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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AFTER-HOURS DEPOSITORY

No. 92-7209

FREDERIKA FARRIS, SARA FELLEZ, and
GEORGE FELIX FELLEZ, Jr.,

Plaintiffs-Appellants,

v.

JOHN W. COMPTON,

Defendant-Appellee.

On Appeal from the United States District Court
For the District of Columbia
Civil Action No. 91-1509

BRIEF OF AMICI CURIAE

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CERTIFICATE AS TO PARTIES, RULINGS
AND RELATED CASES PURSUANT TO
RULE 11 OF THE GENERAL RULES OF
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Except for the following, all parties, intervenors and amici appearing below and in this Court are listed in the Brief of Appellants:

NOW Legal Defense and Education Fund
Alliance for the Rights of Children
Believe the Children
Concerned Citizens for the
Protection of Abused Children
D.C. Rape Crisis Center
Human Issues, Inc.
Men's Anti-Rape Resource Center
National Association of Social Workers
Vermont Incest Survivors Enlightened
& Empowered
Women's Law Center, Inc.
Women's Law Project

Amici Curiae

The following organizations have filed a motion for leave to join this brief:

California Women Lawyers
Equal Rights Advocates
Giaretto Institute
National Center on Women and Family Law
National Organization for Women
Northwest Women's Law Center
Pennsylvania Coalition Against Domestic Violence
Trial Lawyers For Public Justice, P.C.

References to the rulings below appear in the Brief of Appellants.

Amici are aware of no related cases.

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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.

SUMMARY OF ARGUMENT

The trial court's decision in this case was apparently influenced by several misconceptions regarding the nature of sibling incest. Once these misconceptions are dispelled, it becomes clear that application of the discovery rule is appropriate in such cases and is fully consistent with previous applications of the discovery rule in the District of Columbia.

ARGUMENT

I.

UNDER THE LAW OF THE DISTRICT OF COLUMBIA,
THE CAUSE OF ACTION ACCRUED ONLY WHEN APPELLANTS
DISCOVERED THEIR INJURY AND ITS CAUSE

A. District of Columbia Courts Have
Adopted The Discovery Rule And
Applied It In A Broad Range Of Cases

The statute of limitations applicable to this case, D.C. Code Ann. § 12-301, does not include a definition of when a cause of action "accrues." Therefore, the term has been "left to judicial interpretation." Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1198 (D.C. 1984).

The courts in the District of Columbia have adopted the "discovery rule," which provides that a cause of action accrues at the time a plaintiff knows "or by the exercise of

reasonable diligence should [know] . . . (1) of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing."¹ Both the courts of the District of Columbia and the federal courts sitting there have gradually expanded the application of the discovery rule to encompass a broad range of circumstances.²

B. Federal Courts In The District of Columbia Have Applied The Discovery Rule In Contexts Not Yet Addressed By The District's Courts

The Court can, and should, apply the discovery rule to this incest case even though the District of Columbia courts have not yet considered whether the discovery rule should apply in this context. Such application would be consistent

¹ Bussineau v. President & Director of Georgetown, 518 A.2d 423, 435 (D.C. 1986). See also Allen v. Hill, 626 A.2d 875, 877 (D.C. 1993) (reaffirming test as stated in Bussineau).

² See, e.g., Kropinski v. World Plan Executive Council, 853 F.2d 948 (D.C. Cir. 1988) (fraud); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (product liability); Shamloo v. Lifespring, Inc., 713 F. Supp. 14 (D.D.C. 1989) (intentional emotional distress); Byers v. Burleson, 713 F.2d 856 (D.C. Cir. 1983) (legal malpractice); Fearson v. Johns-Manville Sales Corp., 525 F. Supp. 671 (D.D.C. 1981) (wrongful death and survival action involving latent occupational disease); Stackhouse v. Schneider, 559 A.2d 306 (D.C. 1989) (claim under District of Columbia No-Fault Act); Stager v. Schneider, 494 A.2d 1307 (D.C. 1985) (loss of consortium resulting from medical malpractice); Ehrenhaft, 483 A.2d at 1192 (breach of contract and warranty).

with the rule's previous applications in the District of Columbia.

The discovery rule was first applied under District of Columbia law by a federal district court in a medical malpractice diversity case, see Burke v. Washington Hospital Center, 293 F. Supp. 1328 (D.D.C. 1968), and the District of Columbia Court of Appeals later explicitly adopted the rule, see Burns v. Bell, 409 A.2d 614 (D.C. 1979) (following Burke). Thereafter, federal courts in the District of Columbia have consistently expanded the application of the discovery rule, and the District of Columbia Court of Appeals has approved of such expansion. See, e.g., Knight v. Furlow, 553 A.2d 1232, 1234 (D.C. 1989) (explicitly approving of federal court's application of the rule to a new situation).

C. Pertinent Case Law And Policy Considerations Support The Discovery Rule's Application Here

Application of the discovery rule to cases involving adult survivors of incest would be a logical extension of District of Columbia precedent. Where, as here, the injury or its cause is not readily apparent, the District of Columbia applies the discovery rule, and the statute of limitations does not begin to run until the plaintiff has sufficient information about both her injury and its cause. See

Dawson v. Eli Lilly & Co., 543 F. Supp. 1130, 1338 (D.D.C.

1982). As the Dawson court stated:

discovery rules are adopted to avoid the unfairness of interpreting a statute of limitations to accrue when the injury first occurs, if at that time plaintiff does not have enough information to bring suit. . . . Where the injury is latent, the claim is held not to accrue until the plaintiff discovers the injury. Where causation of an injury is unknown, the action accrues when both the injury and its cause have been (or should have been) discovered. Where the injury and causation are known, but not that there has been any wrongdoing, the action is held to accrue when the plaintiff discovered, or by due diligence should have discovered, the wrongdoing.

Id.

The discovery rule is often applied on the theory that a plaintiff should not be barred from asserting her claim if her inability to assert her claim earlier is a result of the defendant's wrongful conduct. See, e.g., Fontana v. Aetna Casualty & Surety Co., 363 F.2d 297, 300 (D.C. Cir. 1966) (applying the discovery rule against the perpetrator of insurance fraud and stating: "[t]o decide the case we need look no further than the maxim that no man may take advantage of his own wrong"); In re Estate of McCagg, 450 A.2d 414, 418 (D.C. 1982) (applying discovery rule in dispute over title to art works and stating that "it is unjust to hold a claim barred due to the passage of time when the claimant was unable to assert it at an earlier time, through no fault of [her] own").

Similarly, an incest survivor should not be deprived of the opportunity to assert her claim when she either represses the memory of abuse by the defendant or is otherwise unable to recognize the causal connection between her injuries and the abuse, due to the nature of the defendant's conduct. Accordingly, courts in other jurisdictions have applied the discovery rule to incest cases. See, e.g., Hewczuk v. Somber, 803 F. Supp. 1063, 1065 (E.D. Pa. 1992) (stating that where "tortfeasors are responsible, not only for the original trauma, but also for plaintiff's inability to assert her claims sooner, the alleged tortfeasors should not be heard to complain of the prejudicial delay").

D. Appellants' Interest In Judicial Consideration Of Their Claim Outweighs Appellee's Interest In Not Having To Defend Stale Claims

The District of Columbia Court of Appeals recently described how the interests of plaintiffs and defendants must be balanced in reaching a decision of whether the discovery rule should be applied:

the plaintiffs' interest in the protection afforded by the discovery rule is more compelling than the defendants' interest in not having to deal with stale claims. The resulting obligation to defend which rests on the defendant is "somewhat tempered by the fact that the burden of proof remains upon the plaintiff." . . . Moreover, . . . statute of limitations are merely "statutes of repose," which do not bestow any fundamental right on defendants. Rather, they "find their justification in necessity and convenience rather than in logic." . . . Such statutes can and do remove valid claims from judicial consideration . . . Thus, in the application of any statute of limitations, it is the

plaintiff's fundamental interest in the adjudication of meritorious claims which must be balanced against the defendant's interest in repose.

Colbert v. Georgetown University, 623 A.2d 1244, 1251 (D.C. 1993) (citations omitted).

These policy considerations weigh in favor of incest survivors. As one court cogently concluded:

[t]he policy justification for applying the statute of limitations to protect defendants from "the threat of liability for deeds in the past" is unpersuasive in incestuous abuse cases Further, "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions."

Hammer v. Hammer, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987) (citations omitted), review denied, 144 Wis. 2d 954 (Wis. 1988). See also Phillips v. Johnson, 599 N.E.2d 4, 7 (Ill. App. Ct. 1992) ("[T]he manifest injustice of requiring plaintiff to know that which is inherently unknowable outweighs defendant's difficulty of proof in this case. To hold otherwise would deny a remedy to those who survive childhood sexual abuse by suppressing the memory of the abusive acts.").

The desire to prevent stale claims should not inhibit application of the discovery rule. The discovery rule does not indefinitely prevent the statute of limitations from running, and even where the rule is applied, plaintiffs still must prove their case. Since they bear the burden of proof, plaintiffs have an incentive to bring suit as soon as

they are able. That the evidence available might be nonexistent or of doubtful reliability prejudices plaintiffs at least as much as defendants. See Hewczuk, 803 F. Supp. at 1065. In sum, the "judiciary should act to recognize the difference between the voluntarily dilatory plaintiff and the incest survivor who is incapable of realizing the fact and cause of her injuries at an earlier date." Camille W. Cook & Pamela K. Millsaps, Redressing the Wrongs of the Blamelessly Ignorant Survivor of Incest, 26 U. Rich. L. Rev. 1 (1991).

II.

THE NATURE OF INCEST ABUSE RENDERS APPLICATION OF THE DISCOVERY RULE PARTICULARLY APPROPRIATE HERE

A. Symptoms Of Incest Frequently Do Not Become Manifest Until Well Into Adulthood

Experts describe sexual abuse as resembling a "time bomb" because traumatic symptoms may remain hidden for years after the abuse but may be "totally destructive to later adult adjustment." Roland Summit, Recognition and Treatment of Child Sexual Abuse, in Coping with Pediatric Illness 116 (1983). See also Jill Blake-White & Christine Madeline Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, Social Casework: The Journal of Contemporary Social Work 394, 397 (1985). The delay in

the onset of symptoms and request for treatment³ is related to the recognized coping mechanisms of incest survivors, including dissociation and repression, discussed below. Id. at 487-488, 491. The delayed effect of incest is analogous to the delay in the manifestation of a latent disease. The courts in the District of Columbia apply the discovery rule in such cases. See, e.g., Wilson v. Johns-Manville Sales

³ In a study of 364 adults molested as children, there was an average of 17 years between the end of the molestation and the first request for treatment, with 8 of the survivors waiting at least 40 years before seeking treatment. Kathleen A. Kendall-Tackett, Characteristics of Abuse that Influence When Adults Molested as Children Seek Treatment, 6 J. Interpersonal Violence 488-89 (1991). Dr. Kendall-Tackett finds that those survivors who wait years before seeking treatment may well be those who have repressed memories of the abuse. Id. at 488. The researchers in another study state:

Why therapists encounter adult clients often many years after their incest abuse is a question that deserves careful consideration. . . . Following a severe trauma, a pattern of repression, denial and emotional avoidance emerges. This denial-numbing phase . . . can last days or decades, then is followed by an intrusive-repetitive phase, in which disquieting symptoms such as nightmares or guilt reoccur. For the women in this study, the average time period between the last occurrence of incest and present treatment was 17 years.

Fredrick H. Lindberg & Lois J. Distad, Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest, 9 Child Abuse & Neglect 329, 332 (1985).

Corp., 684 F.2d 111 (D.C. Cir. 1982); Baker v. A.H. Robbins & Co., 613 F. Supp. 994 (D.D.C. 1985).

B. In Order To Deal With Their Trauma, Some Survivors Repress Memories Of The Abuse, Whereas Other Survivors Deny The Impact Of The Abuse

Dissociation and repression are normal responses to severe trauma and contribute to the memory difficulties of incest survivors. Children subjected to incestuous abuse find the experience overwhelming and hence may either dissociate themselves from the acts of abuse or repress all or some of the memories of the abuse.⁴ Survivors report dissociative experiences such as becoming part of the wall,

⁴ Blake-White & Kline, supra, at 397. The authors explain:

'patients, when faced with a situation that has aroused overwhelming grief, despair, or anxiety may respond by a total repression of the memories of the disturbing events, accompanied by a disappearance of painful affect.' The experience of incest, . . . is fraught with all these emotions -- emotions a child finds overwhelming. The fear and pain, and the feelings of abandonment by both the perpetrator and the . . . parent who does not rescue the child, cause intense despair. To deal with these fears and emotions, the child must deny their existence by pushing them into her unconscious.

Id. at 396 (citation omitted). See also Vernon R. Wiehe & Theresa Herring, Perilous Rivalry: When Siblings Become Abusive, 49-50, 114 (1991) (discussing memory deficits of victims of sibling incest).

floating up to the ceiling, or inducing self-hypnotic anaesthesia in order to endure the abuse. Denise J. Gelinas, The Persisting Negative Effects of Incest, 46 *Psychiatry* 313, 317-19 (1983); Leslie Young, Sexual Abuse and the Problem of Embodiment, 16 *Child Abuse & Neglect* 89, 92 (1992). A majority of those who experience childhood sexual abuse have difficulty remembering the abuse.⁵ In a recent study in which one hundred women who had been treated in an emergency room for childhood sexual abuse were interviewed seventeen years after the abuse, thirty-eight percent of the women either failed to recall or failed to disclose the abuse. Linda Meyer Williams, Adult Memories of Childhood Abuse, 5 *The Advisor* 19 (Summer 1992). Qualitative analysis indicates that the vast majority of these women had no recollection of the abuse. Id. at 20.

Researchers have noted a relationship between violent and sadistic sexual abuse, as appellants allege they experienced, and memory deficits. Herman & Schatzow, supra, at 5;

⁵ E. Sue Blume, Secret Survivors: Uncovering Incest and Its Aftereffects in Women, 66, 81 (1990); Blake-White & Kline, supra, at 396; Judith Lewis Herman & Emily Schatzow, Recovery and Verification of Memories Childhood Sexual Trauma, 4 *Psychoanalytic Psychol.* 2, 4 n.8 (1987); Kathy K. Swink & Antoinette E. Leveille, From Victim to Survivor: A New Look at the Issues and Recovery Process for Adult Incest Survivors, *The Dynamics of Feminist Therapy* 119, 122 (1986).

Christine A. Courtois, The Memory Retrieval Process in Incest Survivor Therapy, 1 J. Child Sexual Abuse 15, 18-19 (1992). Guilt and self-blame may also prevent recognition of the cause of psychological trauma.⁶ Threats, such as those allegedly made by the appellee, exacerbate the victim's sense of guilt for having "chosen" the sexual abuse over the threatened alternative, in this case, death.

The secrecy surrounding the incest, forced on the victim by the perpetrator and reinforced by societal reactions of aversion and disbelief, may well contribute to the repression of memories of incest:

The abuser almost always tries to get the child to keep the activity secret. The very nature of the secrecy conveys that the activity is wrong and bad. This, in turn, leaves many a child feeling . . . deserving of the abuse. . . . Over time, the child learns to keep the incest secret . . . for fear of being blamed, hurt, rejected or abandoned The pressure for secrecy contributes to

⁶ "[T]heir guilt and self-blame are inordinate, and the victims have difficulty placing their activities in the context of their chronic emotional deprivation and the preexisting sexual abuse." Gelinas, supra, at 323. Therapy helps victims shift the responsibility for the incest from themselves to the perpetrator, at which point the survivor is able to begin to realize the harm caused by the incest. Swink & Leveille, supra, at 134-35. See also Blume, supra, at 27-28 ("self-blame might result in a survivor's not acknowledging her victimization").

Guilt and self-blame allow a child to maintain the illusion that she is in control and responsible for the abuse, which is less threatening than to acknowledge her actual powerlessness. Id. at 111.

protective blocking or forgetting of abuse memories.

Courtois, supra, at 18 (emphasis added). The enforced secrecy by the abuser is generally successful in that the vast majority of abused children do not reveal their abuse while it is ongoing.⁷

Various life events may awaken repressed memories of childhood sexual abuse, including the birth of a child, having a child reach the age a survivor's incest began, or a mid-life crisis. Courtois, supra, at 21-23; Blake-White & Kline, supra, at 400. As with appellants, it is frequently

⁷ David Finkelhor, Risk Factors in the Sexual Victimization of Children, 4 Child Abuse & Neglect 265, 267 (1980); Diana E.H. Russell, The Secret Trauma: Incest in the Lives of Girls and Women (1986).

Dr. Roland Summit has defined the child sexual accommodation syndrome, which explains why most victims do not reveal their abuse. The stages of the syndrome are (1) secrecy (the child obeys the threats to keep the abuse secret from fear of the outcome of disclosure); (2) helplessness of the child victim; (3) entrapment and accommodation ("[t]he healthy, normal emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse"); (4) delayed, conflicted, and unconvincing disclosure (most children maintain the secret of incest, but those few who disclose are confronted with adult disbelief and blame); and (5) retraction ("[w]hatever a child says about sexual abuse, she is likely to reverse"). Roland Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177, 181-88 n.13 (1983); see also Wiehe & Herring, supra, at 62-65 (finding that the child sexual abuse accommodation syndrome applies to sibling abuse as well as to other forms of sexual abuse).

the therapeutic relationship itself which brings back the memories: "[a]n atmosphere of support and validation is also conducive to memory and, in and of itself, is often a memory retrieval cue." Courtois, supra, at 22.

Survivors who are able to recall their abuse usually experience denial whereby they minimize the effect of the abuse in an attempt to protect their sense of self. Swink & Leveille, supra, at 122; Blake-White & Kline, supra, at 397. These survivors are able to connect their psychological problems with their incestuous abuse only through therapy.⁸ Based on such evidence, the Canadian Supreme Court has established a rebuttable presumption that incest survivors are able to discover the connection between their injuries and the incest (and hence their cause of action) only through some form of psychotherapy. K.M. v. H.M., [1992] S.C.J. No. 85 (Q.L.). Likewise, in Hoult v. Hoult, 792 F. Supp. 143, 145 (D. Mass. 1992), in which the plaintiff

⁸ Swink & Leveille, supra, at 133 (discussing how survivors overcome denial through therapy, which allows them to realize the abuse was wrong and damaged them); Blake-White & Kline, supra, at 397; Gelinas, supra, at 326-27 (noting that most incest victims do not seek treatment for incest, but rather for its negative effects such as depression, poor self-esteem, or guilt; if, however, the incest is not the focus of the treatment, the therapy is unsuccessful, and the negative effects persist); Wiehe & Herring, supra, at 115 (many sibling incest survivors do not realize their emotional problems result from the abuse).

alleged incestuous childhood abuse, the district court held that a reasonable person in the plaintiff's situation would not have been able to discover the cause of her harm until receiving therapy.

Similarly, in many cases where the discovery rule has been applied by courts in the District of Columbia, the injury is such that the plaintiff could not have discovered either the injury or its cause without the assistance of a skilled professional. See, e.g., Burns, 409 A.2d at 616 (noting that many injuries "do not manifest themselves in a manner recognizable to a layperson for many years"). For example, in Shachtman v. Lifespring, Inc., No. Civ. A. 89-0564, 1990 WL 134505, at *4 (D.D.C. Aug. 29, 1990), the district court applied the discovery rule in a case in which the plaintiffs alleged emotional injury resulting from participation in defendant's psychological courses because "the alleged mental and emotional injuries at issue . . . can be multi-causal and . . . lay individuals generally do not have the expertise to understand the causative factors of these types of injuries." The incest victim's reliance on a therapist to discover the cause of her injuries is analogous to the reliance of other plaintiffs on a professional opinion in medical malpractice or products liability cases to determine the cause of injury.

C. The Devastating Effects Of Incest Are Well Documented

In addition to the physical injuries and pain frequently involved in cases of incestuous abuse, some of the initial effects of incest include fear, anxiety, depression, anger, hostility and inappropriate sexual behavior. Angela Browne & David Finkelhor, Impact of Child Sexual Abuse: A Review of the Research, 99 Psychol. Bull. 1 (1986). Long-term effects, which are distinct from the initial effects, include self-mutilation, depression, suicide attempts, flashbacks, eating disorders, sleep disorders, hypervigilance, relationship and sexual difficulties, substance abuse, low self-esteem, self-blame, persistent fear, anger, guilt, anxiety, denial, dissociation and multiple and borderline personality disorders.⁹ These effects plague victims of sibling incest as well as victims of other forms of incest. See, e.g., Wiehe & Herring, supra, at 96-115. The appellants allegedly suffer from a number of these symptoms. Joint Appendix ("J.A.") at 9-10.

⁹ Joseph H. Beitchman, et al., A Review of the Long-Term Effects of Child Sexual Abuse, 16 Child Abuse & Neglect 101 (1992); Judith L. Alpert, Retrospective Treatment of Incest Victims: Suggested Analytic Attitudes, 78 Psychoanalytic Rev. 425 (Fall 1991); Herman & Schatzow, supra, at 2; Judith Herman, et al., Long-Term Effects of Incestuous Abuse in Childhood, 143 Am. J. Psychiatry 1293 (1986); Wiehe & Herring, supra, at 96-115.

Research indicates that survivors of incest are especially harmed by violent sexual abuse that involves a high degree of physical violation (such as vaginal, anal or oral penetration) or that occurs over a long period of time. Herman, et al., Long-Term Effects of Incestuous Abuse in Childhood, 143 Am. J. Psychiatry 1293, 1295 (1986); Joseph H. Beitchman, et al., A Review of the Long-Term Effects of Child Sexual Abuse, 16 Child Abuse & Neglect 110, 112-115 (1992); Leslie Young, supra, at 90. The appellants allege they experienced violent, highly violative abuse that continued over a long period of time, J.A. at 5-6, which indicates that their abuse was particularly damaging.

The symptoms of incest survivors are so severe that they fit the diagnostic criteria of post-traumatic stress disorder, Frederick H. Lindberg & Lois J. Distad, Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest, 9 Child Abuse & Neglect 329 (1985), which is caused by experiencing an unusually traumatic event not within the range of ordinary human experiences and is characterized by persistent reexperiencing of the trauma, a numbing of emotions associated with the trauma, and an increased and abnormal sense of anxiety. Diagnostic and Statistical Manual of Mental Disorders 247-51 (3d ed. rev.) (DSM-III-R, American Psychiatric Association, 1987).

D. Sibling Incest Is At Least As Traumatic
As Other Forms Of Sexual Abuse

Sibling incest can be and often is as psychologically disturbing as parental incest and other forms of sexual abuse:

A recent [unpublished] study comparing the experiences and affective reactions of adult women survivors of brother-sister sexual abuse with adult women survivors of father-daughter incest found no differences between the groups in the frequency of reported self-abusive behaviors, physical problems, or level of guilt and shame about the experiences.

Michael J. O'Brien, Taking Sibling Incest Seriously, in Family Sexual Abuse: Frontline Research and Evaluation 75-76 (1991) (citation omitted); see also Dr. Susan Forward & Craig Buck, Betrayal of Innocence: Incest and its Devastation 83 (1978) ("a sibling victim can be as severely traumatized as any victim of an adult aggressor"). In addition, experts generally consider sibling incest to be the most frequent type of incest. See, e.g., Wiehe & Herring, supra, at 46; Margaret M. Canavan, et al., The Female Experience of Sibling Incest, 18 J. Marital & Family Therapy 129 (1992); Allan R. De Jong, M.D., Sexual Interactions among Siblings and Cousins: Experimentation or Exploitation?, 13 Child Abuse & Neglect 271 (1989). In his book considering 150 cases of sibling incest, Vernon Wiehe notes:

sibling sex abusers are worse than other sex offenders, whose victims may be inside or outside the family. Sibling sex abusers commit more sex

crimes for more years and often practice intrusive sexual behavior like vaginal penetration. . . . [B]ecause the victims are always within reach of their siblings, these crimes are long-term.

Wiehe & Herring, supra, at 45. See also O'Brien, supra, at 88. Researchers have successfully challenged the myth that sibling incest is benign or mutual.¹⁰ "The relationship between big brothers and little sisters contains many of the same elements as relationships between fathers and daughters." 11 Ellen Cole, Sibling Incest: The Myth of Benign Sibling Incest, 1 *Women & Therapy* 79, 88 (1982). See also Forward & Buck, supra, at 89 ("[t]he older brother is often a father figure to his sister . . . The trust that is betrayed here is very close to that of father-daughter incest"); Russell, supra, at 292.

¹⁰ 11 Ellen Cole, Sibling Incest: The Myth of Benign Sibling Incest, 1 *Women & Therapy* 79 (1982) (arguing that "[s]ibling incest can be, and often is, as traumatizing as sexual abuse of a child by an adult"); Russell, supra, at 270; De Jong, supra, at 277 (all 84 cases of sibling and cousin incest studied are interpreted as abusive, using age, coercion and attempted penetration as criteria); Marisa Laviola, Effects of Older Brother-Younger Sister Incest: A Study of the Dynamics of 17 Cases, 16 *Child Abuse & Neglect* 409, 418 (1992) (all of the women studied were either coerced or forced into the incest); Canavan et al., supra, at 131 (noting that none of the authors had ever had clinical contact with women with a benign sibling incest experience); Holly Smith with Edie Israel, Sibling Incest: A Study of the Dynamics of 25 Cases, 11 *Child Abuse & Neglect* 101 (1987) (noting that sibling incest is underreported and misunderstood).

The appellants' alleged experience of violent sexual abuse involving both their brother and his friends is similar to the experiences of other survivors of sibling sexual abuse.¹¹ The continuation of abuse into the appellants' teenage years is also common.¹²

As a result of their traumatic experience, sibling incest survivors, like other incest survivors, may repress memories of the abuse or deny the impact of the abuse. Wiehe & Herring, supra, at 46, 49-50 (discussing repressed memories of sibling incest survivors); De Jong, supra, at 278 (sibling victims' denial masks the negative effects of

¹¹ "Often older brothers gang up or bring in their friends." Cole, supra, at 85 (citation omitted); Canavan, et al., supra, at 136 ("Boys in two families [out of four discussed] apparently had a sense of ownership of their sisters, 'trading' or selling them to friends" for sexual purposes); Wiehe & Herring, supra, at 51-53 (describing cases of sibling incest in which the brothers' friends were involved); De Jong, supra, at 275 (a majority of the cases studied involved force or threats); Forward & Buck, supra, at 89 ("[t]he older brother is usually much larger and stronger than his younger sister, and his abuse often takes the form of forcible rape").

It is also not unusual that the appellee allegedly abused both of his sisters. In a study of fifty sibling incest offenders, more than half of the offenders had two or more victims. O'Brien, supra, at 79-80.

¹² Wiehe & Herring, supra, at 48; Finkelhor, supra, at 175 (approximately one-quarter of the cases of sibling incest occurred during the teenage years or later); Russell, supra, at 276; see also Herman & Schatzow, supra, at 4 (average of 5 years for duration of abuse in sample of 53 women).

the abuse); Canavan, et al., supra, at 140 (discussing "denial of impact" phenomenon in survivors of sibling incest). Accordingly, application of the discovery rule is appropriate in cases of sibling incest.

E. Scholarly And Judicial Authorities Provide Guidance For Application Of The Discovery Rule

In considering statutes of limitation defenses in cases brought by adult survivors of childhood sexual abuse, both federal¹³ and state¹⁴ courts have recognized the unique trauma of victims of incest and other forms of childhood sexual abuse. As the Michigan Court of Appeals recently stated:

that sexual molestation of children exists, is extensive and leaves deep scars on its victims can no longer be seriously questioned. Adults who have repressed child sexual abuse bring to the courts unusual circumstances and injuries not readily conforming to the ordinary constructs on which periods of limitations are imposed.

¹³ See, e.g., Hewczuk v. Somber, 803 F. Supp. 1063 (E.D. Pa. 1992); Phillips v. Sugrue, 800 F. Supp. 789 (E.D. Ark. 1992); Hoult v. Hoult, 792 F. Supp. 143 (D. Mass. 1992); Nicolette v. Carey, 751 F. Supp. 695 (W.D. Mich. 1990); Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990).

¹⁴ Lemmerman v. Fealk, No. 131850, ___ N.W.2d ___, 1993 WL 371597 (Mich. App. Sept. 20, 1993); Schultz-Lewis Child & Family Services, Inc. v. Doe, 604 N.E.2d 1206 (Ind. Ct. App. 1992); Phillips v. Johnson, 599 N.E.2d 4 (Ill. App. Ct. 1992); Evans v. Eckelman, 265 Cal. Rptr. 605, 609, 610 (Cal. Ct. App. 1990); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987), review denied, 144 Wis. 2d 954 (Wis. 1988).

Lemmerman, 1993 WL 371597, at *3. See also Petersen, 792 P.2d 18, 22 (Nev. 1990) ("Ofttimes survivors of [child sexual abuse] are beset with such crippling symptoms as guilt, anxiety, embarrassment, depression, and fear over protracted periods of time.") (footnote omitted).

Legal commentators overwhelmingly advocate application of the discovery rule to cases brought by adult survivors of childhood sexual abuse.¹⁵ One commentator persuasively argues that:

If sexual abuse of young children is a pattern of behavior that we as a society abhor and want to eliminate, there is no justification for maintaining a system of law that prevents survivors from holding their abusers accountable. The judiciary

¹⁵ See, e.g., Kristin E. Rodgers, Comment, Childhood Sexual Abuse: Perceptions on Tolling the Statute of Limitations, J. Contemp. Health L. & Pol'y 309 (1992); Norrie Cleavelander, Note, Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil Actions Against Their Perpetrators After Attaining the Age of Majority, 30 J. Fam. L. 447 (1991-92); Lisa Bickel, Note, Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse, 33 Ariz. L. Rev. 427 (1991); Ann Marie Hagen, Note, Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse, 76 Iowa L. Rev. 355 (1991); Jocelyn B. Lamm, Note, Easing the Access to Courts for Incest Victims, 100 Yale L.J. 2189 (1991); Cook & Millsaps, 26 U. Rich. L. Rev. 1; Rebecca L. Thomas, Note, Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations, 26 Wake Forest L. Rev. 1245 (1991); Carol W. Napier, Civil Incest Suits: Getting Beyond the Statutes of Limitations, 68 Wash. U. L.Q. 995 (1990); James Wilson Harshaw III, Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation, 50 Ohio St. L.J. 753 (1989).

must recognize and come to understand the trauma and long-term effects of childhood sexual abuse and must allow survivors their day in court.

Alan Rosenfeld, The Statute of Limitations Barrier in Childhood Sexual Abuse Cases, 12 Harv. Women's L.J. 206, 219 (1989).

Even though courts are more willing to apply the discovery rule when, as in this case, the plaintiffs allege they have repressed all memories of the abuse, the discovery rule should apply to cases in which the incest survivor is aware of the abuse but is reasonably unaware of the connection between the abuse and her injuries as well as to cases in which the survivor completely represses her abuse.¹⁶ The distinction between those plaintiffs who have no recollection of the abuse and those who recall the abuse but do not understand the causal connection between their injuries and the defendant's conduct is artificial, and those courts allowing the plaintiff to proceed even if she partially or

¹⁶ See, e.g., Johnson v. Johnson, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988) (distinguishing between so-called "type 1" cases, in which the plaintiff knows of the sexual assaults but is unaware that her physical and psychological problems were caused by the sexual abuse, and so-called "type 2" cases, in which the plaintiff represses all memories of the sexual abuse until shortly before filing suit); Messina v. Bonner, 813 F. Supp. 346 (E.D. Pa. 1993) ("type 1" case in which the court refused to apply the discovery rule).

fully recalls her abuse take the better-reasoned approach.¹⁷ As the above discussion demonstrates, it is just as reasonable for incest survivors to fail to understand the causal connection between their injuries and the defendants' wrongs as a result of mechanisms such as denial and self-blame as it is for incest survivors to repress memories of the abuse altogether. The court in Hildebrand v. Hildebrand, in which the plaintiff incest survivor did not repress the memory of her abuse, recognized that:

the nature of incestuous sexual abuse and its concomitant trauma often makes the victim internalize her fear and anger. . . . Indeed, the most common signs of such trauma -- self-blame, low self-esteem and depression -- correspond exactly to the symptoms [plaintiff] alleges. This internalization, in turn, prevents a victim from realizing that her psychological problems were caused by the abuse, or by any external event.

¹⁷ See, e.g., Hildebrand, 736 F. Supp. at 1521; Hammer, 418 N.W.2d at 26 (court applied discovery rule in case in which plaintiff knew of her abuse but did not know it caused her injuries); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) (affirming trial court's conclusion that the plaintiff's severe emotional trauma from incest resulted in plaintiff's being unable to fully understand or discover her cause of action during applicable statutory limitations period, even though plaintiff did not allege repression of memory); Schultz-Lewis Child & Family Services, Inc. v. Doe, 604 N.E.2d 1206 (Ind. Ct. App. 1992) (plaintiffs' allegations of partial repression and unawareness of causal connection between injuries and molestations were sufficient to deny defendants' motion for summary judgment).

736 F. Supp. at 1521. Similarly, the court in Evans v.

Eckelman stated:

It has been widely recognized that the shock and confusion engendered by parental molestation, together with the parent's demands for secrecy, may lead a child to deny or block the traumatic events from conscious memory, or to turn the anger and pain inward so that the child blames himself or herself for the events. . . . Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts.

265 Cal. Rptr. at 608-9. Most commentators are also of the view that the statute of limitations "should begin to run only when the incest victim is aware of all the elements of her cause of action, including the abusive acts, the harm suffered, and the causal connection between the two."¹⁸

III.

THE DISTRICT COURT MISCONSTRUED PRIOR CASES AND IMPROPERLY EVALUATED THE MERITS OF APPELLANTS' CASE

In refusing to apply the discovery rule, the district court misconstrued prior cases and was improperly influenced by a premature and erroneous assessment of the merits of appellants' case. The district court relied on two factors which it erroneously asserted distinguished prior cases applying the discovery rule. First, it stated that the dis-

¹⁸ Napier, 68 Wash. U.L.Q. at 1018. See also Carolyn B. Handler, Note, Civil Claims of Adults Molested as Children, 15 Fordham Urb. L.J. 709, 742 (1987); Hagen, 76 Iowa L. Rev. at 357.

covery rule applies only if there is "a relationship between the plaintiff and defendant at the time the wrong was committed that justified the former's reliance upon the latter's skill or superior knowledge." J.A. at 80. Second, the district court maintained that the discovery rule should not apply because appellants's injury is "purely psychic" and, therefore, supposedly unverifiable. J.A. at 81. In addition, the trial court prematurely and erroneously suggested not only that the expert evidence the appellants might later present would be unreliable, but also that the appellants' alleged incest was not traumatic.

An evaluation of the merits of the appellants' case in the context of a motion to dismiss is improper because the court has not heard any evidence and must accept a plaintiff's factual allegations as true, resolving any ambiguities or doubts in favor of the plaintiff. See Doe v. United States Dep't of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985) (discussing standard for motion to dismiss and noting that such motions are "viewed with disfavor and rarely granted"). Appellants should have the opportunity to present expert and other evidence regarding their injuries and the cause of such injuries.

A. A Special Relationship Between The Defendant
And The Plaintiff Is Not A Prerequisite To
Application Of The Discovery Rule

The discovery rule applies not because of the relationship between the plaintiff and defendant, as the trial court incorrectly suggests, but rather because of the nature of the injury. See Bussineau v. President & Director of Georgetown, 518 A.2d 423, 426 (D.C. 1986). Although many cases applying the discovery rule involve a relationship in which the plaintiff relied on the skill or superior knowledge of the defendant, such a relationship is not a prerequisite to application of the discovery rule. That such a relationship has often been present is merely due to the discovery rule's frequent application in professional malpractice cases. However, the rule has long been applied in the District of Columbia in other contexts such as product liability and fraud cases, which do not involve such a relationship. See, e.g., Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116 n.27 (D.C. Cir. 1982) (products liability case; stating that "[n]othing . . . implies that the rule should be limited to claims for relief alleging professional malpractice"); Fontana v. Aetna Casualty & Surety Co., 363 F.2d 297, 300 (D.C. Cir. 1966) (fraud case; no special relationship).

B. The Discovery Rule Has Been And Should Be Applied To Cases Involving Psychological Injuries

The district court cites no authority in support of its conclusion that the discovery rule may not be applied because the appellants' injuries are psychological and therefore not verifiable.¹⁹ See J.A. at 81. District of Columbia cases have applied the discovery rule in cases involving psychological injuries. See, e.g., Shachtman, No. Civ. A. 89-0564, 1990 WL 134505 (applying discovery rule in case alleging negligent and intentional infliction of emotional injuries); Shamloo, 713 F. Supp. 14 (same). Indeed, the discovery rule is particularly appropriate in such cases because "the fact that an individual develops psychological problems, even severe ones, is not sufficient in itself to put a reasonable person on notice that they have been injured." Shamloo, 713 F. Supp. at 18.

Furthermore, in asserting that appellants' claims are solely of unverifiable psychological injuries, the court

¹⁹ Evidence other than expert psychological testimony may well be available to incest survivors. For instance, the defendant may admit the abuse or there may be witnesses (such as the defendant's friends or a sibling who shared a room with the victim) or physical evidence (such as hospital records, photographs or letters).

In one study of childhood sexual abuse, 74% of those participating were able to confirm their memories of sexual abuse with another source, while 11% made no attempt to corroborate their recollected experiences. Herman & Schatzow, supra, at 10.

overlooked appellants' allegations of physical injuries, including eating and sleep disorders. J.A. at 9-10. Cases of incestuous abuse include, by their nature, the often severe physical injuries resulting from the molestations.

C. The Trial Court Prematurely And Erroneously Evaluated The Quality Of Appellants' Expected Evidence

The district court improperly concluded that any expert testimony that might later be presented by appellants would be unreliable, and, in so concluding, usurped the function of the fact-finder. See J.A. at 81. In a similar case brought by an adult plaintiff against her uncle arising out of childhood sexual abuse, the appellate court found that "the trial court improperly considered the reliability of plaintiff's anticipated evidence in ruling on a motion to dismiss the complaint. Psychological evidence is generally admissible, assuming that relevancy and foundational requirements are met, and determination of credibility and weight are matters for the trier of fact." Phillips v. Johnson, 599 N.E.2d 4, 7 (Ill. App. Ct. 1992). See also Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) ("concern about the availability of objective evidence should not preclude application of the discovery rule" in case affirming an award of damages to an adult daughter who sued her father for childhood sexual abuse). The following criticism of the Tyson case, a case which was relied on by the dis-

trict court, is also applicable to the district court's decision:

[a]pplication of the discovery doctrine would have permitted Ms. Tyson to pursue her claims to the evidentiary stage, at which point proof of her claims would have had to satisfy the finder of fact for actual recovery. Whether plaintiff's ultimate proof will be objective, verifiable and capable of proof is irrelevant to the issue of the statute of limitations.

Cook & Millsaps, 26 U. Rich. L. Rev. at 29 (1991). Finally, the district court's rejection of the validity of expert psychiatric testimony constitutes a "denigration of mental health professionals' contribution to our justice system." Tyson v. Tyson, 727 P.2d 226, 232-37 (Wash. 1986) (dissenting opinion).

D. The Trial Court Prematurely And Erroneously Assumed That The Alleged Incest Was Not Traumatic

1. The Trial Court Erred In Stating That The Appellants Should Have Stopped The Abuse

The trial court's decision was apparently influenced, in the absence of any evidence, by several misconceptions regarding the nature of incest. The trial court's assertion that, because the abuse continued beyond the appellants' "childhood" years, the appellants should have been aware of the wrongful character of the incest and should have stopped it, J.A. at 81, is victim-blaming which incorrectly presumes that a minor is in full, adult, objective, and deliberative possession of the situation. Yet the law of the District of

Columbia recognizes generally that minors cannot appreciate the legal significance of events and therefore tolls the statute of limitations until the child is 18 years of age. See D.C. Code § 12-302. Further, the above discussion of the long-term effects of incest demonstrates that a minor has only a confused sense of what has happened, and an adult survivor of incest often realizes her damage only after extensive therapy.

Courts applying the discovery rule have correctly acknowledged that the negative effects of incest may not even surface until later adulthood. "[T]he victim of incest reaches adulthood without the benefits of childhood. Some parts of her personality are hyperdeveloped . . . at the expense of other parts" Gelinas, supra, at 322. As one commentator notes:

The law presumes that upon reaching majority the child understands enough about herself, the wrong, its nature, and the law to file an action against her abuser. This presumption incorrectly assumes that the age of majority is the age of maturity If a child is abused most of her "under majority" life, her maturity and her psyche are often drastically affected.

Harshaw, 50 Ohio St. L.J. at 758 (footnote omitted). The Supreme Court of Nevada recognized that:

child victims of sexual abuse suffer from a form of personal intrusion on their mental and emotional makeup that interferes with normal emotional and personality development. As a result, the adverse effects of such abuse may perceptibly

increase for prolonged periods, if not an entire lifetime.

Petersen v. Bruen, 792 P.2d at 24 (footnote omitted). The Supreme Court of Iowa cites the following with approval:²⁰

"The child's damaged psyche and weakened ability to perceive right and wrong hinders the child from taking self-protective measures. It is fundamental that in order for a person to take action for a wrong, that person must perceive it as a wrong. . . . The sexually abused child's world is very often a confused one and thus she may be greatly disabled both in her ability to perceive wrongs and to take appropriate legal action. The people she normally should be able to trust for protection and moral guidance are often the ones hurting her."

Callahan v. State of Iowa, 464 N.W.2d 268, 271 (Iowa 1990)
(quoting Harshaw, 50 Ohio St. L.J. 753).

²⁰ As previously discussed, appellants' failure to disclose and possibly stop the abuse when it occurred is typical, particularly in cases involving threats of violence such as those allegedly employed by the appellee. Finkelhor, supra, at 180 (finding only 12% of the respondents involved in sibling incest reported their experiences to anyone; those involved in the most exploitative experiences were the least likely to reveal their abuse); Wiehe & Herring, supra, at 62-64 (most sibling victims do not fight back or even tell of their abuse, particularly when threats and force are involved); Laviola, supra, at 419 (most sisters do not disclose the abuse). Furthermore, "victims of sibling incest are likely to be implicated gradually as coconspirators by the abusive sibling so they will share in the responsibility, blame, and punishment for the behavior if the 'secret' is disclosed. Once established, this dynamic makes it difficult for victims to resist offenders' more intrusive sexual demands." O'Brien, supra, at 79.

In applying the discovery rule, courts have recognized the complexity of incest dynamics. For instance, in a case alleging paternal sexual and physical abuse, the district court stated:

[t]his court cannot conclude as a matter of law that Susan ascertained her injuries back in the early 1980's; whether she did or should have ascertained her injuries is a question to be resolved by the jury. . . . When dealing with subtle issues of psychological injuries, a court should hesitate to intrude on the factfinding prerogative of the jury.

Hildebrand, 736 F. Supp. at 1523. See also Schactman, 1990 WL 134505, at *4 (where dealing with mental and emotional injuries, "questions of fact exist which are within the exclusive province of the jury to resolve"). In sum, courts should determine the "appropriate" response of incest victims only after the plaintiff has had the opportunity to present her case and the court understands the complex dynamics of incest.

2. The Trial Court Improperly Focused
On The Age Difference Between Appellants And
Their Alleged Abuser

The trial court discounted appellants' alleged injuries in part because of the trial court's subjective opinion that the age difference between the appellants and their brother was not significant. See J.A. at 81. However, focusing on the age difference of siblings alone as a means for determining the level of violation in incest cases ignores the

physical and societal power differences between males and females:

[T]he power differential between males and females appears significant in all four of our cases. Age differentials are not the only determinations of power. James and MacKinnon's . . . critique of family-systems based theories of incest dynamics and treatment emphasizes the importance of the power differential between siblings of different genders, regardless of age difference. A female child may have difficulty refusing sexual contact with a male sibling, even if they are very close in age, because of the relatively greater power of males in the family and social context.

Canavan et al., supra, at 137. Dr. Marisa Laviola states "it is essential for the clinician to recognize that such incest can have a negative and long-lasting impact on women, regardless of age differential between the siblings." Laviola, supra, 419. The age difference between the plaintiffs and the defendant of four years and eight years is, however, significant because "[e]ven a one-year age difference between siblings has enormous power implications for both parties." Russell, supra, at 292. In addition, experts have "found no statistically significant relationship between the age disparity between the victimized sisters and their brothers and the degree of trauma reported." Id. at 284.

CONCLUSION

Childhood sexual abuse is a national problem of overwhelming proportion. Studies indicate that approximately

20% to 40% of women have suffered at least one experience of childhood sexual abuse and that approximately 15% of women have suffered experiences of incestuous childhood sexual abuse.²¹ Victims of incest deserve a meaningful legal remedy.

Since most children do not have the capacity to understand, much less to reveal, their abuse while it is ongoing and since most reported cases are not prosecuted successfully to conviction, criminal remedies are inadequate.²² A tort remedy may deter childhood sexual abuse and is necessary to provide compensatory damages to incest victims who often require expensive psychiatric treatment and who may suffer from lost wages. This Court should follow the growing trend of judicial authority in providing access to redress for incest victims by applying the discovery rule to

²¹ In Diana Russell's study of 930 women in San Francisco, 38% reported an experience of sexual abuse before reaching age 18, and 16% reported an experience of incest before reaching age 18. Russell, supra, at 61. In a study of 796 college students, 19% of the women and 9% of the men reported an experience of childhood sexual abuse, with 15% of the women and 10% of the men reporting a sexual experience with a sibling. Finkelhor, supra, at 267; David Finkelhor, Sex Among Siblings: A Survey on Prevalence, Variety and Effects, 9 Archive of Sexual Behavior 171, 174 (1980).

²² See Thomas, 26 Wake Forest L. Rev. at 1248; Lamm, 100 Yale L.J. at 2189; Russell, supra, at 85-86 (only 5% of the 648 cases of childhood sexual abuse were reported to the police and only 1% of the cases resulted in a conviction).

this case. Application of the discovery rule would allow the appellants to prove that their harm resulted from the appellee's allegedly violent abuse and would be fully consistent with District of Columbia precedent.

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Respectfully Submitted,

Deborah A. Ellis by DMJ

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