

CASE NO. A10-1951

STATE OF MINNESOTA
IN COURT OF APPEALS

John Doe 76C,

Appellant.

vs.

Archdiocese of St. Paul and Minneapolis and Diocese of Winona,

Respondents.

RESPONDENT ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS' BRIEF

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STATEMENT OF THE ISSUES

I. Did the district court err by excluding appellant's evidence of repressed and recovered memory?

Appellant sought to introduce evidence of repressed and recovered memories at trial. Following a three-day evidentiary hearing, the district court ruled that the evidence was not generally accepted and was not reliable. (Add. 1–30.) The district court later denied appellant's request for leave to bring a motion for reconsideration. (RAA 1–3.)

Most apposite authorities: *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989); *McDonough v. Allina Health Sys.*, 685 N.W.2d 688 (Minn. App. 2004).

II. Did the district court properly grant respondents' summary judgment motions on the nonfraud claims because they were untimely under Minn. Stat. § 541.073, subd. 2(a)?

Respondents moved for summary judgment. The district court concluded that appellant's nonfraud claims were untimely and granted summary judgment in favor of respondents. (Add. 32–52.)

Most apposite authorities: Minn. Stat. § 541.073, subd. 2(a), *W.J.L. v. Bugge*, 573 N.W.2d 677 (Minn. 1998); *D.M.S. v. Barber*, 645 N.W.2d 383 (Minn. 2002); *Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996).

III. Did the district court properly grant respondents' summary judgment motions on the fraud claims, because they were untimely under Minn. Stat. § 541.05, subd. 1(6)?

Respondents moved for summary judgment. The district court concluded that appellant's fraud claims were untimely and granted summary judgment in favor of respondents. (Add. 32–52.)

Most apposite authorities: Minn. Stat. § 541.05, subd. 1(6); *Blegen v. Monarch Life Ins. Co.*, 365 N.W.2d 356 (Minn. App. 1985); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 235 (8th Cir. 1996); *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806 (Utah 2007).

STATEMENT OF THE CASE

Appellant John Doe 76C sued respondents The Archdiocese of St. Paul and Minneapolis and The Diocese of Winona in 2006, alleging he was sexually abused by a parish priest in 1980 or 1981. (Add. 33, 36.)¹ Appellant asserted claims of negligence, negligent supervision, negligent retention, vicarious liability, fraud, and fraud (intentional nondisclosure) against respondents. (AA 188–99.)²

In an attempt to toll the running of the statute of limitations on his claims, appellant alleged that he “repressed” memories of the abuse and did not “recover” those memories until the summer of 2002 and sought to introduce expert testimony on the issue. (Add. 2; AA 193.) The district court, The Honorable Gregg E. Johnson presiding, ruled that such evidence was subject to the *Frye-Mack* test. (Add. 2.) Following an evidentiary hearing, the court excluded appellant’s expert testimony on repressed and recovered memories, because appellant had not shown that repressed and recovered memory is generally accepted in the relevant scientific community and had not shown that the evidence is reliable and trustworthy. (Add. 1–30.)

Later, appellant asked for leave to bring a motion to reconsider the order excluding evidence of repressed and recovered memory. The district court denied appellant’s request, explaining that appellant again had not demonstrated evidence of reliability and

¹ “Add.” refers to Appellant’s Addendum.

² “AA” refers to Appellant’s Appendix.

rejecting appellant's claim that there was a broad trend in admitting evidence of repressed and recovered memories. (RAA 1-3.)³

On October 12, 2010, the district court granted respondents' motions for summary judgment and dismissed all of appellant's claims as being time-barred. (Add. 32-52.) Judgment was entered on October 14, 2010. (Add. 31.) This appeal followed. (AA 185.)

STATEMENT OF FACTS

I. APPELLANT AND HIS SEXUAL-ABUSE CLAIMS

Appellant was born in 1967 and is in his forties. (Add. 33.) He is a licensed psychologist, having received his master's degree in counseling in 1991 from the University of Wisconsin—Stout. (RAA 5, at 7:1-12.)

From the late 1960s to 2001, appellant attended Risen Savior Catholic Church in Apple Valley, Minnesota. (AA 160; Add. 33.) Thomas Adamson was an Associate Pastor at Risen Savior from 1981 to 1984. (Add. 33.) Adamson had previously served at other parishes within The Archdiocese of St. Paul and Minneapolis and the Diocese of Winona, and the record suggests that respondents knew before the 1980s, that Fr. Adamson had a history of abusing children.⁴ (Add. 34-36.)

Appellant claims Adamson touched him inappropriately on four occasions in 1980 or 1981. (Add. 33.) None of the incidents lasted more than a few seconds each, and

³ "RAA" refers to Respondent Archdiocese's Appendix.

⁴ The extent of respondents' purported knowledge of Adamson is not relevant to this appeal. Rather, since the ultimate issues in this case are whether appellant's claims are timely, the focus should be on appellant's knowledge.

three of the incidents took place while appellant was fully clothed. (Add. 33; RAA 6–8, at 31:16–40:5; RAA 10, at 47:15–25; RAA 11, at 54:1–56:4; RAA 12–13, at 72:19–74:1.) Appellant claims he “repressed” memories of this abuse and did not “recover” those memories until the summer of 2002. (RAA 6, at 30:8–14, 32:3–7.)

Even though he claims to have “repressed” the abuse memories, appellant told Father Thomas Doyle, one of his expert witnesses, that he could remember how he felt and reacted at the time of the abuse. (Add. 34.) Fr. Doyle asked appellant “how he reacted when the first events happened, if he could remember that far back, and he does.” (Add. 34; RAA 20, at 37:20–22; RAA 21, at 41:11–14.) Appellant told Fr. Doyle:

- He felt “emotionally paralyzed” at the time the incidents occurred. (RAA 20, at 37:20–38:4; RAA 21, at 41:15–22.)
- He “considered [the sexual abuse] to be abusive and intrusive.” (RAA 21, at 40:14–15.)
- “[W]hen the events occurred . . . he felt shocked[.]” (RAA 21–22, at 41:23–42:3.)
- “[W]hen the incidents occurred,” he “felt very isolated and confused.” (RAA 22, at 42:4–14.)
- “[W]hen the incidents occurred,” he was “deathly afraid to tell anyone.” (Add. 34; RAA 22, at 42:4–18.)
- “At the time the abuse was going on his reactions were . . . isolation, paralysis, fear, confusion.” (RAA 23, at 48:25–49:3.)
- “At the time that the abuse was going on,” he felt “isolation.” (RAA 24, at 50:11–16.)
- He felt “[g]uilt at the time” of the abuse. (RAA 24, at 50:22.)
- “[A]t or about the time the abuse was going on,” he felt “jolted.” (RAA 24, at 51:7–19.)

II. OTHER ALLEGATIONS AGAINST ADAMSON AND APPELLANT'S KNOWLEDGE THEREOF

In the mid- to late-1980s, several plaintiffs commenced lawsuits against respondents, alleging that Adamson had touched them inappropriately when they were minors. (Add. 33.) Those lawsuits received extensive media publicity: Between 1987 and 1991, major local papers ran more than 130 stories on the lawsuits. (Add. 33.)

In the wake of these claims, appellant's parish, Risen Savior, asked a psychologist to visit the parish to discuss the allegations against Adamson with parishioners. (RAA 26, at 47:16–19.) Risen Savior also made an announcement of the abuse allegations involving Adamson from the pulpit. (RAA 29, at 34:15–21.)

In addition, The Archdiocese held a meeting at Risen Savior to inform parishioners about the allegations against Adamson and to explain that those allegations were the reason for Adamson's removal from the parish. (RAA 29, at 35:24–36:4.) The meeting was open to the public and anyone could attend. (RAA 29, at 34:24–35:9.) Appellant's mother attended the meeting. (Add. 34; RAA 29, at 35:7–8.)

In addition, appellant's mother and father discussed the abuse charges against Adamson with the pastor from Risen Savior on at least two occasions. (Add. 34; RAA 26, at 45:19–46:5.)

After learning of the allegations and with the advice of the psychologist who spoke at Risen Savior, appellant's mother spoke to her children about the allegations. (Add. 34; RAA 26–27, at 47:10–49:1.) In 1986 (when appellant was 18 or 19), appellant's mother asked appellant about Adamson. Appellant denied ever being

sexually abused by Adamson. (Add. 34; RAA at 26–27, at 48:20–50:22; RAA 17, at 251:15–22.) After that, appellant, his family, and his wife continued to occasionally discuss Adamson and the abuse allegations against him. (RAA 17, at 251:24–252:1; RAA 31, at 31:11–32:19; RAA 32, at 57:1–21.) By the 1990s, appellant was aware of the Catholic Church’s problems with sexual abuse claims by the 1990s. (RAA 17, at 252:17–20.)

III. EXPERT TESTIMONY ON REPRESSED AND RECOVERED MEMORIES

Appellant sought to introduce expert testimony at trial to support his claim that he had repressed and recovered memories of the abuse. During a three-day evidentiary hearing in June 2009, the district court heard extensive testimony from five witnesses. (Tr. 1–560.)⁵ Dr. Harrison G. Pope Jr., M.D., Dr. Elizabeth F. Loftus, Ph.D., and Dr. William M. Grove, Ph.D., testified as expert witnesses for respondents, explaining that the theory of repressed and recovered memory has not been scientifically proven to be anything more than “psychiatric folklore.” (Tr. 281, 362, 438, 505, 546; Add. 2.) Appellant called Dr. Constance Dalenberg, Ph.D., and Dr. James A. Chu, M.D. (Add. 2.)

A. Dr. Harrison G. Pope Jr., M.D.

Dr. Harrison G. Pope Jr., M.D., is a full Professor of Psychiatry at Harvard University Medical School. (Tr. 256–57). He has treated more than 1,000 patients—many of whom have experienced trauma and claim to have had amnesia for traumatic events. (Tr. 396, 416). His other qualifications include authoring 280 peer-reviewed

⁵ “Tr.” refers to the transcript from the evidentiary hearing held on June 1, June 2, and June 4, 2009.

papers in scientific journals, over 150 reviews and book chapters, and seven books;⁶ being among the 250 most widely cited psychiatrists and 250 most widely cited neuroscientists in the world; and receiving \$5–10 million in grants from the National Institute of Health and the National Institute of Mental Health. (Add. 13–14; Tr. 258, 260, 379; *Curriculum Vitae of Dr. Pope*, Exh. 1001 to June 2, 2009 Hearing).

At the hearing, Dr. Pope testified in detail about repressed-and-recovered-memory theory, noting it is distinct from other psychological processes, like ordinary forgetting. (Tr. 272–74.) Dr. Pope explained that the studies cited by appellant as proof of repressed and recovered memories are so inherently flawed that they could not reasonably be interpreted as supporting the existence of repressed and recovered memories. (Tr. 345–60.) He reviewed 77 studies involving more than 11,000 individuals, who had experienced a wide variety of traumatic events. But none of these studies contained a single, well-documented case of memory impairment that could not be explained by organic amnesia, incomplete encoding, ordinary forgetting, or a psychological process. (Tr. 341–43.)

⁶ Some of Dr. Pope’s works focused exclusively on repressed and recovered memories. See, e.g., H.G. Pope, Jr., et al., *The Scientific Status of Research on Repressed Memories*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, 408–47 (D. Faigman, ed. 2005); H.G. Pope, Jr., et al., *Questionable Validity of “Dissociative Amnesia” in Trauma Victims: Evidence from Prospective Studies*, 172 BR. J. PSYCHIATRY 210–15 (1998); H.G. Pope, Jr., et al., *Custer’s Last Stand: Brown, Schefflin, and Whitfield’s Latest Attempt to Salvage “Dissociative Amnesia,”* 28 J. PSYCHIATRY & L. 149–213 (2000); H.G. Pope, Jr., et al., *Is Dissociative Amnesia a Cultural Artifact? Findings from a Survey of Historical Literature*, 37 PSYCH. MED 225–33 (2007).

B. Dr. William M. Grove, Ph.D.

Dr. William M. Grove, Ph.D., is an Associate Professor at the University of Minnesota, a licensed psychologist, and an expert in scientific methodology. (Tr. 419–22.) His other qualifications include being among the 100 most frequently cited psychologists and psychiatrists of the last quarter-century; authoring more than 100 publications; receiving \$1 million in grants; serving on the editorial board of journals published by the leading professional organizations; and serving on the Minnesota Board of Psychology. (Add. 15–16; Tr. 420–28; *Curriculum Vitae of Dr. Grove*, Exh. 1009 to June 2, 2009 Hearing.)

Dr. Grove testified that the accuracy of “recovered” memories has not been scientifically established, that the studies that appellant relied on “are not of sufficiently high methodological quality” for several reasons, and that clinical observations are unreliable. (Tr. 424, 433–35.)

C. Dr. Elizabeth F. Loftus, Ph.D.

Dr. Elizabeth F. Loftus, Ph.D., is a Distinguished Professor at the University of California, Irvine. (Tr. 472–73.) The American Psychological Association has called her one of the 100 Most Eminent Psychologists of the 20th Century. (Tr. 484.) She is a prolific author; recipient of over \$1 million in grants; member and past president of the Association for Psychological Science; on the editorial board of 8 journals; an inductee to the National Academy of Sciences; and a recipient of the Grawemeyer Award, which has been called psychology’s “Nobel Prize” and which is the largest monetary prize in the psychology field. (Add. 17–18; Tr. 473–74, 479–81.)

Dr. Loftus testified that the theory of repressed and recovered memory remains “massively controversial” and “has sometimes been called the major mental health scandal of the 20th century.” (Tr. 483; *see also* Tr. 483, 501–02.) She also testified that studies which purport to support repressed and recovered memories “don’t support it all,” because “they don’t look anything like what . . . you want to see in a solid credible scientific study.” (Tr. 495.)

D. Dr. Constance Dalenberg, Ph.D.

Appellant’s primary expert was Dr. Constance Dalenberg, Ph.D., a professor of psychology at a specialized school in California. (Tr. 7–8, 131.) In sharp contrast to respondents’ experts, Dr. Dalenberg never received any grant money, and she has never served on the editorial boards of, or been an editor or reviewer for, any journals published by the American Psychiatric Association, American Psychological Association, or the Association for Psychological Science. (Tr. 123, 128–29.) Her work focuses on the narrow specialized area of trauma and dissociation. (Tr. 21.) She has only published 30–40 articles over a 25-year career. (Tr. 21.) She admits that her lifetime citation index is only 125, at best. (RAA 35–36, at 322:13–324:8.) By way of contrast, Dr. Pope’s lifetime citation index is 14,128 and Dr. Grove’s is 4,439.⁷ (RAA 36–37, at 326:19–20, 342:20–22.)

⁷ Citation counts are widely used in the field of psychology and psychiatry to gauge a scientist’s impact. (Tr. 260.) Studies that are more methodologically sound have higher citation counts than studies that are not so methodologically sound. (Tr. 260).

E. Dr. James A. Chu, M.D.

Plaintiff's second expert was Dr. James A. Chu, M.D., a psychiatrist. (Tr. 189). Since 2000, Dr. Chu has not conducted any research or read any peer-reviewed articles about traumatic amnesia or the nature of the debate about repressed and recovered memories. (RAA 39, at 23:9–24; RAA 40, at 25:1–19.) Rather than conducting research, most of Dr. Chu's work over the past decade has been "administrative." (Tr. 229.) Even though he was called to testify on behalf of appellant, Dr. Chu admitted during the evidentiary hearing that there is "great debate" about the concept of repression and that there is currently no method for establishing the accuracy of so-called "recovered" memories. (Tr. 224, 227–28.)

ARGUMENT

Appellant offered expert testimony on repressed and recovered memories to toll the running of the statute of limitations on his claims against respondents. The district court evaluated the proffered evidence under *Frye-Mack* and ruled that it was inadmissible. (Add. 1–30.) Later, the district court granted respondents' motions for summary judgment on appellant's nonfraud claims, namely his claims of negligence, negligent supervision, negligent retention, and vicarious liability, and on appellant's two fraud claims. (Add. 31–52.) On appeal, appellant challenges the award of summary judgment and the underlying evidentiary ruling.

I. THE DISTRICT COURT PROPERLY EXCLUDED APPELLANT’S EVIDENCE OF REPRESSED AND RECOVERED MEMORIES.

The theory of repressed and recovered memory posits that people who experience traumatic events can repress memories of traumatic events in their entirety, making them literally *unable* to remember the event, and then years later, recover those repressed memories in essentially pristine or unchanged form. (Tr. 263, 546.) In other words, “someone could have a terrible trauma and then be literally unable to remember it for a period of time,” such that “I could walk up to you 5 years later and say do you remember [an event] and you would look me straight in the eye and say, no, I don’t remember that.” (Tr. 274.)

Appellant and his experts refer to the purported phenomenon by a variety of names—including, “repressed memory,” “recovered memory,” “traumatic amnesia,” “dissociative amnesia,” or “traumatic dissociative amnesia.” But, regardless of the label, the underlying theory remains the same. (Tr. 262–63.) And, regardless of the label, the theory of repressed and recovered memories is distinct from other processes, such as: (1) ordinary forgetting, in which someone forgets something but would be perfectly capable of remembering if reminded; (2) not thinking about something for a long time; (3) incomplete encoding of a traumatic event, which is “if I threaten you with a gun, you will remember exactly what the gun looked like, but you may not remember what color shirt I was wearing”; (4) organic amnesia, which is “when you get knocked out in a car accident and you have no memory of what happened, or when you get drunk and you have a blackout”; (5) psychogenic amnesia, a “very rare phenomenon where someone wakes up

in a hotel room and has no idea what their names are or who they are”; (6) childhood amnesia, which is when an event occurs when a child is too young to remember it; and (7) nondisclosure, in which a subject may remember a traumatic event perfectly well but not want to disclose it to a researcher. (Tr. 272–74, 353).

Appellant sought to introduce expert testimony at trial on his repressed and recovered memories. The admission of novel, scientific evidence is governed by the *Frye-Mack* standard. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). Under *Frye-Mack*, the proponent must establish (1) that the scientific theory is generally accepted in the relevant scientific community and (2) that the particular scientific evidence has foundational reliability. *Id.*; *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 694 (Minn. App. 2004). Further, as with all expert testimony, the proponent must also establish that his witnesses are qualified as experts and that their testimony will be helpful to the trier of fact. Minn. R. Evid. 702; *Goeb*, 615 N.W.2d at 814. Even if the evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury. Minn. R. Evid. 403.

Here, the district court held that appellant’s evidence on repressed and recovered memory was not admissible at trial, because appellant had not shown that the theory was generally accepted or that the evidence had foundational reliability.⁸ The district court’s

⁸ The result would be the same if the court had only considered the reliability of the expert testimony under Minn. R. Evid. 702. The court found that the testimony was unreliable, and thus would have had no choice under Rule 702, but to exclude it. Minn. R. Evid. 702 (requiring that expert testimony “have foundational reliability”); *State v. DeShay*, 645 N.W.2d 185, 191 (Minn. App. 2002) (requiring that the proponent demonstrate that the expert testimony is reliable even when *Frye-Mack* does not apply).

general-acceptance determination is reviewed de novo. *Goeb*, 615 N.W.2d at 815. The reliability determination is reviewed for an abuse of discretion. *Id.*

A. The District Court Properly Determined That Evidence of Repressed and Recovered Memories Was Not Generally Accepted in the Relevant Scientific Community.

Under the first element of the *Frye-Mack* standard, appellant must show that the evidence on the theory of repressed and recovered memory is generally accepted in the relevant scientific community. *Id.* at 814. As the Minnesota Supreme Court has explained, the general-acceptance requirement “ensures that the persons most qualified to assess scientific validity of a technique have the determinative voice,” *id.* at 813, by requiring that “experts in the field generally agree that the evidence is reliable and trustworthy,” *State v. Schwartz*, 447 N.W.2d 422, 424 (Minn. 1989). “If there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no general acceptance.” *State v. Phillips*, 98 P.3d 838, 842 (Wash App. 2004). Similarly, when a review of the scientific literature or the testimony of experts in the field, demonstrates that there is no general acceptance, the evidence must be excluded. *See State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985) (determining, based on its “review of the scientific literature,” that graphological personality assessment is “not generally accepted in the scientific fields of psychology and psychiatry,” and holding, therefore, that the evidence was properly excluded); *see also State v. Garcia*, 3 P.3d 999, 1002 (Ariz. App. Div. 1 1999) (“[S]ignificant disputes between qualified experts will preclude a finding of general acceptance.”); *People v. Shirley*, 723 P.2d 1354, 1377 (Cal. 1982) (“[I]f a fair overview of the literature discloses that scientists significant either in

number or expertise publicly oppose [a scientific method or technique] as unreliable,” the court must conclude that “there is no . . . consensus.”); *Blackwell v. Wyeth*, 971 A.2d 235, 242 (Md. 2009) (“[A]s long as the scientific community remains significantly divided, results of a controversial technique will not be admitted.”).

1. Case law does not show that evidence on repressed and recovered memories has been generally accepted.

Appellant claims Minnesota courts have admitted scientific expert testimony on repressed and recovered memory for over a decade. (AB 15.)⁹ But appellant does not cite even one case where such testimony was in fact admitted. None of the cases appellant cites accept the concept as a means of tolling the running of the statute of limitations. For instance, appellant cites *D.M.S. v. Barber* and *W.J.L. v. Bugge*, but those cases merely indicate that concerns over repressed memory were a basis for the enactment of the delayed-discovery statute of limitations in Minn. Stat. § 541.073. *D.M.S. v. Barber*, 645 N.W.2d 383, 387 (Minn. 2002); *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 n.5 (Minn. 1998).

Appellant next claims that, in *Lickteig v. Kolar*, 782 N.W.2d 810 (Minn. 2010), the Minnesota Supreme Court took “a clear position that evidence regarding repressed memory is to be admitted.” (AB 16.) *Lickteig*, however, does not address the validity or admissibility of repressed-and-recovered-memory theory. In fact, the *Lickteig* court expressly noted that any “arguments relating to [plaintiff’s] memory repression and whether she knew or had reason to know prior to 2005 that the alleged sexual abuse

⁹ “AB” refers to appellant’s brief.

caused her injury” were not properly before the court and refused to consider the repressed-memory claim. 782 N.W.2d at 818 n.6.

Appellant cites several out-of-state cases, but it is inappropriate to rely exclusively on the decisions of other courts to establish general acceptance. *State v. Roman Nose*, 649 N.W.2d 815, 820 (Minn. 2002). Further, the cases cited by appellant are clearly distinguishable. Many of those cases use a more lenient approach to admissibility of scientific evidence than Minnesota. *See Goeb*, 615 N.W.2d at 812 (explaining that *Frye-Mack* represents a more conservative approach). For instance, appellant cites *Isley v. Capuchin Province*, 877 F.Supp. 1055 (D. Mich. 1995), and *Doe v. Archdiocese of New Orleans*, 823 So.2d 360 (La. Ct. App. 2002), but neither required general acceptance.

Appellant similarly errs in relying on an Indiana trial court’s decision in *John Doe RG v. Archdiocese of Indianapolis*, No. 49D10-0509-CT-035090 (Marion Sup. Ct., Ind. Jan. 20, 2010) (AA 202), and the Massachusetts court’s decision in *Commonwealth v. Shanley*, 919 N.E.2d 1254 (Mass. 2010). In *John Doe RG*, the court did not apply the general acceptance standard. More importantly, *John Doe RG* and *Shanley* are factually dissimilar from this case. Here, the district court heard testimony from three defense witnesses. The courts in *John Doe RG* and *Shanley* did not have the benefit of such extensive testimony. In fact, no witnesses testified in the *John Doe RG* case, as all evidence was submitted by affidavits. No. 49D10-0509-CT-035090, at *1–*2. Because *John Doe RG* and *Shanley* are plainly distinguishable, they should have no bearing on this court’s analysis.

Contrary to appellant's representations, courts that reviewed the scientific literature or heard from experts have concluded that evidence of repressed and recovered memories must be excluded because it is not generally accepted in the scientific community. These decisions "make it clear that there is *no* consensus among experts as to the validity of the [theory of repressed and recovered memories]." Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence Civil and Criminal*, § 41.20, at 376 (7th ed. 2010) (emphasis added). See, e.g., *Travis v. Ziter*, 681 So.2d 1348, 1352 (Ala. 1996) (reviewing numerous studies and articles and concluding "[t]here is no consensus of scientific thought in support of the repressed memory theory"); *Doe v. Maskell*, 679 A.2d 1087, 1092 (Md. Ct. App. 1996) (evaluating lack of acceptance and remaining "unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting"); *Rivers v. Father Flanagan's Boys' Home*, Doc. 1024, No. 743, at *14 (D. Ct., Douglas County, Neb., Nov. 25, 2005)¹⁰ ("Based upon the evidence presented, the Court finds that the theory of repressed memory and recovered memory has not gained general acceptance. . . ."); *State v. Walters*, 698 A.2d 1244, 1248 (N.H. 1997) (recognizing "the divisive state of the scientific debate on the issue"); *State v. Hungerford*, 697 A.2d 916, 928 (N.H. 1997) ("We cannot say that the phenomenon has gained general acceptance."); *State v. Quattrocchi*, No. P92-3759, 1999 WL 284882, at *13 (R.I. Super. Apr. 26, 1999) ("This court believes that the phenomenon of repressed recollection has not gained general acceptance."); *Hunter v. Brown*, No. 03A01-9504-CV-00127, 1996 WL 57944, at *4 (Tenn. Ct. App. 1996) (finding there is "simply too

¹⁰ This Order can be found at RAA 51.

much indecision in the scientific community” and “psychologists have not come to an agreement”); *S.V. v. R.V.*, 933 S.W.2d 1, 18 (Tex. 1996) (recognizing the scientific community has not reached a consensus); *Franklin v. Stevenson*, 987 P.2d 22, 28 n.3 (Utah 1999) (“[T]he idea of memory repression itself... is a point of disagreement within the medical, psychiatric, and psychological communities).

2. The theory of repressed and recovered memory is not generally accepted in the relevant scientific community.

The scientific community has not generally accepted the concept of repressed and recovered memories. According to respondents’ experts, there is a heated and ongoing debate over whether it is even possible to repress and recover memories in some way that is distinct from ordinary forgetting and remembering. (Tr. 271, 276, 433, 483, 501–02.) That debate has been referred to as the “memory wars” and described as being “the most passionately contested battle waged about the nature of human memory.” (Tr. 503.) Dr. Loftus testified that the validity of the theory is so “massively controversial” that “it has sometimes been called the major mental health scandal of the 20th century.” (Tr. 483.)

The existence of such passionate debate prevents courts from concluding that the theory of repressed and recovered memories is generally accepted. As Dr. Loftus told the district court,

[T]his is not just a few people disagreeing . . . and the vast majority agreeing. We have this enormous debate that’s been raging on this topic for at least a decade or more. And so I don’t see how anyone can, with a straight face, say that there is general acceptance here.

(Tr. 502–03).

The record is replete with evidence demonstrating a lack of general acceptance. None of this evidence has been rebutted or addressed in appellant's brief. For example, respondents' experts are leading experts in the fields of psychology and psychiatry, and each testified that the theory of repressed and recovered memories is not generally accepted. (Tr. 271, 433, 483, 501–02.) Further, respondents' experts explained that the American Psychological Association (APA) and other major professional organizations have issued statements expressing skepticism over the validity of repressed and recovered memories. Dr. Loftus testified that she was part of the APA's Task Force on Recovered Memories of Childhood Abuse. The Task Force was comprised of three clinicians and three researchers (including Dr. Loftus). (Tr. 477.) According to Dr. Loftus, despite studying the issue for months, the Task Force was unable to reach any consensus on the validity of repressed and recovered memories. (Tr. 477.) Dr. Loftus also testified that other major professional organizations, including the American Medical Association, Canadian Psychiatric Association, and Australian Psychological Society, issued position statements recognizing the existence of the controversy and expressing skepticism about repressed and recovered memories. (Tr. 504). *See generally* Robert T. Reagan, *Scientific Consensus on Memory and Repression*, 51 RUTGERS L. REV. 275, 290–96, 319 (1999) (reviewing reports issued by seven national scientific societies, concluding that there was no general acceptance on the existence of the condition of repressed-and-recovered memories, and calling the evidence supporting repressed and recovered memory “remarkably weak”). Appellant has not explained how he can claim general acceptance despite these statements from leading experts and major professional organizations.

Dr. Pope explained that the scientific community has not accepted the existence of repressed and recovered memories. (Tr. 275–82.) During the evidentiary hearing, Dr. Pope identified more than 30 publications from the last two decades, expressing skepticism about repressed and recovered memory. (Tr. 278–81; *Papers and Books from 1990 to 2007*, Exh. 1002 at June 2, 2009 Hearing.) These scientists do not, as Dr. Dalenberg claims, merely disagree about the “mechanisms” of forgetting or other minor details of the theory. Rather, they question whether people forget and remember traumatic events in a way that is distinct from ordinary forgetting and other psychological processes and whether recovered memories can be accepted as such. This skepticism amongst leading scientists demonstrates that there is a significant dispute between the experts and precludes a finding of general acceptance.

3. Appellant’s expert, Dr. Chu, admitted that the theory of repressed and recovered memory was not generally accepted in the scientific community.

Although appellant claims that the theory of repressed and recovered memories is generally accepted in the scientific community, his own expert disagrees. Appellant has offered no basis for rejecting his expert’s testimony on this point.

Dr. Chu testified several times that repressed and recovered memories are highly controversial and hotly debated in the fields of psychology and psychiatry. At the hearing, Dr. Chu admitted that a “great debate,” a “heated debate,” and “controversy” existed on the concept of repressed and recovered memories. (Tr. 227–29.) At his deposition, Dr. Chu testified: “[T]here are strongly held views by many people, and in that sense there is still a debate.” (RAA 39, at 22:2–11.) He is “well aware of the heated

debate.” (RAA 44, at 92:2–3; *see also* RAA 48, at 189:22–190:5.) He agrees there is still “a great debate” on the specific concept of repression. (RAA 47, at 145:24–146:22.) Dr. Chu further testified that he continues to agree with this statement from *his* book: “Ever since the introduction of dissociative identity disorder, controversy has swirled around the nature and the validity of this diagnosis.” (RAA 47, at 147:23–148:7.)

Like Dr. Chu, one of the articles introduced by appellant at the evidentiary hearing, expressly acknowledges the existence of a “heated controversy.” Laurence Alison, et al., *Considerations for Experts in Assessing the Credibility of Recovered Memories of Child Sexual Abuse*, 12 PSYCHOLOGY, PUB. POLICY & L. 419, 419 (2006). (Exh. 402 at June 1, 2009 Hearing; Tr. 12.) The same article further observes that there is a “current absence of scientific consensus on the reliability of recovered memories.” *Id.* at 435. Similarly, a leading treatise on evidence acknowledges that the existence of repressed and recovered memories is “hotly disputed.” Fishman & McKenna, *Jones on Evidence Civil and Criminal*, § 41.19, at 374.

By definition, a scientific theory cannot be both highly controversial and generally accepted. (Tr. 269.) The evidence shows there is a “great” and “heated” debate over the existence of repressed and recovered memories and an “absence” of consensus in the scientific community. As a result, appellant cannot satisfy his burden of showing that the concept of repressed and recovered memories is generally accepted.

4. The DSM does not support the claim of general acceptance.

Appellant contends that inclusion of “dissociative amnesia” as a diagnosis in the DSM-IV-TR is “absolute proof” that the relevant scientific community has generally

accepted repressed and recovered memories. (AB 24.) Appellant's contention may have superficial appeal, but it falters under closer scrutiny.

Some diagnoses in the DSM-IV-TR, such as anorexia nervosa and alcoholism, are widely accepted by scientists. (Tr. 315.) But not all diagnoses have gained general acceptance.¹¹ (Tr. 305.) The United States Supreme Court expressed skepticism of the utility of the DSM, observing that a diagnosis in the DSM "may mask vigorous debate within the profession."¹² *Clark v. Arizona*, 548 U.S. 735, 774, 126 S. Ct. 2709, 2734 (2006).

The DSM-IV-TR is a "dictionary" of diagnoses and diagnostic codes. (Tr. 314.) It is "not a scientific paper or a scientific reference or a scientific review article," and it "does not, by itself, establish the validity of a diagnostic entity." (Tr. 314, 431.) In fact, as the United States Supreme Court has acknowledged, the DSM-IV itself cautions against the use of psychiatric diagnoses in forensic settings:

When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.

Introduction to DSM-IV-TR at xxxii–xxxiii, *quoted in Clark*, 548 U.S. at 775, 126 S. Ct. 2735. (*See also* Tr. 305.)

¹¹ For instance, Dr. Loftus noted the DSM-IV-TR includes "fugue," which is "where you lose all of your past, identity, who you are, your autobiography and so on." (Tr. 538). Dr. Loftus testified, "[T]here is a lot of controversy about that." (Tr. 539).

¹² The Supreme Court's analysis undermines cases that admitted evidence of repressed and recovered memories on the basis of the DSM diagnosis—including *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996), which appellant cites. (AB 17.)

The DSM is not sacrosanct. *State v. Klein*, 124 P.3d 644, 651 (Wash. 2005) (quotation omitted). Rather, it is an evolving and imperfect document. *Id.* (quotation omitted); *see also Clark*, 548 U.S. at 774, 126 S. Ct. 2734 (acknowledging that “the end of such debate [over disorders listed in the DSM-IV] is not imminent”). Relying on the DSM-IV-TR to determine general acceptance makes the DSM-IV-TR—not the court—the de facto adjudicator.

Furthermore, the record demonstrates that the diagnosis of dissociative amnesia was highly controversial, despite having been included in the 1994 version of the DSM. Dr. Pope testified about his study questioning the validity of the diagnosis. (Tr. 295–96.) In that study, Dr. Pope sent a questionnaire to 400 randomly selected, board-certified psychiatrists around the United States. Only 35% of the survey respondents said dissociative amnesia should be included as an official diagnosis, while 40% said it should be only be included as a “proposed diagnosis.” More importantly, only 23% of 367 psychiatrists said there was “strong evidence” for the validity of dissociative amnesia.¹³ (Tr. 295–96).

5. The district court did not erroneously distinguish between research and clinical experts.

Appellant contends the district court erred in recognizing that researchers and clinicians are “deep[ly] split” on the validity of the theory of repressed and recovered memories. (AB 38.) Appellant’s argument is baseless because the finding is supported

¹³ Those responses do not indicate that the theory is generally accepted. Just as some experts may believe that there is *evidence* of life on Mars, that does not mean they believe there *is* life on Mars. (Tr. 296–97.)

by the record. Dr. Loftus, for example, explained that the researchers and clinicians on the APA's Task Force disagreed "vehemently." (Tr. 477.) Other courts recognize a similar split. *See, e.g., Hungerford*, 697 A.2d at 926 ("Despite common support for the phenomenon in the therapeutic setting, scientists rest their rejection of recovery of repressed memories on the absence of confirming laboratory results.").

6. The articles identified by appellant do not establish general acceptance.

Appellant purports to have provided the district court with more than 300 articles demonstrating that the theory of repressed and recovered memory is generally accepted. But these articles¹⁴ merely represent "one half of the story." (Tr. 269.) As the district court correctly recognized, the task under *Frye-Mack* is not to "play the role of scientist" and determine who—the supporters or detractors of the theory of repressed and recovered memory—is correct. (Add. 25.) Rather once the court "discern[s] a lack of general acceptance—which in this instance is palpable—[the court has] no choice but to exclude" the evidence. *People v. Barney*, 10 Cal.Rptr.2d 731, 743 (Cal. App. 1 Dist. 1992).

The district court found that there is a "deep controversy" and "great debate" in the scientific community as to whether "repressed and recovered memory is a real psychiatric condition or a much more natural process involving something closer to a process of normal forgetting." (Add. 24–25.) In light of this "deep split," the district court had no choice but to conclude that the theory of repressed and recovered memories was not generally accepted in the relevant scientific community. (Add. 25.)

¹⁴ As discussed *infra*, there are numerous problems with the studies that proponents of repressed-and-recovered-memory theory rely on.

B. The District Court Did Not Abuse its Discretion in Ruling that Repressed and Recovered Memory Evidence Was Inadmissible Because it Was Not Reliable.

Under the second prong of *Frye-Mack*, the district court determines whether the evidence has foundational reliability. *Goeb*, 615 N.W.2d at 814. The proponent bears the burden of demonstrating that the evidence is foundationally reliable. *Id.* The district court's findings on reliability are reviewed under an abuse-of-discretion standard. *Id.* at 815. This court will not reverse those findings absent clear error. *Id.*

Trial courts are charged with being a gatekeeper and must “ensur[e] that an expert’s testimony rests on a reliable foundation.” *Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714–15 (8th Cir. 2001). Accordingly, before a court accepts expert testimony, it must first determine that the testimony is based upon sound, reliable theory, as opposed to rank speculation. *N. Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F. Supp. 2d 1140, 1146–47 (D. Minn. 2003). To establish foundational reliability, the proponent of the evidence must show that a theory is reliable and trustworthy, based upon well-recognized scientific principles and independent validation, and that its administration in the particular instance conformed to the procedure necessary to ensure reliability. *Sentinel Mgmt. Co. v. Aetna Cas. and Sur. Co.*, 615 N.W.2d 819, 824 (Minn. 2000); *McDonough*, 685 N.W.2d at 694.

Other courts have found that evidence of repressed and recovered memory lacks foundational reliability. *Rivers*, Doc. 1024, No. 743, at *14 (determining that evidence was not valid or reliable); *Walters*, 698 A.2d at 1248 (concluding evidence was not reliable); *Hungerford*, 697 A.2d at 928–30 (concluding that repressed memories were not

reliable); *Quattrocchi*, 1999 WL 284882, at *10 (“Based upon case law, the testimony of experts, and various articles on the topic, this court finds that repressed recollection has not been tested adequately to ensure the reliability and accuracy of the recovered memory.”); *Franklin*, 987 P.2d at 28 (rejecting as unreliable testimony on recovery of memories). Their conclusions are consistent with the recent analysis from the Second Circuit Court of Appeals in *Friedman v. Rehal*, 618 F.3d 142 (2nd Cir. 2010). In *Friedman*, the Second Circuit detailed its concerns with prosecutions based on repressed and recovered memories. The court concluded that the “consensus” within the scientific community was that memory recovery tactics could create false memories and that the “prevailing view is that the vast majority of traumatic memories that are recovered through the use of suggestive recovery procedures are false.” 618 F.3d at 142, 160.

Like these courts, the district court, here, after listening to three days of testimony on the issue, concluded that the studies that appellant relied on to support his claim of repressed and recovered memories lacked foundational reliability. (Add. 26–29.) In particular the district court observed that the studies did not provide sufficient information about the scope of the subject’s purported amnesia and did not scientifically establish the accuracy of the recovered memories. (Add. 26.) Appellant has offered no basis for concluding that the district court abused its discretion in making these findings. Instead, appellant criticizes the court, claiming it improperly took on the role of scientist. (AB 41–42.) The district court, however, is not required to rely on an expert’s *ipse dixit* contention that the evidence is reliable. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519 (1997).

Proponents of repressed-and-recovered-memory theory basically rely on two different kinds of studies: retrospective studies and prospective studies.¹⁵ Retrospective studies are studies where researchers ask people who now claim that they were sexually abused, if there was ever a time when they did not remember the abuse. (Add. 27; Tr. 345–46.) Prospective studies are studies where researchers identify people who in the past claimed to have been abused and then contact those people to determine if they recall the abuse. (Add. 27; Tr. 352–53.) The district court examined both of these kinds of studies. The district court also explained its concerns with appellant’s reliance on case studies, clinical observations, and accuracy studies. (Add. 28–29.)

Rather than addressing reliability concerns of the district court, appellant continues to point to the same unreliable studies and to argue that his experts are highly credentialed. Such arguments do not warrant a conclusion that the district court abused its discretion. *See Goeb*, 615 N.W.2d at 816 (affirming exclusion of expert testimony because it was not sufficient to simply argue an expert’s credentials without pointing to independent validation of their methodology or addressing the particular reliability concerns raised by the defendant). This is especially true when, as here, the court’s findings are supported by the record. For example, respondents’ experts testified that the various studies relied on by appellant are not reliable. Even Dr. Chu acknowledged the studies’ shortcomings. Furthermore, Dr. Dalenberg conceded that it is not possible to determine whether someone can lose total access to their memories as posited by the

¹⁵ Contrary to appellant’s claims, the district court did not ignore his studies, but merely organized them differently.

theory of repressed and recovered memories. In particular, she testified that she cannot tell if appellant lost 100% access to his memories. (Tr. 136–37.)

1. Retrospective Studies

The “vast majority” of studies that have been offered as scientific proof of repressed and recovered memory are retrospective, “do you remember whether you forgot,” studies. (Tr. 495–96, 345–46.) In a typical retrospective study, researchers identify a cohort of people who claim to have been sexually abused and ask them if there was a time when they didn’t remember, couldn’t remember, or remembered less of the abuse. (T. 496, 345–46.)

These studies are not reliable because, even if a subject answers “yes,” it is not clear what the “yes” response means. It could mean that the person could not remember; that the person simply did not think about it because they were, for instance, traveling on vacation; or that the person did not think about it for a while but then were reminded of the abuse. (Tr. 346–47, 496–97, 553; Add. 27.) Likewise, the studies lack independent corroboration, that is, they did not validate a subject’s claim that he was in fact incapable of remembering the abuse at a prior point in time. (Tr. 347.) Even Dr. Chu has admitted that the studies are unreliable and flawed, because a subject might remember something that never happened; the memories might have been influenced by outside forces; and there is “always ... the danger that people are not recalling accurately.” (Tr. 231.) *Cf. Goeb*, 615 N.W.2d at 816 (finding no abuse of discretion in excluding testimony as unreliable where the testimony from the proponent’s expert was contradictory).

Appellant's brief suggests that respondents did not provide any support for their claim that the studies were not reliable, but Dr. Pope testified that research demonstrates that these retrospective studies are unreliable because people can forget that they remembered a situation. Dr. Pope recounted a study in which researchers asked subjects to memorize a list of words on their first visit to the laboratory, tested them on what they could remember on a second visit, and, on the third visit, asked them what they had remembered on the second visit. This research "graphically demonstrate[d]" that "people would forget that they had been able to remember things." (Tr. 348–49). Dr. Pope also recounted a case in which, "a woman remembered with considerable anxiety and an outburst of emotion that she had been abused and believed that she had recovered a memory that she had not previously had, and then her husband said to her, well, you talked to me about that six years ago." (Tr. 347–48).

In light of testimony from respondents' experts and the testimony from Dr. Chu, appellant cannot claim that the district court abused its discretion in rejecting the retrospective studies.

2. Prospective Studies

The district court ruled that the prospective studies that appellant cited were similarly unreliable for several reasons. Dr. Pope and Dr. Loftus explained, and the district court agreed, that many of the subjects in those studies were simply too young to remember the incident, some may have forgotten it, or others might not have wanted to disclose it. (Add. 27–28; Tr. 498–500, 353–57.) Dr. Chu similarly testified that one of the most prominent prospective studies, namely the Williams study, was highly flawed

because researchers failed to specifically ask the subjects about the traumatic event. (RAA 42–43, at 63:23–66:4.) As a result, according to Dr. Chu, “it really was impossible to know for sure whether or not they actually remembered those events.” (RAA 42, at 64:21–24.) Dr. Chu further observed the study was not reliable because “it’s very hard to say, okay, this was due to repression, [as opposed to] some kind of normal forgetting.” (RAA 43, at 65:2–11.) Dr. Loftus further explained that the prospective studies are not foundationally reliable because attempts to replicate these studies have produced discordant results. (Tr. 498–500.) In one follow-up study, a researcher, Gail Goodman, determined that only 8% of the subjects had failed to mention the target incident. (Tr. 499.) Goodman concluded that “[t]hese findings do not support the existence of special memory mechanisms unique to traumatic events;” rather, they imply “that normal cognitive operations underlie long-term memory for childhood sexual abuse.” (Tr. 288–89.) Under such circumstances, appellant cannot show that the district court abused its discretion in finding that the prospective studies lacked foundational reliability.

3. Case Studies

Appellant relied extensively on case studies to demonstrate the reliability of repressed-and-recovered-memory theory. The district court found these studies unreliable because they were anecdotal and because the authors of the studies did not share their data. (Add. 28.) *Goeb*, 651 N.W.2d 816 n.10 (affirming lower court’s exclusion of case reports as unreliable anecdotes).

Respondents’ expert, Dr. Loftus, testified in detail about appellant’s case studies. She explained that case studies are essentially “anecdata” and are “just a story somebody

is telling you about another person,” and as such, they are bound by the storyteller’s motivations and interpretations. (Tr. 500–01; Add. 28.) More importantly, the authors of case studies do not share their data, making it impossible for other scientists to determine if the case study is accurate or actually provides evidence of repressed and recovered memory. (Tr. 500; Add. 28). In instances where scientists learned the facts behind a case study, they discovered that the actual facts are “nothing like” those reported in the case study. (Tr. 500–01.) Appellant has not explained why the case studies are foundationally reliable despite these shortcomings.

4. Clinical Observations

The district court similarly observed that Dr. Chu’s clinical observations do not establish that the theory of repressed and recovered memory is valid or reliable. (Add. 28.) The court’s determination is supported by Dr. Grove, who explained that research on clinical judgment suggests that observations alone cannot establish the validity of a theory. Dr. Grove testified that research shows that experienced clinicians are no better at making accurate psychiatric diagnoses than novices, explaining that “research in this area shows little or no correlation between the amount of experience that a clinician has had and the accuracy of their judgments . . . There doesn’t seem to be a strong tie between experience and accuracy.” (Tr. 424). Thus, any opinion about whether a research subject or patient “repressed” a memory is nothing but speculation. Appellant has offered no reason for challenging Dr. Grove’s testimony on this point. In fact, appellant’s expert, Dr. Chu, did not challenge the testimony: Dr. Chu testified he was not aware of the research on clinical judgment. (Tr. 239–42.) And he further agreed that

clinical diagnoses can be influenced by the clinician's own preconceived notions. (Tr. 239–42.)

Dr. Chu's observations are unreliable for other reasons, too. First, Dr. Chu's work has been mostly administrative since 2000, and he has not conducted any research or read any peer-reviewed articles about traumatic amnesia or the nature of the debate about repressed and recovered memories since 2000. (Tr. 229; RAA 39, at 23:9–24; RAA 40, at 25:1–19.) Second, and most importantly, Dr. Chu failed to ensure that his observations were reliable by (1) obtaining independent corroboration that the patient had been the victim of the alleged abuse, (2) establishing that the patient had experienced true amnesia for the event and had not simply forgotten or not thought about the event, and (3) ensuring that the patient's supposedly "recovered" memories were accurate and had not been degraded or distorted by the passage of time, intervening information, or the patient's current mental states. Appellant did not show that Dr. Chu did any of these things in any systematic or scientific manner and has not explained why the observations are reliable despite these concerns.

5. Accuracy Studies

Appellant also relies on accuracy studies, which ostensibly establish that "recovered" memories are as accurate as "continuous" memories. The district court found these studies unreliable. (Add. 29.)

At the hearing, appellant did not produce evidence explaining that the accuracy studies determined whether the subjects had experienced total amnesia (as opposed to ordinary forgetting or other psychological phenomenon), whether the "recovered"

memories concerned events occurring decades earlier, or whether the alleged abuse was traumatic. Likewise, appellant cannot show that Dr. Dalenberg's accuracy study is reliable because Dr. Dalenberg is the only one who has ever seen all of her data and she destroyed the data before others could review it. (Tr. 147; RAA 34, at 204:18–205:20.) Appellant again has not responded to these concerns.

6. Studies by respondents' experts also show that the science behind repressed and recovered memories lacks foundational reliability.

Appellant suggests that respondents have not produced sufficient evidence discounting his studies. But appellant's argument misses the mark because it is he, as the proponent of the evidence, who bears the burden of establishing that his evidence has foundational reliability. *Goeb*, 615 N.W.2d at 814; Minn. R. Evid. 702. Furthermore, respondents' experts did cite their own studies questioning the reliability of purportedly repressed and recovered memories. As noted above, Dr. Pope recounted a study demonstrating that people can forget that they were able to remember certain events in the past. (Tr. 347–49.) In addition, Dr. Loftus's research demonstrates the unreliability of so-called recovered memories. Dr. Loftus explained that by using suggestive interviewing techniques, she implanted false memories and convinced subjects that they had been involved in traumatic events, such as being lost for an extended period of time in a shopping mall and being attacked by an animal. (Tr. 488–90). From this research, Dr. Loftus concluded that if “[y]ou supply people with post-event suggestion, it can distort or contaminate memory, whether an emotional memory or a more mundane memory.” (Tr. 542). She said that once false memories are “implanted,” “they can be

held with confidence, expressed with detail, and even experienced with emotion,” and that it is “virtually impossible without independent corroboration to tell whether you are dealing with a real memory or one that is a product of some other process.” (Tr. 492). Her findings are especially enlightening here where the record indicates that that there was widespread media coverage of the abuse allegations and that appellant was questioned about the abuse by his mother and discussed the allegations with others. (Tr. 490–91.)

In sum, the record supports the conclusion that appellant’s evidence on repressed and recovered memory lacks foundational reliability. As a result, it does not matter whether appellant provided 300 or 3,000 studies in support of his claim: As Dr. Pope testified, “A hundred times zero is still zero.” (Tr. 351). Appellant has not met his burden of showing that the district court abused its discretion in finding that the evidence lacked foundational reliability. Accordingly, this court must affirm the district court’s order excluding evidence on repressed and recovered memories.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE NONFRAUD CLAIMS.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from a district court’s grant of summary judgment, the reviewing court asks “(1) whether there are any genuine issues of material fact for trial; and (2) whether the trial court erred in its application of the law.” *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*,

736 N.W.2d 313, 317 (Minn. 2007) (quotation omitted). The reviewing court applies a de novo standard of review to the district court's decision to grant summary judgment, reviewing the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). Summary judgment is appropriate when a claim is barred by the applicable statute of limitations. The construction and applicability of statutes of limitations are questions of law that are reviewed de novo. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

The statute of limitations on an action for damages based on personal injury caused by sexual abuse is six years. Minn. Stat. § 541.073, subd. 2(a). This six-year period of limitations applies to appellant's nonfraud claims.¹⁶ The statute of limitations in Minn. Stat. § 541.073 begins to run when the victim of sexual abuse reaches the age of majority. *D.M.S.*, 645 N.W.2d at 389. Section 541.073 is governed by an objective, reasonable person standard, and courts cannot make a "wholly subjective inquiry into an individual's unique circumstances" to determine when the statute of limitations begins to run. *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996).

To toll the running of the statute of limitations on a claim of child sexual abuse into adulthood, a plaintiff must produce evidence of a legal or mental "disability" that would make a reasonable person *incapable* of recognizing that he had been sexually abused. *W.J.L.*, 573 N.W.2d at 681. Clearly, ordinary forgetting or not thinking about

¹⁶ Appellant's vicarious liability claim is governed by the same statute of limitations as the underlying tort. *D.M.S.*, 645 N.W.2d at 390. Because a claim by appellant against the underlying tortfeasor would be untimely, appellant's vicarious liability claim is also untimely. *Roe v. Archdiocese of St. Paul and Minneapolis*, 518 N.W.2d 629, 632 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994).

something for a long time does not toll the statute of limitations under this standard. *Id.* at 682 (“Merely not thinking about the abuse is not enough to delay the running of the statute of limitations.”); *see also Duffy v. Father Flanagan’s Boys’ Home*, No. 8:03CV31, 2006 WL 208832, at *4 (D. Neb. 2006) (“Mere forgetfulness is not a valid reason to toll a statute of limitations.”); *Phillips v. Gelpke*, 921 A.2d 1067, 1076 (N.J. 2007) (explaining that testimony that the plaintiff did not remember abuse, standing alone, did not toll the statute of limitations); *Barrett v. Hylsburg*, 487 S.E.2d 803, 806 (N.C. Ct. App. 1997) (holding that the statute of limitations is not tolled by claim that plaintiff suddenly remembered the trauma); *Maskell*, 679 A.2d at 1092 (ruling that the claims were time-barred because repression was indistinguishable scientifically from the normal process of forgetting).

Because the district court correctly excluded evidence of repressed and recovered memories, appellant’s allegations that he somehow “repressed” and subsequently “recovered” memories of the alleged abuse are irrelevant and he cannot prove any disability that would toll the running of the statute of limitations on his nonfraud claims.¹⁷ *See W.J.L.*, 573 N.W.2d at 682 (“A discussion of what [plaintiff] claims she knew is not helpful to this court.”); *ABC v. Archdiocese of St. Paul and Minneapolis*, 513 N.W.2d 482, 486 (Minn. App. 1994) (“[Appellant’s] inability to comprehend that her situation has been abusive does not toll the statute of limitations.”). As a result, the six-year statute of limitations for appellant’s nonfraud claims began to run when appellant attained

¹⁷ Appellant’s only argument for reversing the summary judgment ruling on the nonfraud claims is his contention that the district court erred in excluding evidence of repressed and recovered memories. (AB 43–44.)

the age of 18 in 1985 and expired in 1991. Because appellant did not commence this action until 2006, his claims are clearly time-barred. The district court properly granted respondents' motion for summary judgment on the nonfraud claims.

III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S FRAUD CLAIMS.

A. Appellant's Fraud Claims are a Blatant Attempt to Circumvent the Statute of Limitations.

To address his childhood-sexual-abuse claims, appellant pleaded claims sounding in negligence. Those claims are time-barred. Appellant's attempt to disguise that more apposite but unavailing legal theory through a fraud theory should not be sustained. *See Abraham v. County of Hennepin*, 639 N.W.2d 342, 353 (Minn. 2002) (stating that "a party should not be permitted to cloak or disguise an equitable action," by making a claim for money damages in its prayer for relief); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. App. 1997) (concluding that breach of fiduciary duty claim was actually a medical malpractice claim, where "the gravamen of the complaint sounds in medical malpractice"); *Stuart & Sons, L.P. v. Curtis Pub. Co., Inc.*, 456 F.Supp.2d 336, 343 (D. Conn. 2006) (concluding that claim was for conversion and would be construed as such, despite being labeled as declaratory relief, because any other ruling would "mak[e] a mockery of the statute of limitations through creative labeling").

A fraud claim typically contemplates a commercial relationship and a pecuniary loss flowing from a misrepresentation made in the course of that relationship. *United States v. Neustadt*, 366 U.S. 696, 711 n.26, 81 S. Ct. 1294, 1302 n.26 (1961) (explaining that an action in tort of misrepresentation has been largely confined to "the invasion of

interests of a financial or commercial character in the scope of business dealing”); *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D. N.Y. 1991). Courts have rejected attempts to expand fraud claims to noncommercial situations. *See, e.g., Tolliver v. Visiting Nurse Ass’n of Midlands*, 771 N.W.2d 908, 916 (Neb. 2009) (“[O]ther theories of action have been sufficient to deal with non-pecuniary damage, and resort to theory of deceit is usually unnecessary.”); *Doe v. Dilling*, 888 N.E.2d 24 (Ill. 2008) (rejecting plaintiff’s fraud claim, where she contracted AIDS after her fiancé’s parents fraudulently concealed that her fiancé had AIDS). For example, in the context of sexual-abuse claims, courts have limited application of fraud claims. Thus, in *Mars v. Diocese of Rochester*, the court stated that an action for fraud, where premised on childhood sexual abuse by a member of the clergy, would fail, unless the plaintiff identified damages that were separate and distinct from those flowing from the abuse. 196 Misc.2d 349, 352 (N.Y. Sup. 2003). Appellant here has not alleged any damages in his fraud counts which are separate and distinct from the damages in his other claims. (AA 188–99.)

Appellant’s failure to timely pursue his negligence claims does not warrant the unprecedented expansion of actions for fraudulent misrepresentation or fraudulent nondisclosure. Nor should his tardiness permit him to create a mockery of the statute of limitations by recasting his failed negligence action as a fraud claim.

B. Appellant’s Fraud Claims are Untimely.

Appellant has alleged two fraud claims: one based on affirmative representations allegedly made to him and his family, and another on intentional nondisclosure. (AA 197–99.) Appellant cannot identify any oral or written communications from

respondents indicating that Adamson did not pose a danger to children. Instead, appellant claims that respondents misrepresented that Adamson was fit to serve as a priest by assigning him to a parish.

Under Minn. Stat. § 541.05, subd. 1(6), the statute of limitations for fraud is six years and begins to run “when the aggrieved party discovers the facts constituting the fraud.” It is well settled that Minn. Stat. § 541.05, subd. 1(6), imposes a “standard of objective reasonableness upon the plaintiff to discover the facts constituting the fraud.” *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 235 (8th Cir. 1996) (citing *Bustad v. Bustad*, 116 N.W.2d 552, 555 (Minn. 1962)). “[T]he facts constituting the fraud are deemed to have been discovered when, with reasonable diligence they could and ought to have been discovered.” *Blegen v. Monarch Life Ins.*, 365 N.W.2d 356, 357 (Minn. App. 1985). When the evidence leaves no room for reasonable minds to differ, the court may determine as a matter of law whether the plaintiff exercised reasonable diligence. *Klehr*, 87 F.3d at 235.

Here, the district court found that the undisputed facts showed that appellant “learned . . . of the facts constituting the fraud in the 1980s,” and, in the alternative, that he “should have learned in the exercise of reasonable diligence, of the facts constituting the fraud in the 1980s.” (Add. 52.) As a result, appellant could have commenced this action against respondents at that time. Because he did not commence this action until 2006, his claims are untimely.

1. The undisputed facts reveal that appellant knew that Adamson was a danger to children in the 1980s—over two decades before he commenced this lawsuit.

As the district court found, the undisputed facts, even when viewed in a light most favorable to appellant, demonstrate that appellant knew that Adamson was a child abuser in the 1980s. (Add. 52.) Thus, appellant knew that any representation to the contrary was false.

At all times relevant hereto, appellant was fully functional and not incapacitated in anyway: Appellant is highly educated, has worked as a licensed psychologist, has operated his own successful business for years, and has been married to the same woman since 1989. (RAA 5, at 6:17–7:12; RAA 14–15, at 124:22–127:16; RAA 50.) Appellant knew that he had been abused by Adamson in the 1980s.¹⁸ Appellant also knew that Adamson’s conduct was wrong. He admitted to Fr. Doyle, that when the abuse occurred, he felt: emotionally paralyzed, shocked, isolated, fear, guilt, and jolted. (RAA 20–21, at 37:20–38:4; RAA 21–22, at 41:15–42:18; RAA 23, at 48:25–49:3; RAA 24, at 50:22, 51:7–19.) Fr. Doyle asked appellant “how he reacted when the first events happened, if he could remember that far back, and he does.” (RAA 20, at 37:20–22; RAA 21, at 41:11-14. Appellant explained how he felt “when the *events* occurred” and “at the time that *the abuse* was going on.” (RAA 21–22, at 41:23–42:3; RAA 23, at 48:25–49:3.)

¹⁸ Because evidence of repressed and recovered memories has been excluded, appellant cannot claim that he did not know of the abuse. *Hopkins by LaFontaine v. Empire Fire and Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991) (requiring that plaintiff provide admissible evidence to oppose summary judgment).

Appellant said, for instance, that “when the *incidents* occurred,” he was “deathly afraid to tell anyone.” (Add. 34; RAA 22, at 42:4–18.)

Not only was appellant aware of his own abuse, but appellant also knew by the mid-1980s that Adamson was a serial abuser. Once the allegations against Adamson surfaced, Risen Savior made announcements about the allegations from the pulpit. (RAA 29, at 34:15–21.) Appellant’s mother testified that a psychologist came to the parish to speak to the parishioners about the allegations against Adamson. (RAA 26, at 47:16–19.) Appellant’s father explained that two months after the allegations against Adamson surfaced, The Archdiocese held a meeting informing parishioners that there were accusations of “inappropriate behavior” against Adamson and that the allegations were “one reason [Adamson] was transferred” from Risen Savior. (RAA 29, at 34:24–36:4.) Furthermore, appellant testified that in 1986 (when he was 18 or 19 years old), he had discussions with his mother about Adamson and whether he had been victimized by Adamson. (Add. 34; RAA 17, at 251:15–22.) Appellant’s mother confirmed this discussion, explaining that she asked appellant if he had been “sexually abused” by Adamson, after being advised to do so by the psychologist who spoke at Risen Savior. (Add. 34; RAA at 26–27, at 47:10–50:22.) The family discussions regarding Adamson’s history did not end there. Appellant testified that his mother and he discussed the abuse a second time, and that she believed that appellant may not have been a victim because they were so prominent in the church. (RAA 17, at 251:24–252:1.) Appellant’s wife also admitted that, before marrying appellant in 1989, she, appellant, and his family discussed the claims against Adamson. (RAA 31, at 31:11–32:19; RAA 32, at 57:1–21.)

In light of these undisputed facts, appellant cannot claim that he did not know of the facts constituting the fraud in the 1980s. Appellant knew that Adamson was a danger to children, and thus he cannot reasonably claim that he did not know that any representation to the contrary was false. Since he waited until 2006 to commence this action, his fraud claims are clearly time-barred. The district court's order dismissing his fraud claims should be affirmed.

2. Appellant had a duty to exercise reasonable diligence when he knew that any representation that Adamson was safe for children was false.

Before a court can conclude that his claims are timely, appellant must demonstrate that he did not know of and should not have discovered in the exercise of reasonable diligence, the facts constituting the fraud before 2000, which was six years before he commenced this action. But the undisputed facts demonstrate that appellant had enough information to trigger his duty to use reasonable diligence to investigate his fraud claims. Appellant knew that Adamson had abused him and other children in the 1980s, and thus was aware that any representation to the contrary was false. Appellant also testified that he knew of the Catholic Church's problems with sexual abuse claims in the 1990s. (RAA 17, at 252:17–20.)

In the mid- to late-1980s, a number of plaintiffs commenced lawsuits against the respondents, claiming that Adamson had touched them inappropriately when they were minors. (Add. 33.) *See Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). These lawsuits raised the same claims about respondents' knowledge of Adamson's history that appellant is now

making. Furthermore, these lawsuits received extensive media publicity, unmasking respondents' knowledge about Adamson. Between 1987 and 1991, more than 130 articles were published in the Minneapolis and St. Paul newspapers on the abuse allegations against Adamson. (Add. 33.) Meetings were held at appellant's parish, Risen Savior, in response to these allegations. (Add. 34.) And these meetings were open to the public. (Add. 34.) In light of these circumstances, appellant cannot show that his failure to discover the purported fraud was excusable under the objective, reasonable person standard. There is no room for a reasonable difference of opinion in this regard. *See Klehr*, 875 F. Supp. at 1349 (recognizing that summary judgment on the issue of reasonable diligence is appropriate if the evidence leaves no room for a reasonable difference of opinion). To rule otherwise, on such facts, renders the duty to exercise reasonable diligence meaningless.

a. *The court must reject appellant's attempts to apply a subjective standard to his fraud claims.*

Because appellant cannot meet his burden of showing that a reasonable, objective person would have been unaware of the fraud, he asks this court to apply a *subjective* standard to his claims and contends that his claims are timely simply because he claims he was not aware of the purported fraud. But the running of the statute of limitations on appellant's claim is not tolled merely because he claims that his personal knowledge about respondents' role in allowing Adamson's sexual misconduct to continue may have been "incomplete." *John Doe 76A v. Diocese of Winona*, No. A04-688, 2004 WL

2711650, at *4 (Minn. App. Nov. 30, 2004).¹⁹ Case law clearly establishes that a party does not need to know all of the evidence establishing a cause of action. *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 542 (Minn. 1994). Rather, a party need only know that the cause of action existed. *Id.*; *see also Kassan v. Kassan*, 400 N.W.2d 346, 350 (Minn. App. 1987) (stating that mere suspicions of fraud trigger the limitations period), *review denied* (Minn. Apr. 23, 1987).

Here, appellant knew or should have known that any representation that Adamson was safe to be around was false. And the record demonstrates that the allegations against Adamson were public knowledge. Even though he bears the burden of proving that he could not have discovered the facts constituting the fraud earlier, appellant has offered no explanation for his failure to pursue these claims earlier; nor, is it clear, under appellant's analysis, when (if ever) the statute of limitations on a fraud claim would begin to run.²⁰ *Blegen*, 365 N.W.2d at 357.

b. *As in cases involving fraudulent concealment, appellant here did not exercise "reasonable diligence" in pursuing his fraud claims.*

Appellant's fraud claims invite an analysis similar to that used in assessing whether the running of the statute of limitations should be tolled due to fraudulent concealment. There is no difference between a claim of fraudulent concealment and

¹⁹ Respondent is aware of Minn. Stat. § 480A.08(3). Unpublished cases are cited as persuasive authority, and respondent respectfully notes that the cited cases deal with situations uniquely similar to those involved here. Copies of unpublished cases cited herein are reproduced in the appendix to this brief.

²⁰ Appellant claims that he learned of the fraud after recovering his memories, but he does not provide any citation to the record in support of that claim. (AB 12.)

appellant's attempt here to toll the running of the statute of limitations on his fraud claims, because the inquiry for both centers on when a plaintiff with reasonable diligence could have discovered respondents' knowledge of Adamson's history of misconduct.²¹

In *Collins v. Johnson*, 374 N.W.2d 536, 541–42 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985), the court rejected a patient's claim of fraudulent concealment in a medical-malpractice action, explaining that the medical records showed that plaintiff was aware of her medical problems, that she was not prevented from discovering facts, and that she had not met her burden of showing that she could not have discovered the doctor's alleged concealment sooner by exercising reasonable diligence. *See also Paine v. Jefferson Nat'l Life Ins. Co.*, 594 F.3d 989, 992 (8th Cir. 2010) (applying Arkansas law and rejecting fraudulent-concealment argument where defendants did not commit any positive act of fraud, did nothing to actively conceal their actions, and their knowledge could have been discovered with reasonable diligence).

This court applied similar reasoning in rejecting fraudulent-concealment claims against churches in sexual-abuse cases. *See Quenroe v. Order of St. Benedict*, No. A03-1212, 2004 WL 1381195, at *3–*4 (Minn. App. June 15, 2004) (refusing to toll the limitations period where the victim is “fully aware” of the injury), *review denied* (Minn. Aug. 25, 2004); *Ivers v. Church of St. Williams*, No. C2-98-519, 1998 WL 887536, at *3–

²¹ “To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false or was made in reckless disregard of its truth or falsity, and *that the concealment could not have been discovered by reasonable diligence.*” *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. App. 1992) (emphasis added), *review denied* (Minn. Aug. 4, 1992).

*4 (Minn. App. Dec. 22, 1988) (refusing to toll the statute of limitations where plaintiff had all the “facts necessary to assert a claim because he had “always remembered the abuse” and “knew it was wrong”). Other jurisdictions have similarly rejected fraudulent-concealment claims against churches, holding that a plaintiff who knows of his sexual abuse by a clergy member has notice of the existence of potential causes of action against the church because of the church’s relationship with the priest. *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806, 816 (Utah 2007); *Meehan v. Archdiocese of Philadelphia*, 870 A.2d 912, 921–23 (Pa. Super. Ct. 2005); *Doe v. Archdiocese of Detroit*, 692 N.W.2d 398, 406–07 (Mich. App. 2004).

Appellant’s fraud claims raise the same kind of arguments as in the foregoing cases, and should be rejected for the same reasons. Appellant, like the plaintiff in *Collins*, had sufficient facts to commence his suit: he knew he had been abused by Adamson, a priest who served as a pastor at Risen Savior, which is within The Archdiocese of St. Paul and Minneapolis; he knew that the abuse by Adamson was wrong; that Adamson posed a risk of harm to children; and he was not prevented from discovering facts upon which to commence suit against respondents.

c. Appellant’s reliance on a Wisconsin case is not persuasive.

In an attempt to excuse his failure to investigate his fraud claim with reasonable diligence, appellant cites *John Doe 1 v. Archdiocese of Milwaukee*, 734 N.W.2d 827 (Wis. 2007). But his reliance on *John Doe 1* is unpersuasive. This court has previously reviewed and rejected the Wisconsin court’s analysis in *John Doe 1*. See *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 687–88 (Minn. App. 2010). Further, *John Doe*

I is procedurally distinct from this case, because *John Doe 1* arose on a motion to dismiss and specifically stated that summary judgment might be appropriate. 734 N.W.2d at 846. In fact, when considering whether the plaintiff in *John Doe 1* should have discovered the fraud, the court declined to consider “voluminous submissions” on the issue because the court was reviewing a decision on a motion to dismiss. *Id.* at 843 & 843 n.16.

The Utah Supreme Court’s decision in *Colosimo* is more apposite as it arose on summary judgment. There, the court held that the plaintiffs’ fraud claims arising from sexual abuse by a priest were untimely because the plaintiffs knew of their own abuse and knew of the relationship between the abusing priest and the defendants, which included a diocese and archdiocese. 156 P.3d at 811.

Appellant’s failure to take any action until 2006 is inconsistent with the reasonable diligence required to toll the running of the statute of limitations for fraud and is the result of his own negligence. Accordingly, his fraud claims are untimely and the district court’s summary judgment order dismissing those claims should be affirmed.

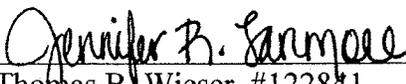
CONCLUSION

In light of the foregoing, Respondent Archdiocese of St. Paul and Minneapolis respectfully requests that this court affirm the district court's evidentiary ruling, which excluded appellant's evidence of repressed and recovered memories. Respondent further respectfully requests that this court affirm the district court's summary judgment order dismissing appellant's nonfraud and fraud claims as time-barred.

Respectfully submitted,

MEIER, KENNEDY & QUINN, CHTD.

Dated: February 3, 2011

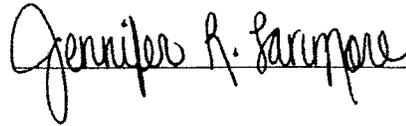


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CERTIFICATION OF COMPLIANCE

I hereby certify that Respondent Archdiocese of St. Paul & Minneapolis' Brief in Case NO. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, subd. 3(a)(1) and that the brief contains 12,748 words. The brief was prepared using Microsoft Office Word 2007 and complies with the typeface requirements of Rule 132.01.

Dated: February 3, 2011

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