CAUSE NO. 07-03807-D

JOHN DOE I and JOHN DOE III, Through His Mother as Next Friend of John Doe II, a Vulnerable (Non Compos Mentis) Adult, JOHN DOE III, JOHN DOE IV and JOHN DOE V	§	IN THE DISTRICT COURT
v.	§	95TH JUDICIAL DISTRICT
REVEREND NICHOLAS E. KATINAS, Pastor (Formerly) of Holy Trinity Greek Orthodox Church, HOLY TRINITY GREEK ORTHODOX CHURCH; THE GREEK ORTHODOX METROPOLIS OF DENVER BY AND THROUGH BISHOP ISAIAH OF DENVER IN HIS OFFICIAL CAPACITY, And THE GREEK ORTHODOX ARCHDIOCESE OF AMERICA BY AND THROUGH ARCHBISHOP DEMETRIOS IN HIS OFFICIAL CAPACITY	§	DALLAS COUNTY, TEXAS

PLAINTIFF JOHN DOE IV'S RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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To the Honorable Karen Gren Johnson:

Plaintiff John Doe IV ("Doe IV") files this Response to (1) Defendants, the Greek Orthodox Archdiocese of America and the Greek Orthodox Metropolis of Denver's, Motion for Summary Judgment as to Plaintiff John Doe IV ("GOAA Motion"), and (2) Holy Trinity Greek Orthodox Church's Motion for Summary Judgment as to Doe IV's Claims ("HT Motion"), and respectfully shows the Court the following:

I.

Introduction

This case is about an egregious pattern of sexual abuse by defendant Father Nicholas Katinas ("Katinas") and an equally disturbing pattern of denial and cover-up by the Greek Orthodox Archdiocese of America ("GOAA"), the Greek Orthodox Metropolis of Denver

("Metropolis"), and Holy Trinity Greek Orthodox Church ("Holy Trinity) (collectively, "Defendants") that employed Katinas and gave him unfettered access to minors, including Doe IV.[1] The Defendants were fully aware of Katinas's sexual proclivities toward adolescent boys and his troubled career that was marked by complaints against him for sexual misconduct. But despite those risks to boys, potential liability, and warning signs, neither the GOAA Defendants nor Holy Trinity did anything to stop Katinas or to warn unsuspecting communities that they had knowingly and recklessly placed a sexual predator in their midst. Instead, the GOAA Defendants and Holy Trinity were more concerned about avoiding bad publicity and scandal than protecting the welfare of the people in Texas where Katinas was sent to serve.

Predictably, and consistent with the acknowledged trail of damaged youngsters Katinas left behind in Illinois, Katinas, with the aid of the GOAA Defendants and Holy Trinity, used this new opportunity to sexually abuse Doe I, Doe II, Doe III, Doe IV, and Doe V in Dallas, Texas. And when that abuse finally stopped, Defendants hid behind a veil of secrecy that kept the public and Katinas's victims in the dark about Katinas's history and Defendants' role in permitting that history to repeat itself -- over and over again, parish after parish, victim after victim -- until Katinas conveniently fled the State of Texas to Greece.

In a transparent attempt to avoid trial for their obvious culpability in exposing Doe IV to the sexual predation of Katinas in the first place and then concealing their role in abetting the foreseeable sexual abuse, the GOAA Defendants and Holy Trinity argue that all of Doe IV's claims against them are barred by the two-year, four-year, or five-year statute of limitations. As set forth below, Defendants have failed to meet their summary judgment burden of demonstrating that Doe IV's claims are barred by limitations.

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[1] The GOAA and Metropolis will be collectively referred to throughout this Response as "the GOAA Defendants."

II.

Summary of Argument

For any or all of the reasons outlined below and discussed more fully in this Response, Doe IV's claims are not barred by the statute of limitations, and Defendants' motions for summary judgment should be denied:

- **Defendants' motions are premised on one so-called "fact" that is highly disputed** -- Defendants' motions must be denied because they are premised on one so-called "fact" that is far from undisputed -- namely, that Doe IV was supposedly aware of the sexual abuse by Katinas "at the time" it occurred. The summary judgment evidence, however, raises a fact issue that contradicts the very premise of Defendants' motions.

- **Doe IV's claims were tolled while he was minor** -- Whatever Doe IV might have known while he was a minor is irrelevant to the limitations analysis here because, as a minor, he was under a legal disability at the time.

- **Defendants ignore their own tortious conduct** -- Defendants' motions must be denied because they ignore their own tortious conduct and the specific claims asserted against them, and instead focus their arguments exclusively on Katinas's sexual abuse, when that abuse occurred, and when Doe IV was supposedly aware of that abuse.

- **Defendants have not conclusively negated each of Doe IV's defenses to limitations, and in any event, the summary judgment evidence raises fact issues on each disputed element of those defenses** -- Even if Defendants had been able to conclusively establish that Doe IV failed to bring suit within the applicable statute of limitations, Defendants' motions must be denied for either one of two reasons. First, Defendants have not conclusively negated all of Doe IV's pleaded defenses to the statute of limitations. Second, the summary judgment evidence raises a genuine issue of material fact regarding each disputed element of those defenses.

- **The discovery rule applies to Doe IV's claims** -- The discovery rule does apply here because the wrongful acts and Doe IV's injury were inherently undiscoverable and objectively verifiable. Applying the discovery rule, the summary judgment evidence demonstrates -- or, at the very least, raises a fact issue -- that Doe IV did not discover the wrongful acts and his resulting injuries until recently.

- **Doe IV's summary judgment evidence shows that he repressed and suppressed the memory of the sexual abuse and injuries he suffered** -- Defendants' limitations defense also fails because there is abundant summary

judgment evidence that Doe IV repressed and suppressed all memory of the sexual abuse and the injury he suffered at the hands of Katinas.

- **Defendants' fraudulent concealment tolls limitations, and they are estopped from asserting limitations as a defense** -- Defendants' motions must be denied because the summary judgment evidence further demonstrates that Defendants fraudulently concealed Doe IV's claims and are estopped from asserting their limitations defense under the circumstances here.

For any one of these reasons, Defendants' motions for summary judgment must be denied.

III.

Summary Judgment Evidence

This response is based upon the following summary judgment evidence attached to the Appendix of Evidence in Support of Plaintiffs' Responses to Defendants' Motions for Summary Judgment, filed contemporaneously herewith and incorporated by reference herein:[2]

Exhibit 1: Deposition of John Doe I ("Doe I Depo.")

Exhibit 2: Deposition of John Doe II ("Doe II Depo.")

Exhibit 3: Deposition of John Doe III ("Doe III Depo.")

Exhibit 4: Deposition of John Doe IV ("Doe IV Depo.")

Exhibit 5: Deposition of John Doe V ("Doe V Depo.")

Exhibit 6: Deposition of Mother of John Doe II ("Doe II Mother Depo")

Exhibit 7: Deposition of Father of John Doe IV ("Doe IV Father Depo.")

Exhibit 8: Deposition of George Kachavos ("Kachavos Depo.")

Exhibit 9: Letter from Father Katinas, dated June 15, 1978 ("6/15/78 Katinas letter") (identified and authenticated as Exhibit 7 to the Deposition of George Kachavos)

[2] To protect their identities, the actual names of Plaintiffs and some of Katinas's other victims (as well as other identifying information) have been redacted from the deposition excerpts and affidavits. Further, because of a protective order, Exhibit Nos. 32-37 described below will be filed in a sealed envelope for the Court's *in camera* review.

Exhibit 10:	Deposition of Leo Manta ("Manta Depo.")
Exhibit 11:	Deposition of Basil Xeros ("Xeros Depo.")
Exhibit 12:	Draft Proposed Policies and Procedures for Child Safety at Holy Trinity ("HT Draft Policies for Child Safety") (identified and authenticated as Exhibit 2 to the Deposition of Basil Xeros)
Exhibit 13:	Deposition of Nicolas Carayannopoulos ("N. Carayannopoulos Depo.")
Exhibit 14:	Special Regulations and Uniform Parish Regulations of the Greek Orthodox Archdiocese of North and South America ("Uniform Parish Regulations") (identified and authenticated as Exhibit 1 to the Deposition of Nicolas Carayannopoulos and Exhibit 5 to the Deposition of Michael Kontogiorgis)
Exhibit 15:	Deposition of Father Wesley Benson Hohnholt ("Hohnholt Depo.")
Exhibit 16:	Exhibit 3 to the Deposition of Father Gregory Hohnholt ("Hohnholt Depo. Ex. 3")
Exhibit 17:	Deposition of George Chris Michael ("Michael Depo")
Exhibit 18:	Affidavit of D. Z. ("DZ Aff.")
Exhibit 19:	Affidavit of S. A. ("SA Aff.")
Exhibit 20:	Affidavit of T. S. ("TS Aff.")
Exhibit 21:	Affidavit of S. S. [mother of T. S.] ("SS Aff.")
Exhibit 22:	Affidavit of Elaine Loumbas ("Loumbas Aff.")
Exhibit 23:	Affidavit of John Faklis ("Faklis Aff.")
Exhibit 24:	Affidavit of Harvey Rosenstock, M.D. re: Doe I ("Rosenstock I Aff.")
Exhibit 25:	Affidavit of Harvey Rosenstock, M.D. re: Doe II ("Rosenstock II Aff.")
Exhibit 26:	Affidavit of Harvey Rosenstock, M.D. re: Doe III ("Rosenstock III Aff.")
Exhibit 27:	Affidavit of Harvey Rosenstock, M.D. re: Doe IV ("Rosenstock IV Aff.")
Exhibit 28:	Affidavit of Harvey Rosenstock, M.D. re: Doe V ("Rosenstock V Aff.")
Exhibit 29:	Affidavit of Richard Fulbright, Ph.D. re: Doe II ("Fulbright Aff.")
Exhibit 30:	Affidavit of Catherine Metropoulos ("Metropoulos Aff.")

Exhibit 31: Affidavit of Tahira Merritt Khan ("Khan Aff.")

Exhibit 32: Deposition of Father Nicholas Triantafilou ("Triantafilou Depo.")

Exhibit 33: Deposition of Father Michael Kontogiorgis ("Kontogiorgis Depo.")

Exhibit 34: Report from Saint Luke Institute ("SLI Report") (identified and authenticated as Exhibit 10 to the Deposition of Michael Kontogiorgis)

Exhibit 35: Exhibit 11 to the Deposition of Michael Kontogiorgis ("Kontogiorgis Depo. Ex. 11")

Exhibit 36: Spiritual Court of the First Instance - Fr. Nicholas J. Katinas ("Spiritual Court") (identified and authenticated as Exhibit 12 to the Deposition of Michael Kontogiorgis)

Exhibit 37: Exhibit 14 to the Deposition of Michael Kontogiorgis ("Kontogiorgis Depo. Ex. 14")

IV.

Summary Judgment Standards

A motion for summary judgment must "stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). "In determining whether grounds are expressly presented, reliance may not be placed upon briefs or summary judgment evidence." *Id.* As the movants seeking a traditional summary judgment, Defendants have the burden under TEX. R. CIV. P. 166a(c) of showing that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In reviewing the summary judgment evidence, a court is required to (1) assume that all of the evidence favorable to Doe IV, as the non-movant, is true, (2) indulge every reasonable inference in favor of Doe IV, and (3) resolve all doubts about the existence of a genuine issue of a material fact in favor of Doe IV. *Id.*; *see Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 12 (Tex. App.--Fort Worth 2002, no pet.) ("[A]ll conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true."). A court should not ascertain the credibility of affiants or

determine the weight of evidence in the affidavits, depositions, exhibits, and other summary judgment proof. *See Gulbenkian v. Penn*, 252 S.W.2d 929, 932 (Tex. 1952).

When, as here, a defendant is the movant, summary judgment is proper only if the plaintiff cannot, as a matter of law, succeed upon *any* theory pleaded. *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 886 (Tex. App.--Dallas 2000, pet. denied). A plaintiff can defeat a summary judgment motion by conceding that the material facts are undisputed, but convincing the court that the defendant's legal position is unsound. *Id.*; *see Estate of Devitt*, 758 S.W.2d 601, 602 (Tex. App.--Amarillo 1988, writ denied). Alternatively, a plaintiff may defeat summary judgment by presenting evidence that creates a fact question on those elements of the plaintiff's case under attack by the defendant or on at least one element of each affirmative defense advanced by the defendant. *Turner*, 18 S.W.3d at 886. In determining whether a fact question exists, a trial court "must not weigh the evidence at the summary judgment stage." *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 422 (Tex. 2000). A trial court's "only duty at the summary judgment stage is to determine if a material question of fact exists." *Id.* At best, Defendants' evidence, when coupled with Doe IV's summary judgment evidence, gives rise to questions of fact that cannot be resolved by summary judgment. *See, e.g.*, *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (drawing conflicting inferences from different summary judgment evidence raises a fact issue).

V.

Factual Background

Viewing all of the evidence favorable to Doe IV as true and indulging every reasonable inference in favor of Doe IV, the summary judgment evidence demonstrates a disturbing pattern of sexual abuse by Katinas, and an equally disturbing pattern of complicity, denial, and cover-up by the Defendants that employed him and enabled him to have unfettered access to minors. As

set forth below, Katinas's notorious career in the clergy is troubling and abhorrent. Even as far back as his days as a seminary student, Katinas exhibited sexual proclivities that made him unsuitable to serve as a priest. For the next 44 years, Katinas's career was marked by complaints against him for sexual misconduct involving minor boys, transfers to different parishes, and repeated but unsuccessful therapy to address his psychological problems of acting out sexually with minor males.

Despite psychosexual diagnoses, warning signs, and red flags, neither the GOAA Defendants nor Holy Trinity did anything to stop Katinas or warn their own church members -- much less the unsuspecting public -- that there was a sexual predator in their midst. Instead, they conspired to ensure that Katinas was given repeated opportunities to exploit boys in Illinois and Texas. In this manner, both the GOAA Defendants and Holy Trinity provided Katinas with the means and opportunity that enabled him to sexually abuse Doe I, Doe II, Doe III, Doe IV, and Doe V in Dallas. And when that abuse was completed, the GOAA Defendants and Holy Trinity hid behind a wall of secrecy and deception that kept the public and Katinas's victims ignorant of Katinas's sordid history and Defendants' active role in allowing that history to repeat itself over and over again.

A. Even Before Katinas Was Ordained as a Priest, There Were Red Flags About His Sexual Proclivities.

From the beginning of his pastoral career, red flags were raised about Katinas's fitness to serve as a Greek Orthodox priest. While completing his seminary studies at Holy Cross Greek Orthodox School of Theology, Katinas had a sexual encounter with a male Presbyterian minister and confessed his sexual proclivities for boys to Bishop Gerasimos. (SLI Report at 3, 5; DZ Aff. ¶ 11) Although Katinas initially finished his seminary studies in 1959, a professor would not sign his diploma, causing him to be sent to Istanbul and Geneva. (SLI Report at 5) About this

same time, Katinas paid for sex with a male prostitute in a Greek bathhouse. (*Id.* at 3) Despite these red flags, the Greek Orthodox Church ordained Katinas as a priest in 1963. (*Id.* at 5; 6/15/78 Katinas letter)

B. Katinas's Years in Illinois and Texas Were Marked by Sexual Abuse, Treatment, and Transfer from One Parish to Another.

1. Katinas sexually abused at least four minor boys in Olympia Fields, Illinois.

After having sexual encounters with the Presbyterian minister and the male prostitute, Katinas began focusing his attention on underage boys who were part of his parish. (SLI Report at 3) While assigned by the GOAA as a pastor at Assumption Greek Orthodox Church ("Assumption Church") in Olympia Fields, Illinois, Katinas sexually abused DZ, a 16-year old parishioner and altar boy, for a period of two years beginning in 1971. (DZ Aff. ¶¶ 4-6)

During this same time period, Katinas sexually molested SA, a junior high school student. (SA Aff. ¶ 5) After attending the Greek Independence Day Parade, SA and another boy were changing their clothes in Katinas's office, when Katinas came in, began rubbing their genitals, and performed oral sex on each of them. (*Id.*) Katinas's abuse, including attempts to anally penetrate SA, continued for many years anytime SA was alone with Katinas. (*Id.* ¶¶ 6-7)[3]

In the spring of 1974, Katinas also made inappropriate sexual advances toward a 13-year old parishioner, TS, by requesting that he disrobe (unbutton his shirt as well as loosen his belt and pants) in the church office so Katinas could "massage" him, and then forcibly pushed him to the floor. (TS Aff. ¶¶ 5, 8; SS Aff. ¶ 8; *see* Kachavos Depo. at 22-24, 27-29, 79) This attack on TS was undoubtedly sexual in nature. (TS Aff. ¶¶ 8-9) TS immediately reported the sexual

[3] Although DZ later identified SA (and others) as probable victims of Katinas (DZ Aff. ¶ 13), the GOAA has never contacted SA regarding Katinas or the abuse (SA Aff. ¶ 9).

misconduct to his parents, who confronted Katinas. (TS Aff. ¶ 10; SS Aff. ¶¶ 7-8, 12) Katinas admitted to TS's mother that he was a "sick person" who needed help (SS Aff. ¶ 12).[4]

Ultimately, Katinas decided to undergo psychiatric treatment while in Illinois. Katinas contacted Leo Manta, a parish councilmember at Assumption Church and an Archon of the Greek Orthodox Church, and sought a recommendation for a psychiatrist.[5] (Manta Depo. at 8-9, 13-14, 56-57) Manta referred Katinas to Dr. Forrest Schufflebarger (Manta's own psychiatrist), who, after treating Katinas, warned Manta that Katinas "should be kept away from boys." (Manta Depo. at 14, 22-24; Loumbas Aff. ¶ 5; DZ Aff. ¶ 11) To prevent any future assaults on the young parishioners of Assumption Church, Manta advised the GOAA, as well as the Greek Orthodox Diocese in Chicago, of Dr. Schufflebarger's professional opinion. (Loumbas Aff. ¶ 6)[6] But instead of removing Katinas from the priesthood (and protecting young Greek Orthodox parishioners), the GOAA elected instead to transfer Katinas from Illinois to Dallas to "avoid scandal to the church" and kept "the real reason [for the transfer] secret." (Loumbas Aff. ¶ 7)

2. The GOAA reassigns Katinas to Holy Trinity in Dallas to "cover up" his prior assaults of minor boys in Illinois.

TS's parents were not the only Assumption Church parishioners who became aware of Katinas's attempt to sexually assault TS. George Kachavos, Assumption Church Parish Council

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[4] Understandably, out of a very deep concern for the welfare of their son and the welfare of other young parishioners in contact with Katinas, TS's parents informed Katinas that they could no longer remain as parishioners at Assumption Church where Katinas remained as pastor and had unfettered access to minors. (*Id.*)

[5] An "Archon" is a "position of honor" within the Greek Orthodox Church and consists of a "group of select individuals . . . whose calling . . . is to be a defender of the [Ecumenical] Patriarchate [of Constantinople] and some of its legal issues with the [c]ountry of Turkey . . . and to promote the Patriarchate as much as they can." (Kontogiorgis Depo. at 225-26)

[6] Manta later discussed the Katinas problem with Andy Athens, a member of the GOAA Archdiocese Council, who responded that he "wish[ed] more of our Greek Orthodox priests would keep their peckers in their pants." (Manta Depo. at 20-21)

President, also became aware of the assault. (Kachavos Depo. at 22-24)[7] As a result, he contacted Gust Dickett, the attorney for Assumption Church and its Parish Council Treasurer, and reported the incident to him. (Kachavos Depo. at 27-29, 79) Kachavos instructed Dickett "to take whatever action [was] necessary to see that [Katinas] [was] reassigned." (*Id.* at 30-32) Dickett followed Kachavos's instruction, and after the sexual misconduct was made known to the GOAA, it reassigned Katinas in September 1978 to Holy Trinity in Dallas, Texas, in order to "cover-up" his sexual misconduct and to avoid the publicity and scandal that would necessarily follow if TS's family reported the incident to the state attorney's office. (*Id.* at 30-31, 39, 42, 44, 49, 77, 79-80)

C. Katinas Sexually Abuses Plaintiffs in Dallas.

Predictably, Katinas used the authority granted to him by the GOAA as a pastor at Holy Trinity to sexually abuse Plaintiffs, most of whom served as altar boys at the church. (Doe I Depo. at 34-35; Doe II Mother Depo. at 101-03; Doe IV Father Depo. at 26; Doe V Depo. at 31) The pattern of abuse of each boy was disturbingly similar. Katinas's pattern of seduction involved grooming each Plaintiff by approaching him individually and either telling him that he was special and that he loved him or discussing sexual issues with him during confession. (Doe I Depo. 37-44, 173-74; Doe IV Depo. at 83; Doe V Depo. at 41, 137-38) Due to the reverence associated with Katinas's position in the parish -- and not having the same knowledge as Defendants about Katinas's prior deviant behavior in Illinois -- Plaintiffs discussed their most private personal and sexual issues with Katinas, believing he was properly counseling them about adolescent issues, including sexuality. (Doe I Depo. at 42-43, 173; Doe II Depo. at 117;

[7] This was not the first time Kachavos had become aware of Katinas's predatory conduct. Kachavos had personally observed Katinas engaging in sexually inappropriate behavior with young boys and/or men on three other occasions. (*Id.* at 32-37) Additionally, rumors of Katinas's sexual misconduct with boys circulated among other parish council members, including John Faklis. (Faklis Aff. ¶¶ 2-4)

Doe IV Depo. at 83, 173-74; Doe IV Father Depo. at 22; Doe V Depo. at 137-39) Shortly after engaging in explicit sexual discussions with them, Katinas would approach each boy in the sacristy after mass or other secluded locations on church grounds and initially fondle or masturbate their genitals.

In 1983, Katinas approached Doe I, then 13 years old, in the church rectory and proceeded to assault him. (Doe I Depo. at 40-41, 45) Following this incident, Katinas continued to assault Doe I over 100 times during a three year period under the guise of a loving relationship designed to train Doe I in the ways of Greek manhood. (*Id.* at 35-41, 43-44, 173-74) After Katinas had finished with Doe I, he warned him to keep quiet about what he had done, likening it to "confession." (*Id.* at 176-77; Rosenstock I Aff. ¶ 3 & Ex. B at 7)

Sometime in 1982, Katinas molested Doe II, the fourteen-year old half-brother of Doe I, in the church daycare room. (Doe II Depo. at 39, 41-45) Katinas demanded that the mentally disabled teenager take off his pants and then sexually assaulted him. (*Id.* at 43-44; Doe II Mother Depo. at 51, 54, 56) On at least two other occasions, Katinas brazenly walked up to Doe II and groped his genitals. (Doe II Depo. at 46-49, 115-16, 145-47)

In 1987, after repeatedly slapping Doe IV on his buttocks, Katinas approached Doe IV, then eleven years old, in the sacristy and rubbed his erected penis on Doe IV's buttocks in a bumping and grinding fashion. (Doe IV Depo. at 78-81) Finally, following a Sunday mass, Katinas sexually assaulted Doe V, then twelve years old, in the narthex of the church. (Doe V Depo. at 29-31, 98) Katinas continued to sexually abuse Doe V on repeated occasions over the next 20 years until 2004, usually within the sacred confines of the church's sacristy and elsewhere on church property. (*Id.* at 35-39, 44-48, 50-53, 101-02, 151-52)

Katinas's abuse of young boys, however, was not limited to the altar, the sacristy, or the daycare room. In addition to abusing Doe I, Doe II, Doe IV, and Doe V, Katinas sexually assaulted 15-year old Doe III on Halloween night in a home paid for by Holy Trinity. (Doe III Depo. at 5; Kontogiorgis Depo. at 115; N. Carayannopoulos Depo. at 93-97) Upon returning from a night of trick-or-treating with Katinas's sons, whom Doe III knew and trusted as his former next door neighbors in Illinois, Katinas requested that his children leave him alone with Doe III so that he could have a private conversation with him. (Doe III Depo. at 60-64) Instead of talking, however, Katinas proceeded to push Doe III back on the bed and perform oral sex on him. (*Id.*)

D. Defendants, Once Again, Conceal Katinas's Sexual Misconduct.

After Doe IV's parents notified Holy Trinity and the GOAA of the incident between Katinas and their son in 1987 (Triantafilou Depo. at 105-07; Doe IV Father Depo. at 38-43, 98-100), Defendants hatched a plot for how they were going to manage the potential scandal. The GOAA sent Father Triantafilou, Vicar General of the GOAA and an old friend of Katinas from the seminary, to Dallas under the guise of conducting an investigation.[8] (Triantafilou Depo. at 7-9, 56-61, 137) Triantafilou initially met with Doe IV's parents, and in an effort to "protect the church," he instructed them "not to call the police" or "talk to anybody" about the incident. (Doe IV Father Depo. at 48-49; Triantafilou Depo. at 77) After conducting a single interview with Doe IV's parents and Katinas about the matter (and without interviewing anyone else), Triantafilou convinced Doe IV's parents and their son that Doe IV had "misunderstood" and "imagined" Katinas's actions; that "nothing had occurred"; that "Father Katinas wouldn't lie";

[8] The Vicar General works in concert with the Chancellor of the Greek Orthodox Archdiocese of America. (Triantafilou Depo. at 7-8) His job duties include investigating claims of clergy sexual misconduct. (*Id.* at 22) Triantafilou kept other GOAA officials, including Bishop Isaiah, the Chancellor of the Archdiocese (and now the current head of the Metropolis of Denver), abreast of the Doe IV investigation. (*Id.* at 7-8, 181)

that "he was a good man"; that "he has been in several different parishes and he has always been well respected and well received"; that "he has no blemish . . . in his past at all"; and that "[t]here is no record of him ever having any type of an incident like this." (Doe IV Father Depo. at 60-62, 108; Doe IV Depo. at 177; Triantafilou Depo. at 77) Doe IV's parents "listened to the church," accepted its purported findings, and relayed Triantafilou's representations to their son. (Doe IV Father Depo. at 63-64)

Despite their affirmative representations that "nothing had occurred," Defendants sent Katinas to counseling for so-called "boundary" issues. (Triantafilou Depo. at 77) But Defendants did nothing to confirm that Katinas completed the counseling or to ascertain the results. (*Id.* at 110).[9]

E. Katinas Admits to Sexually Abusing Minor Boys.

Like many other child abuse victims, DZ was unable to talk to anyone about the sexual abuse he suffered at the hands of Katinas in Illinois until more than 25 years later because of the shame he felt. (DZ Aff. ¶ 9) After entering psychotherapy to address issues surrounding his molestation, DZ confronted Katinas out of concern that Katinas was continuing to molest young boys. (*Id.* ¶ 10) Although Katinas claimed he was no longer abusing children, he admitted that it took him several years after moving to Dallas to "clean up" his act, thus confirming DZ's fears that Katinas indeed had molested other children at Holy Trinity. (*Id.* ¶ 11)

In October 2005, DZ contacted the GOAA and lodged an official complaint against Katinas. (*Id.* ¶ 12) As part of the investigative process, DZ spoke to Bishop Savas Zembillas (the Chancellor of the GOAA) and Father Michael Kontogiorgis (the Assistant Chancellor) regarding the sexual abuse Katinas inflicted. (*Id.* ¶¶ 12-13) In April 2006, six months after DZ

[9] This was not the first time Katinas had been sent to counseling. In the early 1980s, Katinas "spoke to someone in a counseling capacity" after a parent complained about his inappropriate behavior with their son. (SLI Report at 4; *see* Kontogiorgis Depo. at 150-53)

submitted his complaint, Kontogiorgis finally confronted Katinas concerning DZ's allegations of sexual misconduct. (Kontogiorgis Depo. at 62, 64, 66-67; Spiritual Court at 1) Katinas immediately and unabashedly admitted that he had abused DZ and four other minor parishioners while he was a pastor in Olympia Fields. (Kontogiorgis Depo. at 65-67; Spiritual Court at 1) Shockingly, Katinas expressed no remorse for his actions, but instead defended himself on the grounds that he had acted in a spirit of love and pastoral concern for the boys. (Kontogiorgis Depo. at 156; Spiritual Court at 1)

F. Katinas Is Sent for Further Psychiatric Evaluation and Treatment and Admits to Abusing "Approximately Five Teenage Boys."

Once again recognizing that Katinas was "a threat and liability for [Defendants] to have . . . as one of [their] Priests," Kontogiorgis requested that Katinas undergo an extensive week-long psychological evaluation at St. Luke Institute ("SLI"), a private residential treatment facility in Maryland known for its treatment of priests with psycho-sexual problems such as the abuse of minors. (Kontogiorgis Depo. at 54-55, 67-68) Katinas thus entered SLI, where he remained under the care of Dr. Andrew Martin, a clinical psychologist who prepared an assessment report that he shared with Kontogiorgis. (SLI Report at 1-10; Kontogiorgis Depo. at 138, 144-147) Among other observations, Martin noted that Katinas was a paraphiliac who admitted he had "a sexual preference for teenage boys who were athletic and intelligent," used "oral sex and mutual masturbation" with young boys as "an escape" and "believ[ed] it was a pleasurable experience" for them, and had "difficulty incorporating his sexuality into a consistent understanding of himself."[10] (SLI Report at 3, 9) Katinas further admitted that he had "sexual contact with approximately 5 teenage boys" while serving as a priest. (*Id.* at 3) Based on Katinas's

[10] A paraphiliac is a person who engages in paraphilia -- *i.e.*, a pattern of recurring sexually arousing mental imaging or behavior that involves unusual and especially socially unacceptable practices as pedophilia. MERRIAM-WEBSTER'S MEDICAL DICTIONARY (2008).

admissions and his own findings, Martin recommended that Katinas enter an intensive residential treatment program and "have no individual or unsupervised contact with minors" in order "to reduce [Katinas's] potential risk of acting . . . on his sexual attractions to minors." (*Id.* at 9-10; Kontogiorgis Depo. at 147)

G. Katinas Is Finally Suspended from the Priesthood.

Following his brief stint at SLI, Katinas returned to Holy Trinity. (Kontogiorgis Depo. at 159-60) Although Kontogiorgis informed Father Wesley Benson Hohnholt, the assistant pastor at Holy Trinity, of the allegations of sexual misconduct lodged against Katinas (Hohnholt Depo. at 32-33), Kontogiorgis told Hohnholt not to disclose "this to anyone" (*id.* at 42, 49). Hohnholt, however, was so concerned about the situation that he sent an e-mail to Kontogiorgis in June 2006:

> What has changed is [Katinas's] talk about retirement. He now makes plans for what will happen here at the Church next year, . . . how he is going to try to keep things in his control even when a new [priest] is assigned . . . .
>
> It is hard to see his face every day, to hear his perverted world view, his reluctance to hold people with sexual deviations accountable because he obviously couldn't do it himself. . . . I don't want him to look at my sons, much less talk to them. When he wants to give them food, I want to throw up. I won't let him. When he talks about the Academy and the need for an Orthodox School, I can only think how he just wants kids around. I believe less and less in the idea of a pedophile being rehabilitated. When people go on and on, praising him, venerating his priesthood and commenting on what a good family man and role model he is, I want to lose it.
>
> . . . I notice you only speak with me in vague terms...and I'm sure there's plenty of politics involved.

(Hohnholt Depo. at 49-50, 53 & Depo. Ex. 3)

In July 2006, Katinas was ultimately suspended, but only after he repeatedly refused to enroll in a residential treatment program and attempted to resign for "health" reasons. (Spiritual

Court at 1-2; Kontogiorgis Depo. at 147, 161, 165, 167; Kontogiorgis Depo. Ex. 11 at GOAA 59 & Ex. 14) Although Katinas had been suspended for a "very serious moral transgression," neither the GOAA nor Holy Trinity informed any of their trusting parishioners, including the parents of Doe I, Doe II, Doe IV, and Doe V, of Katinas's crimes, sought out any of Katinas's victims, or reported Katinas's unlawful conduct to any civil authorities. (Kontogiorgis Depo. at 74-75, 81, 144, 203-04, 207, 218, 263) In fact, the GOAA instructed the Holy Trinity parish council not to make any statement to their parishioners regarding Katinas's suspension. (Michael Depo. at 95-97) Moreover, Defendants permitted Katinas to continue to attend Holy Trinity, sit in the altar, and fraternize with unsuspecting minors. (Kontogiorgis Depo. at 203-05) In 2007, Katinas fled Texas to Greece suddenly and without explanation. (*Id.* at 12-13)

Finally, on June 15, 2007, the Spiritual Court of the First Instance, a group comprised of GOAA clergy including Bishop Savas, recommended that Katinas be laicized for "abus[ing] the power and prescience of his priestly office . . . [by] seduc[ing] and subsequently engag[ing] in sexual relations with a young man of his spiritual flock . . ., actions for which he has expressed no remorse." (Kontogiorgis Depo. at 139 & Ex. 12; Spiritual Court at 2-3).[11] Despite its belated proclamations, the GOAA (who allegedly condemns Katinas's actions) continues to make monthly pension payments to Katinas, even though it is aware that he abused numerous boys during his 46 years of employment as a priest. (Kontogiorgis Depo. at 44, 207)[12]

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[11] To laicize a priest is to remove his right to exercise the functions of the priestly office and to return him to the status of a layman. WEBSTER'S INTERNATIONAL DICTIONARY 1265 (3d ed. 1969).

[12] As with Katinas, Defendants have engaged in a similar pattern and practice of covering up and concealing the sexual abuse of minors by other clerics by, among other actions, sending them to treatment centers, recycling them into the ministry, remaining silent about their crimes, or misleading their victims. (*See, e.g.*, Metropoulos Aff. ¶¶ 3-13; Kontogiorgis Depo. at 44, 48, 52-53) This atmosphere has thus enabled these clerics to repeat their sexually abusive behavior.

H. Doe IV Repressed and Suppressed the Sexual Abuse Perpetrated by Katinas and Was Unaware that He Had Been Abused or Harmed by that Abuse until Recently.

Because Doe IV was a child when Katinas perpetrated the sexual acts against him, he experienced, perceived, and dealt with the events as a child. (Rosenstock IV Aff. ¶ 10) And because he did not possess the maturity and psychological capability of processing it as an adult, Doe IV could not apply adult perception, rational thinking, problem solving, decision making, or judgment, nor could he identify Katinas's actions under the psychological rubric of "sexual abuse." (*Id.*) In short, Doe IV was simply not capable of developing an adult, rational, and competent appreciation for the harm he had experienced as a result of Katinas's actions, nor was he capable of recognizing that those actions constituted sexual abuse. (*Id.*)

As concluded by Dr. Rosenstock, a licensed forensic psychiatrist who has evaluated and treated numerous clergy abuse victims, Doe IV repressed and suppressed the memories of the sexual abuse he suffered at the hands of Katinas, he was unaware of the harm caused by that abuse until shortly before filing before filing this lawsuit, and the nature of Doe IV's injuries was inherently undiscoverable due to his repression and suppression. (Rosenstock IV Aff. ¶¶ 2, 7-9)[13] When Doe IV recently became aware through conversations with his mother that Katinas had abused other boys, his repressed and suppressed memories of the sexual abuse became conscious. (*Id.* ¶ 8) Doe IV suddenly developed an integrated picture of what happened to him,

[13] Repression and suppression are two recognized defense mechanisms to trauma, such as being sexually abused as a child. Repression enables an individual to unconsciously avoid dealing with noxious and painful stimuli that at the moment or moments of impact exceed the individual's coping skills. Similarly, suppression is a conscious defense mechanism that helps maintain mental stability by allowing an individual to compartmentalize noxious memories and associated painful affect until such time as they can be worked through without being overwhelming. Sometimes it can be decades, as in this case, before the repressed or suppressed material is available to the victim for processing and recognition and truly subject to cognitive analysis by the victim. Both concepts are widely accepted in psychiatry and psychology, are reliable, and have been subjected to peer review. (*Id.* ¶¶ 4-6)

and he discovered that despite what had been told to him as a child, he had been victimized and damaged by Katinas (and the Defendants who deceived him into believing otherwise). (*Id.*)

VI.

Doe IV's Claims Are Not Barred by the Applicable Statutes of Limitations

In a misguided attempt to avoid facing a jury for exposing Doe IV to the sexual predations of Katinas, Defendants argue that all of Doe IV's claims against them are barred by the statute of limitations. Regardless of whether those claims are governed by the two-year statute of limitations under TEX. CIV. PRAC. & REM. CODE § 16.003(a), the four-year statute of limitations under TEX. CIV. PRAC. & REM. CODE § 16.004, or the five-year statute of limitations under TEX. CIV. PRAC. & REM. CODE § 16.0045, the claims are not barred by limitations as a matter of law or fact.

As an initial matter, Defendants' motions must be denied because they are premised on one so-called "fact" that is far from undisputed -- *i.e.*, that Doe IV was supposedly aware of the sexual abuse by Katinas "at the time" it occurred. As set forth below, the summary judgment evidence raises a fact issue to the contrary, and in any event, Doe IV's knowledge while he was a minor and under a legal disability is irrelevant to the limitations analysis here. Moreover, the GOAA Defendants and Holy Trinity ignore their own tortious conduct and the specific claims that Doe IV asserted against *them*, and instead myopically focus their argument on Katinas's sexual abuse, when that abuse occurred, and when Doe IV was supposedly aware of that abuse. For any or all of these reasons, Defendants' motions must be denied -- even apart from the application of the discovery rule -- fraudulent concealment, or any other tolling doctrine or defense pleaded by Doe IV in response to Defendants' limitations argument.

A. Doe IV Was Not Aware of the Sexual Abuse at the Time It Occurred.

At the outset, Defendants' motions must be denied because Defendants have not conclusively established that Doe IV was aware of Katinas's sexual abuse when it occurred. Defendants' limitations argument, as well as their effort to negate Doe IV's defenses to limitations, including the discovery rule, fraudulent concealment, and estoppel, hinge entirely on their repeated assertion that Doe IV's testimony conclusively establishes that he was "aware" of the sexual abuse when it occurred. (GOAA Motion at 11; HT Motion at 13-14). As discussed below, however, the summary judgment evidence -- viewed in the light most favorable to Doe IV -- demonstrates to the contrary or, at the very least, raises a fact issue.

To begin with, as Holy Trinity itself recognizes, children often are "[u]naware of the nature of the [sexual] abuse" because "[t]hey do not understand what is happening to them." (HT Draft Policies for Child Safety at 20) Defendants thus put far too much stock in the fact that Doe IV, during his February 15, 2008 deposition in this case, was able to testify about the sexual assaults he endured. (*See* GOAA Motion at 3, 11; HT Motion at 2, 13, 14) The fact that Doe IV could testify about the abuse in 2008 -- more than 20 years after the abuse and shortly after his repressed and suppressed memories returned to him -- does not conclusively demonstrate that he "has always been aware" that he was being sexually abused by Katinas or that he was "aware of the abuse since it . . . occurred." (GOAA Motion at 11; HT Motion at 14) *Cf. Dixon v. E.D. Bullard Co.*, 138 S.W.3d 373, 379 (Tex. App.--Houston [14th Dist.] 2004, pet. granted, judgm't vacated w.r.m. by agr.) ("We do not find [plaintiff's] deposition testimony in 2001, in which he said he had pneumonia in 1996 due to silicosis, to be persuasive evidence as to what [plaintiff] knew or should have known regarding his condition and its cause in 1996."). Defendants further mischaracterize the evidence when they assert that Doe IV "told numerous persons of the *abuse* prior to and after reaching the age of majority." (GOAA Motion at 3, 11; HT Motion at 14)

(emphasis added) The testimony on which Defendants rely, however, is completely uninformative about what Doe IV supposedly told those persons -- *i.e.*, there is no indication as to whether Doe IV told them he had been "abused" (as Defendants suggest) or whether he merely told them that he "misunderstood" what Katinas did to him (as Triantafilou had fraudulently convinced him and his parents). (Doe IV Father Depo. at 108)

Viewed in the light most favorable to Doe IV, the summary judgment evidence raises a fact issue regarding whether Doe IV was aware of the sexual abuse by Katinas at the time it occurred (or at any time thereafter). That fact issue is sufficient to defeat Defendants' motions for summary judgment.

B. Any Alleged Awareness of Katinas's Sexual Acts at the Time They Occurred Is Legally Irrelevant to the Limitations Analysis Here Because Doe IV Was a Minor and Therefore Under a Legal Disability at the Time.

Even if Doe IV were "aware" of the sexual abuse by Katinas at the time it occurred, such alleged awareness is legally irrelevant to the limitations analysis here. Defendants' contrary contention overlooks the undisputed fact that Doe IV was a minor at the time of the abuse and therefore was under a legal disability until he turned 18 on March 23, 1994. (Doe IV Depo. at 143) As a result, none of the so-called facts upon which Defendants rely have a bearing on the limitations issue here because they all occurred *before* the limitations period began to run (at the earliest) in March 1994.

Although a claimant must generally bring his claims not later than two, four, or five years "after the day the cause of action accrues" pursuant to sections 16.003, 16.004, and 16.0045 of the Texas Civil Practice and Remedies Code, the Texas Legislature has recognized that a person "younger than 18 years of age" is "under a legal disability." TEX. CIV. PRAC. & REM. CODE § 16.001(a)(1). For such persons, "the time of disability is *not included in the limitations period*," and therefore, the statute of limitations does not begin to run until the claimant turns 18

years of age. *Id.* § 16.001(b) (emphasis added); *see S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996) ("In applying the statute of limitations, . . . the years of [plaintiff's] minority are not included. . . . [Plaintiff] is [thus] in the same position as if her claims all accrued on her 18th birthday and limitations began to run on that date."). As a result, for purposes of establishing a limitations defense, it is irrelevant whether Doe IV was aware of or knew of the sexual abuse during a time "not included in the limitations period" while he was a minor and under a "legal disability." Rather, the relevant inquiry is whether Doe IV was aware of the sexual abuse when he turned 18 on March 23, 1994 and the limitations period began to run (at the earliest). *See Fager v. Handt*, 610 N.E.2d 246, 250 (Ind. 1993) ("This grace period [until age 18] allows a person a reasonable opportunity upon reaching adult age to assess and assert his or her legal rights. Such opportunity, however, is of no avail to the new adult who lacks knowledge of early childhood trauma and injury.").

As to this relevant inquiry, Defendants' summary judgment evidence is notably lacking. In fact, as set forth above, Defendants rely exclusively on Doe IV's deposition testimony from 2008. Tellingly, however, Defendants offered no summary judgment evidence demonstrating -- much less conclusively establishing -- that Doe IV was aware of the sexual abuse by Katinas at any time between March 23, 1994 when he turned 18 and 2008 when he gave his deposition testimony. *See* Part VI.A, above. In the absence of such proof, Defendants have not met their summary judgment burden to show that all of Doe IV's claims are barred by limitations as a matter of law. The motions therefore must be denied for this reason as well.

C. Defendants Ignore Their Own Tortious Conduct and Instead Focus Entirely on Katinas's Sexual Abuse.

Finally, in addition to the reasons discussed above, Defendants' motions also must be denied because they improperly focus only on Katinas's sexual abuse of Doe IV, when that

abuse occurred, and when Doe IV was supposedly aware of that abuse and his resulting injury. In conducting this superficial analysis, however, Defendants conveniently ignore their *own* tortious acts and omissions and the causes of action asserted against them by Doe IV in this lawsuit. With respect to *those* causes of action, Defendants have not met their summary judgment burden to demonstrate that Doe IV's claims accrued, and the statute of limitations commenced on those claims, more than two, four, or five years before Doe IV filed suit.

Under Texas law, the question of when a claim "accrues" arises out of "the application of the statute of limitations to the facts ascertained *as they relate to the cause of action pleaded.*" *Parker v. Yen*, 823 S.W.2d 359, 363-64 (Tex. App.--Dallas 1991, no writ) (emphasis added); *see Port Arthur Rice Milling Co. v. Beaumont Rice Mills*, 143 S.W. 926, 928 (Tex. 1912). Limitations do not begin to run until suit can be commenced "upon the claim asserted." *Parker*, 823 S.W.2d at 364. Therefore, a cause of action does not accrue until "the point at which the tort complained of is completed -- *i.e.*, when facts supporting each element of the cause of action come into existence." *Stroud v. VBFSB Holding Corp.*, 917 S.W.2d 75, 79-80 (Tex. App.--San Antonio 1996, writ denied); *see also Deloitte & Touche v. Weller*, 976 S.W.2d 212, 215 (Tex. App.--Amarillo 1998, pet. denied) ("[A] cause of action only accrues when facts come into existence supporting each element of the tort.").

Applying these principles here, Defendants were required to demonstrate that the facts giving rise to each element of Doe IV's claims *against the GOAA Defendants and Holy Trinity* for negligence, fraud, breach of confidential relationship, and the like had occurred -- and those claims had accrued -- at least two, four, or five years before Doe IV filed suit. They failed to do so. Indeed, Defendants have made no showing that the elements of negligence, fraud, and the like were in existence more than two, four, or five years before Doe IV filed suit. Instead,

without any evidentiary support and without relating any of the so-called facts to the particular causes of action asserted by Doe IV, Defendants merely argue that all of Doe IV's causes of action accrued "when he reached the age of 18" (HT Motion at 14) or "when the alleged acts of sexual abuse occurred" and that Doe IV was therefore "required to file and serve his action prior to his twenty-third birthday or March 23, 1999" (GOAA Motion at 9). Accordingly, Defendants' motions are deficient as a matter of law and must be denied for this reason as well. *See DeWoody v. Rippley*, 951 S.W.2d 935, 947 (Tex. App.--Fort Worth 1997, pet. dism'd by agr.) ("global assertion" that the plaintiffs' claims against the four defendants for tortious conduct were time barred is "insufficient to establish when *each* of the sixteen individual causes of action asserted against [defendants] accrued") (emphasis added).

VII.

Doe IV's Pleaded Defenses to the Statute of Limitations Preclude Summary Judgment Under the Circumstances Here

Even if limitations began to run on all of Doe IV's claims in March 1994 when he turned 18, and even if those claims would be barred under the applicable two, four, or five year statute of limitations, Defendants' motions must still be denied for either one of two reasons. First, Defendants have failed to conclusively negate all of Doe IV's pleaded defenses to the statute of limitations. Second, the summary judgment evidence raises a fact issue regarding each disputed element of those defenses.

As an initial matter, contrary to Defendants' assertion, the discovery rule does apply here because the wrongful acts and Doe IV's resulting injuries were both inherently undiscoverable and objectively verifiable. Applying the discovery rule, the summary judgment evidence demonstrates that Doe IV did not, in fact, discover Defendants' wrongful acts and his resulting injuries until shortly before filing this lawsuit. Defendants' limitations defense likewise fails

because Doe IV repressed and suppressed all memory of the sexual abuse and the injury he suffered at the hands of Katinas. Finally, the summary judgment evidence demonstrates that Defendants fraudulently concealed Doe IV's claims and are estopped from asserting their limitations defense under the circumstances here. For any or all of these reasons, Defendants' motions should be denied.

A. Defendants Have Not Met Their Summary Judgment Burden To Negate the Application of the Discovery Rule.

Under well-settled Texas law, a defendant moving for summary judgment on the affirmative defense of limitations has the burden to "conclusively . . . negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury." *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Although Doe IV specifically pleaded the discovery rule here (*see* Pls.' Sixth Am. Pet. ¶ 13.01), Defendants have failed to meet their summary judgment burden to negate it as a matter of law and undisputed fact.

1. The discovery rule applies here.

In discussing the concept of "inherent undiscoverability," Defendants confuse the distinction between (1) whether the discovery rule applies in the first instance to Doe IV's claims in this case, and (2) whether, when applying the discovery rule, Doe IV discovered or should have discovered his claims at least two years before filing suit. The concept of inherent undiscoverability, along with the related concept of objective verifiability, is used to determine whether the discovery rule applies in the first instance to a particular cause of action. *S.V. v. R.V.*, 933 S.W.2d 1, 6-7 (Tex. 1996). It is well-established in Texas that the discovery rule *does* apply to Doe IV's claims for breach of fiduciary duty, fraud, and conspiracy. *See Computer*

Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455-56 (Tex. 1996) (explaining reasons for applying discovery rule in fraud cases and noting that, in a fiduciary context, the nature of the injury is presumed to be inherently undiscoverable); *Prostok v. Browning*, 112 S.W.3d 876, 898 (Tex. App.--Dallas 2003) (discovery rule "applies to claims of breach of fiduciary duty and conspiracy"), *rev'd on other grounds*, 165 S.W.3d 336 (Tex. 2005); *In re Estate of Herring*, 970 S.W.2d 583, 586 (Tex. App.--Corpus Christi 1998, no pet.) (discovery rule applies to conspiracy to commit fraud). As to those claims, the Court need not examine the concepts of inherent undiscoverability or objective verifiability. *See, e.g., Computer Assocs. Int'l*, 918 S.W.2d at 455-56; *Prostok*, 112 S.W.3d at 898; *Herring*, 970 S.W.2d at 586.

Once it is determined that the discovery rule does apply to a particular cause of action, the question becomes whether the discovery rule defers the accrual of limitations and thereby saves the claim from being time-barred. *S.V.*, 933 S.W.2d at 6. Specifically, at the summary judgment stage, a defendant has the burden to negate the discovery rule by conclusively establishing that the plaintiff discovered or should have discovered the "nature of the injury" -- *i.e.*, "the injury and that it was likely caused by the wrongful acts of another" -- more than two, four, or five years before he filed suit. *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998).

Although Doe IV is not required to establish the elements of inherent undiscoverability and objective verifiability for the discovery rule to apply in this case, Doe IV would be able to do so in any event, as set forth below.

a. <u>*The nature of Doe IV's injury was inherently undiscoverable.*</u>

As the Texas Supreme Court has expressly recognized, "some [childhood] traumas are by nature impossible to recall for a time." *S.V.*, 933 S.W.2d at 8. Thus, even though the plaintiff in *S.V.* (unlike here) was not deceived into thinking she was not being abused, the Court assumed that a plaintiff could "satisfy the inherent undiscoverability element for application of the

discovery rule" in a sex abuse case. *Id.*; *see also Doe v. Grossman*, No. 3:99-CV-1336-P, 2000 U.S. Dist. LEXIS 12233, at *11 (N.D. Tex. Aug. 24, 2000) ("[C]hildhood sexual abuse is the type of injury that may be inherently undiscoverable.").

The case for inherent undiscoverability is even stronger here, because Defendants did deceive Doe IV into believing that he was not abused and that he had simply "misunderstood" and "imagined" Katinas's actions. (Doe IV Father Depo. at 108; Doe IV Depo. at 177) Accordingly, Doe IV can readily satisfy the inherent undiscoverability element, and more importantly for present purposes, Defendants have failed to conclusively establish that he cannot.[14]

Holy Trinity is thus wrong when it asserts that Doe IV "admitted that he was aware of the abuse at the time it occurred," and its reliance on *Doe v. Linam*, 225 F. Supp. 2d 731 (S.D. Tex. 2002), and *Doe v. Grossman*, 2000 WL 1400626 (N.D. Tex. Aug. 25, 2000), is misplaced. (HT Motion at 17; *see also* GOAA Motion at 11) In *Linam*, the plaintiff "candidly admit[ted] that he was aware of the alleged sexual abuse incident involving [the defendant] and his related injuries prior to the expiration of the limitations period" and "admittedly knew that he had been abused." *Linam*, 225 F. Supp. 2d at 735. Similarly, before the expiration of the natural statute of limitations in *Grossman* at the plaintiff's twenty-third birthday, the plaintiff knew or "began to suspect her father abused her." *Grossman*, 2000 WL 1400626, at *5. In stark contrast here, Doe IV was not aware that he had been sexually abused before the expiration of the statute of

[14] Moreover, under well-settled Texas law, a fiduciary's misconduct is inherently undiscoverable. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988); *Haas v. George*, 71 S.W.3d 904, 912 (Tex. App.--Texarkana 2002, no pet.). A person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so. *S.V.*, 933 S.W.2d at 8; *see Willis*, 760 S.W.2d at 645 ("Facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved."). Because Defendants are not entitled to summary judgment on the existence of a fiduciary or confidential relationship for the reasons discussed below in Part VII.C, the "inherent undiscoverability" prong of the discovery rule is satisfied for this reason as well.

limitations. Rather, Defendants deceived Doe IV into believing that he was not abused and that he had simply "misunderstood" and "imagined" Katinas's actions. (Doe IV Father Depo. at 108; Doe IV Depo. at 177).

b. The wrongful acts and Doe's injury are objectively verifiable.

Defendants are similarly mistaken when they contend that Doe IV cannot establish the objective verifiability prong of the test for whether the discovery rule applies. (GOAA Motion at 12; HT Motion at 18) As discussed below, Defendants are mistaken, and their reliance on *S.V.* to contend otherwise is misplaced.

In *S.V.*, the Texas Supreme Court ultimately concluded that the discovery rule did not apply to the facts of that case because there was "no physical or other evidence . . . to satisfy the element of objective verifiability." *S.V.*, 933 S.W.2d at 15. Thus, the facts in *S.V.* presented a classic swearing match between the alleged abuser (the father) and the alleged victim of sexual abuse (the daughter). Because the Court rejected the daughter's use of expert psychiatric testimony concerning repressed memories to satisfy the objective verifiability prong, "the daughter's allegations of past sexual abuse amounted to her word against her father's." *Id.* at 15-21.

Significantly, however, the Court did not rule out the possibility that a sexual abuse claim could be objectively verified in *other* cases. To the contrary, the Court recognized that various kinds of evidence -- that were not present in *S.V.* -- "would suffice" to meet the objective verifiability element:

> The kinds of evidence that would suffice would be a confession by the abuser; a criminal conviction; contemporaneous records or written statements of the abuser such as diaries or letters; medical records of the person abused showing contemporaneous physical injury resulting from the abuse; photographs or recordings of the abuse; an objective eyewitness's account; and the like. Such evidence would provide sufficient objective verification of abuse,

> even if it occurred years before suit was brought, to warrant application of the discovery rule.

Id. at 15 (internal citations omitted). Unlike the facts in *S.V.*, this type of evidence is present here, and application of the discovery rule is therefore warranted.

For example, Katinas has openly admitted that he had a "sexual preference for teenage boys," that he used "oral sex and mutual masturbation [with minors] as an escape," that he "believ[ed] that it was a pleasurable experience for the young boys," and that he had "sexual contact with approximately 5 teenage boys between the 1960's and early 1980's." (SLI Report at 3, 9) In addition, Katinas admitted to one of his former victims that it took him several years to "clean up" his act after moving to Dallas. (DZ Aff. ¶ 11) In the summary judgment context, where the evidence must be viewed in the light most favorable to Doe IV and every reasonable inference indulged in his favor, Katinas's admissions essentially amount to a confession that satisfies the objective verifiability prong by itself.

In addition to Katinas's confessions, there is an abundance of other evidence that objectively corroborates and verifies Katinas's sexual abuse of minor boys like Doe IV. For example, numerous victims -- including DZ, TS, and SA -- as well as the other plaintiffs in this action have come forward to corroborate the sexual abuse committed by Katinas. (DZ Aff. ¶¶ 4-7; TS Aff. ¶¶ 5-8; SA Aff. ¶¶ 5-7; *see also* Parts V.A, V.B) *See Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 680 (S.C. 2000) (corroborating evidence that will satisfy the element of "objective verifiability" includes "evidence the abuser had sexually abused others"). A forensic psychiatrist who examined Doe IV had no reason to doubt that Doe IV was sexually abused by Katinas. (Rosenstock IV Aff. ¶ 3 & Ex. B. at 7-9; *see also* HT Draft Policies for Child Safety at 20 ("There is little research evidence to support the contention that children fabricate these reports . . . [and] children seldom lie about acts of sexual exploitation.")) And the

GOAA itself has concluded that Katinas "abuse[d] the power and prescience of his priestly office, and did seduce and subsequently engage in sexual relations with a young man of his spiritual flock." (Kontogiorgis Depo. Ex. 12 at 2-3)

In total, this evidence provides "sufficient objective verification of abuse, even if it occurred years before suit was brought, to warrant application of the discovery rule" here. *See S.V.*, 933 S.W.2d at 15. For these reasons, there is no question that the discovery rule applies to all the claims asserted by Doe IV.

2. Doe IV did not discover -- and should not have discovered -- the wrongful acts and the resulting injury until recently.

Because the discovery rule applies in this case, Defendants have the burden to conclusively prove that there is no genuine issue of material fact that Doe IV discovered, or in the exercise of reasonable diligence should have discovered, the "injury and that it was likely caused by the wrongful acts of another" at least two years (and for many claims four or five years) before he filed suit. *Childs*, 974 S.W.2d at 40. Defendants have failed to meet that burden. Under well-settled Texas law, the question of what one "should have known" is one of fact, and a summary judgment is not a "trial by deposition or affidavit, or to be resolved by weighing the relative strength of the conflicting facts and inferences." *Hassell v. Missouri Pac. R.R. Co.*, 880 S.W.2d 39, 44 (Tex. App.--Tyler 1994, writ denied); *see also Childs*, 974 S.W.2d at 44 ("Inquiries involving the discovery rule usually entail questions for the trier of fact."); *accord Logerquist v. Danforth,* 932 P.2d 281, 287 (Ariz. App. Div. 2 1996) ("[D]etermination of a claim's accrual date usually is a question of fact, with the inquiry centering on the plaintiff's knowledge of the subject event and resultant injuries, whom the plaintiff believed was responsible, and plaintiff's diligence in pursuing the claim."). This is precisely the case here, thus preventing the limitations issue from being resolved by summary judgment.

In determining whether Defendants have conclusively established when Doe IV knew or should have known of the wrongful acts and resulting injuries, it is important at the outset to consider two aspects of this case that are not present in most other discovery rule cases. First, Doe IV was a child at the time of the abuse, and his perceptions should be analyzed from the standpoint of a child, not an adult. Children simply do not have the same judgment and maturity as adults, and their concept of what is good or bad, right or wrong, is very undeveloped. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("[A]s any parent knows and as the scientific and sociological studies [confirm,] a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults [and] . . . juveniles are more vulnerable or susceptible to negative influences . . . and to psychological damage") (internal citations omitted). That is precisely the case here, where Doe IV "dealt with the events as a child" and "was not capable of forming an adult, rational, and competent appreciation for the harm he had experienced, nor was he capable of identifying Katinas's actions as constituting sexual abuse." (Rosenstock IV Aff. ¶ 10) Second, the abuser was a priest. As the Orthodox Bishops of America (including the Greek Orthodox Bishops) recognize:

> While sexual misconduct is sinful and harmful for any Christian, it is especially grave and painful when the perpetrator is a clergyman, because it so often entails a serious abuse of the legitimate authority of the clergy within the community of the Church . . . . The relationship of the clergyman to his parishioners is one of a spiritual father to his spiritual children. The clergyman's authority carries with it an inherent and often unrecognized power. Its depth in this relationship is such that the victim, of whatever age, never truly acts freely.

(Khan Aff. ¶ 4 & Ex. B) Doe IV thus trusted and respected Katinas as a man of God, and Defendants told him that he "misunderstood" Katinas actions and that nothing inappropriate had occurred. (Doe IV Father Depo. at 22, 60-62, 108) Under these circumstances, Doe IV did not view (and could not be expected to view) the acts as wrongful.

Measured against the backdrop of these factors, the evidence here raises genuine issues of fact as to when Doe IV discovered the *wrongful* acts of Katinas (not to mention the distinct wrongful acts of the Defendants), as well as the *resulting injuries* from those wrongful acts. *Childs*, 974 S.W.2d at 40. As to Katinas, the evidence shows that, until recently, Doe IV did not view their interaction as involving sexual abuse or wrongful acts. (Rosenstock IV Aff. ¶ 8) Instead, he was deceived into thinking that he had "misunderstood" and "imagined" Katinas's actions, that "nothing had occurred," that "Father Katinas wouldn't lie," and that Katinas "was a good man." (Doe IV Father Depo. at 60-62, 108; Doe IV Depo. at 177; Rosenstock IV Aff. ¶¶ 7-8) And as to the Defendants, there is no evidence whatsoever of when Doe IV discovered or should have discovered their integral role in allowing the sexual abuse to occur in the first place. Certainly, the evidence does not conclusively establish that the operative date was March 1994 (when Doe IV turned 18), as Defendants contend.

Try as they might, Defendants cannot avoid this conclusion by relying solely on the contention that Doe IV was aware that Katinas touched or fondled him when he was an altar boy. (GOAA Motion at 3, 11; HT Motion at 13) Such contention does not establish that Doe IV discovered, or should have discovered, the wrongful acts of Katinas, the GOAA Defendants, or Holy Trinity and the injury resulting from the acts at that time. Nor does it constitute any evidence that Doe IV (who was a minor at the time) knew that he was being sexually abused by Katinas or that the GOAA Defendants and Holy Trinity had pre-existing knowledge about -- and actually could have prevented -- Katinas's sexual abuse *before* he preyed on Doe IV. Accordingly, the evidence does not show that Doe IV discovered or should have discovered that the GOAA Defendants and Holy Trinity were, in fact, responsible for Katinas abusing him, and it certainly does not conclusively demonstrate that Doe IV knew or should have known that he

had a cause of action against Katinas, the GOAA Defendants, or Holy Trinity. Aside from this immaterial contention, the GOAA Defendants and Holy Trinity do not offer any concrete, unequivocal, undisputed evidence that Doe IV knew of any Defendant's wrongful acts or the resulting injuries around the time they occurred. For example, there are no diary entries, reports of sexual abuse, or counseling records indicating that Doe IV identified Katinas's actions as constituting sexual abuse.[15]

For similar reasons, Holy Trinity is also mistaken when it contends that Doe IV knew of his injuries at the time of Katinas's actions.[16] (HT Motion at 13) Like the evidence showing that Doe IV was not aware of Defendants' (or even Katinas') wrongful acts at the time they occurred, the summary judgment evidence also demonstrates that Doe IV was not aware of -- and had not discovered -- any *injury* at the time he was sexually molested by Katinas or that those injuries were likely caused by the wrongful acts of another. *Childs*, 974 S.W.2d at 40. In fact, in the opinion of Dr. Harvey Rosenstock, the clinical psychiatrist who evaluated Doe IV, Doe IV was not aware of the harm he experienced from the sexual abuse by Katinas until recently, because he was forced to repress and suppress the "painful" and "noxious" memories of the sexual abuse by Katinas. (Rosenstock IV Affidavit ¶¶ 4, 7-10) As a result, the nature of Doe IV's injury was inherently undiscoverable by him and "unlikely to be discovered within the prescribed limitations period despite due diligence." (*Id.* ¶¶ 9-10) Thus, like the question of when Doe IV discovered the wrongful acts, the question of when Doe IV discovered his resulting injury is also a question of fact that cannot be resolved by summary judgment.

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[15] Even if Defendants could establish that Doe IV was aware of the wrongful acts of Katinas, the GOAA Defendants, and Holy Trinity before March 1994 (and they cannot), such awareness is legally irrelevant because Doe IV was a minor at the time of the abuse and therefore was under a legal disability until he turned 18 on March 23, 1994. *See* Part VI.B.

[16] The GOAA offers no evidence or argument as to when Doe IV suffered or supposedly discovered his injuries.

For this reason, the GOAA Defendants' emphasis on Doe IV's after-the-fact deposition testimony regarding his "suicidal thoughts" (GOAA Motion at 3, 11) does not conclusively demonstrate that he knew of Katinas's or the Defendants' wrongful acts at the time they occurred or that his injuries were the result of those acts. *See* Part VI.A, above. Indeed, Defendants have made no showing that Doe IV actually connected his suicidal ideations to Katinas's abuse at the time -- much less the wrongful acts of Defendants that allowed that abuse to occur. *See Shahzade v. Gregory*, 930 F. Supp. 673, 676 (D. Mass. 1996) (denying motion for summary judgment because even if plaintiff admitted to knowledge of the sexual abuse, there was nothing to show that the plaintiff was "aware of a causal relation between the abuse and any harm which she now claims was the result of such abuse"); *cf. Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 220, 224 (Tex. 1999) (although plaintiff was diagnosed with brain cancer in 1989, a fact question prevented summary judgment on employer's limitations defense because the employer did not show that the plaintiff knew or should have known that his brain tumor was likely work related more than two years before he filed his personal injury action in 1992); *Hassell*, 880 S.W.2d at 44-45 (although plaintiff was aware that he had some form of hearing loss as early as 1971 and did not file suit until 1991, "[w]e cannot hold as a matter of law that [plaintiff's] difficulties with hearing necessarily charged him with notice of an injury caused by his employment sufficient to initiate the running of limitations.").

In many respects, this case is similar to *Winkler v. Magnuson*, 539 N.W.2d 821, 823 (Minn. App. 1995), another case involving claims of sexual abuse against a pastor by a male who was 13 years old when the abuse started in 1968. The plaintiff did not discuss the pastor's conduct with anyone until the summer of 1991, when his brother also revealed that he had been abused by the same pastor, and at that moment, the plaintiff began to realize there was a

connection between the abuse and the psychological problems he had experienced in his life. *Id.* The plaintiff filed suit in February 1994, and the trial court granted summary judgment for the defendants on the six-year statute of limitations after finding that the plaintiff knew or should have known before February 1988 that the abuse had caused his claimed injuries. *Id.* at 824.

On appeal, the plaintiff claimed that he did not know and should not have known that the abuse caused his injuries until at least the summer of 1991, when he first discussed the pastor's conduct with his brother. In response, the defendants emphasized the plaintiff's statement that he never forgot what the pastor had done, arguing that this and other evidence indicated that the plaintiff knew at that time that he in fact was abused and that it was injuring him. *Id.* Viewing all the evidence in the light most favorable to the plaintiff, however, the appellate court concluded that the evidence was not conclusive and therefore reversed the summary judgment:

> We believe, however, that a jury could nonetheless find that [plaintiff] did not know that the abuse caused his injury until much later. Although he admits never forgetting [the pastor's] conduct, he stated numerous times in his deposition that he did his best to "block out" the memories. Further, [plaintiff] indicated that although he was for many years "uncomfortable" and "embarrassed" about the situation, he never knew until recently whether it was right or wrong. At the time of the abuse, [plaintiff] placed great trust in [defendant] as his pastor. Adding to his confusion was the fact that [the pastor] portrayed the conduct to him as having the imprimatur of religion, by telling him to keep it a secret between the two of them and God. . . . This evidence, viewed in the light most favorable to [plaintiff], helps demonstrate the existence of a factual issue on the reasonable discovery date.

Id. at 825-26.

The New Hampshire Supreme Court reached a similar result in *Conrad v. Hazen*, 665 A.2d 372 (N.H. 1995). There, the plaintiff brought suit in 1993 for sexual abuse that allegedly occurred in 1977. The trial court granted summary judgment on the grounds of limitations, and the New Hampshire Supreme Court reversed. Although the plaintiff's pleadings and affidavit

made clear that she experienced pain and physical injury at the time of the assault, that she recognized that the experience was "devastating and extremely painful," and that following the assault, "[s]he felt dirty, sick, and scared," the supreme court nevertheless held that a question of fact existed as to whether these injuries were sufficiently serious to apprise her that a possible violation of her rights had taken place. *Id.* at 375-76.

The same is true here. Indulging every reasonable inference in favor of Doe IV, as the non-movant, and resolving all doubts about the existence of a genuine issue of material fact in his favor, the summary judgment evidence raises questions of fact regarding when Doe IV discovered or should have discovered the wrongful acts and the resulting injury. Those questions of fact cannot be resolved by summary judgment, and as a result, Defendants' motions must be denied for this reason as well.

B. Holy Trinity Has Not Conclusively Negated the Applicability of the Suppressed or Repressed Memory Doctrine.

For at least two reasons, Holy Trinity is wrong when it asserts that Doe IV cannot rely on his repressed memory to support the application of the discovery rule.[17] (HT Motion at 18) First, Holy Trinity's contention is erroneous and, in any event, irrelevant because Doe IV also relies on the concept of memory suppression, not simply repression. Significantly, "suppression" of one's memory is different from the "repression" of one's memory, as the Texas Supreme Court discussed in *S.V.*, 933 S.W.2d at 11, and neither the Texas Supreme Court nor any other Texas appellate court has rejected the suppressed memory doctrine as a basis for defeating the application of limitations. The concept of suppressed memory is "widely accepted in psychiatry and psychology, is reliable, and [has been] subject[ed] to peer review."

[17] The GOAA Defendants do not address -- much less attempt to conclusively negate -- either the suppressed or repressed memory doctrine in their motion for summary judgment. For this reason alone, they have not met their summary judgment burden to establish their limitations defense as a matter of law.

(Rosenstock IV Aff. ¶ 6) As a result of suppressed memory, Doe IV was not aware of the harm he experienced from the sexual abuse by Katinas. (*Id.* ¶¶ 8-10) Indeed, Doe IV made persistent efforts to avoid recollection of Katinas's acts, and unknowingly developed methods to try to banish the memories from his consciousness. (*Id.*; Doe IV Depo. at 125-26, 137-38, 178-80, 207) Accordingly, Doe IV suppressed any knowledge of the sexual abuse he suffered at the hands of Katinas until recently, when he became empowered by previously unknown facts to lift this suppression. (Rosenstock IV Aff. ¶ 8) Viewed in the light most favorable to Doe IV, as the non-movant, this evidence plainly raises a question of fact as to whether and for how long Doe IV suppressed any memory of his sexual abuse. This fact issue is sufficient to defeat summary judgment on the discovery rule, even apart from the facts discussed above.

Second, Holy Trinity is also mistaken when it contends that "[t]he Texas Supreme Court has categorically rejected repressed memory as sufficient evidence to satisfy the objective verification prong of the discovery rule." (HT Motion at 18) Contrary to Defendants' assertion, the Texas Supreme Court has not "categorically rejected" the repressed memory doctrine. (*See id.*) Rather, in *S.V.*, the Court merely concluded that opinions in the area of repressed memory as of the early 1990s, by themselves, could not meet the "objective verifiability" element for extending the discovery rule. *S.V.*, 933 S.W.2d at 19-20. In so concluding, however, the Court specifically noted that "we have not held that such testimony can never suffice, at least in connection with other evidence." *Id.* at 15. Nonetheless, in *S.V.*, the *only* evidence offered by the plaintiff to objectively verify her abuse was the expert testimony of a psychiatrist regarding repressed memories, and the Court found that evidence alone to be insufficient in that case to establish the objective verification prong.

In this case, by contrast, there is an abundance of other evidence that objectively verifies the sexual abuse by Katinas. *See* Part VII.A(1)(b). That evidence -- even without the testimony of Dr. Rosenstock -- is more than sufficient to meet this prong of the discovery rule. Accordingly, there is no basis to summarily reject Dr. Rosenstock's opinions or the repressed (or suppressed) memory doctrine. As the Arizona Supreme Court recognized in *Roe v. Doe*, 955 P.2d 951, 960 (Ariz. 1998):

> A victim whose memory is inaccessible lacks conscious awareness of the event and thus cannot know the facts giving rise to the cause [of action]. The policy behind the discovery rule is thus served by application to repressed memory cases involving childhood sexual abuse and is, we believe, logically appropriate given that the intentional act of the tortfeasor caused both the damage and the repression of memory. To hold otherwise would be to effectively reward the perpetrator for the egregious nature of his conduct and the severity of the resulting emotional injury.

Id. at 960 (internal citation omitted); *see also Shahzade v. Gregory*, 930 F. Supp. 673, 675 (D. Mass. 1996) ("[F]undamental fairness requires the 'discovery rule' to apply to tort claims brought by victims of sexual abuse whose memories of such abuse have been repressed until after the statute of limitations has run."); *Hearndon v. Graham*, 767 So.2d 1179, 1181, 1186 (Fla. 2000) (discovery rule applies to tort action based on childhood sexual abuse where plaintiff alleges that she suffered from traumatic amnesia caused by the abuse); *Moriarty v. Garden Sanctuary Church*, 534 S.E.2d 672, 682 (S.C. 2000) (sexual abuse victim who suffers from repressed memory syndrome may rely on discovery rule); *Ault v. Jasko*, 637 N.E.2d 870, 873 (Ohio 1994) (discovery rule applies to toll limitations where a victim of childhood sexual abuse represses memories of that abuse until a later time); *McCollum v. D'Arcy*, 638 A.2d 797, 799-800 (N.H. 1994) (applying the common law discovery rule in child sexual abuse case).[18]

[18] Leading commentators have likewise recognized that child sexual abuse is often accompanied by symptoms of dissociation or depersonalization involving an alteration in the victim's perception so

C. The Existence of a Confidential Relationship Between Defendants and Doe IV Affects the Application of the Discovery Rule, Fraudulent Concealment, and Equitable Estoppel.

In addition to the defects discussed above in Defendants' motions and their summary judgment evidence, the existence of a confidential relationship between Defendants and Doe IV -- or, at the very least, a fact question regarding that relationship -- is also fatal to Defendants' motions here.[19]

1. Because Doe IV's claims do not implicate the First Amendment, Defendants' reliance on *Turner* and *Hawkins* is misplaced.

Defendants initially argue that they are entitled to summary judgment on Doe IV's breach of fiduciary duty or confidential relationship claim because an examination of "the relationship between a parishioner and [the GOAA Defendants] . . . would necessarily involve excessive entanglement by the government with the Church in violation of the Establishment Clause." (GOAA Motion at 5; *see also* HT Motion at 8 ("Texas refuses to recognize the existence of a fiduciary relationship between a minister or church and a member of a congregation.")) This is

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that the child's usual sense of reality is temporarily lost or changed. C.B. Scrignar, *Post-Traumatic Stress Disorder* 149 (1984). One study has revealed that 64 percent of the adults in an incest survivors' group did not have full recall of their childhood abuse and suffered some degree of amnesia. J.L. Herman & E. Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, Psychoanalytic Psychology, 4(1), 1-14 (1987). Further, some children succeed in blocking trauma from their consciousness by "dissociating themselves from the act when it occurs." Christopher Bagley & Kathleen King, *Child Sexual Abuse* 139 (1990).

[19] The existence of a confidential relationship (or a fact question pertaining thereto) has important implications for the application of the discovery rule, fraudulent concealment, and equitable estoppel. For example, if Defendants are not entitled to summary judgment on the existence of a confidential relationship (and for the reasons discussed below, they are not), there is no question that the discovery rule applies to Doe IV's claims. *See, e.g., Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (special relationship between the parties "justifies the imposition of the discovery rule"). Furthermore, the GOAA Defendants' and Holy Trinity's silence in the face of a duty to speak constitutes fraudulent concealment and/or estoppels, which would likewise be sufficient to toll limitations. *See, e.g., Santanna Natural Gas Corp. v. Hamon Operating Co.*, 954 S.W.2d 885, 890-91 (Tex. App.--Austin 1997, pet. denied). Nonetheless, Doe IV's defenses do not turn or otherwise depend on the existence of a confidential relationship, and Defendants' motions must be denied regardless of the nature of that relationship.

not a ground for summary judgment, and even if it were, it is inapplicable because this case does not implicate any First Amendment concerns.

In making this argument, Defendants do not rely upon any summary judgment evidence; they do not argue that the undisputed facts demonstrate that no fiduciary duty existed between Defendants and Doe IV under the circumstances here; and they do not move for summary judgment under TEX. R. CIV. P. 166a(i) on the ground that there is no evidence to support the existence of a fiduciary or confidential relationship.[20] Instead, Defendants rely entirely on *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App.--Tyler 2000, no pet.); *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877 (Tex. App.--Dallas 2000, pet. denied); *Doe IV v. Roman Catholic Diocese of Galveston-Houston*, 2006 WL 2413721 (S.D. Tex. 2006); and *Doe XV v. Roman Catholic Diocese of Dallas*, 2001 WL 856963 (Tex. App.--Dallas 2001, pet. denied) (not designated for publication), for the proposition that there is no fiduciary duty between a church and its members under Texas law. (GOAA Motion at 5-6; HT Motion at 8) As set forth below, however, these cases were decided on First Amendment grounds, are inapposite, and do not apply here.

In *Turner*, a former missionary brought various claims against a church for injuries he allegedly suffered during and after his missionary work in Guatemala. The defendant church moved for summary judgment on two grounds: (1) all of the plaintiff's claims were barred by the Establishment and Free Exercise of Religion Clauses of the First Amendment; and (2) no evidence supported the plaintiff's causes of action, including his claim for breach of fiduciary duty. *Turner*, 18 S.W.3d at 885. In affirming the trial court's grant of summary judgment, the

[20] Notwithstanding Defendants' present contention that they do not owe a fiduciary duty to Doe IV, Nicolas Carayannopoulos, a former President of the Holy Trinity Parish Council, testified that the Parish Council owed the parishioners of Holy Trinity the duties of prudence and good faith and fair dealing. (N. Carayannopoulos Depo. at 154-55)

court of appeals observed that all of the facts offered by the plaintiff to support his fiduciary duty claim "involve either religious doctrine and practices or the internal policies of the Church." *Id.* at 897. Accordingly, the "determination of whether a confidential or fiduciary relationship exists would require the courts to interpret religious doctrine, practices, and the internal policies of the church." *Id.* Because "[m]aking such an examination of the relationship between the Church and its missionaries would necessarily involve excessive entanglement by the government with the Church in violation of the Establishment Clause," the court concluded that the plaintiff's claim that a confidential or fiduciary relationship existed between the church and him was barred by the First Amendment. *Id.* Similarly, the court in *Hawkins* likewise "decline[d] to determine that the pastor-member relationship *in this case* established a fiduciary duty" in light of the court's "concerns toward treading upon the Free Exercise Clause of the First Amendment." *Hawkins*, 30 S.W.2d at 453 (emphasis added).[21]

In stark contrast to these cases, this case does not involve religious doctrine or practices. Nor does it require an examination of the relationship between a church and its members, such that it would involve excessive entanglement by the courts into the affairs of the Greek Orthodox Church. Under such circumstances -- where the First Amendment is not implicated -- numerous courts have held that a diocese and clergy owe fiduciary duties to the persons they serve or, alternatively, that the existence of any such confidential relationship is a question of fact.

For example, in *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998), plaintiffs who had received marital counseling from a

[21] Defendants' reliance on the unpublished opinions in *Doe I* and *Doe XV* fares no better. The courts in *Doe I* and *Doe XV* did not engage in any discussion of whether the particular facts in those cases supported the existence of a fiduciary or confidential relationship between the church and the plaintiffs. Instead, the courts merely cited *Turner* and *Hawkins* to support the conclusion that the church did not owe a fiduciary duty to plaintiffs under the circumstances of those cases.

minister and had sexual relationships with the minister brought suit against the church and minister for, among other claims, breach of fiduciary duty. After concluding that the plaintiffs' claims did not implicate the First Amendment, the court recognized that, under Texas law, "certain informal relationships may give rise to a fiduciary duty." *Id.* at 1176 (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992)). As the Texas Supreme Court has observed, such "confidential relationships" may arise "where one person trusts and relies upon another, whether the relation is a moral, social, domestic, or merely personal one." *Id.* (quoting *Crim Truck*). Further, "the law recognizes the existence of confidential relationships in those cases 'in which influence has been acquired and abused, in which confidence has been reposed and betrayed.'" *Id.* (quoting *Crim Truck*). Importantly, as the *Sanders* court observed, the "existence of a confidential relationship is usually a *question of fact*." *Id.* (quoting *Crim Truck*) (emphasis added). Based on these well-settled principles of Texas law, the court therefore held that "genuine issues of material fact are present in this case regarding whether confidential relationships existed between [the minister] and Plaintiffs 'in which influence had been acquired and abused, in which confidence had been reposed and betrayed.'" *Id.* (quoting *Crim Truck*); *see also Martinelli v. Bridegeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429 (2d Cir. 1999) ("[I]rrespective of the duties of the Diocese to its parishioners generally, the jury could reasonably have found that the Diocese's relationship with [plaintiff], based on the particulars of [plaintiff's] ties to the [abusive priest] and the Diocese's knowledge and sponsorship of that relationship, was of a fiduciary nature.").[22]

[22] Other jurisdictions have similarly concluded that a diocese or priest may owe fiduciary duties to their congregants. *See Koenig v. Lambert*, 527 N.W.2d 903, 906 (S.D. 1995) ("[Plaintiff] was taught to trust and respect members of the Diocese. [Plaintiff] put his trust and faith in the members of the Diocese, and was encouraged to do so by the Diocese. . . . [I]f there is a trust relationship [between doctor and patient, architect and client, attorney and client, and tenants in common], there must also be one between a Diocese and the members of the faith it purports to serve."), *overruled on other grounds by*

The same is true here. As a result, this case simply does not and cannot implicate any First Amendment concerns. And without First Amendment implications, Defendants have cited no authority holding that a fiduciary or confidential relationship cannot exist under *any* circumstances between Doe IV and Defendants. There is none. Rather, as the Texas Supreme Court recognized, the "existence of a confidential relationship is usually a *question of fact*." *Crim Truck & Tractor Co.*, 823 S.W.2d at 1176 (emphasis added); *see Schiller v. Elick*, 240 S.W.2d 997, 1000 (Tex. 1951). Accordingly, because Texas law recognizes the existence of confidential relationships in cases like this, in which "one person trusts and relies upon another" or in which "'influence has been acquired and abused, in which confidence has been reposed and betrayed,'" the trier of fact must ultimately decide if such a confidential relationship existed under the circumstances here. *Crim Truck & Tractor Co.*, 823 S.W.2d at 1176 (quoting *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980)).[23]

Stratmeyer v. Stratmeyer, 567 N.W.2d 220 (S.D. 1997); *Moses v. Diocese of Colorado*, 863 P.2d 310, 322-23 (Colo. 1993) (evidence supported jury's finding that a fiduciary relationship existed between bishop and plaintiff who sought counseling from the bishop, and that the diocese and bishop breached that duty); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992) ("[I]nasmuch as it is conduct, and not creed, that underlies plaintiffs' actions, and that the potential for civil consequences exists equally as to religious and non-religious persons alike, . . . the First Amendment does not come into play to preclude plaintiffs' [breach of fiduciary duty action]."); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) (priest who held himself out to the community as a professional or trained counselor owed fiduciary duty to plaintiff "created by his undertaking" to counsel her); *Erickson v. Christenson*, 781 P.2d 383, 384-86 (Or. Ct. App. 1989) (complaint stated valid claim against pastor and church that employed pastor for breach of confidential relationship arising from pastor's seduction of plaintiff through a counseling relationship).

[23] Holy Trinity is thus wrong when it asserts that "a majority of courts throughout the country" refuse to recognize the existence of a fiduciary duty in circumstances like those here. (HT Motion at 8) Rather, as even one of the cases cited by Holy Trinity observes, "[c]lergy and religious organizations are not absolutely immune from civil liability" and "causes of action for breach of fiduciary duty with respect to [the] sexual misconduct of clergy [have been] recognized" in numerous jurisdictions. *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995). In any event, the three out-of-state cases cited by Holy Trinity are distinguishable because the courts in those cases concluded that defendants did not owe a fiduciary duty to plaintiffs because "the allegation of fiduciary duty was simply an elliptical way to state a clergy malpractice claim, a cause of action that . . . [was] not recognized in [those jurisdictions]." *Dausch v. Rykse*, 52 F.3d 1425, 1429, 1438 (7th Cir. 1994); *see also Schmidt v. Bishop*, 779 F. Supp. 321, 326

2. Holy Trinity has not conclusively negated the existence of a confidential relationship based on vicarious liability.

There is similarly no basis, in law or in fact, for Holy Trinity's contention -- which is relegated to a lone footnote -- that "Doe IV has no vicarious liability claim against [Holy Trinity]." (HT Motion at 6 n.7) Holy Trinity does not offer *any* summary judgment evidence demonstrating that Katinas was not acting in the course and scope of his employment; it does not argue that the undisputed summary judgment establishes that Katinas was not acting within the course and scope of his employment; and it does not move for summary judgment, pursuant to TEX. R. CIV. P. 166a(i), on the ground that there is no evidence that Katinas was acting in the course and scope of his employment. Instead, Holy Trinity merely asserts -- without support -- that Katinas's "physical[] assault [of] children" at the church was "wholly unrelated to [the church's] business" and therefore "outside the scope of [his] authority and scope of [his] employment [as] an agent or employee." (*Id.*)[24]

For these reasons, Holy Trinity's reliance on *Sanders* and *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994), is misplaced, and contrary to Holy Trinity's suggestion, those cases do not hold that a clergy's misconduct can *never* be within the scope of a cleric's employment. (HT Motion at 6 n.7) Rather, in *Sanders*, the court, in granting summary judgment to the church for its alleged vicarious liability for the intentional torts of one of its ministers during marital counseling, specifically noted that "[c]ounseling was

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(S.D.N.Y. 1991) (finding that plaintiff's breach of fiduciary claim was "merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in *malpractice*," which was not actionable under New York law) (emphasis in original); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 912 (Neb. 1993) (agreeing with reasoning of *Schmidt* case that breach of fiduciary duty claim against priest was simply another way of alleging malpractice, which was not actionable).

[24] Although it is not Doe IV's burden to do so, he has nevertheless demonstrated that Defendants not only knew about Katinas's actions, but actively tolerated them by moving Katinas from one parish to another where he left a trail of damaged youth in his path.

not a part of [the minister's] job description or within his job authority." *Sanders*, 898 F. Supp. at 1178. In fact, the minister was informed that "he was never to counsel," and the court therefore found that the minister "did not have actual or apparent authority to counsel Plaintiffs." *Id.* at 1178-79. Defendants have presented no such evidence here.

Further, although the *Sanders* court further recognized that "[a]n employer who ratifies the tortious conduct of an agent may be vicariously liable for such tortious conduct . . . when the employer fails to repudiate the known acts of an employee," the court nevertheless found that the church did not ratify the minister's tortious acts there because it did not know (and should not have known) about the minister's conduct. *Id.* at 1179; *see also Dausch*, 52 F.3d at 1436 (Ripple, J., concurring in part and dissenting in part) (plaintiff's complaint "failed to allege that . . . church defendants knew or should have known of the necessity and opportunity to exercise control over [priest who engaged in sexual misconduct]" and failed to allege any indications that the priest was having sexual relations).[25] Of course, the same cannot be said here. Indeed, Defendants have not moved for summary judgment on Doe IV's ratification claims -- nor could they do so successfully. As detailed above, Defendants here *knew* about Katinas's sexual propensities for decades (*see* Part V), but despite that knowledge, they failed to repudiate it. Instead, they permitted it to continue over and over and over again, giving Katinas the access and the power to destroy the lives of more boys.

Defendants' reliance on *Tichenor* is equally unavailing. In that case, the court merely determined that the Archdiocese of New Orleans and St. Rita's Roman Catholic Church in New Orleans were not subject to personal jurisdiction in Mississippi in a suit arising from a priest's

[25] Even in noting that sexual misconduct by a clergy member is ordinarily beyond the scope of employment of the cleric, the *Sanders* court relied on evidence of the church's policy providing that "adultery by any member of the clergy is immediate grounds for dismissal." *Sanders*, 898 F. Supp. at 1179. In contrast, Defendants offered no such evidence here.

sexual abuse of a minor in Louisiana. *Tichenor*, 32 F.3d at 956-61. Importantly, in so concluding, the court specifically found that the Archdiocese had not authorized or ratified the priest's conduct. *Id.* at 960. Thus, unlike this case, there was *no* evidence in *Tichenor* that the Archdiocese or St. Rita's knew (or even suspected) the priest had engaged in any sexual misconduct:

> The record, however, permits of no conclusion that the defendants suspected that [the priest] had engaged in sexual improprieties or might do so in the future. It is doubtful that the Archdiocese or St. Rita's knew anything about [the priest's] darker side. [The priest] was diligent in guarding his secrets. He did not disclose his extracurricular activities to anyone at anytime in the course of his employment and, from his perspective, with good reason. No tangible evidence in the form of a criminal history or discipline exists that would have been uncovered in a background check. . . . There is . . . nothing to indicate that the Archdiocese or St. Rita's knew or should have known what was taking place in [the priest's] private world.

Id. at 960-61. In contrast, the summary judgment record here demonstrates (and, at the very least, raises a fact issue) that Defendants knew about Katinas's predatory behavior. *See* Part V.B. As a result, Holy Trinity has not conclusively negated its vicarious liability for Katinas's actions, and its motion must therefore be denied.

D. Limitations Have Been Tolled on All of Doe IV's Claims Because of Defendants' Fraudulent Concealment.

Like the discovery rule, fraudulent concealment is an equitable doctrine that provides an affirmative defense to the plea in bar of limitations. *See Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex. App.--Dallas 1991, writ denied). When fraudulent concealment is raised, limitations is deferred "because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run." *Gibson v. Ellis*, 58 S.W.3d 818, 823-24 (Tex. App.--Dallas 2001, no pet.); *see S.V.*, 933 S.W.2d at 6. Consequently, fraudulent concealment "tolls the statute [of limitations] until the fraud is discovered or could have been

discovered with reasonable diligence." *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex. 1997). As the Texas Supreme Court observed:

> Texas courts have long adhered to the view that fraud vitiates whatever it touches, and have consistently held that a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations. To reward a wrongdoer for his own fraudulent contrivance would make the statute a means of encouraging rather than preventing fraud.

Borderlon v. Peck, 661 S.W.2d 907, 908-09 (Tex. 1983). Fraudulent concealment therefore estops a defendant from relying on the statute of limitations as an affirmative defense to the plaintiff's claim. *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 439 (Tex. App.--Fort Worth 1997, pet. denied). Fraudulent concealment may be shown by circumstantial evidence as well as direct evidence. *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999).

The doctrine applies when a party makes fraudulent misrepresentations or, if under a duty to disclose, conceals facts from the plaintiff and thereby prevents the plaintiff from discovering its cause of action against the defendant. *See, e.g., Santanna Natural Gas Corp. v. Hamon Operating Co.*, 954 S.W.2d 885, 890-91 (Tex. App.--Austin 1997, pet. denied). The "gist" of the defense is "the defendant's active suppression of the truth or its failure to disclose the truth when it is under a duty to speak." *Id.* at 890. In order to invoke fraudulent concealment, the plaintiff must show: (1) actual knowledge by the defendant that a wrong has occurred, and (2) a fixed purpose to conceal the facts necessary for the plaintiff to know that it has a cause of action. *Id.*; *see Savage v. Psychiatric Inst. of Bedford, Inc.*, 965 S.W.2d 745, 753 (Tex. App.--Fort Worth 1998, pet. denied).[26] As set forth below, fraudulent concealment applies to the circumstances

[26] Although Holy Trinity additionally contends that fraudulent concealment requires evidence that the plaintiff reasonably relied on the deception (HT Motion at 21), there is no such requirement where the concealment is due to a defendant's silence -- as opposed to an affirmative misrepresentation. *See*

here, and the summary judgment evidence, viewed in the light most favorable to Doe IV, easily raises a fact issue with respect to each challenged element of that defense.

1. The summary judgment evidence raises a question of fact regarding the essential elements of Doe IV's fraudulent concealment defense.

Although Holy Trinity (but not the GOAA Defendants) attempts to negate Doe IV's reliance on the fraudulent concealment defense to limitations, it makes no effort to conclusively negate the existence of any underlying tort or its knowledge of the wrong. It cannot do so because the summary judgment evidence conclusively establishes or, at the very least, raises a fact issue regarding those elements of Doe IV's fraudulent concealment defense. *See* Part V, above.

In particular, the evidence shows that Doe IV's parents notified both Holy Trinity and the GOAA about the incident between Katinas and their son in 1987. (Triantafilou Depo. at 105-07; Doe IV Father Depo. at 38-43, 98-100) Under the guise of conducting an investigation, Defendants sent Triantafilou, to Dallas to meet with Doe IV's parents. (Triantafilou Depo. at 7-9, 56-61, 137) Triantafilou initially met with Doe IV's parents, and in an effort to "protect the church," he instructed them "not to call the police" or "talk to anybody" about the incident. (Doe IV Father Depo. at 48-49; Triantafilou Depo. at 77) After conducting a single interview with Doe IV's parents and Katinas about the matter (and without interviewing anyone else), Triantafilou then convinced Doe IV's parents that their son had "misunderstood" Katinas's actions, that "nothing had occurred," that "Father Katinas wouldn't lie," "he was a good man," "he has been in several different parishes and he has always been well respected and well received," "he has no blemish . . . in his past at all," and that "[t]here is no record of him ever having any type of an incident like this." (*Id.* at 60-62, 108; Triantafilou Depo. at 77) Doe IV's

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Savage, 965 S.W.2d at 753 (elements of fraudulent concealment are (1) the defendant had actual knowledge of the wrong, (2) a duty to disclose the wrong, and (3) a fixed purpose to conceal the wrong).

parents "listened to the church," accepted its findings, and relayed Triantafilou's representations to their son. (Doe IV Father Depo. at 63-64) Because the evidence thus raises fact issues on Doe IV's fraudulent concealment defense, Defendants' motions must be denied.[27]

In any event, whether or not Defendants had specific knowledge of Katinas's sexual abuse of Doe IV is ultimately irrelevant to the fraudulent concealment analysis. Rather, as the Second Circuit recognized in *Martinelli v. Bridegeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 426 (2d Cir. 1999), "the Diocese's knowledge of the actual identity of an assaulted child was not required for it to realize that there was likely to be an actionable claim, or for it to seek to conceal from such a potential plaintiff the facts underlying the claim." It is sufficient to show that the defendant "had and concealed actual awareness of facts that created a *likely potential for harm*." *Id.* (emphasis in original). That is precisely what occurred here given the evidence that Defendants were aware of Katinas's sexual proclivities toward young boys and that he had sexually assaulted minors before being transferred to Dallas. *See* Parts V.A, V.B.

Moreover, Defendants unquestionably also had knowledge of their *own* torts -- *e.g.*, their negligence in investigating, hiring, supervising, reassigning, and retaining priests (such as Katinas) known to have abused minors, failing to inform parishioners that priests assigned to their parishes were a threat to their children, fostering an environment and culture where the abuse of children could flourish, and the like. With respect to these facts, there can be no doubt that Defendants were fully aware of the risks posed by Katinas, and despite those risks, made the reckless decision to retain him in the active priesthood without regard to the welfare of children in the communities he purported to serve. *See* Part V, above.

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[27] Further, although Triantafilou took copious notes of his so-called "investigation" of the incident between Katinas and Doe IV (Triantafilou Depo. at 46, 65, 118-20, 173, 183-84), the GOAA has failed to produce those notes in this lawsuit despite request (Khan Aff. ¶ 4), thus raising the presumption that the notes would be unfavorable to the GOAA. This likewise demonstrates that Defendants had knowledge of Katinas's wrongful acts and a fixed purpose to conceal them from Plaintiffs.

Holy Trinity similarly misses the point when it argues that Doe IV was clearly "aware" that he had been abused (HT Motion at 22), thus implying that it did not conceal the "tort" from him. Although Holy Trinity (and the GOAA Defendants) did, in fact, conceal that tort by, among other acts, failing to seek out Katinas's victims in the community, Holy Trinity once again ignores the fact that Doe IV has also alleged a number of other torts against Holy Trinity and the GOAA Defendants -- *e.g.*, negligence, breach of fiduciary duty, and fraud. Importantly, it is *those* torts -- not the sexual assault itself -- that Defendants also fraudulently concealed. Thus, Doe IV was not required to demonstrate that he was "deceived into thinking [he] [was] not abused" (*see* HT Motion at 23) -- although he has in fact made that showing. (*See, e.g.*, Rosenstock IV Aff. ¶ 8; Doe IV Father Depo. at 60-62, 108; Doe IV Depo. at 177; Triantafilou Depo. at 77)

With respect to its own torts, there is no question that Holy Trinity (and the GOAA Defendants) used deception to conceal the facts from Doe IV (and others). For example, despite knowing of the danger Katinas posed to the communities at large, neither the GOAA Defendants nor Holy Trinity warned Doe IV, the parishioners of their congregations, or the general public that they had placed a known sexual predator in their midst. (*See* Part V; Kontogiorgis Depo. at 74-75, 81, 144, 203-04, 207, 218, 263) Instead, faced with a moral, ethical, and legal duty to speak, they remained silent and transferred Katinas from parish to parish. *See Martinelli*, 196 F.3d at 426 (evidence that diocese failed to warn or inform parishioners of priest's conduct was sufficient to establish fraudulent concealment defense).

2. <u>The evidence of fraudulent concealment here is sufficient to toll the statute of limitations</u>.

This evidence of concealment by Defendants is more than sufficient to toll the statute of limitations. In *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. Ct. App.

1998), the court addressed a similar situation with far less egregious facts. *Secter* involved a former student who was sexually abused by a church-operated school employee in 1976; he sued the diocese 17 years later in 1993 for negligently hiring, supervising, and retaining the employee as a teacher and guidance counselor in its schools. The trial court dismissed the student's claim against the employee as barred by limitations, but denied the diocese's motion for summary judgment after finding that material factual issues existed regarding whether the diocese concealed or obstructed the plaintiff from obtaining information material to his claim. *Id.* at 288. At trial, the diocese moved for directed verdict on limitations, and the trial court again denied its motion. *Id.* After the jury returned a verdict against the diocese, the diocese appealed the trial court's refusal to grant a directed verdict.

On appeal, the student argued that the diocese should be estopped from relying on the statute of limitations "due to its failure to report incidents of sexual abuse by [the teacher] to the authorities as well as its continued concealment of its knowledge in secret archive files and its failure to inform students, faculty, and staff." *Id.* at 290. The diocese, on the other hand, argued that "the concealment must 'in point in fact' mislead or deceive the plaintiff so that he or she is lulled into inaction or is otherwise obstructed from investigating or instituting suit during the limitations period." *Id.* In disagreeing with the diocese and affirming the judgment in favor of the student, the court noted that the diocese "knew prior to the period of time in which [the student] was abused that [the teacher] had sexually abused students and would continue to be 'a problem' and continued to receive reports of [the teacher's] sexually abusing students during at least part of the time period in which [the student] was abused." *Id.* Nevertheless, the diocese "took no action to discipline or sanction [the teacher], to inform other students, parents, or employees, or to report the incidents to state authorities." *Id.* Instead, the diocese kept the

information "secret and confidential," and the student had "no clue that the Diocese had prior knowledge" of the teacher's propensities until 1992 when he learned from television reports that the teacher had sexually abused other students. *Id.* at 287, 290. Until that time, the student "neither knew nor had reason to know that he had a potential cause of action against the Diocese for causing tortious injury to him due to the Diocese's concealment of its knowledge of [the teacher's] actions toward other students." *Id.* at 290. Because the diocese clearly obstructed the prosecution against it by continually concealing the fact that it had knowledge of the teacher's problem well before the time that the student was abused, limitations was properly tolled. *Id.*

The same is true here. Like the diocese in *Secter*, Defendants knew before Doe IV was abused that Katinas had exhibited deviant sexual behavior toward minor boys. *See* Part V.B, above. Thus, like the diocese in *Secter*, Defendants knew that Katinas would continue to be "a problem," and they continued to receive reports of Katinas's inappropriate behavior with other young boys during the same period in which Doe IV was abused. (*See* Part V.D.; Doe I Depo. at 49-50; Doe IV Father Depo. at 38-42, 47-49) Nevertheless, Defendants did not take any action to supervise, discipline, or sanction Katinas. (*See* Part V; *see also* Triantafilou Depo. at 110) It did not warn other parishioners, parents, or the communities where Katinas served. (*See* Part V; *see also* Triantafilou Depo. at 77, 105, 182-83) And it did not report these incidents to the state authorities (as the law required them to do). (*See* Part V; *see also* Doe IV Father Depo. at 48-49) Instead, just as the diocese did in *Secter*, Defendants kept their information about Katinas secret and confidential, and as a result, Doe IV had "no clue" that Defendants had prior knowledge of Katinas's propensities until recently. Because Doe IV neither knew nor had reason to know that he had claims against Defendants for causing tortious injury to him -- as a result of their

concealment of their knowledge of Katinas's actions toward other minors -- the doctrine of fraudulent concealment tolls the statute of limitations here.

Moreover, the evidence discussed above is even superior to the evidence upon which the court relied in *Koenig v. Lambert*, 527 N.W.2d 903 (S.D. 1995), to find a question of material fact on fraudulent concealment. In that case, a former altar boy sued a priest and a diocese in 1992 for alleged sexual abuse by the priest from 1958 to 1975. In reversing the grant of summary judgment to the diocese on grounds of limitations, the South Dakota Supreme Court recognized that if a trust or confidential relationship existed between the diocese and the plaintiff, then "silence on the part of the Diocese is sufficient for this Court to find that the Diocese fraudulently concealed the cause of action from [plaintiff], thereby tolling the statute of limitations." *Id.* at 906. As to this question, the court found that such a confidential relationship did exist:

> [Plaintiff], as a Catholic parishioner and altar boy, was taught to trust and respect the members of the Diocese. [Plaintiff] put his trust and faith in the members of the Diocese, and was encouraged to do so by the Diocese.
>
> This Court has found relationships of trust or confidence several times in the past, including the relationship between doctor and patient, architect and client, attorney and client, and tenants in common. Certainly if there is a trust relationship in those instances there must also be one between a Diocese and the members of the faith it purports to serve.

Id. (internal citations omitted). Accordingly, because the summary judgment evidence raised a question of material fact as to the diocese's knowledge of the abuse by the priest, the court reversed the summary judgment dismissing the diocese from the suit. *Id.*

For the reasons discussed above in Part VII.C, the existence of a confidential relationship between the parties is also a question of fact for the jury that cannot be resolved by summary judgment here. Because Defendants -- like the diocese in *Koenig* -- also stood by silently, that

silence is "sufficient for this Court to find that the Diocese fraudulently concealed the cause of action from [plaintiff], thereby tolling the statute of limitations."[28] *Id.*

3. Doe IV was not clearly "aware" of the sexual abuse by Katinas, and even if he was, fraudulent concealment still tolls Doe IV's claims against Defendants.

Defendants have not challenged and cannot negate any of the evidence of their fraudulent concealment, discussed in detail above. Instead, in a last-ditch effort to defeat Doe IV's fraudulent concealment defense, Holy Trinity resorts to relying, once again, on its contention that Doe IV indisputably knew he had a cause of action because he was "aware of the abuse." (HT Motion at 22) As demonstrated above in Part VI.A, however, the summary judgment evidence raises a question of fact regarding Doe IV's awareness of the sexual abuse, and this fact question is alone sufficient to defeat Defendants' motions in their entirety.

For this reason, Holy Trinity's reliance on the Texas Supreme Court's brief discussion of fraudulent concealment in *S.V. v. R.V.*, 933 S.W.2d 1, has no application here. (*See* HT Motion at 22-23) In *S.V.*, the plaintiff intervened in her parents' divorce proceeding alleging that her father was negligent by sexually abusing her while she was a minor. *S.V.*, 933 S.W.2d at 3. Unlike this case, however, there was no third-party (*e.g.*, the diocese and local church) who made that sexual abuse possible and who helped conceal their role in the abuse after the fact.

In any event, any awareness on the part of Doe IV about Katinas's sexual abuse and the resulting injury still would not be sufficient to preclude application of the doctrine of fraudulent

[28] Because Defendants have not conclusively negated the existence of a fiduciary duty as a matter of law and undisputed fact for the reasons discussed in Part VII.C, their silence or failure to disclose can suffice to support Doe IV's fraudulent concealment defense. *See, e.g., Haberstick v. Goron A. Gundaker Real Estate Co.*, 921 S.W.2d 108, 109 (Mo. Ct. App. 1996) (acts and other non-verbal conduct can be the equivalent of affirmative misrepresentations on which fraudulent concealment can rest). Further, Defendants' acts of placing Katinas in parishes where he would have unsupervised access to minors equates to an affirmative representation that Katinas was an upstanding and reputable priest and that Defendants did not know that Katinas had a history of sexually abusing young boys or that he was a danger to minors.

concealment against Defendants. Rather, as the court recognized in *Secter*, because Doe IV had "no clue" that Defendants had prior knowledge of Katinas's sexual propensities, and "neither knew nor had reason to know that he had a potential cause of action" against the dioceses for causing tortious injury to him, the doctrine of fraudulent concealment applies to the circumstances here regardless of whether Doe IV was consciously aware of Katinas's abuse at the time. *See Secter*, 966 S.W.2d at 290; *see also Koenig*, 527 N.W.2d at 906 ("[S]ilence on the part of the Diocese is sufficient for this Court to find that the Diocese fraudulently concealed the cause action from [plaintiff], thereby tolling the statute of limitations."). In fact, Doe IV did not know -- and had no reason to suspect -- that Defendants were responsible for transferring Katinas to Dallas after allegations of sexual abuse were raised against him in his Illinois parish. For these reasons, fraudulent concealment operates to toll the limitations period here, and Defendants' motions for summary judgment should therefore be denied.

Finally, where there is a duty to disclose a fact, the failure to disclose that fact is legally equivalent to a representation of the non-existence of that fact. *See, e.g., Playboy Enters. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 259-60 (Tex. App.--Corpus Christi 2006, pet denied) (upholding jury verdict finding defendant liable for fraudulent concealment where evidence supported the imposition of a duty by defendant to disclose material facts to plaintiff regarding parties' business dealings). As discussed in detail above, whether Katinas and Defendants had a fiduciary duty to Doe IV is, at least, a question of fact for the jury to decide in this case. *See* Part VII.C. Here, despite knowing the danger Katinas posed to the community at large, the Defendants did not warn Doe IV, his mother, the parishioners of Doe IV's congregation or other congregations, or the citizens of Dallas that they had placed a known sexual predator in their midst. Instead, Defendants remained silent in the fact of a moral,

spiritual, and legal duty to disclose what they knew about Katinas's scandal-laden history. They failed to disclose what they knew and failed to offer any assistance to Doe IV, despite knowing that he (and others like him) were likely to be more in a long line of victims left by Katinas. Rather, to complete the cover-up and ensure that the pattern of sexual abuse would go undetected by the public at large (as it had in the past), Defendants conspired with and assisted Katinas by remaining silent and transferring him from parish to parish where he sexually abused other young boys. In so doing, Defendants concealed facts that Doe IV needed to know to pursue a claim against Defendants. *See Martinelli*, 196 F.3d at 426 (evidence that diocese failed to warn or inform parishioners of priest's conduct was sufficient to establish fraudulent concealment defense).

E. Defendants Are Estopped from Asserting Their Limitations Defense.

For similar reasons, Defendants are estopped from asserting their limitations defense under the circumstances here. Estoppel is a concept based in equity -- the main principle of which is "to do justice when the application of routine legal principles reaches an unjust result." *Cook v. Smith*, 673 S.W.2d 232, 236 (Tex. App.--Dallas 1984, writ ref'd n.r.e.). Estoppel may be invoked to defeat a claim of limitations in two ways. First, "a potential defendant's concealment of facts from a plaintiff which facts are necessary for the plaintiff to know to pursue a cause of action may prove fatal to the defense of limitations." *Rendon v. Roman Catholic Diocese of Amarillo*, 60 S.W.3d 389, 391 (Tex. App.--Amarillo 2001, pet. denied); *see Leonard v. Eskew*, 731 S.W.2d 124, 128 (Tex. App.--Austin 1987, writ ref'd n.r.e.). Second, a plaintiff may defeat a limitations defense by establishing that the defendant engaged in conduct that induced the plaintiff to forego a timely suit regarding a claim that the plaintiff knew existed. *Rendon*, 60 S.W.3d at 391.

1. The summary judgment evidence raises a fact issue regarding the elements of Doe II's estoppel defense.

To invoke equitable estoppel to prevent a defendant from relying on a limitations defense, a plaintiff must show (or raise a fact issue showing): (1) a false representation or concealment of a material fact; (2) made with knowledge, actual or constructive, of the facts; (3) to a party without knowledge or the means of knowledge of the real facts; (4) with the intention that it should have been acted upon; and (5) the party to whom it was made must have relied upon or acted upon it to his prejudice. *Cook*, 673 S.W.2d at 235. As set forth below, the summary judgment evidence raises a fact issue concerning the only two elements of that defense addressed by Holy Trinity -- that there was no "fiduciary relationship between [Holy Trinity] and Doe IV" and Holy Trinity did not "ma[k]e representations to [Doe IV] to induce him to delay filing suit." (HT Motion at 20-21)

a. A confidential relationship existed between Holy Trinity and Doe IV.

Holy Trinity is wrong when it suggests that Doe IV may not rely upon estoppel by concealment because "there was no fiduciary duty between Holy Trinity and Doe IV." (HT Motion at 21) Because Defendants are not entitled to summary judgment on the existence of a fiduciary relationship with Doe IV (*see* Part VII.C), Holy Trinity cannot avoid Doe IV's estoppel defense by simply brushing aside its affirmative duty to speak or disclose.

b. Defendants' concealment of material facts caused Doe IV to delay filing suit.

Holy Trinity likewise misses the point when it claims that Doe IV "will be unable to provide proof" of affirmative representation that "induce[d] him to delay filing suit." (HT Motion at 21) Contrary to Holy Trinity's assertion, the affirmative representations by Triantafilou are alone sufficient to raise a genuine issue of material fact on Doe IV's estoppel defense. *See* Part V.D. In any event, Doe IV does not need to rely upon any affirmative

misrepresentations by Defendants to establish that he was induced to delay filing suit. Instead, as Holy Trinity itself recognizes, estoppel may be based on the "concealment of material facts." (HT Motion at 20) Thus, Doe IV can also rely on Defendants' concealment to establish its estoppel defense.

As set forth above, Defendants remained silent in the face of a moral, spiritual, and legal duty to disclose what they knew about Katinas's scandal-laden history. They failed to disclose what they knew or offer any assistance to Doe IV, despite the fact that they were aware that he (and others like him) were likely to be more in a long line of victims left by Katinas. They failed to disclose what they knew to local law enforcement officials. And they failed to disclose what they knew to members of their respective congregations or the community at large. In so doing, Defendants concealed facts from Doe IV that were necessary for him to know to pursue a claim against them, and that concealment is fatal to the defense of limitations here.

VIII.

Prayer

WHEREFORE, Plaintiff John Doe IV respectfully prays that the Court deny Defendants, the Greek Orthodox Archdiocese of America and the Greek Orthodox Metropolis of Denver's, Motion for Summary Judgment as to Plaintiff John Doe IV, deny Holy Trinity Greek Orthodox Church's Motion for Summary Judgment as to Doe IV's Claims, and grant Plaintiff such other and further relief to which he is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing response was served on this 5th day of September, 2008, via hand-delivery on all counsel of record in accordance with Rule 21a, Texas Rules of Civil Procedure.

Tahira Khan Merritt