sexual abuse from recognizing that she has been injured by the abuser.⁹

⁹ Incest is not limited to sexual abuse by a parent. It has been defined as sexual acts that take place at the hands or command of someone who has power over the child due to trust and/or authority: an ongoing, close relationship such as parent, step-parent, aunt, baby-sitter, mother's boyfriend or even dentist,

The child subjected to incestuous sexual abuse is in an inherently dependent and disadvantaged position. No child is free to say "no" to an adult in a position of power or to anticipate the consequences of sexual involvement with an adult.¹⁰ Because of the child's innocence and powerlessness relative to the adult, the victim is completely unable to give meaningful consent to sexual activity, yet she has no choice but to accede to the abuser's demands.¹¹ This is particularly true when, as in the present case, the child has been rendered especially vulnerable and needy by the loss of parental nurturing. (p.48 ¶4; p.53 ¶5; p.61 ¶2; p.65 ¶1.) The adult easily manipulates the child into accepting the realities as the adult defines them, including the very definition of the child's developing sense of self.¹² (p.48-

piano teacher, or priest, when there is bonding or a surrogate-parent situation. A blood relationship is not necessary for incest.

Blume, The Walking Wounded: Post-Incest Syndrome, 15 SIECUS Report 5, 5 (Sex Information and Education Council of the U.S. 1986). In the present case, Defendant was the Plaintiffs' trusted family confidant, spiritual advisor and surrogate father. (p.48-49 ¶3-5; p.53 ¶3-5; p.61 ¶3; p.65 ¶3.)

¹⁰ Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse and Neglect 177, 182 (1983). See also Blume, supra n. 9, at 5.

¹¹ Blume, supra n.9, at 5; Summit, supra n.10, at 182.

¹² Summit, supra n.10, at 181; Salten, supra n.6, at 196-99.

49 ¶5; p.53-54 ¶6; p.62 ¶6,7; p.66 ¶7.)

Children are by nature intellectually and physically immature and have yet to develop strong emotional and social skills. They have little control of their environment and are highly impressionable. Lacking previous experience to draw on, children must form conclusions about their world by relying upon the meaning given to events by parents and other caregiving adults.¹³ As a result, incestuous sexual abuse quickly and thoroughly distorts the psychological framework of an abused child's life, such that the abuse itself appears normal -- rather than wrongful -- to the child.¹⁴ (p.48-49 ¶5; p.53-54 ¶6,11; p.62-63 ¶6-11; p.65-66 ¶ 4-7.)

The abuser typically enforces and coerces the child's compliance by inflicting or threatening to inflict harm, and by emotional extortion and blackmail -- all the while conveying to the child that she is responsible for what is happening to her and that she must never reveal their secret.¹⁵ Thus, in the current case, Defendant coerced the Plaintiffs and manipulated them into feeling responsible for

¹³ D. Whitcomb, E. Shapiro & L. Stellwagen, When the Victim Is a Child: Issues for Judges and Prosecutors 13-16, National Institute of Justice, U.S. Dep't of Justice (1985) [hereinafter cited as National Institute of Justice].

¹⁴ Gelinas, The Persisting Negative Effects of Incest, 46 *Psychiatry* 312, 319 (Nov. 1983).

¹⁵ Salten, supra n.6, at 196-99.

his well-being. (p.62-63 ¶6-9; p. 65-66 ¶5,7.) He expressly forbade them to tell anyone of his actions, threatening them that if they did so, he would be punished, they would lose his love, and the Plaintiffs' mother would be deeply hurt. (p.48-49 ¶5,7; p.54 ¶8,11; p.62-63 ¶8,11; p.66 ¶7.)

Few incest victims dare to divulge the secret, since doing so would risk punishment, retaliation, disbelief, rejection and blame.¹⁶ Being unable to tell anyone about the abuse prevents the child from learning that the abusive conduct constitutes an injury. Instead, the child victim of abuse is exposed only to the abuser's perspective on the events. Such victims of abuse continually experience fear, confusion, self-blame, anxiety, learned helplessness, and depression. (p.48-49 ¶5; p.53-54 ¶6; p.63 ¶10,11; p.66 ¶7.)

By systematically conditioning them to accept sexual abuse from a young early age, by active misrepresentation, and by preventing them from telling anyone else of the abuse, Defendant successfully deceived the Plaintiffs into believing that they were not being harmed or wronged by his acts. (p.61-63 ¶4-11; p.65-66 ¶2-7.) The powerful effect of this conditioning and secrecy endured long after the Plaintiffs

¹⁶ National Institute of Justice, supra n.13, at 16-17; Salten, supra n.6, at 196-99; Summit, supra n.10, at 181.

were no longer under Defendant's direct control.¹⁷ (p.49 ¶6; p.54 ¶7; p.63 ¶12-14; p.66 ¶8-10.)

It is an accepted legal principle that concealment or misrepresentation by the wrongdoer postpones accrual for purposes of the statute of limitations. See Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957). The fact that Plaintiffs knew that Defendant had imposed certain sexual acts on them is not controlling where Defendant successfully concealed from them the fact that these acts were wrongful. Mastro v. Brodie, 682 P.2d at 1168 (statute of limitations does not begin to run until plaintiff has knowledge of facts that would put reasonable person on notice of nature and extent of injury and fact that injury was caused by wrongful conduct of another). Defendant should not be allowed to profit from his own successful deception of the Plaintiffs by claiming that they should have brought their action earlier. Rosane v. Senger, 149 P.2d at 375.

2. Psychological injuries caused by childhood incestuous abuse prevent the victim from discovering her injury and its cause.

One of the most common damaging effects of childhood incest is the development of psychological blocks which prevent the victim from discovering that she has been injured by the abuser's conduct.

¹⁷ See Handler, supra n.6, at 736.

For a child to realize that an adult who is supposed to love, guide, and protect her is actually exploiting her and causing her suffering and pain would be devastating.¹⁸ Therefore, as a natural response, children subjected to incest do not acknowledge the harms inflicted on them. See Section II.B.1., supra. Instead, authorities on the subject agree, most children "accommodate" to survive.¹⁹ Accommodation is a process of mental coping whereby the child literally blocks the experiences out of her mind in order to protect the developing psyche from being completely overwhelmed.²⁰

According to prominent experts, the psychological denial mechanisms caused by incestuous abuse may take several forms.²¹ The trauma of abuse and betrayal of trust may cause the child to pretend that the assaults did not really happen or to deny that the experiences have any effect or

¹⁸ Salten, supra n.6, at 199. See Swink & Leveille, From Victim to Survivor: A New Look at the Issues and Recovery Process for Adult Incest Survivors, in The Dynamics of Feminist Therapy 133 (D. Howard ed. 1986).

¹⁹ Salten, supra n.6, at 198.

²⁰ Summit, supra n.10. See also, e.g., Herman & Schatzow, Recovery and Verification of Memories of Childhood Sexual Trauma, 4 Psychoanalytic Psychology 1 (1987).

²¹ See generally J. Herman, Father-Daughter Incest (1981); D. Russell, The Secret Trauma: Incest in the Lives of Girls and Women (1986); Herman & Schatzow, supra n.20; Summit, Beyond Belief: The Reluctant Discovery of Incest, in Women's Sexual Experience (M. Kirkpatrick ed. 1982).

significance. Moreover, the victim may repress most or all memories of the abuse. The victim also may "disassociate" herself by placing herself in a type of trance to erase the troubling events from her awareness; this results in gaps and fragmentation in later memories. These psychological responses are a natural defense mechanism, a mental "escape hatch" from thoughts and feelings that would be impossible to bear.²² (See p.48-49 ¶5; p.53-54 ¶6.)

The responses of psychological denial which the incest victim develops to shield and protect herself persist into adulthood.²³ In the current case, Plaintiffs buried the secret of incest within themselves and remained in a state of denial until at least 1987. (p.48-49 ¶5-6; p.53-54 ¶6-7; p.63 ¶14; p.66 ¶10.)

Breaking out of a long-standing pattern of denial requires a monumental psychological change.²⁴ Typically, this occurs when the survivor seeks professional help.²⁵ Usually the decision to seek professional help follows the

²² Tyson v. Tyson, 727 P.2d at 234 (dissent); Gelinas, supra n.14, at 315-16.

²³ Blume, supra n.9, at 5.

²⁴ See Blake-White & Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, Social Casework 394 (Sept. 1985); Swink & Leveille, supra n.18.

²⁵ See Salten, supra n.6, at 202.

occurrence of a pivotal event in the life of the incest survivor.²⁶ In this case, the event that triggered the Plaintiffs' decision to seek therapy was when their mother revealed to them that they had been victims of incest. (p.49 ¶8; p.54 ¶10; p.63 ¶14; p.66 ¶10.) This did not occur until 1985 (for Plaintiff Lynn Cassidy) and 1986 (for Plaintiff Susan Ball). Id.

Until they receive help from a mental health professional, incest survivors typically cannot recognize that they were injured by sexual abuse they suffered during childhood.²⁷ True to this pattern, the Plaintiffs in the present case first began to realize that they were harmed by Defendant's acts after entering therapy. (p.49 ¶6,8,9; p.54 ¶9,10; p.63-64 ¶15.) See Nitka v. Bell, 487 P.2d at 381-82 (cause of action did not accrue until plaintiff learned from medical specialist that he had actionable claim).

Long-lasting psychological denial is a natural consequence of incest and makes it inevitable that an incest survivor will be delayed in discovering her injury and its cause. Hence, Plaintiffs' delay in filing this action was a direct result of Defendant's unconscionable conduct. Unlike

²⁶ Gelinas, supra n. 14, at 317-18.

²⁷ See Tyson v. Tyson, 727 P.2d at 235 (dissent); Gelinas, supra n.14, at 316; Herman & Schatzow, supra n.21; Swink & Leveille, supra n.18.

most conventional torts, where the victim knows or should know that an injury has occurred as soon as the wrongful act takes place, incest operates in such a way as to ensure that the injury remains hidden from the potential plaintiff herself. Incest is thus analogous to other cases involving hidden injuries, such as foreign objects left in a patient's body during surgery. See, e.g., Davis v. Bonebrake, 313 P.2d 982; Rosane v. Senger, 149 P.2d 372. As in the foreign objects cases, Plaintiffs must be allowed to go to trial to prove when their cause of action accrued.

3. Injuries resulting from incest do not manifest themselves for many years.

Many of the most debilitating injuries caused by childhood incest do not even begin to appear until the victim is in her twenties or thirties, often long after the acts of abuse took place.²⁸

As adults, sexual abuse survivors typically report low self-esteem, anxiety, depression and extreme feelings of guilt and shame.²⁹ They suffer from psychosomatic and sleep related disorders, sexual dysfunction, inability to differen-

²⁸ See Salten, supra n.6, at 199-202.

²⁹ On adult symptoms of incest survivors, see generally J. Herman, supra n.21; J. Renvoize, Incest: A Family Pattern (1982); Blake-White & Kline, supra n.24; Blume, supra n.9; Gelinias, supra n.14; Salten, supra n.6, at 199-202; Swink & Leveille, supra n.18.

tiate between sex and affection, and difficulties in forming meaningful, trusting relationships. Survivors of incest also experience extreme feelings of powerlessness, phobias, and a heightened sense of vulnerability. They are prone to self-abuse in the form of anorexia, bulimia, obesity and alcohol and drug abuse. Victims of childhood sexual assault and rape are susceptible to continued victimization in adulthood, frequently marrying men who abuse them and who sexually abuse their children. Just how profoundly childhood sexual abuse traumatizes the victims in their adult lives can be seen in the fact that, according to one study, nearly forty percent of adult incest victims have attempted suicide.³⁰

These disabilities afflicting the adult survivor of childhood sexual abuse are a separate phenomenon from the emotional suffering experienced by the victim during childhood, and they frequently surface for the first time years after the abuse occurred. They are a form of post-traumatic stress syndrome, a psychological disorder that is widely recognized among Vietnam veterans and others, which is often characterized by a long-delayed onset following traumatic events.³¹

³⁰ J. Herman, supra n.21, at 101.

³¹ Hammer v. Hammer, 418 N.W.2d at 25; Berkowitz, supra n.6, at 729 n.46; Blake-White & Kline, supra n.24, at 396; Handler, supra n.6, at 717-18; Herman & Schatzow, supra

The Plaintiffs in this case suffered from post-traumatic stress syndrome long after they entered adulthood. (p.48-49 ¶5; p.53-54 ¶6.) Among the injuries they suffered as a result of Defendant's sexual abuse are depression, anxiety, sexual dysfunction, and interference with subsequent intimate and marital relationships. (p.81; p.48-49 ¶5; p.53-54 ¶6; p.63-64 ¶15.) By their very nature, such symptoms as marital problems cannot become manifest until well into adulthood.³² Plaintiff Lynn Cassidy did not marry until age 26. (p.63 ¶13.)

Injurious effects of childhood abuse that do not emerge until adulthood are like other conditions that remain latent and are therefore undiscovered by the potential plaintiff.³³

n.20, at 8.

³² See Gelinas, supra n. 14, at 318.

³³ A leading case on the issue of applying the discovery rule to delayed manifestation of injuries is Urie v. Thompson, 337 U.S. 163 (1949). In that case, a worker discovered his disabling lung disease thirty years after his initial occupational exposure to silica dust. Even though the disease had necessarily been developing in his lungs for many years, the Supreme Court held that the cause of action did not accrue, for purposes of the three-year statute of limitations, until the symptoms became manifest and the plaintiff received a diagnosis. 337 U.S. at 169-70. The Court determined that strict application of the statute of limitations would afford the plaintiff only a "delusive remedy," and that he should not be punished for his "blameless ignorance." Id.

Similarly, in Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982), the statute of limitations was held to run from the date that the plaintiff discovered he

In McKinley v. Willow Constr. Co., Inc., 693 P.2d 1023, the negligence of the defendant builder in engineering the trusses for the plaintiffs' roof took place in 1972 or 1973, but the harm resulting from the negligence -- namely, damage to the roof caused by settling -- did not occur until 1979. The plaintiffs' cause of action was held to accrue when the latent harm finally manifested itself. 693 P.2d at 1026. The same principle applies to the present case.

III. APPLICATION OF THE DISCOVERY RULE IS REQUIRED TO PERMIT INCEST SURVIVORS TO SEEK LEGAL REDRESS.

The Colorado Supreme Court has recognized the importance of making legal remedies available to people who have suffered an injury. As the Court stated in Rosane v. Senger, "There can be no due process unless the party deprived has his day in court and if without his fault his debtor conceals from him his right until a statute deprives him of his remedy he is deprived of due process." 149 P.2d at 375. The court went on to say that it would be a "mockery" of justice to deprive a person of the right to bring a suit before that person realized how he or she had been wronged. Id. at 375-

had contracted cancer as a result of asbestos exposure, not from the date when the exposure took place, nor even from the date when the plaintiff discovered that he had a mild case of asbestosis resulting from the same exposure. See also, e.g., Fearson v. Johns-Manville Sales Corp., 525 F. Supp. 671 (D.D.C. 1981) (same holding); Pierce v. Johns-Manville Sales, Corp., 296 Md. 656, 464 A.2d 1020 (1983) (same).

376. In Owens v. Brochner, the Court stated that "the injustice of barring the plaintiff's action before he could reasonably have been aware that he had a claim is patent." 474 P.2d at 606.

Similar protections are guaranteed by the Due Process Clause of the U.S. Constitution. The United States Supreme Court has made it clear 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). The opportunity must be granted "'at a meaningful time and in a meaningful manner.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (citations omitted). For the incest survivor, the "meaningful time" comes when she is able to comprehend that she has been injured as a result of the childhood assaults.

Regrettably, our legal system has for too long ignored, condoned, and underestimated the harm done to women and children through domestic violence, rape, child sexual abuse and incest. The rape of a spouse or child was traditionally not considered a crime because women and children were considered a man's "sexual property."³⁴ One of the great advances of recent decades has been society's recognition

³⁴ Saunders, The Child Sexual Abuse Case: A Short Course for Judges, 27 Judges' J. 20, 40-41 (1988).

that domestic violence of all types is epidemic throughout all strata of society, that the physical and psychological damage to its victims is enormous, and that this problem demands public attention.³⁵

At the time when Blackstone formulated the common-law rule that a man may strike his wife with an instrument no thicker than his thumb,³⁶ and for many years thereafter, wife-battering was considered acceptable and a private matter. Today, with soaring estimates of the true frequency of domestic battering,³⁷ courts have held that women have a legal right to be protected from beatings by family members.³⁸

Our courts' treatment of incestuous sexual abuse must make a similar transition to awareness and sensitivity. In

³⁵ See, e.g., M. Straus, R. Gelles, & S. Steinmetz, Behind Closed Doors: Violence in the American Family (1981); U.S. Comm'n on Civil Rights, Battered Women: Issues of Public Policy (1978); L. Walker, The Battered Women Syndrome (1984).

³⁶ W. Blackstone, Commentaries on the Laws of England (1765), cited in U.S. Comm'n on Civil Rights, Under The Rule of Thumb: Battered Women and the Administration of Justice 2 (Jan. 1982).

³⁷ At least 1.8 million women are severely beaten in their homes every year. M. Straus, R. Gelles, & S. Steinmetz, supra n.35.

³⁸ See, e.g., Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984); Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

the past, authorities told us that sexual abuse of female children was not necessarily damaging,³⁹ that children's and adults' reports of child sexual abuse and incest were fantasies,⁴⁰ and that incest was so rare that there was but one case per million persons in the United States.⁴¹ Some even suggested that children invite sexual assault.⁴² The unwillingness to confront sexual abuse of children was so intense that one pioneering physician in the field warned colleagues,

Those who try to assist sexually abused children must be prepared to battle against incredulity, hostility, innuendo, and outright harassment. Worst of all, the advocate of the sexually abused child runs the risk of being smothered by indifference and a conspiracy of silence. The pressure from one's peer group as well as the community to ignore, minimize or even cover up the situation may

³⁹ See, e.g., Kinsey, Pomeroy, Martin & Gobhard, Sexual Behavior in the Human Female (1953).

⁴⁰ J. Masson, The Assault on Truth: Freud's Suppression of the Seduction Theory (1984); Peters, Children Who Are Victims of Sexual Assault and the Psychology of Offenders, 30 Am. J. of Psychotherapy 398 (1976); Rush, The Freudian Cover-up, 1 Chrysalis 31 (1977); Summit, Recognition and Treatment of Child Sexual Abuse, in Coping with Pediatric Illness 115 (C. Hollingsworth ed. 1983).

⁴¹ S. Weinberg, Incest Behavior (1955 Rev. 1976), cited in D. Russell, Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment 177 (1984).

⁴² D. Russell, supra n.41, at 164, quotes an earlier study of rapists that includes the statement, "[I]t is difficult to assess the role of the child in provoking rape...".

be extreme.⁴³

Until recently, in certain states, a murderer could be convicted on the testimony of a child alone, but if a child alleged sexual abuse, every aspect of the crime had to be corroborated.⁴⁴ No less an authority than Wigmore in his treatise on evidence urged that every complainant in a sexual assault case undergo psychiatric examination to determine whether she is fantasizing.⁴⁵

Today, thanks to a process of public education begun by incest survivors courageous enough to tell their own stories,⁴⁶ we are painfully aware that the realities of child

⁴³ Sgroi, Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault in Sexual Assault of Children and Adolescents xv (A.W. Burgess, A.N. Groth, I.L. Holstrom, S.M. Sgroi, eds., 1978).

⁴⁴ See, e.g., Holtzman, To Help Prosecute Child Molesters, N.Y. Times, Mar. 28, 1984, p. A27.

⁴⁵ 3A J. Wigmore, Evidence, Sec. 924a, at 737 (1970). The generalization that women and girls tend to fabricate sexual assault charges is utterly without foundation. Boland, supra n.6, at 225 n.14; Estrich, Rape, 95 Yale L.J. 1087 (1986); Taylor, Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson, 10 Harv. Women's L.J. 59, 74-81 (1987). Contrary to the myth of fabrication, in a study of fifty-three women outpatients in short-term therapy groups for incest survivors, three out of four were able to obtain evidence substantiating their memories from outside sources. Herman & Schatzow, supra n.20, at 10.

⁴⁶ See, e.g., C. Allen, Daddy's Girl: A Memoir (1980); L. Armstrong, Kiss Daddy Goodnight: A Speak-Out on Incest (1978); K. Brady, Father's Days: A True Story of Incest (1979).

sexual assault and incest are the opposite of what we have been led to believe. As Dr. Roland Summit, one of the leading experts in the field, 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."⁴⁷

In 1984, the United States Senate Subcommittee on Children, Family, Drugs and Alcoholism held hearings on child sexual abuse, under the leadership of then-Senator Paula Hawkins, who had herself been molested as a child. As Senator Hawkins later wrote of the testimony received:

In a typical year an estimated 100,000 to 500,000 American youngsters will be sexually molested... [A]ccording to the Family Violence Research Project of the University of New Hampshire, nearly one out of five American women and one out of ten American men have been sexually molested as children. The Program estimates that between two million and five million American women have been victims of incest alone.⁴⁸

In a landmark 1978 study of 930 randomly selected San Francisco women, Professor Diana Russell found that 54% of

⁴⁷ Summit, supra n.40, at 117. By 1985, there were 113,000 reports of child sexual abuse annually, the vast majority of them involving parents and other members of the victim's family. Kleiman, "The Last Taboo: Case on L.I. Pierces the Silence on Incest," N.Y. Times, Sept. 28, 1987, p. A1, col. 1. Unreported cases far outnumber those that are reported. Id.; National Institute of Justice, supra n.13, at 4, 84.

⁴⁸ P. Hawkins, Children at Risk 58 (1986) (emphasis added).

them had been sexually abused before age 18. In 48% of cases the abuse occurred before age 14. Sixteen percent of the 930 women who were studied had been victims of incestuous abuse. Sixty-four percent of the incestuous abuse cases were classified as very serious or serious.⁴⁹ It is estimated that girls are two to ten times more likely than boys to be victims of sexual abuse.⁵⁰ Far from being innocuous, childhood sexual abuse and incest are so damaging as to disrupt their victims' lives long into adulthood and in many cases permanently. See Section II., supra.

Now that American society has achieved this long overdue understanding of the incidence and consequences of childhood incestuous abuse, it is essential that the legal system adjust its own response so as to afford a meaningful remedy for these victims. One of the cruelest aspects of childhood incestuous abuse is the child's perception that, having been betrayed by an adult directly responsible for her care, she cannot depend on any person or any of society's institutions to offer her protection.⁵¹ As one commentator has noted, "near universal societal refusal to respond appropriately to

⁴⁹ D. Russell, supra n.41, at 180-94. The definition of very serious and serious abuse included, e.g., forced penile-vaginal penetration and forced digital penetration.

⁵⁰ Swink & Leveille, supra n.18, at 119.

⁵¹ See id. at 121.

incestuous abuse punishes the victim by denying her warranted assistance, thereby compounding the psychological harm caused by her father's conduct."⁵² Providing reasonable access to the courts for incest survivors is crucial if we are to demonstrate that the legal system does indeed provide redress for the innocent against wrongdoers. This message may have a significant deterrent effect, as well as clearing the victim of guilt in her own eyes and those of society.⁵³

Criminal penalties for incestuous rape and childhood sexual abuse do not provide an adequate legal remedy. These cases are almost never disclosed to the authorities while the abuse is ongoing.⁵⁴ Prosecution and conviction are rare.⁵⁵ Moreover, even if conviction results, criminal punishment does nothing to provide the victim with direct redress. There is a growing recognition of the need to provide a tort remedy for adult survivors of childhood sexual abuse.⁵⁶ In many incest cases, including this one, the survivor requires costly medical care and long-term psychotherapy. (p.81 ¶13;

⁵² Allen, supra n.6, at 616.

⁵³ See Salten, supra n.6, at 190 n.2.

⁵⁴ See National Institute of Justice, supra n.13, at 4, 84; D. Russell, supra n.21; Summit, supra n.10.

⁵⁵ Allen, supra n.6, at 609; Berkowitz, supra n.6, at 723; National Institute of Justice, supra n.13, at 4-8.

⁵⁶ See generally n.6, supra.

p.48-49 ¶5; p.53-54 ¶6; p.63-64 ¶15,16.) Civil damages could furnish the Plaintiffs with funds to pursue the treatment they need in order to come to terms with the sexual abuse inflicted on them. Nothing can restore the Plaintiffs' lost childhood, and nothing will eliminate their permanent psychological scars, but a civil remedy could give them the means to strive toward a more normal life.

American law is undergoing a pronounced trend toward expanded application of the discovery rule.⁵⁷ Because of the nature of childhood sexual abuse, the discovery rule provides the only realistic possibility of access to a legal remedy for incest survivors. This Court has the power to grant or deny Plaintiffs a day in court to seek legal redress. They, and other survivors of childhood incest, should be permitted to prove the application of the discovery rule to the facts of each incest case. A contrary decision would lock the courtroom door before the injured party has had an opportunity to open it.

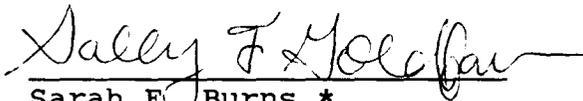
⁵⁷ Allen, supra n.6, at 631; Salten, supra n.6, at 213.

CONCLUSION

For all of the foregoing reasons, amici curiae respectfully request this Court to reverse the District Court's orders granting Defendant's motion to dismiss, granting Defendant's motion for sanctions, and denying Plaintiff's motin for reconsideration.

Dated this 11th day of April, 1989.

Respectfully submitted,



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