

No. A10-1951

**STATE OF MINNESOTA
IN COURT OF APPEALS**

John Doe 76C,

Appellant,

vs.

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

Respondents.

BRIEF OF AMICUS MINNESOTA RELIGIOUS COUNCIL

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I. NATURE OF THE MINNESOTA RELIGIOUS COUNCIL'S INTEREST

The Minnesota Religious Council MRC is a consortium of religious judicatories including the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, the Episcopal Diocese of Minnesota, the Archdiocese of St. Paul-Minneapolis, and the United Methodist Church.¹ These religious judicatories comprise the majority of religiously-observant Minnesotans. The purpose of the MRC is to serve the common interest of Minnesota religious bodies through joint action on legal and legislative issues.

MRC's interest in this case is both public and private. The MRC's interest is public in seeking to protect parties in Minnesota litigation from the prejudice from the admission of purported expert evidence that does not meet either scientific or legal requirements for reliability. The MRC's interest is also private in seeking to protect the religious judicatory members from facing outdated and decades-old claims of sexual abuse that use the scientifically unreliable theory of repressed or recovered memory to avoid legal bars imposed by statutes of limitation.

MRC agrees with the points made in the responsive briefs submitted by the Archdiocese of St. Paul & Minneapolis and the Diocese of Winona and will endeavor not to repeat those arguments here. The MRC does, however, wish to address several points

¹ Pursuant to Minn. R. Civ. App. P. 129.03, PLAC states that no counsel for any party has authored any part of this brief, and that no person other than the MRC, its members, and its counsel have made any monetary contribution to the preparation or submission of this brief.

concerning the proposed use of expert testimony of “repressed memory” that relate both to religious institutions and more generally to other institutions and individuals who may face claims resting on such outdated testimony.

II. MINNESOTA HAS NOT ADOPTED PLAINTIFF’S “REPRESSED MEMORY” THEORY

Minnesota law does not presently recognize “repressed memory” as a scientific theory that is sufficiently established to justify admission in Minnesota’s courts. Despite Plaintiff’s assertions to the contrary, no Minnesota appellate court has “taken a clear position that evidence regarding repressed memory is to be admitted in Minnesota courts,” App. Br. at 16, under the Frye/Mack standard or any other evidentiary rule.

First, neither of the cases Plaintiff cites discussing “repressed memory” as a mental disability, App. Br. at 15-16, actually involved a claim of repressed memory. In each case, the Minnesota Supreme Court’s discussion of the statute of limitations under section 541.073, subd. 2(a) simply theorized that a mental disability that *might* make a person incapable of recognizing sexual abuse, and used “repressed memory” as a hypothetical example. See W.J.L. v. Bugge, 573 N.W.2d 677, 681 (Minn. 1998); D.M.S. v. Barber, 645 N.W.2d 383, 389 (Minn. 2002). In each case, the mention of repressed memory was not even dictum; it was merely mentioned as a ground that *might* be asserted for a theoretical claim of mental disability.

The Minnesota Supreme Court’s decision in Licktieg v. Kolar, 782 N.W.2d 810 (Minn. 2010), likewise provides no support for Plaintiff. On the contrary, the Licktieg court itself noted that its holding had nothing to do with repressed memory: “We address

a question of law—whether the delayed discovery statute is retroactive—not a question of fact relating to the credibility of Licktieg’s claim that she repressed memory of the abuse.” Id. at 818 n.6.

The mere recognition in these decisions that a future case might present a claim of mental disability as a result of repressed memory in no way suggests that these courts would necessarily approve any expert testimony concerning repressed memory, much less that they would endorse the specific foundation for such repressed memory testimony that Plaintiffs’ experts offered here. Plaintiff is simply mistaken in asserting that Minnesota’s appellate courts have not adopted or otherwise approved the admission of expert testimony concerning “repressed memory.”

III. THE DISTRICT COURT PROPERLY WEIGHED THE PARTIES’ SUBMISSIONS CONCERNING WHETHER REPRESSED MEMORY IS GENERALLY ACCEPTED IN THE PSYCHOLOGICAL COMMUNITY.

Plaintiff’s argument that the trial court improperly made its own determinations of scientific reliability, App. Br. at 41-42, misreads the record here. As the parties’ briefs detail, the trial court heard testimony from experts on both sides of the issue; plaintiff’s experts argued that their “repressed memory” theory was generally accepted in the scientific and medical community, and defendants’ experts testified that the theory is in fact the subject of substantial scientific controversy. The trial court did not make its own determination of scientific reliability; it weighed the testimony of the experts before it and decided, not that plaintiff’s theory was scientifically unsound, but that plaintiff had failed to meet his burden of showing that the theory “was generally accepted in the relevant scientific community.” Add. 29-30. This is the trial court’s proper role. See

Minn. R. Evid. 104(a) (“Preliminary questions concerning the qualification of a person to be a witness ... or the admissibility of evidence shall be determined by the court....”); Goeb v. Theraldson, 615 N.W.2d 800, 813-14 (Minn. 2000) (“when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community”).

IV. THE NATURE OF PLAINTIFF’S “REPRESSED MEMORY” THEORY MAKES IT ILL-SUITED TO EXPERT TESTIMONY

Even beyond its failure under the Frye/Mack standard, Plaintiff’s theory of “repressed memory” is inherently unscientific and ill-suited to expert testimony. As such, it does not assist the finder of fact, and the district court was correct to exclude it. See Minn. R. Evid. 702.

The use of evidence of supposedly “repressed memory” in the fact-finding process is ill-advised because of the fundamental differences between the clinical and legal settings. The purpose of a psychological diagnosis in the clinical environment is inherently directed toward the treatment and therapy of the condition diagnosed. As a result, even an uncertain diagnosis may be useful—or at least more useful than no diagnosis at all—because it allows caregivers to at least try to provide a helpful treatment. In contrast, the purpose of expert testimony in the legal setting is to permit the jury to reach a conclusion regarding which party’s version of the facts are true. Because of this different structure and purpose, a legal advocate presents a psychological diagnosis not as the best-available source of information for treatment but as information that the jury is to regard as absolute fact. Indeed, the presentation of such evidence

through the testimony of an expert magnifies this distortion, inasmuch as expert testimony often has a particularly prejudicial impact “by creating an aura of special reliability and trustworthiness.” State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982).

The United States Supreme Court recognized this problem in a discussion of the legal and evidentiary significance of the inclusion of a particular diagnosis in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM). Noting that “the diagnosis may mask vigorous debate within the profession about the very contours of the mental disease itself,” the Court quoted the DSM’s own commentary on the issue:

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.*

Clark v. Arizona, 548 U.S. 735, 775 (U.S. 2006) (quoting DSM-IV-TR xxxii-xxxiii, emphasis added). The Minnesota Supreme Court has rejected certain types of psychological expert evidence based just such concerns. See Saldana, 324 N.W.2d at 231 (reversing conviction based on erroneous admission of rape trauma syndrome, noting: “Rape trauma syndrome is not a fact-finding tool, but a therapeutic tool useful in counseling.”).

Moreover, the legislature’s adoption of section 541.073 itself already addresses the issue of any potentially “repressed memory,” whether as Plaintiff’s experts define it or otherwise. As the Minnesota Supreme Court noted in

[W]e view the language [of section 541.073, subd. 2(a)] as simply a legislative

pronouncement that “personal injury caused by sexual abuse”, as opposed to personal injury caused by any other activity, is entitled to a different limitation period because of its uniqueness and *because of the difficulties attendant on the victim’s often repressed recollections*. See Minn. Stat. § 541.07(1) (1994) (imposing a 2-year limitation for torts resulting in personal injury).

Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996) (emphasis added). This Court should not permit the use of expert testimony to avoid a statute of limitations based on a theory of “repressed memory” that the legislature has already addressed in the statute of limitations itself.

These concerns are compelling here. In essence, Plaintiff asks the Court to permit his experts to use a controversial diagnosis arguably developed in a therapeutic setting to “excuse” a claimed memory lapse that would otherwise bar him from bringing his action, and in the process to bolster the credibility of the “recovered” testimony. See Saldana, 324 N.W.2d at 231-32 (holding an expert opinion about a witness’s capacity to perceive events invades the province of the jury to make credibility determinations). Minnesota law does not permit such evidence, and the Court should affirm the district’s court’s exclusion of this testimony.

V. THE USE OF “REPRESSED MEMORY” AS SUBSTANTIVE EVIDENCE RAISES SERIOUS POLICY CONCERNS.

Beyond Plaintiff’s attempt here to use “repressed memory” to justify tolling the statute of limitations, the broader implications of judicial approval of “repressed memory” as a viable scientific theory are profoundly troubling. If the court were to find expert testimony of “repressed memory” admissible to permit a plaintiff to avoid a statute of limitations, logic suggests no reason that same testimony could not be used in support

of the *substance* of a plaintiff's claims. Indeed, it appears that Plaintiff here intends to put it to that use in this case.

Such substantive use of "repressed memory" raises bright red flags and unavoidably provokes echoes of the disastrous and discredited Jordan child sex abuse prosecutions. See generally Tom Dubbe, *Nightmares & Secrets: The Real Story of the 1984 Child Sexual Abuse Scandal in Jordan, Minnesota* (2005); see also *Friedman v. Rehal*, 618 F.3d 142, 156 (2d Cir. 2010) (noting role of "recovered" memory in wave of fantastic but ultimately discredited prosecutions of "child sex rings" between 1984 and 1995, citing *inter alia* Richard Guillatt, *Talk of the Devil: Repressed Memories and the Ritual Abuse Witch-Hunt* (1996); Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994).

The threat of expert testimony that "repressed memory" has now been recovered is particularly alarming, not only because of the imprimatur of judicial approval afforded by the court's admission of the evidence from an "expert," but also because the unscientific nature of the testimony makes it virtually impossible to conclusively rebut. For example:

- Plaintiff's experts have identified no objective criteria for a finding of "repressed memory" in a particular individual.
- As a result, an expert's conclusion in any particular instance has no error rate and is not reproducible.
- The proposed expert evidence involves not one but two levels of inherently self-serving testimony. The expert's results are necessarily dependent on (1) what a plaintiff says about his or her recollection and (2) whether the

expert believes that testimony. But a plaintiff has every motivation to aver a lack of memory, and a retained expert has every reason to believe that averment.

- The self-serving conclusion is inevitably circular: if the expert believes the plaintiff's statement that he or she did not remember, then the expert concludes that the memory was repressed, and that conclusion is then offered to the fact finder as evidence that the Plaintiff did not remember.

Like the rape trauma syndrome testimony in Saldana, the expert testimony here serves simply to bolster the Plaintiff's own testimony that he did not remember. As the Minnesota Supreme Court noted, "expert opinions concerning the witness's reliability in distinguishing truth from fantasy are generally inadmissible because such opinions invade the jury's province to make credibility determinations." Saldana, 324 N.W.2d at 231. Given the State's experience with "recovered memory" and the very real continuing threat that "repressed memory" evidence poses to religious and public institutions and individuals, MRC respectfully submits that any recognition of "repressed memory" as a tenable subject of expert testimony would be bad public policy, particularly given the controversy reflected in the record here.

VI. MINNESOTA'S STATUTE OF LIMITATIONS FOR FRAUD CONTAINS NO TOLLING PROVISION FOR IGNORANCE OF A CAUSE OF ACTION.

Finally, MRC offers a related comment concerning Plaintiff's argument that his "repressed memory" theory could somehow permit him to assert a timely claim for fraud under Minnesota Statute section 541.05, subd. 1(6). MRC agrees with Respondent that

Plaintiff cannot avoid the statute of limitations governing claims of sexual abuse merely by recasting his claim as a claim for fraud. See Resp. MSP Br. at 36-45.

But even assuming *arguendo* that Plaintiff had pleaded a tenable fraud claim that was subject to the statute of limitations in section 541.05, subd. 1(6), Plaintiff's argument that his claim is timely misinterprets the language of the section. Under this section, the six-year statute of limitations for a fraud claim commences "when the aggrieved party discovers the facts constituting the fraud," *id.*, and that those facts are deemed to be "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) (quoting First National Bank of Shakopee v. Strait, 71 Minn. 69, 73 N.W. 645, 646 (1898)). Here, Plaintiff alleged that Defendants affirmatively represented that "Adamson did not have a history of molesting children," A-197, and that defendants intentionally failed to disclose "that Adamson had a history of molesting children." A-198. Given these allegations, the "fact constituting the fraud" is the fact that Adamson did have a history of molesting children. And, as Defendants note in their brief, the evidence is undisputed that Adamson's history of molesting children was well known to the Catholic community, to the courts, and to Plaintiff himself, by the mid-1980s, two decades before Plaintiff commenced the present action. See Respondent's Br. at 40-41.

Plaintiff, however, would recast the term "discovery of the facts constituting the fraud" to mean his discovery of his right to bring an action. See Appt. Br. at 45 ("[Plaintiff] didn't discover that the Respondents knowingly placed a child molester at Risen Savior and allowed that child molester access to kids, inclosing Appellant, until

sometime after he had a memory that he was sexually abused.... Accordingly, Plaintiff commenced his fraud claim within six years of discovering it.”). But section 541.05, subd. 1(6) does not toll the statute of limitations until a plaintiff discovers that he has a claim, but only until the Plaintiff discovers “the facts constituting the fraud.” See, e.g., Klempka v. G.D. Searle & Co., 769 F. Supp. 1061, 1068 (D. Minn. 1991) (refusing to toll statute of limitations where plaintiff had “shown no connection between the evidence of fraud she presents and the delay in bringing this action”), aff’d, 963 F.2d 168 (8th Cir. 1992).

In effect, Plaintiff is trying to imply into section 541.05, subd. 1(6)’s statute of limitations for fraud the separate language in section 541.073, subd. 2(a) that tolls the statute until “the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.” But section 541.073, subd. 2(a) does not contain that language, and, once the facts constituting the fraud are or should be known, general statute of limitations case law holds that ignorance of the existence of a cause of action does not prevent the statute of limitations from running. See Hermeling v. Minnesota Fire. & Cas. Co., 548 N.W.2d 270, 276 (Minn. 1996).

Plaintiff cannot have it both ways. Section 541.05, subd. 1(6) governs the limitations period for fraud, and section 541.073, subd. 2(a) for damages due to sexual abuse. If Plaintiff chooses to frame his claim as a fraud claim, he must accept that the statute of limitations began to run on that claim at the time he reasonably should have discovered Adamson’s history of molesting children. He cannot rely on the different

language of a different statute—section 541.073, subd. 2(a)—to toll the limitation on his fraud claim.

The facts constituting the claimed fraud were fully disclosed to Plaintiff in the 1980s, the statute of limitations under section 541.05, subd. 1(6) began to run, and no other conduct or concealment by defendants prevented Plaintiff from commencing his action at that time. If Plaintiff is to have any relief based on ignorance of *the fraud claim itself*, that relief must come under section 541.073, subd. 2(a). And as discussed above, Plaintiff is not entitled to that relief here.

CONCLUSION

Plaintiff's argument essentially seeks to use "repressed memory" to convert the statute of limitations analysis into a subjective inquiry that ultimately depends entirely on a plaintiff's own testimony about his or her own memory. Minnesota law, however, adopts an objective, reasonable person standard for this analysis. As the Minnesota Supreme Court stated:

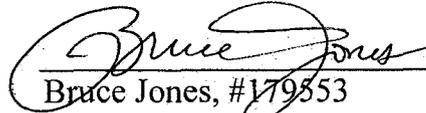
To construe the statute as the court of appeals has here is to inject a wholly subjective inquiry into an individual's unique circumstances, e.g., when did the victim "acknowledge" or "appreciate" the nature and extent of the harm resulting from the abuse. While the manifestation and form of the injury is significant to the victim, it is simply not relevant to the ultimate question of the time at which the complainant knew or should have known that he/she was sexually abused. The question is answered by an application of the objective, reasonable person standard.

Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996) (rejecting a "discovery rule" under

section 541.073, subd. 2). The Minnesota Religious Council urges the Court to reject Plaintiff's arguments and to affirm the judgment of the District Court.

Dated: Feb. 14, 2011

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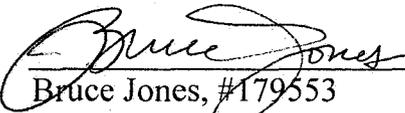
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Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,963 words. This brief was prepared using Microsoft Word 2007 software.

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