IN THE IOWA DISTRICT COURT IN AND FOR CLINTON COUNTY

JOHN DOE (I-A), Plaintiff, vs. FATHER JAMES JANSSEN and DIOCESE OF DAVENPORT, Defendants.	)	Law No. LA 29513 PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF RESISTANCE TO DEFENDANT DIOCESE'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, John Doe I-A, by and through his attorneys, Betty, Neuman & McMahon, L.L.P., and Jeff Anderson & Associates, P.A., and pursuant to Iowa Rule of Civil Procedure 1.981, hereby sets forth the following Memorandum of Authorities in Resistance to Defendant Diocese's Motion for Summary Judgment:

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INTRODUCTION

The Diocese of Davenport (the "Diocese") has moved this Court for summary judgment claiming that the statute of limitations had expired on John Doe I-A's claims prior to him filing the current lawsuit. The Diocese is in error because the statute of limitations in this matter was tolled due to John Doe I-A's mental illness and due to the fraudulent concealment of the Diocese. Further, the Diocese is equitably estopped from asserting the defense of statute of limitations because of its own conduct. As a result, the Diocese's Motion for Summary Judgment should be denied.

STATEMENT OF THE CASE

In 1967, Defendant Father Janssen sexually abused Plaintiff John Doe I-A. John Doe I-A has been suffering from mental illness as a result of the sexual abuse and molestation since he was a child.

As has been indicated in previous Resistances to similar Motions for Summary Judgment, shortly after Father Janssen's graduation from seminary, the Diocese of Davenport was warned of Janssen's "dangerous spirit of duplicity". As early as 1954, the Bishop of Davenport recorded that Janssen had solicited to "acts of impurity" with a St. Ambrose Academy student. At that time, St. Ambrose Academy included boys under the age of 18.

Following the first written complaint in 1954, the Davenport Diocese received numerous complaints about Janssen's improper sexual activities with youth in Newton, Chicago, Holbrook and Davenport. Janssen also confessed to such sexual improprieties to his Bishop.

John Doe I-A has received mental health counseling. Dr. Mark Schwartz has prepared an Affidavit and also prepared a psychological evaluation of John Doe I-A. It is Dr. Mark Schwartz's opinion that John Doe I-A suffered mental illness from the time of the abuse until he filed his lawsuit. It is further his opinion that John Doe I-A was unable, because of his mental illness, to file his lawsuit at any earlier date. John Doe I-A is treating for his mental illness and is under current treatment with a psychologist and psychiatrist.

On May 19, 2003, John Doe I-A filed his Petition alleging he was abused. In addition, John Doe I-A alleged that the Defendant Diocese had intentionally inflicted emotional distress and had breached their fiduciary duty to him.

STANDARD OF REVIEW

Under Iowa Rule of Civil Procedure 1.981(2), "[a] party against whom a claim . . . is sought may, at any time, move with or without supporting affidavits for summary judgment in [its] favor as to all or any part thereof." Iowa R. Civ. P. 1.981(2). The judgment sought shall be rendered forthwith only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. In determining whether the movant has met its burden under Iowa Rule of Civil Procedure 1.981(3), the Court should review the record in a light most favorable to the party opposing summary judgment. De Koning v. Mellema, 534 N.W.2d 391, 394 (Iowa 1995).

ARGUMENT

In the Diocese's Motion for Summary Judgment, the Diocese claims that John Doe I-A's claim is barred by the applicable Iowa statute of limitations. According to Defendant Diocese, the applicable statute of limitations in the current matter is Iowa Code Section 614.1 which provides in part:

> Actions may be brought within the times herein limited, respectively, after their causes of action accrue, and not afterwards, except when otherwise specially declared:

* * *

> 2. Injuries to person or reputation - - relative rights - - statute penalty. Those founded on injuries to the person or reputation, including injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

The statute of limitations in Iowa Code 614.1 was tolled because (1) John Doe I-A suffered from a mental illness; (2) the Defendant Diocese fraudulently concealed the causes of action from John Doe I-A, and (3) the Defendant Diocese is equitably estopped from asserting the statute of limitations as a defense due to its own conduct. Each of these issues is fully discussed below. As a result, John Doe I-A respectfully requests this Court to deny the Defendant Diocese Motion for Summary Judgment.

I. THE STATUTE OF LIMITATIONS WAS TOLLED BECAUSE JOHN DOE I-A WAS MENTALLY ILL UNDER IOWA CODE SECTION 614.8(1) AND SECTION 4.1(21A)

The statute of limitations is tolled in Iowa under Section 614.8(1), which provides as follows:

> "The times limited for actions in this chapter, except those brought for penalties and forfeitures, are extended in favor of persons with mental illness, so that they shall have one year from and after the termination of the disability within which to commence an action".

Iowa Code Section 614.8(1), (emphasis added).

"Persons with mental illness," as it appears in Iowa Code Section 614.8, is defined in Iowa Code Section 4.1(21A):

> "The words 'persons with mental illness' include persons with psychosis, persons who are severely depressed, and persons with any type of mental disease or disorder, except that mental illness does not refer to mental retardation as defined in Section 222.2, or to insanity, diminished responsibility, or mental incompetency as defined and used in the Iowa criminal code or in the rules of criminal procedure, Iowa court rules, 3d ed. A person who is hospitalized or detained for treatment of mental illness shall not be deemed or presumed to be incompetent in the absence of a finding of incompetence made pursuant to Section 229.27."

Iowa Code Section 4.1(21A) (emphasis added).

Expert testimony establishes that John Doe I-A was at all relevant times suffering from mental illness including general anxiety, major depression, avoidant personality and post traumatic stress. At this time, John Doe I-A continues to manifest symptoms consistent with this mental disease, which is attributable to the sexual trauma perpetrated by Father Janssen. As a result, the statute of limitations under Section 614.1(2) is tolled.

Defendant Diocese has relied on Langner v. Simpson, 533 N.W.2d 511 (Iowa 1995), to state that a person's mental illness must rise to such a high level as to prevent them from filing a lawsuit. Langner, 533 N.W.2d at 523. However, post-Langner, the amendments to Iowa Code Section 614.8, coupled with the definition of mental illness found in Section 4.1(21A), dictate a different result. The court decided Langner before the 1996 amendments were in effect.

Prior to the amendment, a "mentally ill person" included "mental retardates, psychotic persons, severely depressed persons and persons of unsound mind." Iowa Code Section 4.1(15) (1995). This definition also stated that one who was

hospitalized or detained for treatment of mental illness could not be deemed or presumed to be incompetent absent a *specific finding* of incompetence made pursuant to Iowa Code Section 229.27. See Iowa Code Section 4.1(15) (1995) (emphasis added).

In 1996, the legislature amended Iowa Code Section 614.8, replacing the words "mentally ill persons" with "persons with mental illness". By so doing, the legislature deleted "mental retardates" and those of "unsound mind" from the definition, but kept persons with a psychosis or severely depressed, Iowa Code Section 4.21A (2003). The legislature also added a *new* category of individuals to the definition – namely, any persons "with any type of mental disease or mental disorder," thus enlarging the definition of "person with mental illness" as defined by Sections 4.1(21A) and 614.8.

Section 614.8 read together with the definition of "persons with mental illness" in Iowa Code Section 4.1(21A), establishes that the legislature intended to include *all* types of mental disease or disorder in its tolling provision for the statute of limitations. The language of Iowa Code Section 4.1(21A) is clear, identifying: "persons with any type of mental illness or mental disorder." Iowa Code Section 4.1(21A).

In these amendments, the legislature materially modified the type of individuals covered by the law. A material modification of statutory language raises a presumption that a change in the law was intended. Midwest Automotive III v. Iowa Dep't of Transp., 646 N.W.2d 417 (Iowa 2002). As a result of these

amendments, the legislature intended to include these expanded groups within the statutory protections offered by the Iowa Code.

In 1997, the Iowa legislature again modified Iowa Code Section 614.8 dividing tolling for mental illness from minority tolling. (See attached Appendix A.) This time, the Iowa legislature explicitly made the provisions of Iowa Code Section 614.8 retroactive for any case filed after July1, 1999.[1] In Iowa, a statute may only apply retroactively if the legislature makes express provisions that the statute should be applied retroactively or when it appears by necessary implication that it was the legislative intent that the statute apply retroactively. Frideres v. Schiltz, 540 N.W.2d 261, 265 (Iowa 1995).

It is abundantly clear that in 1997, the Iowa legislature intended that the provisions of Iowa Code Section 614.8 be applied retroactively. According to the legislature, the provisions of Section 614.8 shall be applied to all causes of action that accrued prior to July 1, 1997 and all causes of action that accrue after July 1, 1997. (pp. 3-4, Appendix A.) This is clearly intended to make Iowa Code Section 614.8 retroactive.

Similarly, it is also clear that the Iowa legislature intended to make the

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[1] The 1997 modification to Iowa Code Section 614.8 appeared Section 7 of 1997 Ia. Legis. Chapter 197 (1997) (the "Act")(Attached as Appendix A). According to the Section 16 of the Act, the effective dates for Section 7 of the Act is as follows: "Sections 6 and 7 of this Act shall apply to all causes of action accruing on or after July 1, 1997, and to all causes of action accruing before July 1, 1997, and filed after July 1, 1999." (p. 8, Appendix A.) *Thus, the Iowa legislature explicitly indicated that the provisions of Iowa Code Section 614.8 (1997) was to be applied retroactively.*

definition of Iowa Code Section 4.1(21A), which was adopted in 1996, retroactive as well. As discussed above, the 1997 Iowa Code Section 614.8 contained a tolling provision for "persons with mental illness." The definition of "persons with mental illness" at the time the 1997 Section 614.8 was adopted appeared as Iowa Code Section 4.1(21A). If the provisions of Iowa Code Section 614.8 is explicitly retroactive, then the applicable definition contained within the retroactive provision would similarly apply retroactively. Consequently, both Iowa Code Section 614.8 (tolling for persons with mental illness) and Iowa Code Section 4.1 (21A) (definition of persons with mental illness) explicitly apply retroactively.

Applying this legal analysis to the case at hand, John Doe I-A suffers from mental illness or disease, which is in fact attributable to the sexual abuse perpetrated by Father Janssen. The Supreme Court has already recognized mental illness from sex abuse can extend the statute of limitations. Callahan v. State, 464 N.W.2d 268 (Iowa 1990).

John Doe I-A's manifested symptoms have included general anxiety, major depression, avoidant personality and post traumatic stress. Substantial evidence of the extent of John Doe I-A's mental illness operates to toll the running of any statute of limitations under Section 614.8, as John Doe I-A meets the Iowa Code's definition of a "person with mental illness." To make a determination as to the tolling of the statute of limitations, the Court determines when "any mental disease or disorder began" and, more importantly, when the disease or disorder ended.

Expert testimony supports that the statute of limitations was tolled until he filed the lawsuit.

Furthermore, the issue of whether a person is mentally ill for purposes of tolling the statute is indeed a fact question. Borchard v. Anderson, 542 N.W.2d 247 (Iowa 1996). Therefore, this issue is inappropriate for summary disposition. There is a factual issue as to whether John Doe I-A had a mental disorder, thereby tolling the statute under Section 614.8.

II. FRAUDULENT CONCEALMENT IN THIS CASE TOLLED THE STATUTE OF LIMITATIONS

The Supreme Court has adopted the doctrine of fraudulent concealment as a tolling mechanism for statutes of limitation. District Township of Boomer v. French, 40 Iowa 601, 603-04 (1875). The doctrine of fraudulent concealment is triggered as follows:

> "where a party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered".

Id. at 603. To establish the doctrine of fraudulent concealment, the Plaintiff must establish that (1) the Defendant did some affirmative act to conceal the cause of action, and (2) the Plaintiff exercised reasonable diligence to discover the cause of action. Van Overbeke v. Youberg, 540 N.W.2d 273, 276 (Iowa 1995). The evidence is clear that the Diocese fraudulently concealed causes of action from John Doe I-A.

A. The Diocese Concealed Causes of Action from John Doe I-A by Concealing the Fact that Father Janssen Was a Known Child Molester

The Diocese was aware as early as September, 1954, of a complaint that Janssen had "solicited to acts of impurity" with a minor age school child at St. Ambrose Academy. (See Exhibit 5 to Plaintiff's Resistance to Defendants' Motions for Summary Judgment in Wells vs. Diocese of Davenport, et al, Law No. 101220, hereinafter referred to as "Wells Exhibit"). The Diocese further documented complaints about his sexual activities with minors in 1955 and 1956 in Newton (Wells Exhibits 6, 7, 8), Hinsdale, Illinois in 1958 (Wells Exhibits 16, 17, 18) and Davenport in 1959-1961 (Wells Exhibits 23, 24, 25, 28, 30).

This evidence establishes that the Diocese acted to fraudulently conceal the accusations of child sexual abuse committed by Father Janssen from John Doe I-A. Not until February, 2004 did the Bishop ever disclose to the public and to John Doe I-A the information regarding other complaints against Father Janssen.

B. The Diocese Concealed Causes of Action from John Doe I-A by Creating a Fiduciary Relationship and By Remaining Silent

Furthermore, the fraudulent concealment doctrine does not require proof of an affirmative act by the defendant to conceal the cause of action if a fiduciary relationship exists between the parties. Kurtz v. Trepp, 375 N.W.2d 280, 283 (Iowa App. 1985). "The diligence requirement is also greatly relaxed when there is a fiduciary relationship between the parties." Id. at 284.

Although the Iowa Supreme Court has not ruled upon the specific issue of

whether a priest has a fiduciary relationship with a child parishioner, other states have found such a relationship. In Koenig v. Father Lambert, 527 N.W.2d 903 (S.D. 1995), the Court found that as a Catholic parishioner and altar boy, the plaintiff was taught to trust and respect the members of the Diocese. Koenig, 527 N.W.2d at 906. As a result, there existed such a confidential or trust relationship between the Diocese and the members of the faith that it purported to serve to constitute a fiduciary relationship. Id. In addition, the Supreme Court of South Dakota held that if a trust or confidential relationship existed between the parties which imposed a duty to disclose, mere silence by the one under that duty constitutes fraudulent concealment. Id. at 906 (citing Glad v. Gunderson, 378 N.W.2d 680, 682 (S.D. 1985)). The applicable statute of limitations is then tolled. Koenig, 527 N.W.2d at 906; Glad, 378 N.W.2d at 683. See also Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 429 (2d Cir. 1999) (Priest has sufficiently special relationship of trust and confidence with a child parishioner to support a finding of a fiduciary relationship.)

Although the Supreme Court of Iowa has not previously addressed this issue in the context of a priest-parishioner relationship, the Court has recognized in the context of a patient-physician relationship that "[t]he close relationship of trust and confidence between patient and physician gives rise to duties of disclosure which may obviate the need for a patient to prove an affirmative act of concealment." Langer v. Simpson, 533 N.W.2d 511, 522 (Iowa 1995) (citing Koppes v. Pearson, 384 N.W.2d 381, 386 (Iowa 1986)).

Similarly, in Kurtz v. Trapp, 375 N.W.2d at 283, the Court of Appeals found a fiduciary relationship between directors of a corporation was enough to obviate the requirement of an affirmative act.

Likewise, the close relationship between the priest, the Diocese and the parishioner obviates the need for plaintiff to prove an affirmative act of concealment. The Diocese was responsible for the spiritual advisors for John Doe I-A. The fiduciary relationship between the parties created a duty for the Diocese of Davenport to disclose information relating to Father Janssen's dangerous characteristics as a child molester to John Doe I-A and his mother. Instead, the Diocese kept such evidence of other complaints a secret. By applying the rule set forth in Koenig, which stated that mere silence, when under a duty, constitutes fraudulent concealment, there is evidence of a fraudulent concealment in the present case. Koenig, 527 N.W.2d at 906. When there is evidence of a fraudulent concealment, the applicable statute of limitations is tolled. Id (citing Glad, 378 N.W.2d at 683).

Other jurisdictions have recognized that the existence of a fiduciary or confidential relationship obviated the requirement of an active concealment. In Hildebrand v. Hildebrand, 736 F.Supp. 1512 (S.D. Ind. 1990), the plaintiff daughter relied on a diagnosis of post-traumatic stress disorder to preclude the bar of the statute of limitations in her suit against her father based on intentional infliction of emotional distress. The concealment needed not be active if the defrauder had a duty to disclose material information to those with whom he or she has a fiduciary

or confidential relationship. Id. at 1523. Affirmative acts of concealment must be calculated to mislead and hinder a plaintiff from obtaining information by the use of reasonable diligence, or to prevent inquiry or investigation. Id. (citing Forth v. Forth, 409 N.E.2d 641 (Ind. App. 1980)). If the defendant's fraudulent conduct involved false representations, the plaintiff must have alleged reliance on those representations. Hildebrand, 736 F.Supp. at 1523-4, (citing Jackson v. Jackson, 149 Ind. 238 (Ind. 1897)). In Hildebrand, the district court held there was an issue of fact, precluding summary judgment, as to whether the accrual of the cause of action was delayed on grounds of fraudulent concealment. Id. at 1524.

In the present case, genuine issues of material fact remain as to whether the accrual of John Doe I-A's action was delayed on the grounds of fraudulent concealment. John Doe I-A has been diagnosed with a psychological illness, as was the plaintiff in Hildebrand. An established fiduciary relationship existed between John Doe I-A and the Diocese.

As a matter of law, the doctrine of fraudulent concealment precludes summary judgment on the issue of the statute of limitations. At a minimum, there remains a genuine issue of material fact as to the application of the doctrine of fraudulent concealment and therefore the summary judgment motion should be denied.

III. THE CONDUCT OF THE DIOCESE EQUITABLY ESTOPPED DEFENDANT DIOCESE FROM RAISING THE STATUTE OF LIMITATIONS DEFENSE

Equitable estoppel also precludes a limitation of action defense under proper circumstances. Northwest Limestone Co., Inc. v. Iowa Dep't of Transp., 499 N.W.2d 8, 12 (Iowa 1993). Under Iowa law, the doctrine of equitable estoppel "prevent[s] a person from speaking against his or her act, representation, or commitments to the injury of the person to whom the act or representation was directed and who reasonably relied thereon." In re Marriage of Halvorsen, 521 N.W.2d 725, 728 (Iowa 1994) (citation omitted). The elements of equitable estoppel are as follows:

(1) A false presentation or concealment of a material fact;

(2) A lack of knowledge of the true facts on the part of the actor;

(3) The intention that it be acted upon; and

(4) Reliance thereon by the party to whom made, to his or her prejudice and injury.

Id. (citations omitted).

A. Defendant Diocese's Fraudulent Concealment of its Conduct Equitably Estopped Defendant Diocese from Raising the Statute of Limitations Defense.

As set forth in Argument II, the Defendant Diocese fraudulently concealed its conduct. The Diocese never reported other complaints about Father Janssen until February of 2004.

The existence of other abuse victims and complaints involving Father Janssen was material to John Doe I-A's legal rights against the Diocese. This was concealed from him until May, 2003 when he first learned there were other victims.

Therefore, John Doe I-A did not have knowledge of the true facts.

The Defendant Diocese intended John Doe I-A to rely upon the concealment of the extent of complaints and other victims, as well as the outright denials. The Diocese's concealment of other complaints about Father Janssen and sexual contacts with minors before 1967 prevented John Doe I-A from vindicating any legal rights against the Diocese. The concealment of witnesses with knowledge of the abuse made it more difficult for John Doe I-A to prove his claim. John Doe I-A relied on the concealment by the Diocese in not bringing a cause of action against the Diocese until this lawsuit was filed.

IV. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHEN JOHN DOE I-A DISCOVERED THE INJURY AND THE CAUSAL RELATIONSHIP BETWEEN THE INJURY AND SEXUAL ABUSE

The statute of limitations has not run on John Doe I-A's claims because his claims had not accrued until 2003. Under the discovery rule, "a cause of action based on negligence does not accrue until plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it . . . ." Callahan v. State, 464 N.W.2d 268, 270 (Iowa 1990) (quoting Chrischelles v. Griswold, 260 Iowa 453, 463, 150 N.W.2d 94, 100 (1967)). The Supreme Court, in Callahan, recognized that even after a victim recognizes the wrong, that victim must be able to identify the type of wrong (i.e., moral, social, legal) in order to take appropriate legal action. Id. at 271. Because of his mental illness, as well as concealment by the Diocese, John Doe I-A was not able to identify that he had a legal cause of action relating to his injury until 2003.

The Iowa Supreme Court has also extended the discovery rule because a Plaintiff may not be charged with knowledge that certain actions are inappropriate in instances of (sexual) abuse by an "authority figure", see Borchard vs. Anderson, 542 N.W.2d 247, 251, Footnote 1 (Iowa 1996). Here, Janssen's abuse of Doe I-A is clearly that by an authority figure, and, therefore, a fact question is generated on the discovery rule.

CONCLUSION

As stated above, the Diocese's Motion for Summary Judgment which claims the statute of limitations has expired on John Doe I-A's claims must be denied because (1) any statute of limitations was tolled due fraudulent concealment; (2) any statute of limitations was tolled due to John Doe I-A's mental illness; (3) the Diocese is equitably estopped from asserting the statute of limitations as a defense due to its own misconduct. As a result, the Diocese's Motion must be denied.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the United States Mail, postage prepaid, in envelopes addressed to each party at their respective address disclosed on the pleadings as follows:

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On the 23rd day of August, 2004.