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## **Child Sexual Abuse by Clergy: Statute of Limitations and Repose Challenges**

The Illinois Appellate Court's *Wisniewski* decision holds that a Catholic diocese's fraudulent concealment of abuse by its priest tolls the statutes of limitation and repose, allowing a now middle-aged victim to collect against the diocese. This article looks at the decision and the law governing clergy abuse litigation.

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**A** 2011 decision by the Illinois Appellate Court, Fifth District, has continued a trend by the Illinois legislature toward allowing victims of clergy sex abuse access to court. Previously, many lawyers would have turned away these victims because their claims are based on sexual abuse from the 1960s, 1970s, and 1980s and thus time-barred by statutes of limitation and repose.

However, in *Wisniewski v. Diocese of Belleville*,<sup>1</sup> the fifth district affirmed a jury's finding of fact that the Roman Catholic Archdiocese of Belleville held a position of trust and confidence over the plaintiff, a former altar boy who was sexually abused by a diocesan priest between 1973 and 1978. Because of this position of trust and confidence, the appellate court recognized that the archdiocese had a special relationship with the plaintiff, and therefore owed him a duty of care.

The *Wisniewski* court found that when such a special relationship exists, the defendant diocese has an affirmative duty to reveal to the plaintiff facts that would enable him to discover his cause of action against the archdiocese because of sexual abuse. The diocese's silence in spite of knowing its priest's long history of abusing minors amounted to fraudulent concealment, which prevented the plaintiff from discovering his cause of action until 2002 – almost 24 years after the abuse ended.

From roughly the 1950s to the 1980s, child sexual abuse by clergy occurred across the country virtually unchecked.<sup>2</sup> Churches often hid allegations of sexual abuse to protect the institution.<sup>3</sup> For decades victims faced pressure by abusers and senior church officials to refrain from doing anything that could be considered disloyal to the church. The shame and guilt borne of clerical sexual abuse is “so strong that people keep it silent for years, well into adulthood.”<sup>4</sup>

Prior to *Wisniewski*, the Illinois statutes of limitations and repose were overwhelming obstacles to victims of childhood sexual abuse at the hands of clergy members because victims could not discover that their injury was wrongfully caused by the actions of religious institutions until well after the limitations and repose periods had expired. The *Wisniewski* decision now gives such plaintiffs a powerful tool to overcome these defenses when it can be shown that in-

stitutions have fraudulently concealed causes of action arising out of the childhood sexual abuse of the plaintiffs by clergy.

This article reviews the bases for the institutional liability of religious organizations for the actions of their clergy, the limitations and repose defenses available to church defendants under Illinois law, and the impact of *Wisniewski* on practitioners handling sexual abuse claims against church organizations.

#### **The liability of religious organizations for sexual abuse**

First, some background. While Illinois does not recognize a cause of action for “clergy malpractice,” religious organizations and orders as institutions can be liable in tort for the sexual abuse perpetrated by their members. In *Malicki v. Doe*, the Florida Supreme Court held that an action by a victim of clergy sexual abuse against a church for negligent hiring and supervision was not barred by the Free Exercise and Establishment Clauses of the First Amendment, because the claims were neutral applications of tort law.<sup>5</sup> Illinois courts have agreed with the Florida Supreme Court that tort actions against a church or diocese do not conflict with the First Amendment.<sup>6</sup>

Religious organizations are exposed to causes of action for negligent hiring and negligent supervision.<sup>7</sup> In Illinois, to prove negligent hiring the plaintiff must show: (1) the employer knew or should have known that the employee had a particular unfitness for the position; (2) such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) this particular unfitness proximately

caused the plaintiff's injuries.<sup>8</sup> To prove negligent supervision, the plaintiff must show that the employer knew or should have known its employee behaved in a dangerous manner, and that the employer, having this knowledge, failed to supervise the employee adequately, or take other action to prevent the harm.<sup>9</sup>

#### **Applicable statutes of limitations and repose**

Because the harm from childhood sexual abuse often does not manifest itself until many years after the abuse, defendant religious institutions commonly raise defenses to such claims based on the Illinois statutes of limitations and repose. A statute of limitations begins to run on the date the plaintiff's cause of action accrues, and in Illinois personal

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injury actions, that usually occurs on the date of the injury.<sup>10</sup>

However, the application of this general rule would be unduly harsh if it barred a plaintiff from bringing suit before the plaintiff was even aware that he

1. 406 Ill.App.3d 1119, 943 N.E.2d 43 (5th Dist. 2011).

2. City University of New York John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2001*, 7 (2004).

3. Constance Fain & Herbert Fain, *Sexual Abuse and the Church*, 31 T. Marshall L. Rev. 209, 226 (2006).

4. The National Review Board for the Protection of Children and Young People, *A Report on the Crisis in the Catholic Church in the United States*, (February 27, 2004).

5. 814 So.2d 347, 365 (Fla. 2002).

6. See *Wisniewski*, 406 Ill.App.3d at 1175, 943 N.E.2d at 89.

7. See *Doe v. Brouillette*, 389 Ill.App.3d 595, 605-07, 906 N.E.2d 105, 115-17 (1st Dist. 2009).

8. *Van Horne v. Muller*, 185 Ill.2d 299, 311, 705 N.E.2d 898, 904 (1998).

9. *Brouillette*, 389 Ill.App.3d at 605-06, 906 N.E.2d at 115-16.

10. *Golla v. General Motors Corp.*, 167 Ill.2d 353, 360, 657 N.E.2d 894, 898 (1995).

was injured.<sup>11</sup> Thus, the “discovery rule” in Illinois postpones the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused.

A statute of repose, however, is designed to place an outer limit on the “long tail” of liability created by the common law discovery rule.<sup>12</sup> Statutes of repose do not incorporate the discovery

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rule and generally terminate claims regardless of a plaintiff’s lack of knowledge of his or her cause of action.<sup>13</sup>

Although a statute of repose does not normally incorporate the discovery rule, under Illinois law a statute of repose can be tolled if a plaintiff does not discover his claim due to fraudulent concealment on the part of the defendant. In *DeLuna v. Burciaga*, the Illinois Supreme Court held that a defendant’s fraudulent concealment can toll the running of a statute of repose because “there would be an obvious and gross injustice in a rule that allows a defendant – particularly a defendant who stands in a fiduciary relationship to the plaintiff – to conceal the plaintiff’s cause of action and then benefit from a statute of repose.”<sup>14</sup>

Over the last 20 years, the Illinois legislature has amended the statute of limitations and statute of repose for childhood sexual abuse actions on multiple occasions. Prior to January 1, 1991, Illinois did not have a statute of repose applicable to personal injury claims arising from childhood sexual abuse. Instead, the Illinois general statute of limitations for personal injury actions applied to sexual abuse claims, which required plaintiffs to file their claims within two years from the date the cause of action accrued.<sup>15</sup>

On January 1, 1991, the Illinois General Assembly added section 13–202.2

to the Illinois Code of Civil Procedure, which established a statute of repose applicable to childhood sexual abuse cases. When enacted in 1991, Section “b” of the statute read:

(b) An action for damages for personal injury based on childhood sexual abuse must be commenced within 2 years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse, but in no event may an action for personal injury based on childhood sexual abuse be commenced more than 12 years after the date on which the person abused attains the age of 18 years.<sup>16</sup> Thus, Section 13-202.2(b), as enacted in 1991, contained a 2-year statute of limitations and a statute of repose which effectively “cut-off” a defendant’s liability once a plaintiff reached 30 years of age.<sup>17</sup>

Effective January 1, 1994, the Illinois legislature eliminated the 12-year statute of repose for childhood sexual abuse claims. After the 1994 amendment, section 13–202.2(b) stated:

(b) An action for damages for personal injury based on childhood sexual abuse must be commenced within 2 years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse.<sup>18</sup>

In 2003, the Illinois legislature extended the limitations period from 2 to 5 years for childhood sexual abuse cases, while allowing a plaintiff less than 28 years of age to file an action even if the discovery period had elapsed:

(b) Notwithstanding any other provision of law, an action for damages for personal injury based on childhood sexual abuse must be commenced within 10 years of the date the limitation period begins to run under subsection (d) or within 5 years of the date the person abused discovers or through the use of reasonable diligence should discover both (i) that the act of childhood sexual abuse occurred and (ii) that the injury was caused by the childhood sexual abuse. The fact that the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred is not, by itself, sufficient to start the discovery period under this subsection

(b). Knowledge of the abuse does not constitute discovery of the injury or the causal relationship between any later-discovered injury and the abuse.

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(d) The limitation periods under subsection (b) do not begin to run before the person abused attains the age of 18 years; and, if at the time the person abused attains the age of 18 years he or she is under other legal disability, the limitation periods under subsection (b) do not begin to run until the removal of the disability.

The Illinois legislature emphasized in the 2003 amendment to the limitations statute that “[k]nowledge of the abuse does not constitute discovery of the injury or the causal relationship between any later-discovered injury and the abuse.”<sup>19</sup>

In 2010, the Illinois legislature gave plaintiffs even more time to commence tort actions arising out of childhood sexual abuse:

(b) Notwithstanding any other provision of law, an action for damages for personal injury based on childhood sexual abuse must be commenced within 20 years of the date the limitation period begins to run under subsection (d) or within 20 years of the date the person abused discovers or through the use of reasonable diligence should discover both (i) that the act of childhood sexual abuse occurred and (ii) that the injury was caused by the childhood sexual abuse. . .<sup>20</sup>

Despite this clear trend toward opening up the courts to victims of sexual abuse, these victims face another obstacle: the repeal by the Illinois legislature of the 1991 statute of repose, and later changes to the statute of limitations, cannot be applied retroactively to revive claims that had expired prior to the repeal of the repose provision, or the extensions to the limitations period. The Illinois Supreme Court has held that the Illinois Constitution does not permit retroactive application of amendments to section 13–202.2(b) to revive otherwise time-barred claims for childhood sexual

11. *Id.*

12. *Hester v. Diaz*, 346 Ill.App.3d 550, 553, 805 N.E.2d 255, 259 (5th Dist. 2004).

13. *Goodman v. Harbor Market, Ltd.*, 278 Ill.App.3d 684, 690–91, 633 N.E.2d 13, 18 (5th Dist. 1995).

14. *DeLuna*, 223 Ill.2d 49, 71, 857 N.E.2d 229, 242 (2006).

15. 735 ILCS 5/2-202.

16. Ill. Rev. Stat. 1991, ch. 110, ¶ 13–202.2(b).

17. *Doe A. v. Diocese of Dallas*, 234 Ill.2d 393, 408, 917 N.E.2d 475, 484 (2009).

18. 735 ILCS 5/13–202.2(b) (West 1994).

19. 735 ILCS 5/13–202.2 (West 2003).

20. 735 ILCS 5/13–202.2 (West 2010).



abuse.<sup>21</sup> The court stated, “[I]f the claims were time-barred under the old law, they remained time-barred even after the repose period was abolished by the legislature.”<sup>22</sup>

Thus the problem for practitioners handling sexual abuse claims against religious organizations is this: *How to pursue claims for victims of sexual abuse in the 1960s, 1970s, and 1980s, when in many cases the victims have not been able to discover until the last few years that the malfeasance of church organizations was responsible for their injury?*

### The Wisniewski case

The theory of fraudulent concealment proved to be crucial to the victim’s success in *Wisniewski v. Diocese of Belleville*.<sup>23</sup> In *Wisniewski*, the victim, born in 1961, was sexually abused by a diocesan priest from 1973 through 1978. The victim repressed memories of the abuse until 2002, when he was exposed to media reports on the Archdiocese of Boston priest abuse scandal. The publicity from the priest scandal led the plaintiff to 1) recall his sexual abuse at the hands of the Diocese of Belleville’s priest many years earlier, and 2) inquire with the Diocese regarding the offending priest.

Fraudulent concealment is not a cause of action on its own; instead it acts as an exception to time limitations imposed on causes of action.<sup>24</sup> The plaintiff has the burden of pleading fraudulent concealment when a defendant raises the statute of limitations as a defense.<sup>25</sup> The tolling effect of fraudulent concealment is equitable in nature.<sup>26</sup> Therefore, the defendant is estopped from raising the statute of limitations as a defense because through the defendant’s own actions, the plaintiff’s complaint was untimely.<sup>27</sup>

At trial in *Wisniewski*, the victim showed that the priest used numerous coercive tactics to keep him quiet about the abuse. The victim also demonstrated that the diocese was aware of multiple instances of sexual abuse by the priest,

but still transferred him to new assignments with unmonitored access to children. Moreover, the diocese was aware that the priest used coercive methods to keep his victims quiet. The court held that the victim demonstrated a prima facie case of fraudulent concealment, and thus the issue of fraudulent concealment was a question of fact to be determined by the jury.

Because the jury found that the diocese fraudulently concealed the victim’s cause of action, the appellate court upheld the circuit court’s judgment on the verdict. The court explained that a reasonable jury could find that the church fraudulently concealed the priest’s abuse and this prevented the victim from discovering his injuries until much later in life. Also, the court held that the victim was under no obligation to search for wrongdoing by the diocese because the priest was engaged in activities that the victim could reasonably view as conduct the diocese would never tolerate.

The court pointed to multiple crucial aspects of the diocese’s conduct in reaching its decision on fraudulent concealment that will likely be present in many priest sexual abuse cases. A victim’s attorney in a priest sexual abuse case should look for similar actions taken by the respective church and diocese and use them to prove fraudulent concealment.

First, the court stressed that the victim and his family placed their trust and confidence in the diocese and the diocese not only accepted that trust and confidence but encouraged and promoted it.<sup>28</sup> This caused the victim’s family to wholeheartedly trust the diocese’s judgment on the priest and allow their child to spend a great deal of unsupervised time with him.

Second, officers of the diocese were aware – and maintained files with evidence – that the priest had abused several minor parishioners. Third and most importantly with respect to fraudulent concealment, the officers were aware that the offending priest’s method of abuse included positive coercion, such as representations that the abuse was a

“good thing.”<sup>29</sup> This awareness caused the officers’ silence to constitute fraudulent concealment because they were complicit in the priest misrepresenting the sexual abuse as a “good thing.”

The officers failed to contact the victim and stop the priest’s manipulation of the victim’s perception of the abuse. This directly contributed to the victim not discovering his injuries until 2002.

### Implications for practitioners

The *Wisniewski* opinion demonstrates that a plaintiff who was the victim of sexual abuse by a priest, minister, other clergy member, or representative of any other large institution dealing with children, even though the abuse occurred many years ago, may still have a viable cause of action for institutional negligence. The silence – and often outright refusal – by religious institutions to reach out to the victims of sexual abuse and assist them in pursuing justice has rightfully resulted in the loss of protection in Illinois from statutes of limitations and repose based on the doctrine of fraudulent concealment.

The Illinois legislature has shown through its recent amendments to the Child Sexual Abuse statute that Illinois intends to remove unfair impediments to childhood sexual abuse victims pursuing their claims in court. Only pressure from plaintiffs pursuing the discovery of the voluminous – and up to now undisclosed – files maintained by religious organizations will shed light on the injuries suffered by the victims, and how such injustice can be prevented in the future. ■

21. *Diocese of Dallas*, 234 Ill.2d at 409, 917 N.E.2d at 484.

22. *Id.*

23. 406 Ill.App.3d 1119, 943 N.E.2d 43.

24. See generally 735 ILCS 5/13-215.

25. *Cangemi v. Advocate South Suburban Hosp.*, 364 Ill.App.3d 446, 456, 845 N.E.2d 792, 803 (1st Dist. 2006).

26. *Id.* at 464, 845 N.E.2d at 809.

27. See generally *Cangemi*, 364 Ill.App.3d 446, 845 N.E.2d 792.

28. 406 Ill.App.3d at 1157, 943 N.E.2d at 76.

29. *Id.* at 1161, 943 N.E.2d at 78.