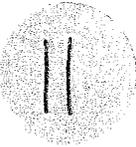


No. A10-1951



State of Minnesota
In Supreme Court

John Doe 76C,

Respondent,

vs.

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

Appellants.

**BRIEF AND ADDENDUM OF
THE ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS
AND DIOCESE OF WINONA**

Thomas B. Wieser (#122841)
Jennifer R. Larimore (#0386663)
MEIER, KENNEDY & QUINN, CHTD.
2200 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2137
(651) 228-1911

*Attorneys for Appellant The Archdiocese
of St. Paul and Minneapolis*

Anna Restovich Braun (#323226)
GEORGE F. RESTOVICH & ASSOCIATES
117 East Center Street
Rochester, MN 55904-3757
(507) 288-4840

Attorneys for Appellant Diocese of Winona

Jeffrey R. Anderson (#2057)
Patrick W. Noaker (#274951)
Michael G. Finnegan (#033649X)
JEFF ANDERSON AND ASSOCIATES, P.A.
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990

Attorneys for Respondent John Doe 76C

Bruce Jones (#179553)
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

*Attorneys for Amicus Curiae Minnesota
Religious Council*

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).

Daniel A. Haws (#193501)
Stacy E. Ertz (#0267181)
MURNANE BRANDT
30 East Seventh Street, Suite 3200
St. Paul, MN 55101-4914
(651) 227-9411

*Attorneys for Amicus Curiae Minnesota
Defense Lawyers Association*

Michael J. Ford (#3082X)
Cally R. Kjellberg (#0390443)
QUINLIVAN & HUGHES, P.A.
400 South First Street, Suite 600
P.O. Box 1008
St. Cloud, MN 56302
(320) 251-1414

*Attorneys for Amicus Curiae False
Memory Syndrome Foundation*

John D. Lamey III (#0312009)
LAMEY LAW FIRM, P.A.
980 Inwood Avenue North
Oakdale, MN 55128
(651) 209-3550

*Attorneys for Amicus Curiae Leadership
Council on Child Abuse and
Interpersonal Violence*

Thomas S. Deans (#21751)
Michelle D. Kenney (#236615)
KNUTSON, FLYNN & DEANS, P.A.
1155 Centre Pointe Drive, Suite 10
Mendota Heights, MN 55120
(651) 222-2811

*Attorneys for Amicus Curiae Minnesota
School Boards Association*

Amy J. Russell (#0389634)
2nd Floor, Maxwell Hall
Winona, MN 55987
(507) 457-2890

*Attorneys for Amicus Curiae National Child
Protection Training Center and National
Center for Victims of Crime*

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STATEMENT OF THE ISSUES

I. Where respondent claimed that the statute of limitations was tolled on the basis of his repressed and recovered memories, did the district court err by conducting a *Frye-Mack* hearing on the issue of admissibility of expert testimony on memory repression?

Respondent sought to introduce expert evidence of repressed and recovered memories at trial. After a *Frye-Mack* hearing, the district court excluded the evidence. (Add. 6–35.) The court of appeals reversed and remanded, holding the admissibility of the testimony should have been evaluated under the helpfulness requirement of Minn. R. Evid. 702. (Add. 60–74.)

Most apposite authorities: Minn. R. Evid. 702; *State v. Roman Nose*, 649 N.W.2d 815 (Minn. 2002); *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

II. Did the district court correctly exclude expert evidence on repressed and recovered memories when respondent failed to demonstrate that the evidence had foundational reliability and was generally accepted in the relevant scientific community?

The district court ruled that respondent had not shown that the evidence was generally accepted in the relevant scientific community or reliable. (Add. 6–35.) The court of appeals reversed and remanded without addressing those rulings. (Add. 60–74.)

Most apposite authorities: *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011); *State v. Roman Nose*, 649 N.W.2d 815 (Minn. 2002); *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *Sanders v. State* 400 N.W.2d 175 (Minn. Ct. App. 1987), *review denied* (Minn. Apr. 17, 1987).

III. Did the district court properly grant summary judgment against respondent, because he could not demonstrate the existence of a legal disability that would toll the running of the statute of limitations?

The district court concluded that the claims were untimely under Minn. Stat. § 541.073, subd. 2(a), and granted summary judgment in favor of appellants. (Add. 39–59.) The court of appeals reversed and remanded. (Add. 60–74.)

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

IV. If the facts show that respondent knew, or in the exercise of reasonable discretion should have known, of the alleged fraud in the 1980s or early 1990s, are the fraud claims untimely if this suit was not commenced until 2006?

The district court concluded that the fraud claims were untimely under Minn. Stat. § 541.05, subd. 1(6), and granted summary judgment in favor of appellants. (Add. 39–59.) The court of appeals reversed and remanded, stating that respondent’s testimony “that he did not become aware that *he* had been abused” until 2002, created a genuine issue of material fact as to when he discovered the fraud. (Add. 60–74.)

Most apposite authorities: Minn. Stat. § 541.05, subd. 1(6); *Bustad v. Bustad*, 116 N.W.2d 552 (Minn. 1962); *First Nat’l Bank of Shakopee v. Strait*, 73 N.W.2d 645 (Minn. 1898); *Blegen v. Monarch Life Ins. Co.*, 365 N.W.2d 356 (Minn. App. 1985); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996).

STATEMENT OF THE CASE

John Doe 76C alleges he was sexually abused by a parish priest in 1980 or 1981. (Add. 40.)¹ In 2006, two and a half decades after the alleged abuse, Doe sued The Archdiocese of St. Paul and Minneapolis and Diocese of Winona, asserting various negligence, vicarious liability, and fraud claims. (Add. 43.)

To toll the running of the statute of limitations on his claims, Doe asserted he “repressed” memories of the abuse at some unspecified date and did not “recover” those memories until the summer of 2002. (Add. 7.) To support that claim, Doe sought to introduce expert testimony on memory and memory repression. (Add. 7.)

The dioceses moved to exclude that evidence, and the district court held a *Frye-Mack* hearing. (Add. 1–5; T. 1–560.)² Doe argued the hearing was not necessary, but did not contest application of the *Frye-Mack* standard. After three days of testimony from leading memory scientists and researchers, the court excluded Doe’s evidence, because Doe had not shown that the theory of repressed and recovered memory was generally accepted in the relevant scientific community or reliable and trustworthy. (Add. 6–35.)

The district court subsequently denied Doe’s request for reconsideration (Add. 36–38) and granted summary judgment to the dioceses, concluding that all of Doe’s claims were untimely. (Add. 39–59.)

On appeal, the court of appeals determined that the district court erred by considering the proffered evidence under *Frye-Mack*, explaining that the evidence should

¹ “Add. ___” refers to the Addendum to this brief.

² “T. ___” refers to the hearing transcript from June 1, June 2, and June 4, 2009.

be evaluated under Minn. R. Evid. 702's helpfulness standard. The court then reversed the district court's summary judgment rulings and remanded the case to the district court for consideration of the admissibility solely under Rule 702. (Add. 60–74.) This Court granted the dioceses' petition for review.

STATEMENT OF FACTS

I. Doe and his sexual-abuse claims

Doe was born in 1967 and is in his forties. (Add. 40.) He is a licensed psychologist and received his Master's degree in counseling from the University of Wisconsin—Stout. (AA 2, at 7:1–12.)³

From the late 1960s to 2001, Doe attended Risen Savior Catholic Church in Apple Valley, Minnesota. (Add. 40; AA 56.) Fr. Thomas Adamson was an Associate Pastor at Risen Savior from 1981 to 1984. (Add. 40.) The record suggested that the dioceses knew before the 1980s that Fr. Adamson had a history of abusing children. (Add. 41–43.) Fr. Adamson's past, and the dioceses' knowledge thereof, was made public in the mid- to late-1980s.⁴ (Add. 40.)

Doe alleges Adamson touched him inappropriately on four occasions in 1980 or 1981. (Add. 40.) No incident lasted more than a few seconds, and three of the incidents took place while Doe was fully clothed. (Add. 40.) Doe claimed that, at some unidentified time, he repressed his memories of this abuse and did not begin recovering them until the summer of 2002. (AA 4, at 30:8–14, 32:3–7.) Doe said he continued recovering abuse memories in 2003 and beyond. (AA 10, at 57:19–22; AA 11–12, at 72:19–74:1; AA 13, at 79:19–21.) Doe does not believe he has remembered all of the abuse. (AA 6, at 42:17–43:6; AA 9, at 52:2–5.)

³ “AA ___” refers to Appellants' Appendix. Additionally, relevant portions of deposition testimony are reproduced in Appellants' Appendix.

⁴ The extent of the dioceses' purported knowledge of Adamson's misconduct is not relevant to this appeal. Rather, the ultimate issues in this case involve Doe's knowledge of the alleged abuse and purported fraud and whether Doe's claims are timely.

Doe provided no evidence of when he repressed the memories. But Doe admitted that he understood the abuse was wrong when it occurred. Doe's expert, Father Thomas Doyle, asked "how he reacted when the first events happened."⁵ Doe told Fr. Doyle:

- He felt "emotionally paralyzed" at the time the incidents occurred.⁶
- He "considered [the sexual abuse] to be abusive and intrusive."⁷
- "[W]hen the events occurred . . . he felt shocked[.]"⁸
- "[W]hen the incidents occurred," he "felt very isolated and confused."⁹
- "[W]hen the incidents occurred," he was "deathly afraid to tell anyone because of the relationship of his family, his parents, to the Catholic Church and to Father Adamson in particular."¹⁰
- "At the time the abuse was going on his reactions were . . . isolation, paralysis, fear, confusion."¹¹
- "At the time that the abuse was going on," he felt "isolation."¹²
- He felt "[g]uilt at the time" of the abuse.¹³
- "[A]t or about the time the abuse was going on," he felt "jolted."¹⁴

II. Other allegations against Adamson and Doe's knowledge of them.

In the mid-1980s, other victims alleged Adamson had touched them inappropriately when they were minors. (Add. 40.) *E.g., Mrozka v. Archdiocese of*

⁵(Add. 41; *see also* AA 22, at 37:20–22; AA 23, at 41:11–14.)

⁶(AA 22, at 37:20–38:4; AA 23, at 41:15–22.)

⁷(AA 23, at 40:14–15.)

⁸(AA 23–24, at 41:23–42:3.)

⁹(AA 24, at 42:4–14.)

¹⁰(AA 24, at 42:4–18.)

¹¹(AA 25, at 48:25–49:3.)

¹²(AA 26, at 50:11–16.)

¹³(AA 26, at 50:22.)

¹⁴(AA 26, at 51:7–19.)

St. Paul and Minneapolis, 482 N.W.2d 806 (Minn. Ct. App. 1992), *review denied* (Minn. May 15, 1992). Those allegations were made public and were the subject of extensive media coverage in the 1980s and early 1990s. (Add. 40.)

Shortly after he left Risen Savior, the allegations against Adamson became common knowledge. (Add. 40–41.) Doe’s parents learned of the allegations within two months of Adamson’s departure. (AA 32, at 34:15–23.) They read about the allegations in the newspaper and discussed the claims with Risen Savior’s pastor at least twice. (AA 28, at 44:18–20; AA 32, at 34:22–23; AA 29, at 45:19–24.)

Risen Savior invited a psychologist to discuss the abuse allegations against Adamson with parishioners. (AA 29, at 47:16–19.) Risen Savior also made an announcement about the allegations from the pulpit. (AA 32, at 34:15–21.) The Archdiocese held a public meeting at Risen Savior, attended by Doe’s mother, to inform parishioners about the allegations against Adamson. It admitted that the sexual misconduct allegations were the reason for Adamson’s removal from the parish. (Add. 41; AA 32, at 34:24–36:9.)

Based on suggestions from the psychologist who spoke at Risen Savior, Doe’s mother questioned him about Adamson and sexual abuse in 1986. Doe, who was then 18 or 19, denied being sexually abused by Adamson. (Add. 41; AA 29–30, at 48:20–50:22; AA 19, at 251:15–22.) After that, Doe, his family, and his wife continued to occasionally discuss Adamson and his sexual misconduct. (AA 19, at 251:24–252:1; AA 34, at 31:11–32:19; AA 35, at 57:1–21.)

Doe's awareness of these allegations must also be evaluated against the media

spotlight, which focused on the dioceses' conduct and knowledge. See Figure 1.

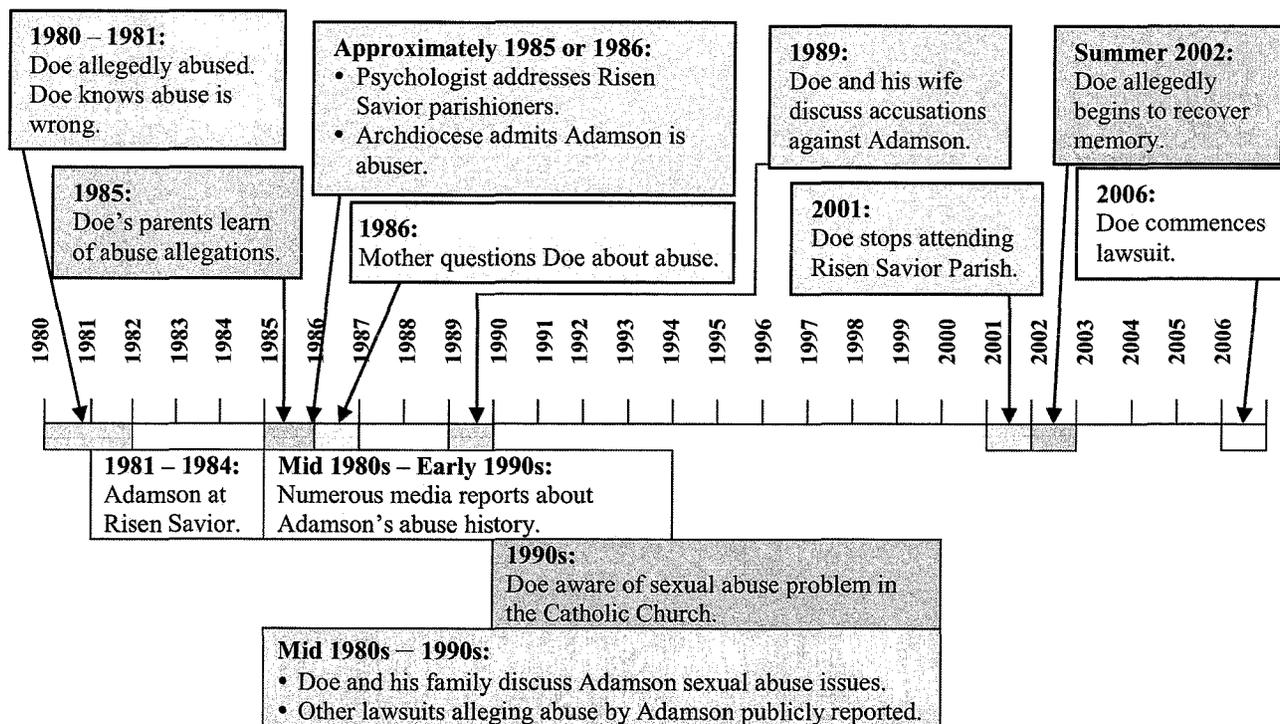


Figure 1

In the 1980s and early 1990s, the claims against Adamson were the subject of intense media coverage.¹⁵ Between 1987 and 1991, major local papers ran more than 130 stories on the lawsuits. (Add. 40.) Those articles detailed the dioceses' knowledge of Adamson's past and said the dioceses admitted responsibility for the abuse.¹⁶ Doe testified he was in college but continued to attend Mass at Risen Savior during that time. Doe was aware of the Catholic Church's problem with sexual abuse claims by the

¹⁵ See Exh. G, Aff. of Anna Restovich (May 12, 2010); Exh. G, Aff. of Thomas Wieser (May 12, 2010); Exhs. U, V, W, and X, Supp. Aff. of Thomas Wieser (July 16, 2010).

¹⁶ See *Priest's past, church's knowledge unveiled in documents*, STAR TRIBUNE (February 18, 1987); *Two Catholic dioceses admit responsibility for sexual abuse by priest*, STAR TRIBUNE (November 3, 1990) (Exhs. U and W, Supp. Aff. of Thomas Wieser (July 16, 2010)).

1990s.¹⁷ (AA 17, at 252:17–20.) He claimed, however, to not recall his alleged abuse until 2002, asserting that he repressed and then recovered his memories.

III. Qualifications and testimony¹⁸ of experts from the *Frye-Mack* hearing.

In June 2009, the district court held a three-day *Frye-Mack* hearing to assess the admissibility of Doe’s expert evidence on repressed and recovered memories. (Add. 7.) The district court heard testimony from five witnesses. Dr. Elizabeth F. Loftus, Ph.D., Dr. Harrison G. Pope, Jr., M.D., and Dr. William M. Grove, Ph.D., testified as expert witnesses for the dioceses, explaining that the theory of repressed and recovered memory has not been scientifically proven to be anything more than “psychiatric folklore.” (Add. 13; T. 281, 362, 438, 505, 546.) Doe submitted 300+ articles on repressed and recovered memories and called Dr. James A. Chu, M.D. and Professor Constance Dalenberg, Ph.D. (Add. 7, 14.)

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

Dr. Elizabeth F. Loftus, Ph.D., is one of the 100 Most Eminent Psychologists of the 20th Century; Distinguished Professor at the University of California, Irvine; prolific

¹⁷ The dioceses take seriously the danger of child abuse and have undertaken numerous efforts to respond to that threat. In the 1980s, the dioceses adopted sexual abuse policies. In the 1990s, the dioceses established committees of psychotherapists and other experts to review allegations of sexual misconduct by members of the clergy and make recommendations about how to address those claims. In the past decade, the dioceses have completed countless background checks and provided training to numerous individuals, all in an effort to respond to and prevent sexual abuse. (*E.g.*, Aff. of Andrew J. Eisenzimmer (Apr. 6, 2009); Aff. of Pamela J. Thompson (Apr. 6, 2009).)

¹⁸ Although the dioceses have attempted to summarize the testimony below, no summary could adequately account for the complex, but enlightening, testimony adduced at the hearing. The dioceses refer the Court to that testimony.

author; recipient of over \$1 million in grants; member and past president of the Association for Psychological Science; member of the editorial board for eight journals; inductee to the National Academy of Sciences; and recipient of the Grawemeyer Award. (Add. 22–24; Exh. 1010 to June 4, 2009 hearing; T. 472–74, 479–81, 484.)

Dr. Loftus told the court that the theory of repressed and recovered memory is “massively controversial,” has been “called the major mental health scandal of the 20th century,” and is the subject of “a great debate” in the fields of psychology and psychiatry. (Add. 22; T. 483, 501–02.) She explained:

This is not just a few people disagreeing . . . and the vast majority agreeing. We have this enormous debate . . . And I don’t see how anyone can with a straight face say that there is general acceptance here.

(Add. 22; T. 503.)

Dr. Loftus also testified about research on false memories, explaining that it is possible to implant false memories of childhood events and that, once implanted, those inaccurate memories are “held with confidence, expressed with detail, and even experienced with emotion.” (Add. 23; T. 488–89, 92.) As a result, it is “virtually impossible without independent corroboration to tell whether you are dealing with a real memory or one that is a product of some other process.” (T. 492.) Dr. Loftus also evaluated the various articles and studies submitted by Doe in support of his theory of repressed and recovered memory, explaining that those studies are too flawed to be of use: They “don’t support it [repressed memory theory] at all,” because the studies “don’t

look anything like what . . . you would want to see in a solid, credible scientific study.”

(Add. 23–24; T. 495–501, 515, 553.)

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

Dr. Harrison G. Pope Jr., M.D., is a Psychiatrist at McLean Hospital, Harvard Medical School’s psychiatric hospital, and a full Professor of Psychiatry at Harvard University Medical School. (Add. 18; T. 256–57.) He has treated more than 1,000 patients—many of whom experienced trauma and claimed to repressed it. (Add. 18; T. 396, 415.) He has authored 280 peer-reviewed papers in scientific journals, more than 150 reviews and book chapters, and seven books.¹⁹ (Add. 19.) He is listed as one of the 250 most widely cited psychiatrists and 250 most widely cited neuroscientists in the world and has received \$5–10 million in grants from the National Institute of Health and the National Institute of Mental Health. (Add. 19; T. 258, 260, 379; Exh. 1001 to June 2, 2009 Hearing.) Dr. Pope’s lifetime citation index is 14,128. (AA 40, at 326:19–21.)²⁰

Dr. Pope testified in detail about the repressed-and-recovered-memory hypothesis, noting that, if valid, it must be distinct from other psychological processes, like ordinary

¹⁹ E.g., H.G. Pope, Jr., et al., *The Scientific Status of Research on Repressed Memories*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, 408–47 (David Faigman et al., eds. 2005) (attached as Exh. C to Aff. of Thomas B. Wieser (Apr. 24, 2009)); H.G. Pope, Jr., et al., *Questionable Validity of “Dissociative Amnesia” in Trauma Victims: Evidence from Prospective Studies*, 172 BR. J. PSYCHIATRY 210–15 (1998); H.G. Pope, Jr., et al., *Custer’s Last Stand: Brown, Schefflin, and Whitfield’s Latest Attempt to Salvage “Dissociative Amnesia,”* 28 J. PSYCHIATRY & L. 149–213 (2000); H.G. Pope, Jr., et al., *Is Dissociative Amnesia a Cultural Artifact? Findings from a Survey of Historical Literature*, 37 PSYCHOL. MED 225–33 (2007).

²⁰ Citation counts are widely used in the field of psychology and psychiatry to gauge a scientist’s impact. Studies that are more methodologically sound have higher citation counts than methodologically flawed studies. (T. 260.)

forgetting. (Add. 19; T. 272–74.) He also testified that the studies cited by Doe as proof of repressed and recovered memories are methodologically flawed. (Add. 20; T. 345–60.)

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

Dr. James A. Chu, M.D., is a psychiatrist at McLean Hospital and professor at Harvard. Dr. Chu is a clinician and has authored a book on treating post-traumatic and dissociative disorders. (Add. 17; Exh. 729 to June 1, 2009 Hearing.) Dr. Chu, who testified for Doe, admitted that there is “great debate” about the concept of repression, that there is currently no method for determining whether an ostensibly recovered memory is accurate, and that many of the studies cited by Doe were unreliable. (Add. 27; T. 227–28, 224, 231.)

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

Dr. William M. Grove, Ph.D., is an Associate Professor at the University of Minnesota, a licensed psychologist, and an expert in scientific methodology. He is among the 100 most frequently cited psychologists and psychiatrists; the author of more than 100 publications; the recipient of \$1 million in grants; and a member of the Minnesota Board of Psychology and various editorial boards. (Add. 20–21; T. 419–28; Exh. 1009 to June 2, 2009 Hearing.)

Dr. Grove testified that the accuracy of recovered memories has not been scientifically established, that the studies that Doe relied on “are not of sufficiently high

methodological quality” for several reasons, and that observations of clinical therapists are unreliable. (Add. 21–22; T. 424, 433–35.)

E. Constance Dalenberg, Ph.D.

Constance Dalenberg, Ph.D., is a psychology professor at Alliant International University. Prof. Dalenberg never received any grant money and never served on the editorial boards of or as an editor or reviewer for any journals published by the American Psychiatric Association, American Psychological Association, or the Association for Psychological Science. (Add. 14; T. 7–8, 123, 128–29; 131; Exh. 730 to June 1, 2009 hearing.) Prof. Dalenberg’s lifetime citation index is 125. (AA 39, at 322:13.)

Prof. Dalenberg diagnosed Doe with dissociative amnesia in partial remission, claiming that he had lost access to his abuse memories over the course of time. Although she asserted that Doe lost access to the memories, Prof. Dalenberg failed to distinguish ordinary forgetting from memory repression. (AA 42, at 359:19–361:25.) She explained that the difference is simply a matter of how the concept is “labeled” (T. 77) and, she claims that “do not remember” is the same as “cannot remember” (AA 37, at 164:2–165:11). When explaining “dissociative amnesia” (T. 22–25), Prof. Dalenberg said that dissociative amnesia occurs when a memory of the event is “unavailable for a period of time” (T. 24) and “unavailable to a conscious search so that one couldn’t access that information” (T. 25). But she again refused to distinguish it from ordinary forgetting saying that the memory would be remembered if a “salient trigger came along.” (T. 25.)

IV. The district court excluded Doe's expert evidence and granted summary judgment to the dioceses.

After evaluating this evidence, the district court excluded Doe's evidence on repressed and recovered memories. (Add. 6–35.) The court said that Doe did not show that the evidence possessed foundational reliability. In particular, the court detailed the types of studies, explaining the testimony showing they were unreliable and scientifically flawed. (Add. 31–34.) The court also determined that the evidence from the hearing showed there was a “deep split” on the theory of repression, particularly between research-based members of the psychiatric and psychological communities and clinical therapists. (Add. 25.) Pointing out that Doe's expert had admitted a “great debate about the concept” and that “something cannot be both controversial and generally accepted,” the court concluded that Doe had not met his burden of showing that the evidence was generally accepted in the relevant scientific community. (Add. 27.)

Later the court granted summary judgment to the dioceses, finding that Doe's sexual abuse claims were untimely under Minn. Stat. § 541.073, subd. 2(a), and that Doe could not produce any admissible evidence of a legal disability that would toll the statute of limitations. (Add. 58.) The court similarly ruled that the fraud claims were untimely, explaining that the undisputed facts showed that Doe “learned, and should have learned in the exercise of reasonable diligence, of the facts constituting the fraud in the 1980s.” (Add. 59.)

V. The Court of Appeals reversed and remanded.

On appeal, the Minnesota Court of Appeals addressed an issue that neither party raised—namely which evidentiary standard applied to Doe’s proffered expert testimony. Neither party had challenged the district court’s use of the *Frye-Mack* standard, either during or after the evidentiary hearing, in their summary judgment motions, or on appeal. The court of appeals ruled sua sponte that the district court erred by holding a *Frye-Mack* hearing. It made no reference to the district court’s analysis of the evidence showing that Doe’s proffered expert testimony was generally accepted or foundationally reliable. Instead, the court stated that the testimony should have been evaluated solely under Minn. R. Evid. 702’s “helpfulness” standard. (Add. 68.)

STANDARD OF REVIEW

Generally, evidentiary rulings are relegated to the broad discretion of the district court. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760–61 (Minn. 1998). When *Frye-Mack* applies, the standard of review is two-pronged: The district court’s determination on foundational reliability is reviewed for an abuse of discretion, as are determinations of expert witness qualifications and helpfulness. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000). The general-acceptance determination is reviewed de novo. *Id.* The issue of which standard governs questions of admissibility is a legal question reviewed de novo. *See id.* at 814–15.

This Court reviews decisions to grant or deny summary judgment de novo, asking whether the law was properly applied and whether there were genuine issues of material fact that precluded summary judgment. *Allen v. Burnet Realty, LLC*, 801 N.W.2d 153, 156 (Minn. 2011). “The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo.” *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008).

ARGUMENT

I. Overview

John Doe claims that Adamson abused him on several occasions in the 1980s. He also claims that while he was aware of the wrongful nature of that conduct when it occurred, he repressed memories of the alleged abuse and that the statute of limitations on his sexual abuse claims was therefore tolled until 2002 when he started recovering the memories.

The statute of limitations on an action for damages caused by sexual abuse is six years. Minn. Stat. § 541.073, subd. 2(a). The statute of limitations runs from the date that the claimant knows or has reason to know that he or she has been injured by sexual abuse. *Id.* Section 541.073, subd. 2(a), uses an objective, reasonable person standard, and courts must not make a “wholly subjective inquiry into an individual’s unique circumstances” to determine when the statute of limitations begins to run. *Blackowiak v. Kemp*, 546 N.W.2d 1, 3, (Minn. 1996).

Generally, the statute of limitations begins to run once the abuse occurs. “As a matter of law, one is injured if one is sexually abused.” *Id.* In the case of child abuse, the statute of limitations does not begin to run until the victim reaches the age of majority. *D.M.S. v. Barber*, 645 N.W.2d 383, 389 (Minn. 2002). To toll the running of the statute of limitations on a claim of abuse into adulthood, a plaintiff must produce evidence of a legal or mental disability that would make a reasonable person *incapable* of recognizing that he had been sexually abused. *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998); *see also* Minn. Stat. § 541.15(a)(2) (suspending the running of the statute of limitations

for insanity). Clearly, ordinary forgetting or not thinking about something for a long time does not toll the statute of limitations under this standard. *Bugge*, 573 N.W.2d at 682 (“Merely not thinking about the abuse is not enough to delay the running of the statute of limitations.”); *Doe v. Maskell*, 679 A.2d 1087, 1092 (Md. 1996) (holding that claims based on sexual abuse were not tolled by repression because there was no evidence that repression was scientifically distinguishable from the ordinary forgetting).

Although repressed memory has been mentioned in dicta, this Court has never held that the mere assertion of a repressed-memory claim tolls the statute of limitations. Nor has this Court previously addressed the admissibility of expert evidence on the topic.

Claims of memory repression go by a variety of names, including: “repressed memory,” “recovered memory,” “traumatic amnesia,” or “dissociative amnesia.” Regardless of how it is labeled, however, the theory remains the same and posits that a person can experience a terrible trauma and then repress the memory of that event thus making him literally unable to remember the event. As a result, if five years later that person is asked if he remembers the trauma, he would answer, “No, I don’t remember that.” Then, according to the theory of repression, years or decades later, the person may suddenly recover the allegedly repressed memories in essentially pristine or unchanged form. (Add. 13; T. 260–61, 274, 546.) Thus, repressed and recovered memory is claimed to be distinct from other memory processes, including ordinary forgetting, not thinking about something, incomplete encoding of a traumatic event, organic amnesia (when an injury or consumption of a substance, like alcohol, causes a loss of memory or blackout), psychogenic amnesia (a rare phenomenon where someone forgets who they are),

childhood amnesia (when a child is too young to remember an event), and nondisclosure.²¹ (Add. 19; T. 272–74.)

At first glance, these distinctions seem academic, but they have profound consequences for Minnesota’s legal system. Limitations periods, including the statute of limitations for claims based on childhood sexual abuse, are not intended to be open-ended. *Bugge*, 573 N.W.2d at 678, 680. Doe bears the burden of proving that the statute of limitations should be tolled. *Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. Ct. App. 2006). As such, he must establish that his claimed repression is something other than ordinary forgetting or not thinking about the event. Without that requirement, the determination of the onset of a limitations period becomes an open question, which is completely and solely within the subjective control of the plaintiff.

II. Regardless of whether Minn. R. Evid. 702 or the *Frye-Mack* standard applies, Doe’s expert testimony on repressed and recovered memories is inadmissible.

In Minnesota, the proponent of expert testimony must demonstrate that the witness is qualified as an expert, that the expert’s opinion exhibits foundational reliability, that the expert’s testimony is helpful to the jury, and that the testimony satisfies the *Frye-Mack* standard if it involves a novel scientific theory. *State v. Obeta*, 796 N.W.2d 282, 294 (Minn. 2011). *Frye-Mack* employs a two-prong standard that requires a proponent to establish (1) that the scientific theory is generally accepted in the relevant scientific community and (2) that the particular scientific evidence has foundational reliability.

²¹ For additional discussion of these processes, see Richard J. McNally, *Dispelling Confusion About Traumatic Dissociative Amnesia*, 82 Mayo Clinic Proceedings 1083, 1083–87 (2007) (included at AA 133).

Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000). Even if these standards are satisfied, the expert testimony may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. *Obeta*, 796 N.W.2d at 294 (citing Minn. R. Evid. 403).

The district court thoroughly analyzed Doe's evidence and concluded that the theory was not generally accepted and that Doe's expert testimony lacked foundational reliability. Inexplicably, the court of appeals' decision makes no reference to the distinguished background and qualifications of the expert witnesses who testified at the evidentiary hearing. More striking is the complete absence of any reference to the nature of the expert testimony that formed the basis of the district court's conclusions. One reading only the court of appeals' decision gets no sense of the extensive testimony considered by the district court concerning studies of memory, how memory works, and why memory testimony, standing alone, is unreliable. It is as if the *Frye-Mack* hearing did not occur. That stands in sharp contrast with the cases relied on by the court of appeals, like *State v. MacLennan*, 702 N.W.2d 219, 226–27 (Minn. 2005), and *Obeta*, 796 N.W.2d at 284–85, where the experts' backgrounds and proffered testimony were discussed at length.

The court of appeals' decision further fails to explain how evidence that is determined to be unreliable can be helpful to a jury. See Minn. R. Evid. 702 (requiring that testimony "assist" the trier of fact to understand evidence); *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (recognizing that expert testimony that does not add

precision or depth to the jury's understanding is not helpful). Nor did it account for the evidence establishing that memory-repression theory is hotly contested.

- A. The district court did not abuse its discretion by excluding Doe's evidence on repressed and recovered memories because it lacked foundational reliability.

Doe must show that his expert evidence on repressed and recovered memory has foundational reliability before it can be admitted. *Obeta*, 796 N.W.2d at 294; *Goeb*, 615 N.W.2d at 814. After combing the record and sifting through three days of testimony and voluminous submissions, the district court concluded Doe failed to meet that burden. That determination, on appeal, is reviewed for an abuse of discretion and will not be reversed on appeal absent clear error. *Goeb*, 615 N.W.2d at 815. The court of appeals made no reference to that standard of review and did not explain how the district court's foundational-reliability conclusion was an abuse of discretion.

1. The record shows that memory is malleable.

Doe's claims of repressed and recovered memories must be evaluated against the scientific research on memory presented at the *Frye-Mack* hearing. Science shows that human memory is a reconstructive process in which "what people remember is dynamic and fluid; constantly erased, distorted, biased, and otherwise altered by events occurring before and after the memory was originally encoded."²² In other words, contrary to popular belief, when we remember an event, we do not replay or rewind a videotape. Rather, our brains are hardwired to reconstruct the event from encoded elements, filling

²² August Piper et al., *What's Wrong With Believing in Repression? A Review for Legal Professionals*, 14 PSYCHOL. PUB. POL'Y AND L. 223, 237 (2008). (AA 138.)

in the gaps where needed or adjusting the picture to account for new or different information.²³

a. **Memories can be contaminated and distorted.**

The evidence from the *Frye-Mack* hearing showed that memory is malleable and can be easily contaminated and distorted, even though memories are often held with conviction. Doe's expert, Dr. Chu, acknowledged memories are unreliable, explaining they are easily influenced by outside forces and a person can remember an event, even if it never happened. (T. 231.)

Adding to that testimony, Dr. Loftus explained that science has proven that memories can be distorted. Dr. Loftus and other researchers successfully implanted false memories in research subjects by using suggestive interview techniques. (T. 488–92.) Researchers began by telling the subjects that their mother had said something traumatic happened to them, telling the subjects about someone else's experience, exposing the subjects to media coverage about an event, or using suggestive questioning. (T. 490.) These techniques created the opportunity for "someone to be exposed to suggestion or even misinformation," which "can contaminate, supplement, distort, transform a prior memory." (*Id.*) Using those opportunities, researchers convinced people they (1) "had been lost in a shopping mall for an extended time and frightened, crying and ultimately rescued by an elderly person and reunited with the family"; (2) were "the victim of a vicious animal attack"; (3) had been involved in "a serious indoor or outdoor accident";

²³ See generally RICHARD J. MCNALLY, REMEMBERING TRAUMA (2003).

(4) had been “at a family wedding where [they] knocked over a punch bowl and spilled punch on the parents of the bride”; and (5) “witness[ed] a demonic possession.” (T. 489.) As Dr. Loftus told the court, these findings showed that once false memories are implanted, “they can be held with confidence, expressed with detail, and even experienced with emotion,” and it is “virtually impossible without independent corroboration to tell whether you are dealing with a real memory or one that is a product of some other process.” (T. 492.) The district court pointed to this testimony as evidence of memory’s unreliability. (Add. 23.) The court of appeals did not address this or show why the district court abused its discretion by relying on it.

b. Memories can be forgotten. But there is no reliable evidence showing they can be repressed.

Research confirms that memories fade and are forgotten over time.²⁴ Memories of ordinary or banal events are more likely to be forgotten than memories of traumatic events, which are often vivid and long-lasting.

Doe does not allege he merely forgot the abuse. Instead, he says, at some unknown time, he repressed memories of those events. But Dr. Loftus testified that there is simply “no credible scientific support” for such a claim. (T. 509.) Dr. Pope testified he reviewed more than 77 studies on trauma memories and testified that that those studies show people do not repress traumatic events in any way distinct from other processes like ordinary forgetting. Those studies involved more than 11,000 individuals, who had experienced a wide variety of traumatic events, including natural disasters and rape. But

²⁴ MCNALLY, *supra* note 23, at 39.

no study contained a single, well-documented case of memory impairment that could not be explained by organic amnesia, incomplete encoding, ordinary forgetting, or other psychological phenomenon.²⁵ (Add. 20; T. 341–45.) The court of appeals did not address this evidence showing that memory is not reliable evidence, and again did not explain how the district court abused its discretion in light of this evidence.

To establish that his claim is something other than mere forgetting, Doe must show that he lost all access to his memories of the abuse. But Doe’s expert, Prof. Dalenberg, admitted it is not possible to determine if Doe lost total access to his memories. (T. 136–37.) Prof. Dalenberg also says there is no difference between ordinary forgetting and repression and the issue is simply one of labeling. (T. 77.) When Prof. Dalenberg was asked to distinguish between “not remembering” and “having an inability to remember,” she said “do not remember” means “cannot remember.” (AA 37, at 164:2–165:11.) When Prof. Dalenberg was asked to distinguish between repression and ordinary forgetting, she said that she “didn’t see any difference between the two.” (AA 42, at 359:19–361:25.) In fact, when asked about “dissociative amnesia,” the condition that she diagnosed Doe with, Prof. Dalenberg said that dissociative amnesia occurs when a memory of the event is “unavailable for a period of time” and “unavailable to a conscious search so that one couldn’t access that information,” but that it would be remembered if a “salient trigger came along.” (T. 23–25.) The court of appeals did not explain why the

²⁵See also Pope, *The Scientific Status*, *supra* note 19, at 409–12 (providing table of studies). Dr. Richard McNally, Department of Psychology, at Harvard University, conducted a similar review and reached the same conclusions. See MCNALLY, *supra* note 23, at 190–227.

jury should be allowed to consider Doe's memory-repression claim when Prof. Dalenberg has admitted that she cannot determine if Doe lost all access to the memories and that repression and forgetting are the same. Prof. Dalenberg's failure to distinguish forgetfulness and repression may have little import in a clinical setting, but the failure to recognize such a distinction in the legal context is fatal to Doe's claims. *See Steinke v. Kurzak*, -- N.W.2d --, 2011 WL2696393, at *7 (Iowa Ct. App. 2011) (stating that experts claim that abuse memory was "effectively excluded from plaintiff's active memory and appreciation" was too equivocal to justify tolling statute of limitations).

Doe must show not that he forgot the abuse, but that he repressed it. According to Prof. Dalenberg, he cannot meet that burden. If Prof. Dalenberg's version of the theory of repressed and recovered memories is so deficient and so unreliable that she cannot say that Doe lost all access to his memories of the alleged abuse and cannot distinguish so-called repressed memories from ordinary forgetfulness, then there is no logical basis for such evidence to be considered by the jury as the reason for tolling the running of the statute of limitations.

- c. **There is no evidence that recovered memories accurately reveal long-ago events.**

Dr. Loftus's testimony on her research on implantation of false memories shows that memory is malleable and easily distorted through suggestion. Her findings are particularly relevant in this case where the allegations against Adamson were highly publicized, where Doe's mother questioned Doe to determine if he had been abused by Adamson, and where Doe and his family had frequent discussions about the abuse.

The evidence from the *Frye-Mack* hearing demonstrated that it is impossible to determine if ostensibly recovered memories are accurate without independent corroboration. Doe's experts admitted as much, explaining that the accuracy of recovered memories cannot be assessed without independent corroboration. (T. 110, 126, 223–24). But here, there is no evidence independently corroborating Doe's recovered memories:

- Doe told no one about the alleged abuse while it was occurring and there were no witnesses.
- Adamson never admitted to engaging in any improper behavior with Doe.
- No documentation or written report of the alleged abuse exists.

There is simply no proof, apart from the memories “recovered” 20+ years after the fact, that Doe was ever abused.

Because of how memory works, the other allegations against Adamson do not corroborate Doe's recovered memories. The allegations in those cases were highly publicized due to a series of lawsuits which received extensive media coverage and were made public before Doe recovered his memories.

If anything, the existence of prior similar allegations makes it more likely that Doe's memories are constructs based on Doe's exposure to those events. According to Dr. Loftus, “there is definitely a lot of suggestive information present in this case” and Doe's recovered memories “seem to have followed a lot of suggestive information.” She explained:

[T]here was years and years of media coverage, there was questioning of [Doe] by his mother, there was therapeutic intervention where ideas were being apparently communicated to [Doe] about things that are of somewhat

dubious quality, like the notion of body memories, for example. There was a discussion in the therapy records about a memory emerging in a discussion with [Doe's] lawyer. So there is a question there about what information might have been conveyed by the lawyer about other accusers.

(T. 491.) In light of these factors, Doe has not shown that his recovered memories are anything other than a form of source confusion, where one confuses one's own memories with stories or similar experiences of others.²⁶

d. People often forget that they remembered a past event.

Doe has never identified when the repression occurred. Doe's expert, Prof. Dalenberg, says that Doe lost access to the abuse memories over the course of time. That conclusion, however, does not demonstrate that Doe did not remember the abuse earlier, such as in the 1980s or 1990s. *See Barre v. Hoffman*, 326 S.W.3d 415, 420–21 (Ark. 2009) (refusing to toll statute of limitations based on repressed memory where plaintiff could not establish he repressed memory before reaching age of majority).

Doe's failure to rule out earlier memories undermines his repression claims. As Dr. Pope testified at the *Frye-Mack* hearing, proponents of memory repression have found "no way to validate that these people were literally unable to remember the abuse." (T. 6–4, 346–47.) In fact, research has shown that people frequently forget that they were able to remember things. At the hearing, Dr. Pope recounted a case in which "a woman remembered with considerable anxiety and an outburst of emotion that she had been abused and believed that she had recovered a memory that she had not previously had,

²⁶ See MCNALLY, *supra* note 23, at 42–43 (discussing source "reality monitoring" and "source confusion").

and then her husband said to her, well, you talked to me about that six years ago.” (T. 347–48).²⁷ This example, says Dr. Pope, shows why “relying on somebody’s recollection is a very hazardous method scientifically.” (T. 348). Dr. Pope also explained a study where subjects memorized a list of words on their first visit to the laboratory. Then on their second visit, they were tested on what they could remember. And, on the third visit, they were asked what they had remembered on the second visit. The subjects would forget that they had been able to remember things. This research, said Pope, “graphically demonstrate[d]” that people frequently and reliably “forget that they had been able to remember things.” (T. 348–49.) In light of this research, Doe’s claim that there was a period of time when he could not remember an event does not support the inference that memory repression exists. It is “much too large of a leap methodologically to be able to infer that.” (T. 349.)

- e. In light of the evidence, reports of repressed and recovered memories must be viewed with skepticism.

Trial courts are charged with being a gatekeeper and “ensur[ing] that an expert’s testimony rests on a reliable foundation.” *Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714–15 (8th Cir. 2001). Accordingly, before a court accepts expert testimony, it must first determine that the testimony is based upon sound,

²⁷ Other researchers have described instances where subjects thought they had recovered a “repressed” memory of child sexual abuse, but were then confronted with evidence that they had in fact remembered the abuse at various other times. MCNALLY, *supra* note 23, at 225–26 (cases 3 and 4).

reliable theory, as opposed to rank speculation. *N. Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F.Supp.2d 1140, 1146–47 (D. Minn. 2003).

Here, the record fully supports the district court’s conclusion that reports of complete amnesia for traumatic childhood events must be viewed with a high degree of skepticism. Doe’s claims cannot be separated from the scientific evidence casting serious doubts on the reliability and validity of repressed-and-recovered-memory theory. This leads to the inevitable question of how memory-repression evidence could help a jury if the overwhelming evidence shows it is not reliable.

2. Doe’s studies are flawed and do not provide foundational reliability for the theory of repressed and recovered memory.

Doe’s experts primarily relied on more than 300 articles on repressed and recovered memories to support their claims. Those studies can be broadly classified as either retrospective studies or prospective studies. The district court examined the studies and concluded they were not reliable. (Add. 31–34.) The court of appeals’ decision does not show why that decision was erroneous.

a. Retrospective studies

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

As the district court recognized, these studies are not reliable because, even if a subject answers “yes,” it is not clear what the “yes” response means. A “yes” could mean the person could not remember; the person simply did not think about it because they were, for instance, traveling on vacation; or the person did not think about the abuse for a while but then were reminded of it. (T. 346–47, 496–97, 553; Add. 32.) Moreover, retrospective studies fail to validate claims that subjects were incapable of remembering the abuse earlier. (T. 347.) This failure to obtain independent corroboration is particularly concerning in light of Dr. Pope’s research showing people forget what they remembered and Doe’s experts’ testimony that the reliability of recovered memories can only be assessed via independent corroboration. (T. 110, 126, 223–24.)

Doe’s expert admitted that the retrospective studies are unreliable and flawed. Dr. Chu explained a subject might remember something that never happened; the memories might have been influenced by outside forces; and there is “always ... the danger that people are not recalling accurately.” (T. 231.) *Cf. Goeb*, 615 N.W.2d at 816 (finding no abuse of discretion in excluding testimony as unreliable where the testimony from the proponent’s expert was contradictory).

b. Prospective studies

In prospective studies, researchers identify people who in the past claimed to have been abused and then ask them if they recall the abuse. (T.352–53.) The court of appeals did not address the evidence introduced at the hearing, which showed that Doe’s prospective studies were unreliable. Dr. Pope and Dr. Loftus explained, and the district

court agreed, that many of the subjects in those studies were simply too young to remember the incident, some may have forgotten it, or others might not have wanted to disclose it. (Add. 32–33; T. 498–500, 353–57.) Dr. Chu similarly testified that the study by Linda Williams, one of the most prominent prospective studies cited by Doe, was highly flawed because researchers failed to specifically ask the subjects about the traumatic event. (AA 47–48, at 63:23–66:4.) Doe’s expert acknowledged that shortcoming, explaining “it really was impossible to know for sure whether or not they actually remembered those events” (AA 47, at 64:21–24) and “it’s very hard to say, okay, this was due to repression, [as opposed to] some kind of normal forgetting” (AA 48, at 65:2–11).

Building on this testimony, the dioceses’ experts explained that attempts to replicate prospective studies have produced discordant results. (T. 498–500.) One follow-up study determined that only 8% of the subjects failed to mention the target incident. (T. 499.) That study concluded, “These findings do not support the existence of special memory mechanisms unique to traumatic events;” rather, they imply “that normal cognitive operations underlie long-term memory for childhood sexual abuse.” (T. 288–89.) The court of appeals did not identify how the district court abused its discretion by concluding that Doe’s prospective studies lacked foundational reliability.

3. Minnesota courts have recognized, in other contexts, that recovered memories are not reliable.

In *State v. Mack*, this Court considered the reliability of memories produced while under hypnosis and determined that testimony regarding such memories should be

excluded as too inherently flawed to be reliable. 292 N.W.2d 764, 768–69 (Minn. 1980). Just as it does here, the expert testimony in *Mack* showed that memories allegedly recovered under hypnosis were highly susceptible to suggestion, even that which was subtle and unintended; recovered memories were influenced when the subject tried to fill in the gaps; and recovered memories hardened in the mind and were held with firm conviction. *Id.* Furthermore, as this Court recognized in *Mack*, because the subject holds the memory with such firm conviction, the ordinary “indicia of reliability” are completely erased and it is impossible to effectively cross-examine such witnesses in any meaningful way. *Id.* at 769.

Similarly, the Minnesota Court of Appeals has opined that memories “recovered” through other means, such as through the use of a “truth serum,” like sodium amytal, are not admissible, because the results (that is, the recovered memories) are unreliable. *Sanders v. State*, 400 N.W.2d 175, 177–78 (Minn. Ct. App. 1987), *review denied* (Minn. Apr. 17, 1987); *see also Ramona v. Superior Court*, 66 Cal.Rptr.2d 766 (Cal. Ct. App. 1997) (holding that victim’s testimony on abuse memories, recovered during sodium amytal interview were inadmissible where expert testimony cited risk of memory contamination). The court of appeals did not address these cases or explain why Doe’s recovered memory claims should be treated differently.

- B. The district court correctly determined that the theory of repressed and recovered memory was not generally accepted.

Doe must show that his theory of repressed and recovered memory is generally accepted in the relevant scientific community. *Goeb*, 615 N.W.2d at 814. As the

proponent of this evidence, Doe has the burden of producing evidence to satisfy this standard. *Id.* Although Minnesota cases have referred to repressed memory in dicta, this Court has never determined whether the theory is generally accepted in the relevant scientific community. References in dicta do not establish general acceptance. *See State v. Hull*, 788 N.W.2d 91, 103 n.3 (Minn. 2010) (agreeing with J. Meyer’s concurrence that lengthy use and unquestioning acceptance by courts does not in and of itself exempt expert testimony from scrutiny under *Frye-Mack’s* general-acceptance prong). Accordingly, the district court properly examined Doe’s proffered evidence under the *Frye-Mack* lens. *State v. Roman Nose*, 649 N.W.2d 815, 821–23 (Minn. 2002).²⁸

The general-acceptance requirement “ensures that the persons most qualified to assess scientific validity of a technique have the determinative voice,” *Goeb*, 615 N.W.2d 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). A significant dispute in the scientific community precludes a finding of general acceptance. *See State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985) (determining, based on a “review of the scientific literature,” that graphological personality assessment is “not generally accepted in the scientific fields of psychology and psychiatry”); *see also State v. Phillips*, 98 P.3d

²⁸ *See also Hadden v. State*, 690 So.2d 573, 577 (Fla. 1997) (evaluating evidence of child abuse syndrome under *Frye*, where the court had not previously found the evidence admissible); *State v. Ballard*, 855 S.W.2d 557, 561–62 (Tenn. 1993) (considering admissibility of PTSD testimony that involved novel scientific basis which had not yet received judicial approval); *State v. MacDonald*, 718 A.2d 195 (Me. 1998) (excluding evidence of adult children of alcoholics syndrome as it was not widely recognized).

838, 842 (Wash App. 2004) (“If there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no general acceptance.”).

1. Doe’s expert, Dr. Chu, agrees that the theory of repression is controversial and hotly debated.

By definition, a scientific theory cannot be both highly controversial and generally accepted. (Add. 27; T. 269.) Doe’s expert, Dr. Chu, testified numerous times that there is a “great” and “heated” debate and controversy in the scientific community on the very concept of repressed and recovered memories.²⁹ The court of appeals did not explain why the district court should have ignored this testimony from Doe’s own expert.

2. The dioceses’ experts explained that, despite its currency in the popular imagination, the theory of repressed and recovered memory is not generally accepted by the scientific community.

According to the dioceses’ experts, there is a heated and ongoing debate over whether it is even possible to repress and recover memories in a way that is distinct from ordinary forgetting and remembering. (T. 271, 276, 433, 483, 501–02.) That debate, colloquially referred to as the “memory wars,” is “the most passionately contested battle waged about the nature of human memory.” (T. 503.) Dr. Loftus added:

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.

(T. 502–03).

²⁹ (T. 227–30, 228; AA 44, at 21:17–22:11; AA 46, at 45:10–15; AA 49, at 91:23–92:14; AA 51, at 133:9–22; AA 52, at 145:24–148:7; AA 53, at 189:14–190:5.)

In addition, prominent, mainstream scientific journals continue to publish articles questioning the existence of repressed and recovered memory. The court of appeals' decision made no reference to the more than 30 publications identified by Dr. Pope published in the last 15 years, expressing skepticism about repressed and recovered memory.³⁰ (T. 278–81.) Those writings explained:

- “clinical evidence for repressed memory is illusory,”³¹
- “no empirical evidence exists to support either repression or dissociation,”³²
- clinical research on blocking of memories is “fatally flawed,”³³ and
- research has produced “hardly a shred of evidence for psychogenic amnesia covering the traumatic event itself.”³⁴

These scientists caution that “neither science *nor the courts* can responsibly accept dissociative amnesia as a valid entity.”³⁵ This skepticism voiced by leading scientists precludes a finding of general acceptance. *Blackwell v. Wyeth*, 971 A.2d 235, 242 (Md. 2009) (refusing to admit evidence for “as long as the scientific community remains significantly divided”). The court of appeals did not explain why a jury should be

³⁰ A list of these articles is in the record as Exh. 1002 at June 2, 2009 Hearing and Exh. 2 to the Affidavit of Dr. Pope (Jan. 21, 2009), submitted as Exh. A of the Aff. of Thomas B. Wieser (Apr. 24, 2009).

³¹ George A. Bonanon, *The Illusion of Repressed Memory*, as *Commentary*, *The Unified Theory of Repression*, 29 BEHAV. & BRAIN SCI. 499, 515 (2006).

³² Sydney Brandon et al., *Recovered Memories of Childhood Sexual Abuse: Implications for Clinical Practice*, 172 BRIT. J. PSYCHIATRY 296, 302 (1998).

³³ John F. Kihlstrom, *An Unbalanced Balancing Act: Blocked, Recovered, and False Memories in the Laboratory and Clinic*, 11 CLINICAL PSYCHOL: SCI. & PRACTICE 34, 39 (2004).

³⁴ *Id.*

³⁵ See Pope, *Custer's Last Stand*, *supra* note 19, at 203 (emphasis added).

permitted to consider memory-repression evidence if it has been established that the theory has not gained general acceptance.

3. The statements and experiences of numerous professional organizations further demonstrate that the theory of repressed and recovered memory is not generally accepted.

The district court heard evidence showing that various professional organizations have not reached consensus over the validity of repressed-and-recovered-memory theory. Dr. Loftus testified she participated in the American Psychological Association's (APA) Task Force on Recovered Memories of Childhood Abuse, which was comprised of three clinicians and three researchers (including Dr. Loftus). (T. 477.) According to Dr. Loftus, despite studying the issue for months, the Task Force could not reach a consensus on the theory's validity. (T. 477.)

The court of appeals did not address evidence showing that the APA and other major professional organizations, including the American Medical Association, Canadian Psychiatric Association, and Australian Psychological Society, have recognized the existence of the controversy and expressed skepticism about repressed and recovered memories.³⁶ (T. 504.)

4. The inclusion of dissociative amnesia in the DSM-IV-TR does not establish general acceptance.

³⁶ See generally Robert T. Reagan, *Scientific Consensus on Memory and Repression*, 51 RUTGERS L. REV. 275, 290–96, 319 (1999) (reviewing reports issued by seven national scientific societies, concluding there was no general acceptance on the existence of the condition of repressed-and-recovered memories, and calling the evidence supporting the condition “remarkably weak”).

As the district court concluded, the mere inclusion of the diagnosis of “dissociative amnesia” in the DSM-IV-TR does not establish that the theory of repressed and recovered memory is proven or accepted. (Add. 7–28.) The DSM is a “dictionary” of diagnoses and diagnostic codes. (T. 314.) It is “not a scientific paper or a scientific reference or a scientific review article,” and it “does not, by itself, establish the validity of a diagnostic entity.” (T. 314, 431.)

The DSM is not sacrosanct; rather, it is an evolving and imperfect document. *State v. Klein*, 124 P.3d 644, 651 (Wash. 2005). In fact, the United States Supreme Court expressed skepticism about the DSM’s utility in legal settings because a diagnosis in the DSM “may mask vigorous debate within the profession.” *Clark v. Arizona*, 548 U.S. 735, 774, 126 S. Ct. 2709, 2734 (2006). Moreover, the DSM itself cautions against the use of psychiatric diagnoses in forensic settings:

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

Introduction to DSM-IV-TR at xxxii–xxxiii, *quoted in Clark*, 548 U.S. at 775, 126 S. Ct. 2735. (See also T. 305.) Furthermore, Dr. Pope testified about his study showing that dissociative amnesia remained highly controversial despite its inclusion in the DSM. (T. 295–96.) To rely on the DSM to establish general acceptance makes the DSM the de facto adjudicator and is contrary to this Court’s directive in *Roman Nose*.

C. The Court of Appeals' rejection of the *Frye-Mack* standard was inappropriate and unfounded.

The court of appeals' conclusion that the admissibility of memory-repression evidence should have been evaluated solely under Minn. R. Evid. 702's "helpfulness" standard cannot be reconciled with the district court's evaluation of the evidence introduced at the hearing or with other cases decided by this Court.

To support its determination that the evidence should be evaluated under Rule 702's helpfulness standard, the court relied heavily on *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989), which applied Rule 702 to evidence of battered woman syndrome, and *MacLennan*, 702 N.W.2d 219, which evaluated battered child syndrome under Rule 702. The court of appeals failed to acknowledge, however, that those cases did not question the reliability or acceptance of the syndromes. Thus, the court missed a crucial distinction between those cases and this one. As a result, its reliance on *MacLennan* and *Hennum* is misplaced. In both those cases, the experts and courts agreed that the so-called syndromes were generally accepted in the psychiatric and psychological communities. *MacLennan*, 702 N.W.2d at 226 n.1 (observing that the concept of battered child syndrome had been "accepted" in Minnesota since the early 1970s); *Hennum*, 441 N.W.2d at 794 (holding that battered woman syndrome had "gained substantial enough acceptance to warrant admissibility"). Here, even Doe's expert admits the theory is not generally accepted.

MacLennan and *Hennum* are further distinguishable because they addressed syndrome evidence offered to explain "behavior." 702 N.W.2d at 230–33; 441 N.W.2d at 798–99. Similarly, *Obeta* addressed expert testimony on typical rape victim behaviors

offered to explain the victim's "behavior" and rebut a defendant's claim that the sexual assault was consensual.³⁷ 796 N.W.2d at 289–94. Even though each of those cases involved a serious traumatic event, none of these cases involved memory impairment. And in each of those cases, the jury was being asked to evaluate the purported explanation for a conscious course of conduct. That is a significant difference. Here, the court of appeals lost sight of the fact that Doe sought to introduce memory-repression evidence to toll the statute of limitations, not to explain why he chose to delay starting his lawsuit. Allowing the jury to consider that issue in light of the serious questions about the validity of memory-repression theory would have them make such a decision based on pure speculation. The court of appeals' decision did not cite a single case where syndrome-type evidence was admitted for the purpose of tolling the statute of limitations.

The methodology for postulating the syndromes discussed in *MacLennan* and *Obeta* is categorically different from the scientific evidence offered here. The syndrome referred to in *MacLennan* was described as "really only an opinion of the expert based on collective clinical observations of a class of victims." 702 N.W.2d at 232 (quotation omitted). Similarly, this Court in *Obeta*, 796 N.W.2d at 290, described "rape trauma syndrome" as a "term coined in 1974 by two practitioners—not researchers—to describe what they observed." Dr. Grove explained that scientific research on clinical judgment reveals that observations of clinicians are not reliable. He stated there is little or no correlation between the amount of experience that a clinician has and the accuracy of her

³⁷ In *Obeta*, as in *MacLennan* and *Hennum*, there was no contention that the evidence was not generally accepted. 796 N.W.2d at 294 n.9.

judgments. (T. 424.) *Cf. State v. Parkinson*, 900 P.2d 647, 654 (Idaho Ct. App. 1996) (excluding, as patently unreliable, psychologist's opinion that 25–30% of abuse cases were false where based only on personal experience and lacking scientific methodology). There is no indication that any such expert evidence was produced in *Hennum*, *MacLennan*, or *Obeta* to explain the flaws inherent in clinical observations, which are essentially “anecdotal” that are not subject to rigorous scientific scrutiny.

This Court has observed that there is a difference between “evidence falling into the general field of psychology” and “social science evidence.” *MacLennan*, 702 N.W.2d at 230–31. But the court of appeals did not recognize that distinction and overlooked earlier rulings from this Court prohibiting admission of testimony based on unreliable memories. *See Mack*, 292 N.W.2d 764. The dioceses submitted substantial scientific evidence, not social science literature, explaining the unreliability of repressed-and-recovered-memory theory. Furthermore, the court of appeals ignored the district court's foundational-reliability determination and did not explain how evidence that has been determined to be unreliable could be helpful to a jury or admissible under Rule 702. *See Obeta*, 796 N.W.2d at 289 (requiring, inter alia, that expert testimony have foundational reliability before it may be admitted). It is axiomatic that evidence that is unreliable is also unhelpful.

These issues warrant careful analysis here, because the usual safeguards of the adversarial system are not present. Cross-examination under such circumstances is ineffective, as this Court observed in *Mack*. Research supports that conclusion and shows that the factor that most affects jurors' assessments of a particular witness is the witness's

confidence level.³⁸ And cross-examination is largely useless with a mistaken (albeit honest) eyewitness who is confident and consistent. *See, e.g., State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009) (“Cross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe what they say is true.”). Thus, “even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.” *U.S. v. Wade*, 388 U.S. 218, 235, 87 S. Ct. 1926, 1936–37 (1967). The court of appeals provided no analysis on how that unrefuted fact can be reconciled with its determination that the jury should be allowed to make the ultimate determination of what memories Doe repressed.

These are exactly the kind of concerns that warrant exercise of the court’s gate-keeping function. *See State v. Quattrocchi*, 681 A.2d 879, 883–84 (R.I. 1996) (holding that trial court should exercise gate-keeping function to determine whether expert testimony on repression and flashbacks is admissible). No jury instruction on the potential fallacy of recovered memory could effectively address this concern—particularly in this case where such an instruction would undercut the basis for tolling the statute of limitations on Doe’s claims.

Furthermore, the court of appeals’ analysis of *MacLennan* is incomplete. The court of appeals relied on *MacLennan* to support its conclusion that *Frye-Mack* was not “the appropriate analytical framework for evaluating the admissibility of the proffered

³⁸ *See* Cutler & Penrod, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 83 (1981).

expert testimony on the repressed-memory theory in this case.” (Add. 67.) The court remanded the case and directed the district court to “judge the admissibility of [Doe’s] proffered expert testimony under the helpfulness requirement of Minn. R. Evid. 702.” The court of appeals then failed to analyze the evidence introduced at the district court hearing using that standard. But that lack of analysis is not consistent with this Court’s decisions.

In *MacLennan*, this Court determined that *Frye-Mack* did not apply to battered child syndrome evidence. Instead, it ruled that Rule 702 was to be applied to discern whether that evidence would be helpful to the jury. *See* 702 N.W.2d at 233. This Court’s analysis in *MacLennan* did not end there, because the Court went on to evaluate the proffered evidence to determine whether the district court had committed reversible error by not allowing expert testimony on battered child syndrome. *Id.* at 235. The Court observed that when the admissibility of evidence is challenged on appeal, it defers to the district court’s exercise of discretion and “will not lightly overturn a district court’s evidentiary ruling.” *Id.* The Court concluded that the district court “did not err when it excluded the proffered expert testimony,” even though it applied the wrong standard. *Id.*

Similarly in *Jacobson v. 55,900 in U.S. Currency*, the Court determined that dog-sniff evidence offered to prove a connection between cash and drug trafficking was not subject to *Frye-Mack* because the technique of using trained dogs to detect drug odors was neither emerging nor scientific evidence. 728 N.W.2d 510 (Minn. 2007). The Court held that Rules 401, 702, and 703 provided the proper analytical framework and reversed

the district court's admission of dog-sniff evidence because there was insufficient evidence establishing its "reliability." *Id.* at 530–31.

Here, the court of appeals elevated form over function by designating the "helpfulness" element of Rule 702 as the appropriate standard. But it then failed to evaluate the evidence under that standard. Had it done so, it would have inevitably concluded that the district court did not abuse its discretion in excluding the evidence.

D. Other jurisdictions exclude evidence of repressed and recovered memories.

The court of appeals unduly expanded *MacLennan* and *Hennum* and erred as a matter of law when it ignored the general acceptance and foundational reliability requirements and concluded that Doe's evidence on repressed and recovered memories should be evaluated solely under Rule 702's helpfulness standard. The court's attempt to compare behavior based on observations by clinicians cannot be reconciled with the scientific research on memory conducted by expert scientists showing that memory is not reliable, and that memory-repression theory is not generally accepted. Cases in other jurisdictions, while not necessarily dispositive here, support this conclusion. *Roman Nose*, 649 N.W.2d at 820.

Various courts have addressed the admissibility of expert testimony on so-called repressed and recovered memories. Those courts have applied an array of legal standards, including *Frye*, *Daubert*, Rule 702, or Rule 403. Regardless of the standard, however, if the court evaluated the state of the science by holding an evidentiary hearing, the court almost invariably exercised its gate-keeping role to exclude the evidence as lacking

reliability or general acceptance.³⁹ Additionally, other courts, which have not directly addressed the evidentiary issue of admissibility, have still ruled that the theory is too unreliable or unaccepted to toll the statute of limitations.

- Alabama: Reviewing numerous studies and articles and then concluding “[t]here is no consensus of scientific thought in support of the repressed memory theory.”⁴⁰
- Maryland: Refusing to toll the statute of limitations on the basis of repressed memory after evaluating lack of acceptance and remaining “unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting.”⁴¹
- Nebraska: Holding that memory-repression theory was not generally accepted and was not valid or reliable.⁴²
- North Carolina: Excluding repressed-and-recovered-memory evidence under a Rule 403 analysis and noting that the deep split in the scientific community precludes a finding of general acceptance.⁴³
- New Hampshire: Recognizing that repression evidence was not reliable and acknowledging the “divisive state of the scientific debate on the issue”⁴⁴ and concluding that evidence was not reliable or generally accepted.⁴⁵

³⁹ Some appellate courts have admitted expert testimony on repressed and recovered memories. *See, e.g., Commonwealth v. Shanley*, 919 N.E.2d 1254 (Mass. 2010); *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996); *Isley v. Capuchin Province*, 877 F. Supp. 1055 (D. Mich. 1995), and *Doe v. Archdiocese of New Orleans*, 823 So.2d 360 (La. Ct. App. 2002). These cases are distinguishable from the present case, either because the courts in those cases did not have the benefit of the extensive testimony on reliability and acceptance from experts, like the district court here did, or because the cases used a more relaxed approach to admissibility of scientific evidence. *See Goeb*, 615 N.W.2d at 812 (explaining that *Frye-Mack* represents a more conservative approach than *Daubert*).

⁴⁰ *Travis v. Ziter*, 681 So.2d 1348, 1352 (Ala. 1996).

⁴¹ *Maskell*, 679 A.2d at 1092.

⁴² *Rivers v. Father Flanagan’s Boys’ Home*, Doc. 1024, No. 743, at *14 (D. Ct., Douglas County, Neb., Nov. 25, 2005).

⁴³ *State v. King*, 713 S.E.2d 772, 778 (N.C. App. 2011).

⁴⁴ *State v. Walters*, 698 A.2d 1244, 1248 (N.H. 1997).

⁴⁵ *State v. Hungerford*, 697 A.2d 916, 928 (N.H. 1997).

- Rhode Island: Stating that “the phenomenon of repressed recollection has not gained general acceptance” and that the theory “has not been tested adequately to ensure the reliability and accuracy of the recovered memory.”⁴⁶
- Tennessee: Acknowledging there is “simply too much indecision in the scientific community,” “considerable doubt about the reliability” of recovered memories, and no “agreement as to whether repressed memories may be accurately recalled or whether they may be recalled at all,” and concluding as a result that “it goes without saying that the judiciary does not have the resources needed to make an accurate ruling on the validity of a psychological theory about which professionals in the field disagree.”⁴⁷
- Texas: Recognizing the scientific community has not reached a consensus on how to gauge the truth or falsity of recovered memories and holding that the lack of consensus precluded application of discovery rule.⁴⁸
- Utah: Stating that “the idea of memory repression itself... is a point of disagreement within the medical, psychiatric, and psychological communities.”⁴⁹

Although *Doe* will undoubtedly claim that the current trend is to admit repressed-and-recovered-memory evidence, just two months ago the North Carolina Court of Appeals ruled that evidence of a victim’s repressed and recovered memories of abuse was properly excluded. In so ruling, the court, after considering testimony from both Dr. Chu and Dr. Pope, determined that there is a significant split in the scientific community on the theory of repressed and recovered memory, which weighs against a finding of general acceptance. *King*, 713 S.E.2d at 778.

⁴⁶ *State v. Quattrocchi*, No. P92-3759, 1999 WL 284882, at *10, *13 (R.I. Super. Apr. 26, 1999).

⁴⁷ *Hunter v. Brown*, No. 03A01-9504-CV-00127, 1996 WL 57944, at *4 (Tenn. Ct. App. 1996).

⁴⁸ *S.V. v. R.V.*, 933 S.W.2d 1, 18 (Tex. 1996).

⁴⁹ *Franklin v. Stevenson*, 987 P.2d 22, 28 n.3 (Utah 1999).

That conclusion is consistent with a decision from New Hampshire, which considered a variety of factors before excluding repressed-and-recovered-memory evidence. In *Hungerford*, after exhaustively reviewing the record and scientific literature, the state supreme court affirmed the lower court’s exclusion of repressed-and-recovered-memory evidence, stating, “We cannot say that the phenomenon has gained general acceptance in the psychological community,” because the psychological community is “deeply divided” on the reliability and accuracy of repressed memories. 697 A.2d at 928. In support of its conclusion, the court cited more than 60 years of research, which—despite its lengthy history—did not identify any controlled evidence supporting the concept of repression. *Id.* at 927 (quoting David S. Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research*, in REPRESSION AND DISSOCIATION 85, 96–98 (J. Singer ed., 1990)).⁵⁰

In 2010, the Second Circuit Court of Appeals joined these courts and expressed its increasing concern with prosecutions based on repressed and recovered memories. *Friedman v. Rehal*, 618 F.3d 142 (2nd Cir. 2010). The court detailed the history of “a series of highly questionable child sex abuse prosecutions” in the 1980s and 1990s, many of which were based on recovered memory. *Id.* at 155–58. Calling these prosecutions a “modern-day ‘witch hunt,’” the court said that now the “consensus” within the scientific community is that memory-recovery tactics could create false memories and that the “prevailing view is that the vast majority of traumatic memories that are recovered through the use of suggestive recovery procedures are false.” 618 F.3d at 142, 160; *see*

⁵⁰ Holmes’s chapter was cited by Dr. Pope at the *Frye-Mack* hearing. *See supra* note 30.

also *United States v. Bighead*, 128 F.3d 1329, 1337 (9th Cir. 1997) (J. Noonan, dissenting) (warning of dangers of altering evidentiary standards to accommodate expert's testimony on typical characteristics of child abuse victims).

In addition to the cases addressed above, some courts, without assessing reliability or acceptance, have ruled that the statute of limitations is not tolled by claims of repressed and recovered memories. *See, e.g., Baye v. Diocese of Rapid City*, 630 F.3d 757, 761 (8th Cir. 2011); *Barre*, 326 S.W.3d at 420–21; *Bonner v. Roman Catholic Diocese of Boise*, 913 P.2d 567, 568 (Idaho 1996); *Lemmerman v. Fealk*, 534 N.W.2d 695, 703 (Mich. 1995); *Burpee v. Burpee*, 578 N.Y.S.2d 359, 360–61 (N.Y. Sup. 1991); *Dalrymple v. Brown*, 701 A.2d 164, 170 (Pa. 1997); *Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 115 (Wis. 1997).

These cases, individually and collectively, support the district court's conclusion that Doe's evidence on repressed and recovered memories is not generally accepted.

- E. The district court correctly granted summary judgment in favor of the dioceses because Doe did not demonstrate the existence of a legal disability that would toll the statute of limitations.

The district court correctly excluded repressed-and-recovered-memory evidence. As a result, Doe's allegations that he somehow repressed and subsequently recovered memories of the alleged abuse fail, and he cannot prove any disability that would toll the running of the statute of limitations. *Bugge*, 573 N.W.2d at 682 ("A discussion of what [plaintiff] claims she knew is not helpful to this court."); *ABC v. Archdiocese of St. Paul and Minneapolis*, 513 N.W.2d 482, 486 (Minn. Ct. App. 1994) ("[Appellant's] inability

to comprehend that her situation has been abusive does not toll the statute of limitations.”). Accordingly, the six-year statute of limitations for Doe’s claims began to run when Doe attained the age of 18 in 1985 and expired in 1991. Minn. Stat. § 541.073, subd. 2(a). Because Doe did not commence this action until 2006, his claims are clearly time-barred. The district court properly granted the dioceses’ motions for summary judgment.

III. The district court correctly granted summary judgment in favor of the dioceses on Doe’s fraud claims because the claims were untimely.

Doe asserts two fraud claims: one based on the dioceses’ implicit misrepresentation that Adamson was fit to serve in a parish when he was held out as a priest and one based on the failure to disclose Adamson’s prior history of abuse. Neither theory avoids the same flaws that defeat Doe’s other tort claims.

To assert a cause of action for intentional misrepresentation, a plaintiff must produce evidence establishing that the defendant (1) made a representation (2) that was false, (3) having to do with a past or present fact (4) that is material (5) and susceptible of knowledge (6) that the defendant knew to be false or is asserted without knowing whether the fact is true or false (7) with intent to induce the other person to act (8) and the person is in fact induced to act (9) in reliance on the representation, and (10) that the plaintiff suffered damages (11) attributable to the misrepresentation. *Florenzano v. Olson*, 387 N.W.2d 168, 174 n.4 (Minn. 1986). If a fraud claim is based on nondisclosure, a plaintiff must show that the defendant owed a duty to disclose. *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 690 (Minn. Ct. App. 2010); *see also Meyer v. Lindala*, 674

N.W.2d 635, 639–40 (Minn. Ct. App. 2004) (holding that churches do not have a “special relationship” with parishioners that could give rise to a duty to care in a negligence action, because “[p]roviding faith-based advice or instruction, without more, does not create a special relationship”).

The district court applied an objective standard and concluded that Doe’s fraud claims were barred because the overwhelming weight of the evidence showed that Doe knew, or in the exercise of reasonable diligence should have known, that Adamson was a danger to children in the 1980s. The district court applied the six-year fraud statute of limitations under Minn. Stat. § 541.05, subd. 1(6) and determined that because Doe did not start his lawsuit until 2006, those claims were barred. (Add. 58–59.) The court of appeals reversed that decision by applying a wholly subjective standard. The court of appeals’ decision is unsupported by the facts and longstanding Minnesota law and must be reversed.

- A. Doe’s fraud claims are untimely because his fraud claims accrued in the 1980s but he did not commence this suit until 2006.

Under Minn. Stat. § 541.05, subd. 1(6), the statute of limitations for fraud is six years, and a cause of action accrues when “the aggrieved party discovers the facts constituting the fraud.”⁵¹ Section 541.05, subd. 1(6), imposes a “standard of *objective*

⁵¹ The dioceses do not concede that the fraud statute of limitations covers Doe’s fraud claims. This Court has not previously been asked to determine whether Doe’s fraud claims, which are premised on alleged childhood sexual abuse, are subject to the fraud statute of limitations in Minn. Stat. § 541.05, subd. 1(6), or the delayed discovery statute for childhood sexual abuse in § 541.073, subd. 2(a). The Minnesota Court of Appeals, in an unpublished opinion, held that section 541.05, subd. 1(6) governed plaintiffs’ claims

reasonableness upon the plaintiff to discover the facts constituting the fraud.” *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 235 (8th Cir. 1996) (citing *Bustad v. Bustad*, 116 N.W.2d 552, 555 (Minn. 1962)) (emphasis added); *First Nat’l Bank of Shakopee v. Strait*, 73 N.W. 645 (Minn. 1898) (requiring that a plaintiff exercise reasonable diligence to discover the alleged fraud). “[T]he facts constituting the fraud are deemed to have been discovered when, with reasonable diligence they could and ought to have been discovered.” *Blegen v. Monarch Life Ins.*, 365 N.W.2d 356, 357 (Minn. Ct. App. 1985). When the evidence leaves no room for reasonable minds to differ, the court may determine as a matter of law whether the plaintiff exercised reasonable diligence. *Klehr*, 87 F.3d at 235.

1. Doe’s fraud claims accrued in the 1980s when Doe discovered the misrepresentation.

The district court noted that Doe told Fr. Doyle that when the abuse occurred in 1980 or 1981, he felt emotionally paralyzed, shocked, isolated, guilt, jolted, and deathly afraid to tell anyone of the abuse.

The district court referred to additional objective evidence showing Doe’s knowledge of Adamson’s misconduct, including the fact that in the 1980s, when Doe was a member of the parish, Risen Savior told parishioners about the allegations against

for intentional misrepresentation. *See Jane Doe 43C v. Diocese of New Ulm*, No. A08-0729, 2009 WL 605749, at *5 (Minn. Ct. App. Mar. 10, 2009). *But see Krammer v. Archdiocese*, No. A04-907, 2005 WL 14934, at *1 (Minn. Ct. App. 2005), *review denied* (Minn. Mar. 15, 2005) (applying Minn. Stat. § 541.073, subd. 2(a) to various claims, including fraud). Pursuant to Minn. Stat. § 480A.08(3), copies of these unpublished cases are reproduced in the appendix to this brief.

Adamson, a psychologist spoke to Risen Savior parishioners about Adamson's misconduct, and The Archdiocese informed parishioners that the accusations against Adamson were one of the reasons Adamson was removed from Risen Savior.

Further, undisputed, objective evidence relied on by the district court showed that Doe should have known about Adamson's unfitness because of the intense media attention in the 1980s and 1990s about Adamson's misconduct and the dioceses' knowledge of it.

Finally, the district court referred to Doe's discussions with his mother in 1986, Doe's discussions with his wife in 1989, and his discussions with other family members in the 1980s and early 1990s about the accusations against Adamson. Under such circumstances, Doe cannot plausibly claim that he did not learn and should not have learned in the exercise of reasonable diligence that the representations—upon which his fraud claims are based—were false.

The court of appeals did not address any of those objective facts. Instead, it focused only on Doe's subjective claim that *he* was not aware of the alleged fraud. That inquiry has no application to the fraud standard. Because Doe was aware of the purported misrepresentation by 1985, and certainly no later than the early 1990s, he had notice of his fraud claim then and the statute of limitations began to run. Since he waited until 2006 to commence this action, his claims are untimely under the six-year fraud statute of limitations.

2. There is no foundation for Doe's testimony that he was not aware of the fraud before 2002.

Doe's testimony that he did not remember the abuse—standing alone—does not provide any basis for concluding that the statute of limitations did not begin to run. Doe admitted he is not qualified to testify on issues of repressed and recovered memory. (AA 2, at 8:14–9:16; AA 3, at 26:24–27:20; AA 15, at 119:17–123:7.) *See Barrett v. Hyldborg*, 487 S.E.2d 803, 806 (N.C. Ct. App. 1997) (holding that a plaintiff cannot express an opinion as to whether she experienced repressed memories and any claim that she “suddenly . . . remembered traumatic incidents from her childhood” required expert testimony on the subject of memory repression); *Anonymous v. St. John Lutheran Church of Seward*, 703 N.W.2d 918, 926–27 (Neb. Ct. App. 2005) (“Obviously, [Plaintiff's] own statements cannot serve to establish that she suffers from a mental disorder; expert testimony is required.”).

B. Doe's fraud claims must be rejected as they are a blatant attempt to circumvent the statute of limitations on his untimely negligence claims.

Doe's untimely fraud claims, which are premised on the dioceses' assignment of Adamson to a parish, are nothing more than a recasting of his untimely negligence claims. They are not typical fraud claims: They do not arise in a commercial context and do not involve any claimed pecuniary loss. *See United States v. Neustadt*, 366 U.S. 696, 711 n.26, 81 S. Ct. 1294, 1302 n.26 (1961); *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D. N.Y. 1991). Rather, they arise from the exact same circumstances as his negligence claims. Doe alleges that merely assigning a priest to a parish constitutes an actionable

misrepresentation—an argument which has been rejected by the Minnesota Court of Appeals. *See Jane Doe 43C*, 787 N.W.2d at 687–90. It is that same act—assignment of a priest to a parish—which Doe claims here constituted negligence on the part of the dioceses. Doe has not identified any oral or written representation by the dioceses—a necessary element of a fraud claim. Nor has Doe alleged any ongoing surreptitious conduct, such as fraudulent concealment, by the dioceses. Indeed, the record *indisputably* demonstrates that the dioceses’ prior knowledge of Adamson’s misconduct history was made public by the late 1980s. Doe also cannot identify any damages from the purported fraud that are different and distinct from the alleged sexual abuse. Because Doe’s fraud claims so closely parallel his negligence claims, it is clear that they are simply an attempt to circumvent the statute of limitations in the delayed discovery statute. *See Christy DeSmith, The Crusader*, SUPER LAWYERS: MINNESOTA, 2011, at 12 (quoting Doe’s counsel’s explanation that he pleads fraud to avoid the statute of limitations). (AA 158.)

Even if fraud doctrine could be expanded in some circumstance, it should not be expanded here where the legislature provided Doe with a remedy for his claims. *See* Minn. Stat. § 541.073, subd. 2(a) (applying to all actions based on personal injury caused by sexual abuse); *see also Tolliver v. Visiting Nurse Ass’n of Midlands*, 771 N.W.2d 908, 916 (Neb. 2009) (“[O]ther theories of action have been sufficient to deal with non-pecuniary damage, and resort to theory of deceit[, that is, the theory of fraudulent misrepresentation] is usually unnecessary.”); *Doe v. Dilling*, 888 N.E.2d 24, 37 (Ill. 2008) (“[I]f the tort of fraudulent misrepresentation is not recognized for a certain fact

pattern, this does not necessarily mean that a plaintiff is left without a remedy for his or her injuries, as other tort actions may be available.”).

Minnesota courts have rejected attempts to expand fraud actions, particularly in the medical malpractice arena where fraud has been pled simply to avoid the statute of limitations. Those cases are particularly instructive because the legislature adopted a specific statute of limitations period for all medical malpractice claims, Minn. Stat. § 541.076, just as it did with claims based on sexual abuse. *See Whitener ex rel. Miller v. Dahl*, 625 N.W.2d 827, 830–31 (Minn. 2001) (explaining that when applying the statute of limitations courts must consider legislature’s intention). For instance, in *Paulos v. Johnson*, 597 N.W.2d 316, 318–321 (Minn. Ct. App. 1999), *review denied* (Minn. Sept. 28, 1999), the Minnesota Court of Appeals determined that the medical malpractice statute of limitations—not the fraud statute of limitations—applied to a claim against a doctor because the complaint sounded in medical malpractice, even though the plaintiff pled fraud. Similarly, in *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997), the court concluded that breach of fiduciary duty claim was actually a medical-malpractice claim, regardless of how it was characterized because “the gravamen of the complaint sounds in medical malpractice.”

Although not directly addressed by Minnesota courts, other courts have expressed skepticism about the validity of fraud claims arising from sexual abuse. *E.g.*, *Mars v. Diocese of Rochester*, 196 Misc.2d 349, 352 (N.Y. Sup. 2003); *Doe v. Diocese of Dallas*, 917 N.E.2d 475 (Ill. 2009). In *Mars*, 196 Misc.2d at 352, the court stated that an action for fraud, where premised on childhood sexual abuse by a member of the clergy, would

fail, unless the plaintiff identified damages that were separate and distinct from those flowing from the abuse.

To address his claims based on childhood sexual abuse, Doe pled claims sounding in negligence. Those claims are time-barred. Doe should not be permitted to breathe new life into those stale claims now and circumvent the limitations period proscribed by the legislature simply by characterizing the claims as fraud claims. When it is particularly clear, as it is here, that a plaintiff's fraud claims are "making a mockery statute of limitations through creative labeling" and are simply a recasting of an otherwise barred negligence claim, courts should act to bar such claims. *Stuart & Sons, L.P. v. Curtis Pub. Co., Inc.*, 456 F.Supp.2d 336, 343 (D. Conn. 2006). Doe's fraud claims must be rejected.

CONCLUSION

On this record and in this case, the district court correctly granted summary judgment in favor of the dioceses because the undisputed facts show that Doe's claims are untimely. Although Doe sought to toll the statute of limitations by asserting that he repressed and recovered memories of the alleged abuse, expert evidence supporting that claim was properly excluded by the district court. Doe failed to show that his evidence on repressed and recovered memory had foundational reliability or was generally accepted in the relevant scientific community.

The Court of Appeals erred when it reversed and remanded this matter to the district court with instructions to determine whether Doe's evidence would be admissible under Rule 702's helpfulness standard. There is no basis for considering whether the evidence would be helpful to the jury if it is not foundationally reliable and not generally accepted in the scientific community. Because the district court correctly excluded Doe's evidence on repressed and recovered memories, there is no basis for tolling the statute of limitations on Doe's claims.

Doe's fraud claims are untimely, regardless of which statute of limitations applies to those claims. For more than 100 years, when applying the fraud statute of limitations, Minnesota courts have applied an objective standard to determine when a fraud cause of action accrues. By focusing only on when Doe claims he remembered the abuse, the Minnesota Court of Appeals abandoned that standard and applied a completely subjective test. It is undisputed that the dioceses never made any written or oral representation that forms the basis for the alleged fraud; it is also undisputed that Doe knew that any implicit

representations that Adamson was fit to serve as a parish priest were shown to be false in the 1980s, with the revelation that Adamson had sexually abused other children.

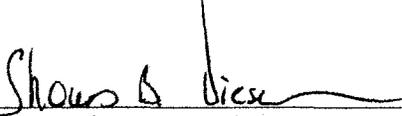
Moreover, Adamson's history and the dioceses' knowledge thereof was publicly revealed via numerous channels, including parish and archdiocesan meetings and announcements, a series of lawsuits against the dioceses, and widespread media coverage. Doe knew or should have known of his fraud claim in the 1980s, and the statute of limitations would have run in 1990s. Because Doe did not commence this action until 2006, the claims are time barred. Summary judgment was proper.

Appellants The Archdiocese of St. Paul and Minneapolis and Diocese of Winona respectfully request that this Honorable Court reverse the court of appeals' decision in its entirety and further request that the district court's orders excluding evidence on repressed and recovered memories and granting summary judgment against Respondent John Doe 76C's claims be affirmed.

Respectfully submitted,

MEIER, KENNEDY & QUINN, CHARTERED

Dated: October 19, 2011


Thomas B. Wieser (#122841)
Jennifer R. Larimore (#0386663)
Attorneys for Appellant The Archdiocese
of St. Paul and Minneapolis
2200 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2137
(651) 228-1911

GEORGE F. RESTOVICH & ASSOCIATES

Dated: October 19, 2011



Anna Restovich Braun (#323226)
Attorneys for Appellant Diocese of Winona
117 East Center Street
Rochester, Minnesota 55904-3757
(507) 288-4840

CERTIFICATION OF COMPLIANCE

I hereby certify that Respondent Archdiocese of St. Paul & Minneapolis' Brief in Case NO. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, subd. 3(a)(1) and that the brief contains 13,617 words. The brief was prepared using Microsoft Office Word 2007 and complies with the typeface requirements of Rule 132.01.

Dated: October 19, 2011

Jennifer R. Larimore