

CASE NO. A10-1951

STATE OF MINNESOTA
IN COURT OF APPEALS

John Doe 76C,

Appellant,

and

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

Respondents.

RESPONDENT DIOCESE OF WINONA'S BRIEF

JEFF ANDERSON & ASSOCIATES

Jeffrey R. Anderson, #2057
Patrick W. Noaker, #274951
Michael G. Finnegan, #033649X
366 Jackson Street, Suite 100
St. Paul, Minnesota 55101
(651) 227-9990
Attorneys for Appellants

FAEGRE & BENSON, LLP

Bruce Jones, #179553
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

Attorneys for Minnesota Religious
Council

GEORGE F. RESTOVICH & ASSOCIATES

Anna Restovich Braun, #323226
Bruce K. Piotrowski, #195194
Thomas R. Braun, #350631
117 East Center Street
Rochester, Minnesota 55904
(507) 288-4840
Attorneys for Respondent Diocese of Winona

MEIER, KENNEDY & QUINN, CHTD.

Thomas B. Wieser, #122841
Jennifer R. Larimore, #0386663
2200 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101
(651) 228-1911
Attorneys for Respondent Archdiocese of St.
Paul and Minneapolis

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF AUTHORITIES. ii

LEGAL ISSUES. 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW. 17

ARGUMENT. 18

A. The district court’s conclusion that Appellant failed to meet his burden of proof under *Frye-Mack* that the concept of repressed and recovered memory is generally accepted in the relevant scientific community and has foundational reliability was not erroneous as a matter of law. 18

B. The district court did not err as a matter of law when it concluded that Appellant failed to commence his lawsuit based on negligence and vicarious liability against Respondents within the applicable statute of limitations, and, as a result, dismissed Appellant’s claims for negligence and vicarious liability with prejudice. 35

C. The district court did not err as a matter of law when it concluded that Appellant failed to commence his lawsuit based on fraud against Respondents within the applicable statute of limitations and, as a result, dismissed appellant’s fraud claims with prejudice. 39

CONCLUSION. 44

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Clark v. Arizona</i> , 548 U.S. 735, 126 S. Ct. 2709, (2006)	1, 25
<i>Isely v. Capuchin Province</i> , 877 F. Supp. 1055 (E.D. Mich. 1995)	20
<i>Marrocco v. Gen'l Motors Corp.</i> , 966 F.2d 220, 223 (7th Cir.1992)	31
<i>Shahzade v. Gregory</i> , 923 F. Supp. 286, 290 (D. Mass. 1996)	20

STATE CASES

<i>Abdallah Inc. v. Martin</i> , 242 Minn. 416 65 N.W.2d 641 (1954).	18
<i>Antone v. Mirviss</i> , 720 N.W.2d 331 (Minn. 2006)	18
<i>Benson v. N. Gopher Enters., Inc.</i> , 455 N.W.2d 444 (Minn.1990).	23
<i>Blackowiak v. Kemp</i> , 546 N.W.2d 1 (Minn.1996)	37
<i>Blegen v. Monarch Life Ins. Co.</i> , 365 N.W.2d 356 (Minn.App.1985).	40
<i>D.M.S. v. Barber</i> , 645 N.W.2d 383 (Minn. 2002).	36, 37, 38
<i>Doe v. Redeemer Lutheran Church</i> , 531 N.W.2d 897 (Minn.App.1995).	36
<i>Duxbury v. Boice</i> , 72 N.W. 838 (Minn.1897).	2, 39, 40
<i>First National Bank of Shakopee v. Strait</i> , 73 N.W. 645 (1898)	40
<i>Goeb v. Tharaldson</i> , 615 NW2d 800 (Minn. 2000)	1, 17, 18, 19, 28, 30
<i>Gross v. Victoria Station Farms, Inc.</i> , 578 N.W.2d 757 (Minn. 1998).	17, 23
<i>Humphrey v. Carpenter</i> , 39 N.W. 67 (1888).	40
<i>Jane Doe 43C v. Diocese of New Ulm</i> , No. A08-0729, 2009 WL 605749 (Minn. App. 2009)..	2, 39, 40
<i>J.J. v. Luckow</i> , 578 N.W.2d 17 (Minn.App.1998).	36
<i>Lickteig v. Kolar</i> , 782 N.W.2d 810 (Minn. 2010).	20
<i>Montgomery Ward & Co. v. County of Hennepin</i> , 450 N.W.2d 299 (Minn.1990)	30
<i>Morrill v. Manufacturing Company</i> , 55 N.W. 547 (1893).	40
<i>O'Donnell v. O'Donnell</i> , 678 N.W.2d 471 (Minn. App. 2004)	30
<i>Offerdahl v. Univ. of Minnesota Hospitals & Clinics</i> , 426 N.W.2d 425 (Minn. 1988) .	18
<i>Patton v. Newmar Corp.</i> , 538 N.W.2d 116 (Minn.1995)	31
<i>State v. Dille</i> , 258 N.W.2d 565 (Minn.1977)	19
<i>State v. Moore</i> , 458 N.W.2d 90 (Minn. 1990)	19
<i>State v. Nystrom</i> , 596 N.W.2d 256 (Minn.1999)	18, 19
<i>Sate v. Schwartz</i> , 447 N.W.2d 422 (Minn. 1989)	28
<i>Wallin v. Letourneau</i> , 534 N.W.2d 712 (Minn.1995)	17
<i>Weeks v. American Family Mut. Ins. Co.</i> , 580 N.W.2d 24 (Minn.1998).	18
<i>W.J.L. v. Brugge</i> , 573 N.W.2d 677(Minn. 1998)	19, 36

OTHER STATE CASES

Commonwealth v. Shanley, 919 N.E.2d 1254 (Mass. 2010). 21
Dalrymple v. Brown, 701 A.2d 164, 172 (Pa. 1997) 22
Doe v. Archdiocese of New Orleans, 823 So. 2d 360, 363 (La. Ct. App. 2002) writ denied, 828 So. 2d 1127 20
Hunter v. Brown 1996 WL 57944 (Tenn. Ct. App. 1996). 22
John Doe RG v. Archdiocese of Indianapolis, Civil Div. Cause No. 49D10-0509-CT-035390. 21
Marsh v. Smyth, 785 N.Y.S.2d 440 (N.Y.A.D. 1 Dept. 2004) 28
McClure v. Catholic Diocese of Wilmington, Inc. New Castle County Super. Court No. 06C-12-235 CLS 21
Reed v. State, 283 Md. 374, 391 A.2d 364, 368 (1978). 24
Rivers v. Father Flanagan’s Boys’ Home, (D. Ct., Douglas County, Neb., Nov. 25, 2005) 22
State v. Hungerford, 697 A.2d 916, 928 (N.H. 1997) 21
State v. Klein, 124 P.3d 644 (Wash. 2005) 21
State v. Quattrocchi, 1999 WL 284882 (R.I. Super. Apr. 26, 1999). 22
State v. Walters, 698 A.2d 1244, 1248 (N.H. 1999). 22
S.V. v. R.V., 933 S.W.2d 1, 16–18 (Tex. 1996). 22
Travis v. Zitter, 681 So.2d 1348, 1351 (Ala. 1996). 22

STATUTES AND RULES

Minn. R. Evid. 402. 19
Minn. R. Evid. 702. 1, 19
Minn. Stat. Sec. 541.05. 2, 39
Minn. Stat. Sec. 541.073. 1, 36, 43
Minn. Stat. Sec. 541.15. 1, 36

STATEMENT OF THE LEGAL ISSUES INVOLVED

- I. Whether the district court's conclusion that Appellant failed to meet his burden of proof under *Frye-Mack* that the concept of repressed and recovered memory is generally accepted in the relevant scientific community and has foundational reliability was erroneous as a matter of law.

The district court held that Appellant failed to meet his burden of proof under *Frye-Mack* that the concept of repressed and recovered memory is generally accepted in the relevant scientific community and has foundational reliability.

Apposite cases: *Goeb v. Tharaldson*, 615 NW2d 800 (Minn. 2000)
 Clark v. Arizona, 548 U.S. 735, 126 S. Ct. 2709,
 (2006)
 State v. Klein, 124 P.3d 644 (Wash. 2005)

Apposite statute: Minn. R. Evid. 702

- II. Whether the district court erred as a matter of law when it concluded that Appellant failed to commence his lawsuit based on negligence and vicarious liability against Respondents within the applicable statute of limitations, and, as a result, dismissed Appellant's claims for negligence and vicarious liability with prejudice.

After Respondent's moved for summary judgment, the district court held that Appellant failed to bring his claims against Respondents for negligence and vicarious liability within the applicable statute of limitations and granted summary judgment in favor of Respondents.

Apposite cases: *D.M.S. v. Barber*, 645 N.W.2d 383 (Minn. 2002)

Apposite statute: Minn. Stat. Sec. 541.073 Subd. 3
 Minn. Stat. Sec. 541.15

- III. Whether the district court erred as a matter of law when it concluded that Appellant failed to commence his lawsuit based on fraud against Respondents within the applicable statute of limitations, and, as a result, dismissed Appellant's fraud claims with prejudice.

Respondents moved for summary judgment and the district court held that Appellant failed to bring his fraud claims against Respondents within the applicable statute of limitations and granted summary judgment in favor of Respondents.

Apposite cases: *Jane Doe 43C v. Diocese of New Ulm*, No. A08-0729, 2009 WL 605749 (Minn. App. 2009).
Duxbury v. Boice, 72 N.W. 838 (Minn.1897).

Apposite statute: Minn. Stat. Sec. 541.05

STATEMENT OF THE CASE

In this appeal, Appellant argues that the trial court erred by dismissing his claims against Respondents of negligence, negligent supervision, negligent retention, vicarious liability, and fraud, based on allegations that he was sexually abused by a priest of both dioceses in 1980 or 1981. (Add. 36.)¹ Appellant attempted to assert a legal disability under Minn. Stat. Sec. 541.15, by arguing that he suffered from traumatic amnesia or repressed memory and that such disability should toll the statute of limitations on his claims. (Add. 2.)

Respondents filed a motion to exclude expert testimony of repressed and recovered memory and, as a result, the district court held a three day *Frye-Mack* evidentiary hearing in June of 2009, to determine whether the theory of repressed and recovered memory is generally accepted within the relevant scientific community and has foundational reliability based on well-recognized scientific principles. (Add. 1-30.) The district court found that Appellant had not met his

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

burden under the *Frye-Mack* test and granted Defendants' motion to exclude evidence of repressed and recovered memory. (Add. 1-30.) Following the decision, Appellant moved for leave to file a motion for reconsideration of the district court's order granting Respondent's motion to exclude such evidence, which request was denied by the district court. (RAA 1-3.)²

Thereafter, Respondents filed motions for summary judgment requesting that the Court dismiss all of Appellant's claims as barred by the applicable statute of limitations. (Add. 32-33.) The district court granted Respondents' motion for summary judgment on all of Appellant's claims and this appeal followed. (Add. 32-52; AA 185.)³

STATEMENT OF THE FACTS

Appellant was born on June 11, 1967 and is now 43 years old. (Add. 33.) Appellant and his family attended Risen Savior in Apple Valley, Minnesota, from 1968 until 2001. (Add. 33; AA. 160.) Thomas Adamson was a priest assigned as an associate pastor to Risen Savior from 1981 to 1984. (Add. 33.) Prior to 1981, Adamson served in a number of parishes in the Archdiocese of St. Paul and Minneapolis and the Diocese of Winona. (Add. 33.) Appellant's various claims against Respondents are based upon Appellant's allegation that Adamson touched him in an inappropriate manner on four occasions in the summer of 1980 or 1981,

² "RAA" refers to Respondent Archdiocese's Appendix.

³ "AA" refers to Appellant's Appendix.

when Appellant was 13 or 14 years old. (Add. 33.) Appellant alleges the contact by Adamson during each incident occurred for a few seconds and the touch was over his clothing on three of the four occasions. (Add. 33.)

After Adamson left Risen Savior in 1984, extensive media publicity concerning allegations of inappropriate sexual contact with minors against Adamson arose as a result of a number of civil lawsuits which were initiated naming Adamson and Respondents. (Add. 33.) Within two months after Adamson left Risen Savior, Appellant's parents became aware of allegations of abuse of minors by Adamson. (RDA 292, at 34:15-23.)⁴ Appellant's mother first read about the sexual abuse charges in the newspaper and she and her husband talked with the pastor at Risen Savior about the allegations. (RDA 317, at 44:18-23; RDA 318, at 45:19- 46:5.) Appellant's father recalls hearing about the allegations through other parishioners and at mass by a priest. (Add. 34; RDA 292, at 34:20, 21.) Appellant's father read several newspaper articles about the allegations of abuse by Adamson. (Add. 33, 34; RDA 292, at 34:22, 23.) According to Appellant's parents, in response to the widespread publicity surrounding Adamson, representatives of Risen Savior held at least one meeting with parishioners to discuss the allegations. (Add. 34; RDA 292, at 35:4-36:9; RDA 318, at 47:16-48:6.)

⁴ "RDA" refers to Respondent Diocese's Appendix.

Appellant's mother discussed the allegations against Adamson with Appellant and her other children during this time period in the mid to late 1980's. (RDA 318-319, at 48:20-49:12.) The family had discussions from time to time about Adamson and the allegations of sexual abuse against him. (RDA 251, at 251:15-20.) In 1986, when Appellant's mother directly asked Appellant whether he had ever being sexually abused by Adamson, Appellant denied it. (Add. 34; RDA 251, at 251:15-22; RDA 381-319, at 48:20-50:22.) Appellant was also aware in the 1990's that the Catholic Church was facing the problem of sexual abuse claims (RDA 252, at 252:17-22.)

Appellant met with Fr. Thomas Doyle on April 22, 2009, for approximately three hours. (Add. 34; RDA 405, at 19:1-8.) Appellant shared with Fr. Doyle that, at the time of the alleged inappropriate contact by Adamson, Appellant felt "emotionally paralyzed", "shocked", and very isolated and confused. (Add. 34; RDA 409-10, at 37:20-38:1-4; RDA 410-411, at 41:2-42:1-9.) When Fr. Doyle asked Appellant whether he felt he could tell anyone about the abuse at the time it occurred, Appellant explained that, at the time of the alleged abuse, he felt "deathly afraid to tell anyone because of the relationship of his family, his parents, to the Catholic church and to Father Adamson in particular." (Add. 34; RDA 411, at 42:9-18.) Appellant expressed to Fr. Doyle that, at the time of the incidents, he "had a feeling of isolation" and that he was "cut off from the church." (RDA 412, at 46:23-47:5.) He told Fr. Doyle that, at the time of the alleged abuse, he experienced feelings of "isolation, paralysis, fear, and confusion." (RDA 412, at

48:25-49:3.) Appellant experienced “guilt at the time” the alleged abuse was going on and “a certain amount of guilt later on connected with the loss of his spirituality. (RDA 413, at 50:11-25.) Appellant shared with Fr. Doyle that he felt “jolted” at the time of the alleged abuse and confused about why he had been abused. (RDA 413, at 51:11-19; RDA 413, at 52:6-14.)

Despite this history, Appellant asserted that he repressed memories of the alleged sexual abuse by Adamson and did not recover his memories until the summer of 2002, and that such repression constituted a legal disability under Minn. Stat. Sec. 541.15, which should toll the statute of limitations on his claims. (Restovich Aff. Exh. A, at 5.) Respondents moved the district court to exclude expert testimony on repressed and recovered memory and to hold an evidentiary hearing to determine the admissibility of such evidence, pursuant to *Frye-Mack*. The district court presided over a three day *Frye-Mack* hearing wherein Dr. Constance Dalenberg, Ph.D., and Dr. James A. Chu, M.D., testified on behalf of Appellant and Dr. Harrison G. Pope, Jr., M.D., Dr. William M. Grove, Ph.D., and Dr. Elizabeth F. Loftus, Ph.D. testified on behalf of Respondents.

I. Dr. Constance Dalenberg, Ph.D.

Constance Dalenberg, Ph.D., is a professor of psychology at California School of Professional Psychology within Alliant International University in San Diego, California. (Tr. 7–8.) Dr. Dalenberg has never received grant money for her research. (Tr. 123.) She has not served on the editorial boards or been an

editor for any journals published by the American Medical Association, the American Psychiatric Association, the Association for Psychological Science, or the American Psychological Association (Tr. 126, 128–29.) Dr. Dalenberg has published approximately 30-40 articles over her entire career in the area of trauma and dissociation. (Tr. 21.) Her lifetime citation index is no more than 125. (RAA 35-36, at 322:13 – 324:8.)

Dr. Dalenberg explained the theory of “recovered memory” as occurring when a person once had a memory that existed but then that memory became unavailable for a period of time, “unavailable to a conscious search so that one couldn’t access that information.” (Tr. 24-25.) Yet, Dalenberg testified, the unavailable memory “might become available once a trigger occurs.” (Tr. 25.)

Dr. Dalenberg testified that the 328 peer-reviewed scientific research articles she presented during her testimony, made up of case studies, prevalence studies, clinical studies, professional studies, accuracy studies, mechanism studies, dissociation and repression studies, physiological and medical studies, therapy studies, and literature review and comments, establish the scientific existence and reliability of repressed memory. (Tr. 28-32.) She acknowledges that case studies do not prove the existence of repressed memory and that each of the prevalence studies is imperfect in terms of accuracy. (Tr. 48, 50.) Dr. Dalenberg noted that clinical studies are studies of the diagnosis of dissociative amnesia and in her opinion are sufficient to prove dissociative amnesia is scientifically reliable, despite the fact that there may be biases associated with each diagnosis. (Tr. 67,

72.) Dr. Dalenberg failed to describe the “biases” referred to or how they could impact the results of the studies. (Tr. 72.) The professional studies Dr. Dalenberg relied on are those in which psychologists report the subjective claims of some of their patients who have said they have repressed a memory. (Tr. 73.) Accuracy studies involve patients’ subjective reporting about whether they remember they were abused. (Tr. 90-92.) Dr. Dalenberg testified there are limits to mechanism studies, in that “to ask people to report on their unconscious mechanisms doesn’t make a lot of sense”. (Tr. 104.) Dr. Dalenberg acknowledged that the dissociation studies do not study trauma memory or repressed memory and that medical studies are “all over the place” in terms of their results. (Tr. 105, 108.) She testified that therapy articles simply summarize the therapy and results of the therapy clinicians provide to people who have experienced “recovered memory.” (Tr. 108.) Finally, literature reviews are reviews on the state of the research on recovered memory. (Tr. 110.)

Dr. Dalenberg would not acknowledge there is a controversy surrounding the concept of “repressed memory” in the scientific community, stating there is only a controversy about the mechanism for how repressed memory occurs. (Tr. 183,184.)

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

At the evidentiary hearing, Appellant also called Dr. James A. Chu, a psychiatrist at McLean Hospital in Massachusetts. (Tr. 189.) Dr. Chu testified that

he has been doing mostly administrative work since 2000 and has not conducted any research in the field since 2000 or received any research grants. (Tr. 228, 229.)

Dr. Chu acknowledged that he is not aware of anyone in the field who can claim to be able to calculate an error rate regarding the accuracy of recovered memories. (Tr. 228.) He stated that “ever since the introduction of dissociative identity disorder, controversy has swirled around the nature and validity of this diagnosis,” and admitted there is a “heated debate as to whether repressed memory exists” and an even more heated debate as to whether memories can be recovered with reliable accuracy. (Tr. 229, 230.)

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

Dr. Harrison G. Pope, Jr., is a full Professor of Psychiatry at Harvard University Medical School, where he has been working for the last 32 years. (Tr. 256, 257.) He has done both clinical and research work and teaches at the medical school. (Tr. 257.) He estimated that he has treated one thousand patients and interviewed between three and four thousand patients as part of his research, many of who have experienced trauma. (Tr. 425, 426.) Dr. Pope has published approximately 280 peer-reviewed papers in major scientific journals, at least 150 reviews and book chapters, and seven books. (Tr. 258.) In terms of the impact of his scientific research, Dr. Pope has been ranked by the Institute for Scientific Information as one of the 250 most widely cited psychologists and psychiatrists in

the world and one of the 250 most widely cited neuroscientists in the world. (Tr. 260.) He is one of only 37 people in the world to be ranked in both categories. (Tr. 260.) He has a lifetime citation index of 14,128. (RAA 36-37, at 326:19-20, 342:20-22.) He has received between five and ten million dollars in research grants from the National Institute of Health and the National Institute of Mental Health. (Tr. 379.)

Dr. Pope testified that “repressed memory” refers to the generic hypothesis that someone could have a terrible trauma and then literally be unable to remember it for a period of time. (Tr. 262.) He distinguished “repressed memory” from various other forms of forgetfulness, such as ordinary forgetfulness, psychogenic amnesia, organic amnesia, incomplete encoding of a traumatic experience, nondisclosure, and not thinking about something for a long time. (Tr. 272-274.)

Dr. Pope testified that the theory of repressed and recovered memory has not been generally accepted in the scientific community. (Tr. 282.) He explained that, in order to show that a theory is generally accepted within the scientific community, you have to show first, that a lot of people favor the theory and second, that there are hardly any people who oppose the hypothesis. (Tr. 277.) He testified that the theory of repressed and recovered memory is highly controversial and has been called the most heated debate currently in psychiatry. (Tr. 268.) He stated that there is “a voluminous literature on this side of people writing in some of the world’s most prestigious journals and people with very,

very high credentials questioning the validity” of the theory of repressed memory. (Tr. 282.) He also testified that inclusion of the diagnosis of dissociative amnesia (repressed memory) in the DSM-IV-TR does not demonstrate general acceptance within the scientific community, as the DSM-IV-TR is not a scientific study and includes some diagnoses that are generally accepted and others that are not. (Tr. 307, 315.)

Dr. Pope testified that, based upon his review of numerous studies in the field with regard to psychological symptoms of victims of trauma, there is very little evidence that such a phenomenon as repressed and recovered memories exists. (Tr. 344.) He explained that he wrote a chapter in a Westlaw book entitled *Moderate Scientific Evidence* wherein he reported that he viewed 77 studies involving more than 11,000 victims who had experienced trauma, including disasters, rape, and near death experiences, and there were no cases in which the victims could not remember the trauma. (Tr. 341.) He also referred to a study wherein the authors reviewed 45 studies looking at the after effects of sexual abuse in 3369 victims and did not report one case of a victim alleging repressed memory. (Tr. 343, 344.)

Dr. Pope described all of the studies Dr. Dalenberg presented as evidence supporting repressed memory as falling into two categories, retrospective studies and prospective studies. He explained that retrospective studies, what he referred to as “do you remember whether you forgot studies”, are inherently flawed methodologically, in large part because they rely on people’s imperfect

recollection and you cannot infer that the phenomenon of repressed memory must exist. (Tr. 348-350.) He also noted that prospective studies done without clarification interviews are also methodologically flawed because, if a person who is known to have been abused is asked about the abuse and denies a history of abuse, there is no way to determine whether the denial represents mere nondisclosure. (Tr. 358.) Dr. Pope testified that “no study that has used clarification has ever shown that people could have a trauma and be unable to remember an event.” (Tr. 356.) As a result, Dr. Pope noted that the retrospective studies and prospective studies cited by Dr. Dalenberg do not support the hypothesis of repressed and recovered memory. (Tr. 359.)

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

Dr. William M. Grove is an Associate Professor at the University of Minnesota and a licensed psychologist in the State of Minnesota. (Tr. 419.) He has testified in a number of cases as an expert in scientific methodology in the field of psychology and is also considered a national expert in the field of clinical judgment. (Tr. 419-426.) He has done editorial work for several journals published by the American Psychological Association, the American Medical Association, and the American Psychiatric Association. (Tr. 421.) He was recently asked to serve on the Editorial Board of Psychological Assessment, an American Psychological Association journal. (Tr. 426.) Dr. Grove served two terms on the Minnesota Board of Psychology and is a Fellow of the Council for

Scientific Medicine and Mental Health and a Fellow of the American Psychological Society for the Association of Psychological Science. (Tr. 420-424.) He is also honored as one of the 100 most frequently cited psychologists and psychiatrists in the last quarter century by Thompson Institute for Scientific Information Journal Citation Frequency Count. (Tr. 420.) Dr. Grove's lifetime citation index is 4,439. (RAA 36-37, at 326:19-20, 342:20-22.) He has received one million dollars in research grants. (Tr. 427.)

Dr. Grove testified that the study of clinical judgment is the study of how clinicians investigate and integrate information about their clients, how effectively they do it, and how clinical judgment errors affect the accuracy of their predictions and studies (Tr. 423.) He stated that there is no scientific evidence to support the premise that a clinician who treats more patients or has more experience is more accurate in his or her clinical judgments. (Tr. 424, 425.) Rather, in evaluating the quality of a scientific study, methodology is paramount. (Tr. 425.)

Dr. Grove testified that there have been attempts to test the validity of repressed and recovered memory in that, there have been studies designed to test it. (Tr. 432.) He stated that the research studies in the field regarding repressed memory "are not of sufficiently high methodological quality" to support the position that repressed memory exists. (Tr. 433.) He further noted that there is not sufficient scientific evidence for the premise that one could accurately recover a so-called repressed memory. (Tr. 434.)

Dr. Grove testified that the theory of repressed and recovered memory is not generally accepted by the relevant scientific community and is not scientifically valid or reliable. (Tr. 432-435.) He stated that there is a heated debate as to whether repressed and recovered memory exists in the scientific community, noting that he “doesn’t believe it has been sufficiently well demonstrated that human beings repress entirely their memories of traumatic events or strings of traumatic events to such a degree that the relevant scientific community has formed a consensus that that happens.” (Tr. 434, 457.)

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

Dr. Elizabeth F. Loftus is a Distinguished Professor at the University of California, Irvine, holding positions in the departments of Psychology and Social Behavior; Criminology, Law and Society; and Cognitive Sciences. (Tr. 472–73.) She is the director of the Center for Psychology and Law and one of the founding faculty at the School of Law. (Tr. 473.) She is a member and past president of the Association for Psychological Science and a member of the prestigious National Academy of Sciences, the highest honor for a psychologist scientist in a field that does not have a Nobel Prize. (Tr. 473.) The National Academy of Sciences consists of a group of scientists that also assist the government in problems of national importance. (Tr. 473, 481.) She also serves on the editorial boards of eight journals, including the American Psychological Association and Association for Psychological Science. (Tr. 475.) Dr. Loftus has published 22 books and more

than 450 scientific articles, primarily in the area of memory and memory processes. (Tr. 480.) She has received over a million dollars in research grants for her work and was recognized in the *Review of General Psychology*, published by the American Psychological Association, as one of the 100 Most Eminent Psychologists of the 20th Century. (Tr. 480, 484.) Dr. Loftus also received the Grawemeyer Prize in psychology for outstanding ideas in the science of psychology, the largest monetary prize in the field. (Tr. 481.)

Dr. Loftus testified that she began reviewing the supposed literature supporting the claim of repression in the mid 1990's and found there was virtually no credible scientific support for the claim. (Tr. 487.) She testified that a big problem in the memory field is that "studies that are used to try to support the claim of massive repression of trauma and reliable recovery later, don't support it all. They don't look anything like what...you would want to see in a solid credible scientific study." (Tr. 495.) One problem with the retrospective memory studies is that, as a scientist, you do not know how to interpret a "yes" response from a person answering a question about the state of their past memory, i.e., was there ever a time in the past when you didn't remember being abused? (Tr. 496.) She indicates such a "yes" response could be attributed to ordinary forgetfulness and is certainly not proof of repressed memory. (Tr. 497.) Similarly in prospective studies, where there is some medical documentation or other verification that a person has been abused and you interview that individual later in life and ask them what they can remember of the abuse, there is a problem of

interpretation of the patient's responses and these prospective studies do not establish support for suppression. (Tr. 499, 500.) Dr. Loftus testified that case histories also fail to prove the existence of repressed memory, as they are merely stories that someone tells you about another person which are bound by the motivation and interpretations of a storyteller. (Tr. 500, 501.) She stated there is no credible scientific support for the idea that "trauma is vanished out of awareness by some special process like repression." (Tr. 501.)

Dr. Loftus testified in no uncertain terms that there is a massive debate as to the whole theory of repressed and recovered memory in the scientific community. (Tr. 502.) She explained, "This 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 . . . I don't see how anyone can with a straight face say that there is general acceptance here." (Tr. 503.)

She testified that a number of professional organizations have recognized the enormous controversy over repressed memory, including the American Medical Association, the American Psychiatric Association, the Canadian Psychiatric Association, the Australian Psychological Society, along with psychologists and psychiatrists in Britain and the Netherlands. (Tr. 504, 505.) She testified that the concept of repressed memory is "unproven and highly controversial, not generally accepted. . . and in many instances people in general, and courts in particular, have been misled to think that there is more support here than there really is." (Tr. 506.) She described participating on the American

Psychological Association's Working Group on Investigation of Memories of Childhood Abuse, and stated that the two different groups in the Working Group, the clinicians and researches, vehemently disagreed about the existence and validity of repressed memories. (Tr. 477.)

STANDARD OF REVIEW

In an appeal from the district court's decision following a *Frye-Mack* hearing, the Court of Appeals is to apply several different standards of review based on what particular part of the court's decision is at issue. Whether the testifying experts in this case were qualified experts is reviewed pursuant to the abuse of discretion standard of review. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998). The standard of review regarding evidentiary admissibility of expert testimony under *Frye-Mack* involves two different standards. Whether a particular scientific theory is generally accepted within the relevant scientific community, is a question of law that the Court of Appeals is to review de novo. Whether that scientific theory has foundational reliability and validity is reviewed under an abuse of discretion standard, as are determinations of expert witness qualifications and helpfulness. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000) [citations omitted].

With respect to the trial court's determination that Appellant failed to bring his claim within the appropriate statute of limitations, the Court of Appeals is to determine whether there are any genuine issues of material fact and whether the

district court erred in its application of the law. *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn.1995). When reviewing an order for summary judgment, the Court of Appeals “must take a view of the evidence most favorable to the one against whom the motion was granted” in determining whether there is a disputed issue of material fact. *Abdallah Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954), *Offerdahl v. Univ. of Minnesota Hospitals & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

If there is no disputed issue of material fact, the Court of Appeals is required to only “determine ‘whether the court erred in applying the law regarding the accrual of the cause of action and the running of the statute of limitations.’ *Weeks v. American Family Mut. Ins. Co.*, 580 N.W.2d 24, 26 (Minn.1998).” *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006). This is a question of law that is reviewed de novo. *Id.*

ARGUMENT

I. THE DISTRICT COURT’S CONCLUSION THAT APPELLANT FAILED TO MEET HIS BURDEN OF PROOF UNDER *FRYE-MACK* THAT THE CONCEPT OF REPRESSED AND RECOVERED MEMORY IS GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY AND HAS FOUNDATIONAL RELIABILITY WAS NOT ERRONEOUS AS A MATTER OF LAW.

According to the Minnesota Supreme Court, when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community. In addition, the particular scientific evidence in each case must be shown to have foundational reliability. *See State v. Nystrom*,

596 N.W.2d 256, 259 (Minn.1999). *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). The requirement that scientific evidence be generally accepted in the relevant scientific community guarantees that “the persons most qualified to assess scientific validity of a technique have the determinative voice”. *Id.* at 813. Foundational reliability “requires the ‘proponent of a * * * test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.’ ” *State v. Moore*, 458 N.W.2d 90, 98 (Minn. 1990) (alteration in original) (quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn.1977)). Additionally, as is the case with all expert testimony, the evidence must satisfy the requirements of Minn. R. Evid. 402 and 702, that is, it must be relevant, be given by a witness qualified as an expert, and be helpful to the trier of fact. *See State v. Nystrom*, 596 N.W.2d 256, 259 (Minn.1999). *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000).

A. The Case Law From This State And Elsewhere Does Not Overwhelmingly Support The Proposition That Evidence Of “Repressed Memory” Is Admissible.

Appellant asserts that “[s]cientific expert testimony has been admitted in Minnesota Courts for over a decade”. (AB 15.)⁵ Appellant cites to the case of *W.J.L. v. Brugge*, 573 N.W.2d 677, 681 (Minn. 1998) for this proposition. This is disingenuous. In reality, the issue being brought before this Court is an issue of first impression. The Minnesota Supreme Court in *Bugge* did not address the

⁵ “AB” refers to Appellant’s brief.

question of whether the “repressed memory” theory was generally accepted in the relevant scientific community. Rather, the Supreme Court simply referred to “repressed memory” as a possible example of a legal disability without addressing in any way its acceptance in the relevant scientific community or its foundational reliability. The lower court in that case had not addressed the issue in any way, such as by conducting a *Frye-Mack* hearing.

The same liberties have been taken by Appellant when citing as support for his position the recent Minnesota Supreme Court case of *Lickteig v. Kolar*, 782 N.W.2d 810 (Minn. 2010). This was not a case which involved the determination of whether “repressed memory” was generally accepted in the scientific community or was scientifically reliable. The Minnesota Supreme Court has never addressed this issue.

While there are other jurisdictions which have ruled that expert testimony concerning repressed memory is admissible, there are an equal number of jurisdictions which have come to the opposite conclusion that repressed memory is not admissible scientific evidence. Also, the jurisdictions which have ruled that said testimony is admissible have, for the most part, followed the *Daubert* standard and not relied upon the *Frye-Mack* standard. For example, the Federal District Court for the District of Michigan in the case of *Isely v. Capuchin Province*, 877 F. Supp. 1055 (E.D. Mich. 1995), explicitly followed *Daubert* stating that, rather than meeting a “general acceptance” standard, in order to be admissible under the Federal Rule of Evidence 702, expert testimony must meet a

standard of “evidentiary reliability”. *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1057-58 (E.D. Mich. 1995). Similarly, this is true in *Shahzade v. Gregory*, 923 F. Supp. 286, 290 (D. Mass. 1996); *Doe v. Archdiocese of New Orleans*, 2001-0739 La. App. 4 Cir. 5/8/02, 823 So. 2d 360, 363 (La. Ct. App. 2002) writ denied, 2002-1960 La. 11/8/02, 828 So. 2d 1127; *McClure v. Catholic Diocese of Wilmington, Inc.*, New Castle County Super. Court No. 06C-12-235 CLS; *John Doe RG v. Archdiocese of Indianapolis*, Civil Div. Cause No. 49D10-0509-CT-035390.

Appellants also cite to a number of cases dealing with the issue of whether the theory of repressed memory should be allowed as evidence to determine whether “the discovery rule” should apply to toll applicable statute of limitations. (AB 19–20.) None of the cases cited dealt with the issue of whether the theory of repressed memory was generally accepted in the relevant scientific community and was, therefore, admissible. As such, the cases are not helpful to this Court.

One case from outside of this jurisdiction, *Commonwealth v. Shanley*, 919 N.E.2d 1254 (Mass. 2010) does address this issue from the perspective of the *Frye-Mack* standard. However, a review of the case makes it clear that the evidence presented by the party opposing the introduction of “repressed memory” focused on the second prong of the *Frye-Mark* test, i.e. the scientific reliability, and did not present significant evidence concerning whether the theory was generally accepted in the scientific community.

In contrast, there is overwhelming, significant, and persuasive case law on point from outside this jurisdiction which concludes that the theory of repressed memory is not generally accepted in the scientific community and, therefore, is inadmissible in courts of law. *State v. Hungerford*, 697 A.2d 916, 928 (N.H. 1997); *State v. Quattrocchi*, No. P92-3759, 1999 WL 284882, at *7, *13 (R.I. Super. Apr. 26, 1999); *Rivers v. Father Flanagan's Boys' Home*, Doc. 1024, No. 743, at *13–14 (D. Ct., Douglas County, Neb., Nov. 25, 2005); *Doe v. Maskell*, 679 A.2d 1087, 1092 (Md. Ct. App. 1996); *Dalyrymple v. Brown*, 701 A.2d 164, 172 (Pa. 1997); *Travis v. Zitter*, 681 So.2d 1348, 1351 (Ala. 1996); *Hunter v. Brown*, No. 03A01-9504-CV-00127, 1996 WL 57944, at *4 (Tenn. Ct. App. 1996); *State v. Walters*, 698 A.2d 1244, 1248 (N.H. 1997); *S.V. v. R.V.*, 933 S.W.2d 1, 16–18 (Tex. 1996).

In conclusion, the issue of whether “repressed memory” evidence is admissible has not been addressed by the Appellate Courts of the State of Minnesota. Furthermore, contrary to Appellant’s claim, there is no such trend among other states finding that repressed memory is generally accepted within the relevant scientific community and otherwise foundationally reliable. Indeed, it is Respondent’s contention that the “trend” is in the opposite direction.

B. The District Court Did Not Abuse Its Discretion By Concluding That Respondents’ Experts Who Testified At The *Frye-Mack* Hearing Were Members Of The Relevant Scientific Community.

Testimony was adduced from five separate experts during the three day *Frye-Mack* hearing in this case. Appellant called two experts in support of his

contention that the principle of “repressed and recovered memory” is generally accepted in the relevant scientific community and fundamentally reliable, Dr. Constance Dalenberg, Ph.D. and Dr. James Chu M.D. (Add. 8.)

Respondents called three experts to testify in support of their position that the theory of repressed memory is not generally accepted in the relevant scientific community and has no foundational reliability, including Dr. Harrison G. Pope, Jr. M.D., Dr. William M. Grove, Ph. D. and Dr. Elizabeth Loftus, Ph. D. (Add. 8).

In its Findings of Fact, Conclusions of Law and Order dated December 8, 2009, the district court set forth the relevant qualifications and experience of each of the testifying experts in some detail, including the most significant experience and accomplishments of each of the testifying experts, current employment positions, scientific publications, relevant professional memberships, accolades and awards. (Add. 9-17.) Based upon these qualifications, the district court concluded that “[w]ithout question all five are representative of the relevant scientific community”. (Add. 8.)

As stated previously, the question of whether the testifying experts were qualified experts is reviewed pursuant to the abuse of discretion standard of review. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998). Minnesota case law makes it clear that appellate courts are to apply “a very deferential standard” to the district court when reviewing a determination as to expert qualification. They may reverse the district court decision only if there has been a clear abuse of discretion. *Gross v. Victoria Station Farms, Inc.*, 578

N.W.2d 757, 761 (Minn.1998); *see also Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 445-46 (Minn.1990).

In this particular case, all of Respondents' experts have significant experience in the fields of psychology and/or psychiatry. (Add. 9-18.) Dr. Pope and Dr. Loftus have each published scholarly articles dealing with the issue of "repressed memory". (Add. 14, 18.) Dr. Pope has treated individuals who have claimed to repress memories of traumatic events and all experts for Respondents have expertise in the research methodology concerning psychological studies. (Add. 13-28.)

Based on the evidence, it cannot be reasonably asserted that the district court's determination that the testifying experts were representatives of the relevant scientific community was an abuse of discretion. According to one court's formulation, "members of the relevant scientific field will include those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it." *Reed v. State*, 283 Md. 374, 391 A.2d 364, 368 (1978). It is clear from the qualifications of the experts in question and their testimony that, Dr. Pope, Dr. Grove and Dr. Loftus had the requisite background and training, clearly comprehended and understood the theory of repressed memory and had formed a judgment concerning its validity.

C. The District Court Did Not Err In It's Determination That The Theory Of "Repressed Memory" Is Not Generally Accepted In The Relevant Scientific Community.

Appellant asserts that the mere inclusion of dissociative amnesia in the DSM-IV-TR establishes that the theory of repressed and recovered memories has attained general acceptance within the relevant scientific community, essentially contending that the presence of a particular diagnosis in the DSM-IV renders a *Frye-Mack* hearing moot. Nothing could be further from the truth.

The testimony adduced at the *Frye-Mack* hearing in this case is instructive on this point. As was testified at the hearing, the DSM-IV-TR is not a "scientific paper or a scientific reference or a scientific review article." (Tr. 315). Furthermore, inclusion in the DSM-IV-TR "does not, by itself, establish the validity of a diagnostic entity." (Tr. 431.) This is supported by case law which has addressed the role of the DSM-IV-TR. *See 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"). The United States Supreme Court has stated that a diagnosis in the DSM-IV "may mask vigorous debate within the profession about the very contours of the mental disease itself." *Clark v. Arizona*, 548 U.S. 735, 774, 126 S. Ct. 2709, 2734 (2006).

In fact, as the United States Supreme Court recently acknowledged in *Clark*, 548 U.S. at 775, 126 S. Ct. 2735, the DSM-IV itself cautions against the use of those categories, criteria and textual descriptions in forensic settings, noting

that “[t]hese 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 (4th ed).

Not all of the diagnoses contained in the DSM-IV-TR are widely accepted by the relevant scientific community. (Tr. 315.) An example of a category contained in the DSM-IV-TR that is not necessarily accepted in the relevant scientific community (in addition to “repressed memory” or “dissociative amnesia”) includes a category called “fugue,” which is “where you lose all of your past, identify, who you are, your autobiography and so on.” (Tr. 538.) Dr. Elizabeth Loftus testified that “there is a lot of controversy about that, but some psychiatrists do believe that kind of thing happens.” (Tr. 539.)

Any claim that the mere inclusion of dissociative amnesia in the DSM-IV-TR demonstrates general acceptance defies logic and has been contradicted by Respondents’ experts. Dissociative amnesia was first included in the DSM-IV, which was published in 1994. Respondents’ experts and Appellant’s expert, Dr. Chu, testified that, throughout the 1990s, the theory of repressed and recovered memories of child-sexual-abuse trauma was highly controversial. (Tr. 216.) Additionally, two years *after* the publication of the DSM-IV, half of the American Psychological Association’s Working Group on Investigation of Memories of Childhood Abuse concluded in their final report that there was no compelling evidence to support the concept. Final Report, *Working Group on Investigation of Memories of Childhood Abuse*, American Psychological Association at 93 (1996).

Dr. Pope testified that his research on inclusion of the diagnosis of dissociative amnesia in the DSM-IV demonstrated that the diagnosis was extremely controversial, despite the fact that it was included in the 1994 version of the DSM. Dr. Pope testified that he conducted a study in 1999 by sending out a questionnaire to four hundred randomly selected board certified psychiatrists around the United States and asking how dissociative amnesia (repressed memory) should be treated if the DSM-IV were to be published today. (Tr. 296.) Forty percent of psychiatrists said it should be included in the DSM-IV only as a “proposed diagnosis” and 25 percent gave no opinion or stated it should not be included at all. (Tr. 296.) When asked if there was strong scientific evidence, some evidence, or no evidence for dissociative amnesia, only 23 percent of these same psychiatrists reported there was strong evidence of the validity of dissociative amnesia. (Tr. 296.)

Appellant’s assertion that the mere inclusion of dissociative amnesia in the DSM-IV-TR establishes general acceptance within the relevant scientific community is without merit. Acceptance of this position would allow courts to abdicate their responsibility as “gatekeeper” with respect to scientific evidence of this nature and would render the DSM-IV-TR the “defacto adjudicator” on the question of admissibility of evidence.

As is recognized by other courts, and indeed, the relevant scientific community, the DSM-IV-TR is not sacred text, see e.g. *State v. Klein*, 124 P.3d 644, 651 (Wash. 2005). Rather, it is an evolving and imperfect document. *Id.* For

these reasons, Appellant's claim that repressed and recovered memory is generally accepted in the relevant scientific community because dissociative amnesia is included in the DSM-IV-TR must be rejected by this Court.

The argument that inclusion of the diagnosis of dissociative amnesia in the DSM-IV-TR somehow silences the debate about general acceptance in the scientific field was useful from Appellant's perspective because such an argument allows him to ignore the testimony of the experts, including his own expert, Dr. Chu, as to the depth and pervasiveness of the actual, existing controversy concerning the existence of "repressed memory" or "dissociative amnesia" as a legitimate psychological impairment or condition.

As stated above, the first element of the *Frye-Mack* standard which Appellant must satisfy is that the proffered scientific evidence has been generally accepted in the relevant scientific community. *Goeb*, 615 N.W.2d at 814. This 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). The purpose of this requirement is to avoid "reliance on psychological theories or experimental processes which may actually be widely rejected as baseless, unreliable, or insufficiently established." *Marsh v. Smyth*, 785 N.Y.S.2d 440, 444 (N.Y.A.D. 1 Dept. 2004) (concurring opinion). The evidence presented at the *Frye-Mack* hearing overwhelmingly

demonstrated that there exists a current, profound, and abiding controversy regarding this most divisive subject.

Indeed, Respondent's own expert Dr. James A Chu, testified that there exists a continuing debate concerning "repressed memory". (Tr. 227-230.) Dr. Chu admitted that a "heated debate" exists and that the theory is highly controversial. (Tr. 229.) He acknowledged writing in his own publication the statement, "Ever since the introduction of dissociative identity disorder, controversy has swirled around the nature and the validity of this diagnosis." (Tr. 299; RDA 47, at 147:23-148:7.)

A number of professional associations of members of the relevant scientific community have, in recent years, examined the issue of "repressed memory" and have either been unable to reach a consensus due to the polarization of the group over the issue, or have expressed extreme skepticism regarding the theory. These include the American Psychological Association's Working Group on Investigation of Memories of Childhood Abuse, the American Medical Association, Canadian Psychiatric Association, the Australian Psychiatric Society, along with psychologists and psychiatrists in Britain and the Netherlands. (Tr. 504, 505.) This evidence, by itself, clearly indicates that the theory of "repressed memory" is not generally accepted within the relevant scientific community.

Substantial testimony was adduced from Respondents' experts discussing the substantial controversy existing in the relevant scientific community

concerning the theory of “repressed memory” or “dissociative amnesia”. Dr.

Elizabeth Loftus, for example, testified as follows:

This 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 I don’t see how anyone can, with a straight face, say that there is general acceptance here.

(Tr. 502-503.) Dr. Pope referred to controversy over repressed and recovered memory as “the most heated debate currently in psychiatry with people who are quite strongly invested on both sides.” (Tr. 268.) He noted that there is “a voluminous literature on this side of people writing in some of the world’s most prestigious journals and people with very, very high credentials questioning the validity” of the theory of repressed memory. (Tr. 282.)

The district court did not err as a matter of law in its determination that the theory of repressed and recovered memory is not generally accepted by the relevant scientific community. The evidence conclusively demonstrates that a great debate within the scientific community continues to rage. The district court correctly pointed out that a theory cannot simultaneously be “generally accepted” and “deeply controversial” (Add. 25.)

D. The Trial Court Did Not Err In Its Determination That The Theory Of “Repressed Memory” Is Not Reliable And Trustworthy And Is Not Based On Well-Recognized Scientific Principles and Independent Validation.

The Court of Appeals is required to review a district court’s determination of the second prong of the *Frye-Mack* test, whether evidence has foundational

reliability, under an abuse of discretion standard. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000) [citations omitted]. A trial court has abused its discretion when its decision is against logic and facts on the record. *See O'Donnell v. O'Donnell*, 678 N.W.2d 471, 474 (Minn. App. 2004). When a district court has discretion, it will not be reversed unless it “abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.” *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 306 (Minn.1990). The party challenging the district court's exercise of discretion has the burden of proof, “a burden which is met only when it is clear that no reasonable person would agree [with] the trial court's assessment [of sanctions].” *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn.1995) (quoting *Marrocco v. Gen'l Motors Corp.*, 966 F.2d 220, 223 (7th Cir.1992)).

Appellant devotes nearly thirteen pages of his brief to the proposition that “repressed memory” is “universally” supported in the “scientific research” and is reliable. These thirteen pages amount to little more than a scientifically credulous summation of a portion of the testimony of Appellant’s expert witnesses’ testimony on retrospective and prospective memory studies. Respondents address these issues in their memorandum of law dated September 25, 2009. (RDA 747-754.) Respondents’ experts testified that, despite the number of studies Appellant submitted in support of his position that repressed memory is reliable, because the studies are methodologically flawed, they fail to demonstrate that there is any compelling scientific evidence that individuals who experience traumatic events

“forget” and “remember” in any fashion significantly different from ordinary “forgetting”. (Tr. 345-351, 433, 495-500.)

Respondents’ witnesses testified that “retrospective studies”, i.e. studies which essentially ask the participants the question “do you remember whether you forgot?”, are of little scientific value and are subject to fatal methodological flaws. (Tr. 345-351, 433, 495-500). Retrospective studies comprise the vast majority of the studies relied upon by Appellant. (Tr. 495-496.) Dr. Pope explained that retrospective studies are inherently flawed because they rely on people’s imperfect recollection and you cannot infer that the phenomenon of repressed memory must exist. (Tr. 348-350.) Dr. Loftus explained that, one problem with the retrospective memory studies is that, as a scientist, you do not know how to interpret a “yes” response from a person answering a question about the state of their past memory, i.e., was there ever a time in the past when you didn’t remember being abused? (Tr. 496.) She indicates such a “yes” response could be attributed to ordinary forgetfulness and is certainly not proof of repressed memory. (Tr. 497.)

Additionally, Appellant relies upon “prospective studies”, i.e. studies which the subjects are identified and then followed forward in time. (Tr. 352-357, 432-434, 498-500.) Dr. Pope noted that prospective studies done without clarification interviews are also methodologically flawed because, if a person who is known to have been abused is asked about the abuse and denies a history of abuse, there is no way to determine whether the denial represents mere nondisclosure. (Tr. 358.)

Dr. Pope testified that “no study that has used clarification has ever shown that people could have a trauma and be unable to remember an event.” (Tr. 356.) Dr. Loftus testified that in prospective studies, where there is some medical documentation or other verification that a person has been abused and you interview that individual later in life and ask them what they can remember of the abuse, there is a problem of interpretation of the patient’s responses and these prospective studies do not establish support for suppression (Tr. 499, 500.)

Respondent also identified research by Gail Goodman which replicated a major study cited by Appellant’s expert Dr. Dalenberg in support of the concept of repression, the Linda Meyer-Williams study, which failed to duplicate the results of the Williams study. (Tr. 499-500.) This study was omitted from Dr. Dalenberg’s voluminous listing of studies, undoubtedly because Goodman concluded that her findings “do not support the existence of special memory mechanisms unique to traumatic events, but instead imply that normal cognitive operations underlie long term memory for CSA [child sexual abuse]”. (RDA 750.)

Dr. Loftus testified that case studies relied upon by Appellant also fail to prove the existence of repressed memory, as they are merely stories that someone tells you about another person which are bound by the motivation and interpretations of a storyteller. (Tr. 500, 501.) She stated there is no credible scientific support for the idea that “trauma is vanished out of awareness by some special process like repression.” (Tr. 501.) Dr. Loftus also noted that a major problem with case studies is that the authors of case studies do not share data,

making it impossible to determine the accuracy of the study. (Tr. 500; RDA 751.)

A similar problem exists with respect to studies cited by Appellant's expert Dr. Dalenberg which purport to establish some level of accuracy for so-called "recovered memories" in that the studies do not distinguish between those who claim, like Appellant, to have completely forgotten alleged abuse (i.e. total amnesia) versus those who claim to have recovered memories of additional episodes of abuse, but always knew that some abuse had occurred. (RDA 753.)

Appellant also takes issue with the district court's distinction between clinicians and research scientists and its conclusion that there was a deep split between the two groups regarding the reliability and accuracy of the "repressed memory" theory. (AB 38.) This argument is a red herring, designed to obscure the clear weight of the evidence that indeed there is significant controversy among the relevant scientific community concerning the "repressed memory" theory. It simply ignores the fact that an "enormous debate", as Dr. Loftus termed it, exists regarding repressed memory. (Tr. 503.)

Appellant also seeks to chastise the district court for assuming "the position of a scientist when analyzing the scientific support for repressed memory". (AB 41.) This grossly mischaracterizes the analysis and determination made by the district court that Respondents' expert witnesses presented more persuasive evidence on whether the theory of repressed and recovered memory was generally accepted and scientifically reliable than did the experts testifying on behalf of Appellant. Respondents submitted considerable testimony from its experts

concerning the logical and scientific flaws of the various studies presented by Appellant's expert to support the theory of repressed memory. Indeed, Appellant's own expert, Dr. Chu, admitted that a particular notable and widely cited study in favor of repression, the Linda Meyer-Williams Study, was significantly flawed. (RAA 42-43, at 63:23-66:4.) Moreover, Dr. Chu testified more than once that there is currently a "heated debate" in the field as to whether repressed memory exists and whether memories can be recovered with reliable accuracy, agreeing with the testimony of Respondents' expert witnesses. (Tr. 229, 230.)

As such, it is clear that the district court did not abuse its discretion in determining that "repressed memory" is not reliable and trustworthy and that it is not based on well-recognized scientific principles and independent validation. Appellant has not met his burden to demonstrate that no reasonable person, in light of the record presented to the district court, could conclude that the "repressed memory" theory lacks foundational reliability. Indeed, in light of the record presented, it is a most reasonable conclusion.

II. THE DISTRICT COURT DID NOT ERR AS A MATTER OF LAW WHEN IT CONCLUDED THAT APPELLANT FAILED TO COMMENCE HIS LAWSUIT BASED ON NEGLIGENCE AND VICARIOUS LIABILITY AGAINST RESPONDENTS WITHIN THE

APPLICABLE STATUTE OF LIMITATIONS, AND, AS A RESULT, DISMISSED APPELLANT'S CLAIMS FOR NEGLIGENCE AND VICARIOUS LIABILITY WITH PREJUDICE.

Appellant asserts claims of negligence, negligent supervision, negligent retention, and vicarious liability against Respondents arising out of alleged sexual abuse he sustained by Thomas Adamson. (Add. 36.)

The statute of limitations for claims alleging sexual abuse is set forth in Minn. Stat. § 541.073. An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the Appellant knew or had reason to know that the injury was caused by the sexual abuse. Minn. Stat. § 541.073, Subd. 2(a). The statute of limitations may be suspended during a period of disability under Minn. Stat. Sec .541.15. Minn. Stat. § 541.073, Subd. 2(d). The six-year statute of limitations applies to actions for damages commenced against a person who caused the Appellant's personal injury either by (1) committing sexual abuse against the Appellant, or (2) negligently permitting sexual abuse against the Appellant to occur. Minn. Stat. § 541.073, Subd. 3. Respondeat superior claims arising from sexual abuse are governed by the same statute of limitations that applies to the underlying tort. *D.M.S. v. Barber*, 645 N.W.2d 383, 391 (Minn. 2002).

Minnesota appellate courts have held that, “[I]n determining when appellant knew or should have known he was abused, we are to apply a reasonable person standard.” *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn.1998); *see also*, *Doe v. Redeemer Lutheran Church*, 531 N.W.2d 897, 900, (Minn.App.1995). The

Minnesota Supreme Court has adopted this standard “in recognition that 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.” *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn.1996); *J.J. v. Luckow*, 578 N.W.2d 17, 19 (Minn.App.1998). This “reasonable person” standard is an objective standard. *W.J.L.*, 573 N.W.2d at 681; *Blackowiak*, 546 N.W.2d at 3. Therefore, in the absence of a legal disability, in order to decide whether the six-year period of limitation expired before Appellant commenced an action, the court must determine the time at which a reasonable person standing in Appellant’s shoes would have known he was sexually abused. *D.M.S.*, 645 N.W.2d at 387.

Appellant attempted to assert a legal disability under Minn. Stat. Sec. 541.15, by arguing that he suffered from traumatic amnesia or repressed memory and that such disability should toll the statute of limitations on his claims. (RDA 715.) The district court ruled that Appellant failed to meet his burden of proof pursuant to *Frye-Mack* of demonstrating that evidence of “repressed and recovered memory” is reliable and that the theory of “repressed and recovered memory” is generally accepted within the relevant scientific community, and granted Respondents’ motion to exclude such evidence. (Add. 1-30.) As a result, Appellant is unable to produce any evidence of a legal disability which would toll the statute of limitations beyond the six-year period.

Appellant acknowledged to Fr. Doyle in April of 2009, that, at the time the abuse allegedly occurred, he felt “emotionally paralyzed” and “shocked”, considered the conduct to be “abusive and intrusive”, and was deathly afraid to tell anyone about the abuse. (Add. 34; RDA 409-10, at 37:20-38:1-4; RDA 410, at 40:12-17; RDA 411, at 42:9-18.) From the record, Appellant clearly understood at the time of the alleged abuse, which occurred no later than 1981, that Adamson’s conduct towards him was inappropriate and harmful. However, Appellant was a minor at the time of the alleged abuse by Adamson. (Add. 33.) According to the Minnesota Supreme Court, “a reasonable child is incapable of knowing that he or she has been sexually abused and, absent some other disability that serves to delay the running of the statute of limitations, the six-year period of limitation under the delayed discovery statute begins to run when the victim reaches the age of majority.” *D.M.S.*, 645 N.W.2d at 390 (Minn. 2002).

As a matter of law, the statute of limitations with respect to Appellant’s claims against Respondents for negligence and vicarious liability began to run upon Appellant’s eighteenth birthday on June 11, 1985, and expired on June 11, 1991. Appellant commenced this action in 2006. (Add. 36.) Appellant’s claims that the Diocese was negligent with respect to its supervision and/or retention of Adamson, or otherwise, and that the Diocese is vicariously liable for Adamson’s misconduct must fail as they are barred by the statute of limitations. As a result, the Diocese was entitled to summary judgment with respect to Appellant’s

negligence and vicarious liability claims and the district court's decision to grant summary judgment must be affirmed.

III. THE DISTRICT COURT DID NOT ERR AS A MATTER OF LAW WHEN IT CONCLUDED THAT APPELLANT FAILED TO COMMENCE HIS LAWSUIT BASED ON FRAUD AGAINST RESPONDENTS WITHIN THE APPLICABLE STATUTE OF LIMITATIONS AND, AS A RESULT, DISMISSED APPELLANT'S FRAUD CLAIMS WITH PREJUDICE.

Appellant claims Respondents committed fraud against Appellant by affirmatively representing to Appellant and his family that Adamson did not have a history of molesting children, and that Respondents owed Appellant a duty to disclose its knowledge regarding Adamson's dangerous propensities, that Respondents failed to disclose such propensities, and that Appellant relied on those intentional non-disclosures which caused him to be sexually molested.

(Add. 36.)

In a recent unpublished decision of the Minnesota Court of Appeals, *Jane Doe 43C v. Diocese of New Ulm*, No. A08-0729, 2009 WL 605749 (Minn. App. 2009), the Court of Appeals held that the applicable statute of limitations for claims of sexual abuse arising out of intentional misrepresentation, i.e., fraud, is Minn. Stat. § 541.05 Subd. 1(6), as opposed to Minn. Stat. § 541.073. The Court of Appeals reasoned that Minn. Stat. § 541.073 explicitly limited its applicability to cases of sexual abuse "commenced against a person who caused the Appellant's personal injury either by (1) committing sexual abuse against the Appellant, or (2) negligently permitting sexual abuse against the Appellant to occur." *Jane Doe*

43C v. Diocese of New Ulm, No. A08-0729, 2009 WL 605749 at * 5 (Minn. App. 2009).

According to Minn. Stat. § 541.05 Subd. 1(6), causes of action for relief on the grounds of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, shall be commenced within six years. *See also, Blegen v. Monarch Life Ins. Co.*, 365 N.W.2d 356, 357 (Minn.App.1985). The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence they could and ought to have been discovered. *Id.* The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation if it appears that the failure to sooner discover it was the result of negligence, and inconsistent with reasonable diligence. *Id.* (citing *First National Bank of Shakopee v. Strait*, 73 N.W. 645, 646 (1898), *Duxbury v. Boice*, 72 N.W. 838 (Minn.1897). The Minnesota Supreme Court has held that, “The burden is on the Appellant to allege and prove that he did not discover the facts constituting the fraud until within six years before the commencement of the action.” *Duxbury*, 72 N.W. at 839; *Humphrey v. Carpenter*, 39 N.W. 67 (1888); *Morrill v. Manufacturing Company*, 55 N.W. 547 (1893).

Under Minn. Stat. § 541.05 Subd. 1(6), Appellant should have commenced his fraud claims within six years from the time he learned, or should have learned in the exercise of reasonable diligence, that Adamson had a “history of molesting children” and was a danger to minor children. Appellant was made aware of the

fact that Adamson was a danger to children at the moment Appellant claims he was abused in 1980 or 1981. Appellant's knowledge of Adamson's harmful conduct towards himself as a child is evidenced by the deposition testimony of Fr. Doyle. (RDA 409-413.) During a three hour meeting between Fr. Doyle and Appellant, Appellant told Fr. Doyle that, at the time of the alleged abuse when Appellant was 13 or 14 years of age, Appellant felt "emotionally paralyzed", "shocked", and very isolated and confused. (RDA 409-411, at 37:20-42:9.) Appellant further stated that, at the time of the alleged abuse, he was "deathly afraid to tell anyone" of the abuse due to his family's relationship to the Catholic Church and with Adamson. (RDA 411, at 42:9-14.)

Appellant was also aware that Adamson was a danger to children when he learned through his family and church community in 1984 that Adamson had been accused of sexually abusing children. (RDA 251, at 251:15-20.) Within two months after Adamson left Risen Savior, Appellant's parents became aware of allegations of abuse of minors by Adamson. (RDA 292, at 34:15-23.) Appellant's mother first read about the sexual abuse charges in the newspaper and she and her husband talked with the pastor at Risen Savior about the allegations. (RDA 317, at 44:18-23; RDA 318, at 45:19- 46:5.) Appellant's father recalls hearing about the allegations through other parishioners and at mass by a priest. (Add. 34; RDA 292, at 34:20, 21.) Appellant's father read several newspaper articles about the allegations of abuse by Adamson. (Add. 33, 34; RDA 292, at 34:22, 23.) In response to the widespread publicity surrounding Adamson, representatives of

Risen Savior held at least one meeting with parishioners to discuss the allegations. (Add. 34; RDA 292, at 35:4-36:9; RDA 318, at 47:16-48:6.)

Appellant's mother discussed the allegations against Adamson with Appellant and her other children during this time period in the mid to late 1980's. (RDA 318-319, at 48:20-49:12.) The family had discussions from time to time about Adamson and the allegations of sexual abuse against him. (RDA 251, at 251:15-20.) In 1986, when Appellant's mother directly asked Appellant whether he had ever being sexually abused by Adamson, Appellant denied it. (Add. 34; RDA 251, at 251:15-22; RDA 381-319, at 48:20-50:22.)

In the late 1980's, after Adamson left Risen Savior, there was extensive publicity in the media detailing various accusations of child abuse against Adamson and several lawsuits filed against Adamson. (Add. 33.) Between 1987 and 1991, 139 stories reported on the lawsuits in the Minneapolis Star Tribune and the St. Paul Pioneer Press. (Add. 33.) Appellant acknowledged that he was also aware in the 1990's that the Catholic Church was facing the problem of sexual abuse lawsuits. (RDA 252, at 252:17-22.)

Clearly, Appellant had enough information at the time he was allegedly abused by Adamson in 1980 and 1981 to file his fraud claims against Respondents. Appellant continued to obtain more and more information about Adamson's dangerous propensities throughout the 1980's and early 1990's. A reasonable person in Appellant's situation should have known that any alleged representation made by Respondents that Adamson was not a danger to children was false. Despite having

the knowledge that Adamson had abused him and many other children in the 1980's, Appellant failed to file his claim in a timely manner as prescribed by Minn. Stat. § 541.05 Subd. 1. Instead, Appellant waited until 2006 to commence this action. (Add. 36.)

Appellant may argue that he did not have enough information to discover the alleged fraud until he first “recovered” memories of being sexual abused by Adamson. This argument is disingenuous. The purported fraud alleged by Appellant is the intentional misrepresentation by Respondents to Appellant that Adamson did not have a history of molesting children and additionally, the fact that Respondents knew of Adamson's history of sexual abuse and failed to tell Appellant. The purported fraud is not the alleged sexual abuse. The fact that Adamson had a history of molesting children was known to Appellant as early as 1980. As stated above, throughout the 1980's and early 1990's, Appellant gained more and more information about Adamson's history of sexual abuse of minors, hearing about allegations of sexual abuse and talking about it with family members and his girlfriend.

Appellant's discovery of the Respondents' alleged fraudulent conduct (misrepresentation about, and non-disclosure of, Adamson's history of molesting children) is not dependent upon the timing of Appellant's alleged “recovered memories” of abuse. It is self-serving for Appellant to allege fraud, argue that the fraud statute of limitations controls, and then argue that the moment of the “recovery” of his memories of sexual abuse is also the moment of the discovery of the alleged

fraud which triggers the commencement of the limitations period. To allow Appellant to veil his allegations of sexual abuse in claims of fraud would create an exception which swallows the statute of limitations set forth in Minn. Stat. § 541.073.

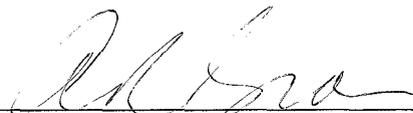
In conclusion, Respondent Diocese of Winona respectfully requests that this Court affirm the district court's dismissal of both of Appellant's claims alleging fraud against Respondents as the claims were untimely pursuant to the applicable statute of limitations.

CONCLUSION

Based upon the foregoing arguments, Respondent Diocese of Winona respectfully requests this Court to affirm the decision of the trial court dismissing all claims against Respondents.

Dated: February 4, 2011

Respectfully Submitted,

By 
Anna Restovich Braun, #323226
Bruce K. Piotrowski, #195194
Thomas R. Braun, #350631
Attorneys for Respondent Diocese of
Winona
117 East Center Street
Rochester, Minnesota 55904
Telephone 507-288-4840

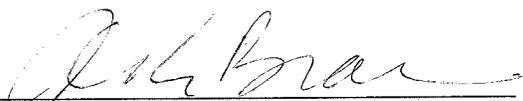
CERTIFICATE OF COMPLIANCE

I hereby certify that the Respondent Diocese of Winona's Brief in Case No. A10-1951 complies with the word limitations of Minn. R. Civ. App. P. 132.01, Subd. 3(a)(1). This brief was prepared using Microsoft Office Word 2003, which reports the brief contains 13,520 words.

Dated: February 4, 2011

GEORGE F. RESTOVICH & ASSOCIATES

By



Anna Restovich Braun, #323226

Bruce K. Piotrowski, #195194

Thomas R. Braun, #350631

Attorneys for Respondent Diocese of Winona

117 East Center Street

Rochester, Minnesota 55904

Telephone 507-288-4840