
STATE OF MINNESOTA
IN COURT OF APPEALS

John Doe 76C,

Appellant,

vs.

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

Respondents.

APPELLANT'S REPLY BRIEF

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I. MINN R. EVID. 702 DOES NOT REQUIRE EXCLUSION OF EXPERT TESTIMONY WHERE THERE IS EXPERT TESTIMONY IN OPPOSITION

It is not the law of Minnesota that expert testimony must be excluded if there are defense expert witnesses who disagree with the positions of the plaintiff's experts. If that were the case, there would never be any expert testimony. There is always an opposing expert.

It is the Respondents' and the Minnesota Research Council's ("MRC") position that even when there is exhaustive scientific evidence introduced that supports the general acceptance and reliability of a scientific diagnosis, like repressed memory, if the Respondents can find an expert to testify in opposition, the expert testimony must be excluded. Specifically, the Respondent Archdiocese claims "[I]f there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no general acceptance," and the evidence must be excluded. Respondent Archdiocese Brief, p. 13.

In support of its position, the Respondent Archdiocese does not cite to any Minnesota case, but instead, cites to the criminal case, State v. Phillips, 98 P.3d 838, 842 (Wash. App. 2004), from the State of Washington. A review of the Phillips decision reveals that the Washington Court of Appeals does not support the experts cannot disagree position taken by the Respondent Archdiocese in this case. In Phillips, 98 P.3d at 842, the Washington Appellate Court admitted testimony under Frye, despite opposing experts and a disagreement in the two (2) scientific articles available as to the validity of

certain accident reconstruction software used by the prosecution expert.¹ Even with these disagreements, the Washington Court of Appeals allowed the prosecution to offer its expert scientific testimony under Frye and Phillips was ultimately convicted based upon that evidence. Id. at 843.

In the current case, the Appellant presented the testimony of Dr. Constance Dalenberg and Dr. James Chu. Both of these experts are the top experts in the world in the area of trauma and memory. Dr. Dalenberg is a professor, researcher and clinician in the field of trauma and the Director of the Trauma Research Institute, where she performs research in the field of trauma and memory. T. 7. Dr. James Chu is an Associate Professor of Psychiatry at the Harvard University Medical School and a well-published researcher and clinician in the field of trauma and abuse. Frye-Mack Hearing Ex. 729. Both Dr. Dalenberg and Dr. Chu clearly testified that repressed memory is generally accepted in the relevant scientific communities. T. 221-222.

In their Briefs, the Respondents misrepresent Dr. Chu's testimony regarding the general acceptance of repressed memory. The Respondents claim that Dr. Chu's testimony that there is a heated debate regarding repressed memory, means that repressed memory is not generally accepted within the scientific community. Respondent

¹ It is important to note that there were only two (2) scientific articles written on the validity of the scientific method underlying the disputed software, one supporting the validity of the method and one critical of the method. Phillips, 98 P.3d at 842. In the current matter, there was testimony from Dr. Dalenberg that there are over a thousand articles supporting the general acceptance and validity of repressed memory, of which 328 of them were admitted into evidence. T.28

Archdiocese Brief, pp. 19 – 20; Respondent Winona Brief, p. 29. This is simply not the case. Dr. Chu was unequivocal in his testimony that repressed memory is generally accepted. T. 221-222. When Dr. Chu testified that there is a heated debate surrounding repressed memory, he testified that in the late 1980's it was controversial whether reports of childhood sexual abuse were true – a fact that was ultimately proven to be true – and in the 1990's, whether repressed memory was a valid construct – also a fact that was ultimately proven to be true by the scientific research. T. 223. Dr. Chu is also acknowledging the fact that there are defense experts like Dr. Pope, Dr. Loftus and Dr. Grove who take the position that repressed memory is not generally accepted. That does not change the fact that the research and the DSM-IV universally supports the general acceptance and validity of repressed memory and the fact that Dr. Chu has treated “dozens if not hundreds” of patients who experienced repressed memory. T. 217.

In support of Appellant's position that repressed memory is generally accepted in the relevant scientific community and is scientifically reliable, Dr. Dalenberg and Dr. Chu also introduced 328 peer-reviewed scientific research articles that span the entire spectrum of scientific research, almost 25 years (1984-2008) and across multiple areas of trauma. T. 28–111; Ex. 401–728. When confronted with this large number of studies supporting general acceptance and reliability, the Respondent Archdiocese replies by stating that the studies “merely represent ‘one half of the story.’” Respondent Archdiocese's Brief, p. 23. What the Respondents fail to provide for this Court is the other half of the story. At no point did the Respondents introduce any research studies that found that repressed memory was invalid. The best that the Respondents could

muster was to criticize the design of some of the 328 studies and introduce some research studies that did not even study memory. If Appellant's thorough scientific support is only one half of the story, then where is the other half of the story?

The same is true about the DSM-IV support for repressed memory. As discussed, the DSM-IV has contained a diagnosis for repressed memory for years. The DSM-IV is the official manual of the American Psychiatric Association that is the authoritative guide, or the "Bible," of diagnoses of psychiatric disorders. T. 199. Before a diagnosis appears in the DSM-IV, it must be firmly rooted in the peer-reviewed scientific research. The diagnoses in the DSM-IV are based upon a firm base of both clinical and research evidence. T. 200. The process used by the DSM-IV Work Groups in deciding whether a diagnosis should be in the DSM-IV involved three stages: (1) comprehensive and systematic reviews of the published literature, (2) re-analyses of already-collected data sets, and (3) extensive issue-focused field trials. Add. 57. In fact, the "goal of the DSM-IV literature reviews was to provide comprehensive and unbiased information and to ensure that DSM-IV reflects the best available clinical and research literature." Add. 58.

In response to this compelling evidence, the Respondents attempt to do a side-step of sorts. In their brief, the Respondents claim that while most of the diagnoses in the DSM-IV are widely accepted by scientists, but for some reason, the diagnosis for repressed memory (dissociative amnesia) is not. Respondent Archdiocese Brief pp. 21–22; Respondent Winona Brief p. 26. The Respondents do not offer an explanation as to why the well-respected scientists involved with the creation and updating of this very important diagnostic resource have made some type of exception to their comprehensive

review of the best available clinical and research literature for repressed memory. The reason for this void of explanation is because the diagnosis of repressed memory (dissociative amnesia) is supported by the best available clinical and research literature.

Despite allocating page after page of criticism of Appellant's evidence, the Respondents and the MRC do not produce a single data-based scientific research study that studied memory that proves that there is no mechanism of repressed memory. In the Respondents' and MRC's briefs, much time is spent criticizing Appellants 328 research studies. Respondents and MRC claim that all of the studies are not perfectly designed. This is, of course, true of all scientific research. There has yet to be the perfect study that transcends criticism. That does not mean that the studies do not have scientific value

What is important to note is the lack of any data-based research that studied memory that proves that the opposite is true – that repressed memory does not exist. Not a single study. As discussed, Appellants have introduced 328 research studies from 1984 through 2008 that span numerous areas of trauma and cover the full spectrum of scientific research (e.g. case studies, prevalence studies, medical studies . . .). If repressed memory is an invalid psychiatric condition, then why have Dr. Loftus, Dr. Pope or Dr. Grove not conducted a single study in that 25-year period proving that. Their credentials clearly indicate that all three are distinguished researchers in other areas. Instead, they have remained satisfied being defense experts who simply criticize the data-based memory research that is being conducted by qualified doctors like Dr. Dalenberg and Dr. Chu. There will always be opposing experts. When deciding whether to admit expert testimony under Minn. R. Evid. 702 and under the Frye-Mack standard, the trial court

and this Court must not rely entirely on expert testimony, but must also consider the state of the scientific research. If that process is followed here, the only conclusion is that expert testimony on repressed memory is proper and the trial court erred in excluding this evidence.

II. THERE IS SIGNIFICANT LEGAL AUTHORITY FOR ADMITTING EXPERT TESTIMONY ON REPRESSED MEMORY

Despite the Respondents' and MRC's attempt to interpret Minnesota cases to the contrary, scientific expert testimony of repressed memory has been admitted in Minnesota courts for over a decade. In W.J.L. v. Bugge, 573 N.W.2d 677, 681 (Minn. 1998), the Minnesota Supreme Court stated that:

Accordingly, the statute of limitations begins to run once a victim is abused unless there is some legal disability, such as the victim's age, or mental disability, such as repressed memory of the abuse, which would make a reasonable person incapable of recognizing or understanding that he or she had been sexually abused.

In their briefs, Respondents and MRC attempt to relegate this recognition of repressed memory as dicta, but there is no denying the fact that the Minnesota Supreme Court recognized repressed memory as one of the legal disabilities that tolls the running of the statute of limitations.

Similarly, in the recent case Lickteig v. Kolar, 782 N.W.2d 810 (Minn. 2010), the Minnesota Supreme Court acknowledged that repressed memory affected the time in which the Minnesota Statute of limitations for sexual abuse began to run. Id. at 818. Specifically, the Court stated “[I]f we apply the statute retroactively, **whether Lickteig**

suffered memory repression, which affects the timing of her knowledge, is a question of fact.” Id. (emphasis added)

In addition to Minnesota, the following courts across the United States have admitted expert testimony of repressed memory:

- Michigan - Isley v. Capuchin Province, 877 F.Supp. 1055, 1066 (D. Mich. 1995);
- Massachusetts - Commonwealth v. Shanley, 919 N.E.2d 1254, 1266 (Mass. 2010);
Shahzade v. Gregory, 923 F.Supp 286, 290 (D. Mass. 1996);
- Louisiana - Doe v. Archdiocese of New Orleans, 823 So.2d 360, 364-65 (La Ct. App. 2002);
- Delaware - McClure v. Catholic Diocese of Wilmington, Inc., et al, New Castle County Super. Court No. 06C-12-235 CLS. A. 200-201;
- Indiana, Doe v. Shults-Lewis Child and Family Services, Inc., 718 N.E.2d 738, 750 (Ind. 1999), John Doe RG v. Archdiocese of Indianapolis, Order Filed January 20, 2010, Civil Div. 10, Cause No. 49D10-0509-CT-035390). A. 202-214;
- Arizona - Logerquist v. McVey, 1 P.3d 113, 117-118 (Ariz. 2000);
- California - Wilson v. Phillips, 73 Cal App. 4th 250, 255-56 (Cal. Ct. App. 1999).

In addition, the following courts have held that repressed memories of childhood sexual abuse tolls the applicable statute of limitations:

- Arizona - Doe v. Roe, 955 P.2d 951, 960 (Ariz. 1998);
- Florida - Hearndon v. Graham, 767 So.2d 1179, 1186 (Fla. 2000);
- Illinois - Pedigo v. Pedigo, 292 Ill.App.3d 831, 841 (Ill. Ct. App.1997);

- Louisiana - Doe v. Archdiocese of New Orleans, 823 So.2d 360, 366-67 (La Ct. App. 2002);
- Massachusetts - Hoult v. Hoult, 792 F.Supp. 143, 145 (D. Mass. 1992);
- Missouri - Sheehan v. Sheehan, 901 S.W.2d 57, 59 (Mo. 1995);
- North Dakota - Peterson v. Huso, 552 N.W.2d 83, 86 (N.D. 1996);
- South Carolina - Moriarty v. Garden Sanctuary Church of God, 511 S.E.2d 699, 709 (S.C. Ct. App. 1999).

In contrast, some courts have excluded expert testimony of repressed memory. For example, in State v. Hungerford, 697 A.2d 916, 918 (N.H. 1997), New Hampshire Supreme Court excluded evidence of repressed memory in a case where memories were recovered in “memory retrieval therapy” and “inner child therapy” designed to recover memories of sexual abuse as a child due to the suggestiveness of the therapy process and its ability to skew memory. Id. at 930. Rivers v. Father Flanagan’s Boys’ Home, Douglas County District Court, November 25, 2005) Respondent Archdiocese Appendix 51.

However, the vast majority of courts that have considered expert witness testimony of repressed memory have approved its admission. The cases that purport to oppose the introduction of repressed memory are factually and legally distinguishable from the current matter. Thus, there is significant legal support for the introduction of expert testimony on repressed memory in the current case.

III. APPELLANT'S FRAUD CLAIM AGAINST THE ARCHDIOCESE WAS FILED TIMELY

The crux of the Respondent Archdiocese's argument that the statute of limitations has expired on Appellant's claims is that Appellant knew that he had been abused by Fr. Adamson, and Appellant knew that Fr. Adamson was a serial sexual abuser in the 1980's. Respondent Archdiocese Brief, p. 39. According to the Archdiocese, this constellation of facts caused the statute of limitations for fraud to begin to run. Appellant had to have known that he was sexually abused by Fr. Adamson because the statute of limitations for fraud does not start to run until the aggrieved party discovers the facts constituting the fraud. Minn. Stat. § 541.05, subd. 1(6). It is a reasonable inference that the statute of limitations would not start running until a person discovered that he was aggrieved, which the Appellant would not have known until he recovered the memories of sexual abuse. Thus, the Archdiocese's argument crumbles if the Appellant did not know that he had been sexually abused by Fr. Adamson in the 1980's.

Interestingly, the Archdiocese is not disputing that the Appellant did not, in fact, have any memories that he had been sexually abused until 2002. In fact, the Archdiocese cites to the fact that Appellant's mother directly asked Appellant whether he was sexually abused by Fr. Adamson, and Appellant, consistent with having repressed the memories of abuse, told his mother "no." Add. 34. It is the Archdiocese's position that "[B]ecause evidence of repressed and recovered memories has been excluded, appellant cannot claim that he did not know of the abuse." Respondent Archdiocese Brief, p. 39, footnote 18.

As is discussed above and in Appellants Brief, the trial court erred when it excluded testimony about repressed memory. This issue will not be discussed further here. The exhaustive science supporting the diagnosis of repressed memory is generally accepted within the relevant scientific community and scientifically reliable. Therefore, evidence of repressed memory should be allowed in this case. If such evidence were allowed, then Appellant would prove that he was incapacitated until 2002 and that Plaintiff did not know that he was sexually abused until 2002. When Appellant filed his lawsuit in 2006, he did so within six years of recovering his memories of sexual abuse, which means that Appellant's claim for fraud is timely.

In addition, it appears that the trial court and the Respondent Archdiocese are interpreting the trial court's Frye-Mack ruling too broadly. When moving the trial court to exclude evidence of repressed memory, the Respondents filed a motion to exclude *expert testimony* regarding repressed and recovered memory under Frye-Mack. Add. 1. The point of a Frye-Mack hearing is to determine whether *expert testimony* should be allowed on a particular topic. In its appellate brief, the Archdiocese Respondent cites to Minn. R. Evid. 702 as support for its Frye-Mack motion to exclude. Minn. R. Evid 702. Rule 702 applies to testimony by *experts*. Id. Under Minn. R. Evid. 702, the trial court only has the power to allow expert testimony or not allow expert testimony. The trial court does not have the power to modify a fact witness, such as the Appellant in this case, to testify in a certain way. The fact that the Appellant did not remember that he had been sexually abused as a child until 2002, is factual testimony.

Thus, the Appellant's testimony is sufficient to rebut the Archdiocese Respondent's position that Appellant knew that he had been abused by Fr. Adamson in the 1980's. This means that the statute of limitations for Appellant's fraud claim did not begin to run in the 1980's and instead began to run in 2001-2, when Plaintiff first recovered memories of the sexual abuse. Consequently, summary judgment of Appellant's fraud claims based on the trial court's determination that the statute of limitations had expired is erroneous and this matter must be reversed and remanded to the trial court on that point.

IV. APPELLANT'S FRAUD CLAIM AGAINST THE RESPONDENT WINONA WAS TIMELY FILED

The Respondent Winona Diocese argues that Appellant should have discovered the Respondent Winona committed fraud in its handling of Fr. Adamson in the 1980's. Specifically, Respondent Winona claims that Appellant discovered that he was sexually abused in 1980 or 1981. Respondent Winona Brief, pp. 40-41. Respondent Winona then claims that Appellant should have discovered that Respondent Winona had defrauded the Appellant when, in the mid 1980's, it became widely known that Fr. Adamson had sexually abused a number of children. Respondent Winona Brief, pp. 41-42.

There are two major problems with the Respondent Winona's position. First, at the time that it became widely known that Fr. Adamson had sexually abused a number of children, the Appellant had already repressed all memories of being sexually abused. Add. 34. This is evidenced by the fact that in 1986, Appellant's mother pointedly asked Appellant whether he had been sexually abused by Fr. Adamson, and consistent with full

repression of the traumatic memories, the Appellant told his mother that he had not been sexually abused by Fr. Adamson. Id. As discussed in Appellant's Brief, Appellant could not discover that he had been defrauded unless he had memories that he had been sexually abused himself. The Appellant cannot reasonably have discovered a fraud until he understands that he has been injured by that fraud. It does not appear to be good legal policy to require a person who learns of a fraud, to file a fraud lawsuit just in case he or she ultimately learns later that he or she was a victim of that fraud. Even if Appellant knew that Adamson had abused other children in the past, it did not involve the Appellant (as far as he knew at the time), he had no reason to use reasonable diligence to discover the fraud.

On this same note, the Minnesota Supreme Court has clearly stated that the determination of when a fraud should be reasonably discovered is a question of fact for the fact-finder. In Estate of Jones by Blume v. Kvamme, 449 N.W.2d 428, 431 (Minn. 1989), the court held that in a fraud case, the question of when discovery could or should have been reasonably made is a question of fact. See also Toombs v. Daniels, 361 N.W.2d 801, 809 (Minn. 1985) (holding "when fraud reasonably should have been discovered is also a question of fact."). Therefore, granting summary judgment based upon a finding that Appellant did not act reasonably, as the Respondent Winona encourages, would be error under current Minnesota Supreme Court case law.

The second major problem with the Respondent Winona's position is how Appellant knowing that he, himself, was sexually abused combined with knowledge that others were also abused somehow puts Appellant on notice that the Respondent Winona

knew that Fr. Adamson was a child abuser and despite that knowledge placed Fr. Adamson in a position where he could abuse more children. This very same issue arose in John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827, 843-845 (Wis. 2007). In the John Doe 1 case, the Wisconsin Supreme Court ruled that, in the case of fraud, knowledge that someone had been sexually abused by a priest does not mean that a person would be on notice that the Archdiocese knew that the priest had a prior history of sexually abusing children and yet placed him in a position where he would molest more children. Id. This same approach to fraud should be taken in this case.

As discussed, the statute of limitations for Appellant's fraud claim against the Respondent Winona did not begin to run in the 1980's and instead began to run in 2001-2, when Plaintiff first recovered memories of the sexual abuse. Consequently, summary judgment of Appellant's fraud claims based on the trial court's determination that the statute of limitations had expired is erroneous and this matter must be reversed and remanded to the trial court on that point

V. RESPONSE TO MINNESOTA RELIGIOUS COUNCIL'S AMICUS BRIEF

In its brief, MRC attempts to invoke incendiary language and images to cover for the fact that its positions are not supported by any scientific evidence. For example, in its Brief, MRC cites to claims of repressed memories causing "disastrous" criminal prosecutions and witch-hunts. Then MRC encourages this Court to be alarmed for a number of absolutely false reasons. First, MRC incorrectly claims that "Plaintiff's experts have identified no objective criteria for a finding of 'repressed memory' in a particular individual." Amicus MRC Brief, p. 7. This statement is absolutely false. The

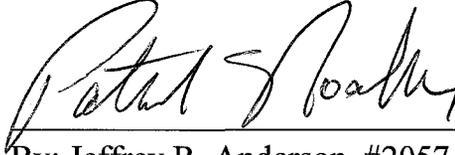
DSM-IV sets very specific diagnostic criteria for determining whether an individual experienced repressed memory (dissociative amnesia). Add. 62. MRC then claims that there is no error rate for the accuracy of repressed memories versus continuous memories. Amicus MRC Brief, p. 7. This is also a false statement. There are two studies, one conducted by Dr. Dalenberg herself, that were introduced into evidence in this matter that tested the accuracy of repressed memories and found them just as accurate as continuous memories. Exs. 500 and 717. This Court should not be swayed by this attempt to invoke fear instead of presenting scientific research.

Further, in its brief, MRC takes the position that Appellant should have brought his lawsuit for fraud at the time that he discovered that the Respondents had committed a fraud, even where the Appellant did not know that he had been defrauded. MRC Amicus Brief, p. 10. Specifically, MRC states: “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’” (emphasis original). It is difficult to understand how a plaintiff could file a lawsuit for a fraud if the plaintiff does not know that he was the victim of the fraud. As discussed above, it is not good legal policy to require a person who learns of a fraud, to file a fraud lawsuit just in case he or she ultimately learns later that he or she was a victim of that fraud. Here, Appellant could not have brought a claim until he recovered the memories of being sexually abused. Even if Appellant knew that Adamson had abused other children in the past, it did not involve the Appellant (as far as he knew at the time), he had no reason to use reasonable diligence to discover the fraud. MRC’s position is flawed and should not be followed by this Court.

Respectfully submitted,

Dated: February 22, 2011.

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A handwritten signature in black ink, appearing to read "Patrick W. Noaker", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief in Case No. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 3,933 words. The brief was prepared in Microsoft Office Word 2007.

