

No. A10-1951

**STATE OF MINNESOTA  
IN SUPREME COURT**

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John Doe 76C,

Respondent,

vs.

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

Appellants.

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**BRIEF OF AMICUS MINNESOTA RELIGIOUS COUNCIL**

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**TABLE OF CONTENTS**

I. NATURE OF THE MINNESOTA RELIGIOUS COUNCIL’S INTEREST ..... 1

II. THE FRYE-MACK STANDARD IS APPROPRIATE FOR EVALUATING PROPOSED EXPERT TESTIMONY CONCERNING THE THEORY OF “REPRESSED MEMORY” ..... 2

    A. The Question of the Admissibility of Expert Testimony Concerning “Repressed Memory” Falls Squarely Within This Court’s Frye-Mack Holding ..... 3

    B. The Court of Appeals’ Reliance on Cases Involving “Syndrome” Testimony Was Misplaced ..... 7

    C. The Parties and Their Experts Here Regarded the Science Concerning Repressed Memory Sufficiently Scientific to Subject It to the Frye-Mack Test ..... 12

III. THE APPLICATION OF THE FRYE-MACK STANDARD HERE IS CONSISTENT WITH THE COURTS’ GATE-KEEPING FUNCTION ..... 13

IV. THE COURT OF APPEALS DECISION WILL HAVE BROAD AND UNDESIRABLE IMPLICATIONS BEYOND THE FACTS OF THIS CASE ..... 17

    A. The Use Of “Repressed Memory” As Substantive Evidence Raises Serious Policy Concerns ..... 17

    B. The Court of Appeals Decision is Inconsistent with the Legislature’s Intent in Minnesota Statute Section 541.073 ..... 20

    C. The Court of Appeals Decision Unwisely Dispenses with the Requirement of Foundational Reliability ..... 21

    D. The Nature of Plaintiff’s “Repressed Memory” Theory Makes It Ill-Suited for Expert Testimony ..... 23

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

	Page(s)
<b>STATE CASES</b>	
<u>Blackowiak v. Kemp</u> , 546 N.W.2d 1 (Minn. 1996).....	20, 25
<u>D.M.S. v. Barber</u> , 645 N.W.2d 383 (Minn. 2002).....	3
<u>Doe v. Archdiocese of St. Paul &amp; Minneapolis</u> , 801 N.W.2d 203 (Minn. App. 2011) .....	4, 7, 22
<u>Goeb v. Theraldson</u> , 615 N.W.2d 800 (Minn. 2000).....	passim
<u>Licktieg v. Kolar</u> , 782 N.W.2d 810 (Minn. 2010).....	3
<u>Ollis v. Knecht</u> , 751 N.E.2d 825 (Ind. Ct. App. 2001) .....	4
<u>People v. Izzo</u> , 90 Mich. App. 727, 282 N.W.2d 10 (1979) .....	15
<u>People v. Leahy</u> , 882 P.2d 321 (Cal. 1994) .....	14
<u>Plath v. Plath</u> , 428 N.W.2d 392 (Minn. 1988).....	20
<u>State v. Anderson</u> , 379 N.W.2d 70 (Minn. 1985).....	7
<u>State v. Anderson</u> , 789 N.W.2d 227 (Minn. 2010).....	13, 16
<u>State v. Dille</u> , 258 N.W.2d 565 (Minn. 1977).....	15
<u>State v. Grecinger</u> , 569 N.W.2d 189 (Minn. 1997).....	15
<u>State v. Hennum</u> , 441 N.W.2d 793 (Minn. 1989).....	7, 8, 9, 10

<u>State v. Mack</u> 292 N.W.2d 764 (Minn.1980).....	2, 5, 6, 18
<u>State v. MacLennan</u> , 702 N.W.2d 219 (Minn. 2005).....	passim
<u>State v. Moore</u> , 458 N.W.2d 90 (Minn. 1990).....	14
<u>State v. Obeta</u> , 796 N.W.2d 282 (Minn. 2011).....	8, 9, 21
<u>State v. Roman Nose</u> , 649 N.W.2d 815 (Minn. 2002).....	3, 14
<u>State v. Saldana</u> , 324 N.W.2d 227 (Minn. 1982).....	passim
<u>State v. Schwartz</u> , 447 N.W.2d 422 (Minn. 1989).....	2, 10, 16
<u>W.J.L. v. Bugge</u> , 573 N.W.2d 677 (Minn. 1998).....	3, 20
<b>FEDERAL CASES</b>	
<u>Clark v. Arizona</u> , 548 U.S. 735 (U.S. 2006) .....	24
<u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u> , 509 U.S. 579 (1993).....	4
<u>Friedman v. Rehal</u> , 618 F.3d 142 (2d Cir. 2010).....	17
<u>Frye v. United States</u> , 293 F. 1013 (D.C.Cir.1923) .....	passim
<b>STATE STATUTES</b>	
Minn. Stat. § 541.07 .....	20
Minn. Stat. § 541.07(1) (1994).....	20
Minn. Stat. § 541.073 .....	3, 20, 24, 25

**RULES**

Fed. R. Evid. 702..... 4  
Minn. R. Civ. App. P. 129.03..... 1  
Minn. R. Evid. 401 ..... 7  
Minn. R. Evid. 702 ..... passim  
Minn. R. Evid. 702 Advisory Committee’s Note to 2006 Amendment ..... 11

**OTHER AUTHORITIES**

Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994)..... 18  
Hearing on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm. (Feb. 17, 1989) ..... 21  
<http://dictionary.reference.com/browse/junk+science>..... 14  
*Merriam-Webster’s Medical Dictionary*, available at <http://dictionary.reference.com/browse/syndrome>. ..... 8  
Richard Guillatt, *Talk of the Devil: Repressed Memories and the Ritual Abuse Witch-Hunt* (1996) ..... 18  
Tom Dubbe, *Nightmares & Secrets: The Real Story of the 1984 Child Sexual Abuse Scandal in Jordan, Minnesota* (2005)..... 17

## **I. NATURE OF THE MINNESOTA RELIGIOUS COUNCIL'S INTEREST**

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

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

MRC agrees with the points made in the opening brief submitted by the Archdiocese of St. Paul & Minneapolis and the Diocese of Winona and will endeavor not

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

to repeat those arguments here. The MRC does, however, wish to address several points concerning the applicability of the Frey/Mack standard and the proposed use of expert testimony of “repressed memory” that relate both to religious institutions and more generally to other institutions and individuals who may face claims resting on such outdated testimony.

## **II. THE FRYE-MACK STANDARD IS APPROPRIATE FOR EVALUATING PROPOSED EXPERT TESTIMONY CONCERNING THE THEORY OF “REPRESSED MEMORY”**

Minnesota state has long imposed a separate threshold for the admission of proposed expert testimony that involves novel scientific concepts, requiring the proponents of such evidence to meet the so-called Frye-Mack standard. See Frye v. United States, 293 F. 1013 (D.C.Cir.1923); State v. Mack, 292 N.W.2d 764, 768-69, 772 (Minn.1980). This Court has rejected repeated attempts to alter that standard, see Goeb v. Theraldson, 615 N.W.2d 800 (Minn. 2000); State v. Schwartz, 447 N.W.2d 422 (Minn. 1989), and has in fact incorporated the standard into the Minnesota Rules of Evidence. See Minn. R. Evid. 702. Under the Frye-Mack standard, novel scientific evidence is admissible only if it satisfies two elements:

First, a novel scientific technique must be generally accepted in the relevant scientific community, and second, the particular evidence derived from that test must have a foundation that is scientifically reliable.

Goeb, 615 N.W.2d at 810 (citations omitted).

The issue of the admissibility of expert testimony concerning “repressed memory” evidence presented here falls squarely within the class of cases to which this Court has applied the Frye-Mack doctrine. The proposed expert opinion undisputedly presents a

novel issue for Minnesota courts, is framed by its own proponents as “scientific,” and in fact closely resembles the evidence the Court addressed in the Mack case itself. The “syndrome” cases on which the Court of Appeals decision relies presented substantially different considerations than those presented here, both in terms of the purpose of the testimony and its scientific basis, and do not support the exemption of repressed-memory testimony from Frye-Mack scrutiny. Finally, the Plaintiff’s experts themselves framed their testimony concerning repressed memory in exactly the kind of scientific terms that the Frye-Mack standard contemplates, reinforcing the suitability of the standard. The Court of Appeals erred in holding that the Frye-Mack standard does not apply here, and this Court should reverse.

**A. The Question of the Admissibility of Expert Testimony Concerning “Repressed Memory” Falls Squarely Within This Court’s Frye-Mack Holding.**

The trial court here properly subjected Plaintiff’s proposed evidence of repressed memory to the rigors of the Frye-Mack standard. Plaintiff’s expert’s theory of “repressed memory” is novel, and this Court has not previously considered whether the theory is generally accepted in the scientific community.<sup>2</sup> See State v. Roman Nose, 649 N.W.2d

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<sup>2</sup> Although two of this Court’s cases do mention repressed memory, neither actually involved a claim of repressed memory. In each case, the court simply theorized in the course of a discussion of section 541.073, subd. 2(a) that a mental disability *might* make a person incapable of recognizing sexual abuse, and used “repressed memory” as a hypothetical example. See W.J.L. v. Bugge, 573 N.W.2d 677, 681 (Minn. 1998); D.M.S. v. Barber, 645 N.W.2d 383, 389 (Minn. 2002). Cf. also Licktieg v. Kolar, 782 N.W.2d 810, 818 n.6 (Minn. 2010) (“We address a question of law—whether the delayed discovery statute is retroactive—not a question of fact relating to the credibility of

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815, 821-22 (Minn. 2002) (requiring hearing on general acceptance required where supreme court has not previously considered scientific technique at issue).

The evidence Plaintiff would offer is also plainly “scientific,” that is, it claims to be grounded in the methods and procedures of science. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993) (discussing “scientific” as used in Federal Rule of Evidence 702). The Court of Appeals’ characterization of repressed-memory evidence as involving the “behavioral sciences,” Doe v. Archdiocese of St. Paul & Minneapolis, 801 N.W.2d 203, 207 (Minn. App. 2011), even assuming it were accurate,<sup>3</sup> would not exempt the evidence from application of the Frye-Mack standard; the evidence still purports to be “science.” See, e.g., Ollis v. Knecht, 751 N.E.2d 825, 829 (Ind. Ct. App. 2001) (“social sciences like economics and psychology, which employ the scientific method, are sciences, and experts from those fields should be prepared to have their opinions and theories subjected to an analysis under...Rule 702(b)”). The proposed evidence thus constitutes the kind of “novel scientific technique” that is subject to the Frye-Mack standard. Goeb, 615 N.W.2d at 810.

Indeed, the Mack case from which the Frye-Mack standard takes the second half of its name itself involved proposed expert testimony on an issue very similar to that presented here: the admissibility of witness testimony based on memories that had been

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Licktieg’s claim that she repressed memory of the abuse.”).

<sup>3</sup> As discussed below in section II(C), the proposed evidence of repressed memory as framed by Plaintiffs’ experts is in fact much closer to the hard physical sciences than to the more subjective behavioral sciences.

“refreshed” through hypnosis. See State v. Mack, 292 N.W.2d 764 (Minn. 1980). In Mack, a woman who had suffered serious injuries could not remember the events surrounding those injuries. 292 N.W.2d at 766. Six weeks later, the police retained a hypnotist to hypnotize the woman about the events the night of her injuries. Id. Under hypnosis, the woman reported that the defendant had threatened to kill her and had repeatedly assaulted her with a knife. Id. At the conclusion of the hypnosis session, the hypnotist told the woman that she would be able to recall clearly on awakening the events surrounding her injuries. Id. The issue before the Court was the admissibility at trial of the woman’s “hypnotically-induced testimony.” Id.

In addressing the applicability of the Frye test, the Mack court noted the difference between the circumstances before it and the usual expert issues involving mechanical or scientific testing, but nevertheless held that the Frye test should apply:

Under the Frye rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. *Although hypnotically-adduced “memory” is not strictly analogous to the results of mechanical testing, we are persuaded that the Frye rule is equally applicable in this context,* where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation a filling of gaps with fantasy. Such results are not scientifically reliable as accurate.

Id. at 768 (emphasis added). The Mack court acknowledged the State’s argument that “the Frye test is inapplicable in the case before us, where the proffered evidence does not consist of the results of a mechanical device, such as a polygraph, but of testimony from human recall.” Id. at 769. The court nevertheless rejected this distinction, focusing

instead on the admitted problems concerning the accuracy of the “recovered” testimony and noting that “[n]either the person hypnotized nor the expert observer can distinguish between confabulation and accurate recall in any particular instance.” Id.; see also id. at 768-69 (“Most significantly, there is no way to determine from the content of the ‘memory’ itself which parts of it are historically accurate, which are entirely fanciful, and which are lies.”). Applying the Frye test, the Mack court concluded that the proposed testimony did not meet the Frye requirements and held that the witness whose memory had been hypnotically “refreshed” could not testify concerning the subject matter addressed by the hypnosis. Id. at 772.

The issues raised by the proposed repressed-memory testimony here strongly echo the concerns over “refreshed” recollection in Mack, and the Court should subject it to the same two-prong Frye-Mack standard of general acceptance and foundational reliability. Here, Plaintiffs’ experts propose to testify that Plaintiff at some unspecified time and through some unknown means repressed his memory of the claimed abuse, and then years later recovered that memory intact. As in Mack, the issue for the Court is whether the party offering the evidence can provide any assurance that that testimony is reliable. And as in Mack, the record contains considerable evidence suggesting that the proposed repressed-memory testimony is not in fact reliable. See 292 N.W.2d at 768-70. Indeed, one of Plaintiff’s experts admits that she cannot determine whether Plaintiff lost all access to his memories, Tr. 136-37, and both of his experts acknowledge that the

accuracy of recovered memories cannot be assessed without independent corroboration. See Tr. 110, 126, 223-24.<sup>4</sup>

Thus, even treating “repressed memory” theory as something other than a “hard science,” the Frye-Mack standard is appropriate for evaluating the admissibility of the proposed expert testimony, just as it was in Mack itself. See also State v. Anderson, 379 N.W.2d 70, 79 (Minn. 1985) (applying Frye to affirm exclusion of graphological personality assessment as scientifically unreliable).

**B. The Court of Appeals’ Reliance on Cases Involving “Syndrome” Testimony Was Misplaced.**

The Court of Appeals decision rested its rejection of the Frye-Mack standard in this case largely on two of this Court’s decisions addressing expert testimony concerning “syndromes,” State v. MacLennan, 702 N.W.2d 219 (Minn. 2005) (addressing battered child syndrome) and State v. Hennum, 441 N.W.2d 793 (Minn. 1989) (battered woman syndrome). See Doe, 801 N.W.2d at 207-08. This reliance was mistaken. The context and the purpose of the syndrome evidence offered in those cases are entirely different from the context and purpose for which Plaintiff offers repressed-memory evidence.

The admissibility of expert testimony naturally depends on the purpose for which the testimony is offered, including what fact(s) of consequence to the action the evidence is intended to make more or less likely. See Minn. R. Evid. 401. Both Hennum and MacLennan involved expert testimony concerning “syndromes” experienced by victims

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<sup>4</sup> See Appellants’ Brief at pp. 22-25 for additional examples of such reliability problems.

of certain types of abuse that was offered for the purpose of demonstrating that a claimed victim's conduct after the abuse, although perhaps superficially puzzling, was nevertheless typical of such victims. See MacLennan, 702 N.W.2d at 234. A syndrome is "a group of signs and symptoms that occur together and characterize a particular abnormality." *Merriam-Webster's Medical Dictionary*, available at <http://dictionary.reference.com/browse/syndrome>. As such, syndrome evidence can legitimately give context to human action, showing that certain conduct is consistent with "typical behavior" in a similar context, particularly where that context may be unfamiliar or the behavior counterintuitive to average jurors. See State v. Obeta, 796 N.W.2d 282, 292-93 (Minn. 2011). When syndrome evidence was offered in that context and for that purpose, the Court held that it was admissible. See MacLennan, 702 N.W.2d at 234; Hennum, 441 N.W.2d at 798.

In contrast here, the proposed testimony concerning "repressed memory" does not involve a syndrome characterized by a collection of symptoms, but instead purports to provide a specific diagnosis of a particular impairment in a single individual to explain a unique "symptom": loss of memory concerning event *X*. The purpose of such evidence is not to give context to the subject's course of conduct through a showing of behavior that is "typical" of those in the subject's claimed circumstances; the purpose of such evidence is to prove that a particular individual had a particular affliction and thereby to excuse the individual's failure to come forward earlier with a claim of abuse.

Consistent with this distinction, neither Plaintiff here nor his experts claim that repressed memory is a "typical" response to sexual abuse. Compare Obeta, 796 N.W.2d

at 292 (noting court's decisions "allowing expert testimony on the typical behaviors of battered women, battered children, and child- and adolescent-victims of criminal sexual conduct" and extending holding to "expert-opinion testimony on typical rape-victim behaviors"). On the contrary, Plaintiff's experts suggest that Plaintiff had a response to the claimed abuse that was *atypical* of abuse victims: he became psychologically *incapable* of recalling the abuse for a period of years, and then recovered the lost memories in pristine condition. Through this testimony, Plaintiffs intend to use their experts, not to explain the typical behavior of an abuse victim so that the jury can make its own determination concerning whether the claimed victim's conduct fits that typical pattern, but to present the jury with the expert's conclusion that this individual plaintiff not only did not recall but was unable to recall the abuse. This case thus involves both substantively different evidence and a much different purpose in offering it than were involved in Hennum and MacLennan.

The inapplicability of Hennum and MacLennan here is reinforced by the limitation that this Court imposed on the scope of permissible syndrome testimony in those cases, a limitation that the Court of Appeals decision does not address. In both Hennum and MacLennan, the court permitted the experts to testify about the syndromes *generally*, but expressly barred any testimony that the *specific* individual whose conduct was in question did or did not suffer from the syndrome. See Hennum, 441 N.W.2d at 799 ("This determination must be left to the trier of fact."); MacLennan, 702 N.W.2d at 233 ("such experts may not testify about whether a particular defendant actually suffers from a syndrome"); see also Obeta, 796 N.W.2d at 290-91 ("the State's experts in this case will

not ...opine that M.B. suffers from [rape trauma] syndrome”). This limitation protects the jury’s role as factfinder while recognizing the potential helpfulness of the syndrome testimony in describing the typical conduct of people in a similar situation.

That limitation, however, is unworkable in the context of the repressed-memory evidence at issue here. Under Hennum and MacLennan, Plaintiff’s experts cannot testify that Plaintiff *actually* suffered from repressed memory because such testimony would invade the fact-finding province of the jury. Hennum, 441 N.W.2d at 799; MacLennan, 702 N.W.2d at 234. But unlike in Hennum and MacLennan, in the present case the proposed expert testimony that Plaintiff *actually* suffered from repressed memory would form the entire factual basis for Plaintiff’s argument that his claim is not time-barred. Plaintiffs’ experts do not claim that repressed memory is “typical” in abuse victims; thus, unless Plaintiffs’ experts actually testify to a *diagnosis* of Plaintiff as suffering from repressed memory, their testimony will provide nothing on which a factfinder could conclude that Plaintiff suffered from any mental disability. In other words, the usefulness of the repressed-memory testimony Plaintiff offers here necessarily depends on offering exactly the type of subject-specific diagnosis that this Court forbade in Hennum and MacLennan.

Finally, the Court of Appeals decision ignores the amendment to Minnesota Rule of Evidence 702 since the Hennum and MacLennan decisions. When this Court decided Hennum and MacLennan, Minnesota’s Frye-Mack standard was simply a judicial gloss on Rule 702. Courts had held that the standard was a logical and necessary adjunct to Rule 702, see, e.g., Schwartz, 447 N.W.2d at 424-26, but the standard was not a part of

the Rule itself.

This changed in 2006, when this Court amended Rule 702 to add the two-prong Frye-Mack standard to the formal language of the Rule. The Rule now reads in its entirety:

#### RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.* (added language emphasized)

The Advisory Committee comments to the 2006 amendment included the following comments:

The amendment codifies existing Minnesota case law on the admissibility of expert testimony. The trial judge should require that all expert testimony under rule 702 be based on a reliable foundation. ... If the opinion or evidence involves a scientific test, the case law requires that the judge assure that the proponent establish that “the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (quoting *State v. Moore*, 458 N.W.2d 90, 98 (Minn. 1990)).

In addition, if the opinion involves novel scientific theory, the Minnesota Supreme Court requires that the proponent also establish that the evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702 advisory committee’s note to 2006 amendment. As a result of this amendment, the Frye-Mack standard is no longer simply a matter of judge-made common law as it was at the time of the Hennum and MacLennan decisions, subject to judicial modification or exception like all common law doctrines. The codification of the Frye-

Mack standard in Minnesota's Rule 702 both increased the importance and broadened the applicability of the standard. The standard is now part of a formal rule, and by its terms imposes the Frye-Mack requirement of general acceptance to all expert opinions involving "novel scientific theory." As discussed immediately below, the repressed-memory testimony at issue here plainly falls within that category. Whether this Court would reach the same decisions in Hennum and MacLennan today under the amended Rule 702 is an open question, and need not be decided in this case. But the Court of Appeals' failure to address or even acknowledge the post-MacLennan amendment to Rule 702 undercuts its reliance on Hennum and MacLennan as justifying rejection in this case of the Frye-Mack standard, which is now in fact the Rule 702 standard.

In sum, the Court of Appeals erred in basing its holding on this Court's decisions in Hennum and MacLennan.

**C. The Parties and Their Experts Here Regarded the Science Concerning Repressed Memory Sufficiently Scientific to Subject It to the Frye-Mack Test**

Finally, the materials submitted by the parties and the character of the testimony offered by the Plaintiff's own experts fully supports the application of the Frye-Mack standard to that testimony. Although this Court is not limited by the arguments of the parties and makes its own determination of whether the Frye-Mack standard applies to particular types of evidence, see MacLennan, 702 N.W.2d at 230, the court's evaluation of the nature of the expert evidence at issue should nevertheless take account of how that evidence is treated by the parties and in particular by the experts who know it best. See

Goeb, 615 N.W.2d at 813 (“the Frye general acceptance standard ensures that the persons most qualified to assess scientific validity of a technique have the determinative voice.”).

Here, one need look no further than Plaintiff’s own submissions for proof that his expert’s repressed-memory theory is both “novel” and “scientific,” and thus subject to the Frye-Mack standard. In his brief to the Minnesota Court of Appeals, Plaintiff spent over 16 pages describing scientific studies of multiple types purporting to prove the existence of repressed memory. See Pl. COA Br. 21-38 (describing case studies, prevalence studies, clinical studies, professional studies, accuracy studies, mechanism studies, disassociation/repression studies, and therapy studies). The MRC respectfully submits that no one could reasonably dispute that this evidence was in the nature of scientific evidence. As its order showed, the trial court either did not credit that evidence or, at the very least, found a lack of consensus in the evidence. See generally Add. 6-35. But the character of the evidence offered was scientific, and Frye-Mack was the appropriate tool by which to evaluate it.

### **III. THE APPLICATION OF THE FRYE-MACK STANDARD HERE IS CONSISTENT WITH THE COURTS’ GATE-KEEPING FUNCTION.**

Looking beyond the mechanics of the Frye-Mack standard to the policies underlying it, the MRC submits that application of that standard here would be entirely consistent with the trial court’s role as “gatekeeper” for the admissibility of expert evidence, State v. Anderson, 789 N.W.2d 227, 237 (Minn. 2010). This Court has noted at least four important ways that the Frye-Mack standard aids trial courts in this gatekeeper function:

- Application of the standard assures that scientific evidence is assessed in the first instance by those most qualified in the pertinent scientific field, Goeb, 615 N.W.2d at 813;
- Application of the standard confirms that the evidence has foundational reliability, State v. Moore, 458 N.W.2d 90, 98 (Minn.1990);
- Application of the standard prevents the expert from having an disproportionately strong influence on the factfinder, State v. Saldana, 324 N.W.2d 227, 231 (Minn. 1982); and
- Application of the standard maintains consistency in the admission of expert scientific evidence. Goeb, 615 N.W.2d at 814.

Each of these considerations is implicated here and each supports the application of Frye-Mack. First, the Frye-Mack standard assures that novel scientific evidence has been assessed and accepted by those most knowledgeable in the relevant field of science. See Roman Nose, 649 N.W.2d at 821 (requiring that trial court “determine whether the method of producing the scientific evidence is generally accepted in the relevant scientific community”). This requirement insulates the jury from so-called “junk science,” that is, “faulty scientific information or research, especially when used to advance special interests.” <http://dictionary.reference.com/browse/junk+science>. As this Court has noted, “the Frye general acceptance standard ensures that the persons most qualified to assess scientific validity of a technique have the determinative voice.” Goeb, 615 N.W.2d at 813 (citing People v. Leahy, 882 P.2d 321, 325 (Cal. 1994)). This consideration is particularly important with respect to scientific theories like repressed

memory, where there exists a considerable body of literature debunking the theory.

Second, the Frye-Mack standard assures that the expert evidence at issue is foundationally reliable within its own scientific field. Even assuming that the science at issue is generally accepted, the party offering the evidence must show that the specific application in the case at hand is consistent with that science. “The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” State v. Dille, 258 N.W.2d 565, 567 (Minn. 1977). Again, the issue of foundational reliability is of special concern where, as here, the expert opinion to be offered depends almost entirely on the unverifiable testimony of a party and the subjective determination of that party’s expert.

Third, the Frye-Mack standard prevents expert scientific testimony from having an influence on the factfinder out of proportion to its legitimate weight. As the Court has noted, “[a]n expert with special knowledge has the potential to influence a jury unduly.” State v. Grecinger, 569 N.W.2d 189, 193 (Minn. 1997). This factor raises particular concerns where, as here, the proposed expert testimony involves another witness’s credibility; such testimony may give “a stamp of scientific legitimacy to the truth of the complaining witness’s factual testimony.” Saldana, 324 N.W.2d at 231 (quoting People v. Izzo, 90 Mich. App. 727, 730, 282 N.W.2d 10, 11 (1979)). Moreover, the emotionally charged nature of sexual abuse claims, and particularly of clergy sexual abuse claims, makes the avoidance of such undue expert influence particularly important in such cases.

Finally, Minnesota employs the Frye-Mack standard to maintain consistency in the

admission of expert scientific evidence. Frye-Mack provides for objective and uniform decisions concerning expert testimony, unlike the more subjective results that may be produced through application of the other Rules of Evidence alone. If the trial court judges were to evaluate “repressed memory evidence” only under Rule 702’s “helpfulness” requirement, as the Court of Appeals decision requires, individual judges would doubtless reach different results in similar cases depending on their subjective views of whether the testimony will be “helpful.” And because the appellate courts review such rulings only for abuse of discretion, e.g., State v. Anderson, 789 N.W.2d 227, 234–35 (Minn. 2010), those inconsistencies are unlikely to be reconciled on appeal. See Goeb, 615 N.W.2d at 814. Thus, as the Goeb court concluded,

the Frye-Mack standard for admission “facilitates more objective and uniform rulings” by the courts while a standard based solely on the rules of evidence introduces an “undesired element of subjectivity \* \* \* [into] evidentiary rulings.”

615 N.W.2d at 810 (quoting Schwartz, 447 N.W.2d at 424). Indeed, insuring “‘objective and uniform rulings’ as to particular scientific methods or techniques” was the Court’s primary concern in retaining the Frye-Mack standard in Schwartz. See Goeb, 615 N.W.2d at 814 (quoting Schwartz, 447 N.W.2d at 424). Again, such objectivity and consistency is particularly important in addressing claims of sexual abuse, where (as here) proposed expert testimony may relate to decades-old facts and conduct.

In sum, the MRC respectfully submits that application of the Frye-Mack standard to repressed-memory evidence would serve each of these four judicial goals.

#### **IV. THE COURT OF APPEALS DECISION WILL HAVE BROAD AND UNDESIRABLE IMPLICATIONS BEYOND THE FACTS OF THIS CASE.**

Not only is the Court of Appeals decision here inconsistent with this Court's prior Frye-Mack decisions, its holdings have a number of implications that are inconsistent with established public policy. MRC urges the Court to reject the Court of Appeals approach based on these policy implications as well.

##### **A. The Use Of "Repressed Memory" As Substantive Evidence Raises Serious Policy Concerns.**

The MRC urges the Court to consider the impact of the Court of Appeals decision on the use of repressed-memory testimony on the merits of sexual abuse claims like the claim Plaintiff asserts here. Although the present question before the Court involves only an attempt to use repressed-memory testimony to avoid the statute of limitations bar, those broader implications are profoundly troubling.

If the Court were to find expert testimony of "repressed memory" admissible on the statute of limitations issue without the Frye-Mack determinations of general acceptance and foundational reliability, logic suggests that a plaintiff would likewise be freed of any need to make a Frye-Mack showing before using the same testimony in support of the *substance* of a plaintiff's claims. Such substantive use of "repressed memory" raises bright red flags and unavoidably provokes echoes of the disastrous and discredited Jordan child sex abuse prosecutions. See generally Tom Dubbe, *Nightmares & Secrets: The Real Story of the 1984 Child Sexual Abuse Scandal in Jordan, Minnesota* (2005); see also Friedman v. Rehal, 618 F.3d 142, 156 (2d Cir. 2010) (noting role of "recovered" memory in wave of fantastic but ultimately discredited prosecutions of

“child sex rings” between 1984 and 1995, citing *inter alia* Richard Guillatt, *Talk of the Devil: Repressed Memories and the Ritual Abuse Witch-Hunt* (1996); Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1994)).

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

- Plaintiff’s experts have identified no objective criteria for a finding of “repressed memory” in a particular individual. As a result, an expert’s conclusion in any particular instance has no error rate and is neither verifiable nor reproducible.
- The proposed repressed-memory evidence involves not one but two levels of inherently self-serving testimony. The expert’s results are necessarily dependent on (1) what a plaintiff says about his or her recollection and (2) whether the expert believes that testimony. But a plaintiff has every motivation to aver a lack of memory, and a retained expert has every reason to believe that averment. See Mack, 292 N.W.2d at 772 (rejecting use of hypnotically refreshed testimony in part based on lack of corroboration of “facts” elicited under hypnosis)
- The self-serving conclusion that the memory is reliable is inevitably

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

Like the rape trauma syndrome testimony in Saldana, any expert testimony purporting to validate a plaintiff's "repressed memory" would simply serve to bolster the Plaintiff's own testimony that he did not remember and to buttress the credibility of the now-"recovered" memories. As this Court has previously noted, "expert opinions concerning the witness's reliability in distinguishing truth from fantasy are generally inadmissible because such opinions invade the jury's province to make credibility determinations." Saldana, 324 N.W.2d at 231. Given Minnesota's experience with altered and suggested memories and the very real continuing threat that untestable "recovered" memory of abuse poses to religious and educational institutions and individuals, MRC respectfully submits that any recognition of "repressed memory" as a tenable subject of expert testimony would be bad public policy, particularly given the lack of scientific consensus reflected in the record here.

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

invades the province of the jury to make credibility determinations).

**B. The Court of Appeals Decision is Inconsistent with the Legislature's Intent in Minnesota Statute Section 541.073.**

The decision of the Minnesota Court of Appeals also runs counter to the careful public policy balance that the legislature adopted in Minnesota Statute section 541.073. That statute establishes a separate limitations period for claims of sexual abuse and makes two specific allowances for plaintiffs in such cases. First, the section provides plaintiffs with six years to bring suit, as opposed to the two years provided for other intentional personal injury torts. See Minn. Stat. § 541.07. Second, the section commences the running of the statute only when the plaintiff “knew or had reason to know that the injury was caused by sexual abuse,” rather than from the time of the offensive contact itself. Compare, e.g., Plath v. Plath, 428 N.W.2d 392 (Minn. 1988) (measuring limitations period for assault under section 541.07(1) from time of claimed assault). As this Court has noted, these considered departures from the usual statute of limitations for this unique class of cases already reflect the legislature’s policy choices accounting for the unusual features of sexual abuse claims, including the issue of repressed memory:

[W]e view the language section 541.073, subd. 2(a)] as simply a legislative pronouncement that “personal injury caused by sexual abuse”, as opposed to personal injury caused by any other activity, is entitled to a different limitation period because of its uniqueness and *because of the difficulties attendant on the victim’s often repressed recollections*. See Minn. Stat. § 541.07(1) (1994) (imposing a 2-year limitation for torts resulting in personal injury).

Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996) (emphasis added); see also W.J.L. v. Bugge, 573 N.W.2d 677, 680 n.5 (Minn. 1998) (“The Minnesota legislature, in drafting

the delayed discovery statute, acknowledged that *repressed memory*, denial, shame, and other similar factors may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion. (emphasis added)) (citing Hearing on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm. (Feb. 17, 1989)).

As section 541.071 and this Court's decisions applying it demonstrate, the legislature has balanced the competing interests involved in the issue of repressed memory through its enactment of the existing statute of limitations. This Court should not permit the use of expert testimony to circumvent a statute of limitations based on a theory of "repressed memory" that the legislature has already accounted for in the statute of limitations itself.

**C. The Court of Appeals Decision Unwisely Dispenses with the Requirement of Foundational Reliability.**

The Court of Appeals decision in this case also eliminates without explanation the requirement that repressed-memory evidence be shown to have a reliable foundation before it is admissible. Under this Court's precedent, even testimony relating to syndrome evidence or other evidence of "typical" conduct by victims is admissible *only* if the proponent can make a showing of foundational reliability. See Obeta, 796 N.W.2d at 294 (holding that district court has discretion to admit expert-opinion evidence on the typicality of certain post-assault conduct by sexual-assault victims "when the district court concludes that such evidence is relevant, helpful to the jury, and *has foundational reliability*" (emphasis added)).

In the present case, however, the Court of Appeals has implicitly but necessarily abandoned the requirement of foundational reliability. This conclusion follows unavoidably from two features of the Court of Appeals decision. First, the court's directions to the trial court on remand requires the trial court to evaluate the admissibility of the proposed repressed-memory testimony based on Rule 702's helpfulness requirement, Doe, 801 N.W.2d at 208 ("On remand, the district court should judge the admissibility of appellant's proffered expert testimony under the helpfulness requirement of Minn. R. Evid. 702."), but does not mention the Rule's requirement of foundational reliability. See Minn. R. Evid. 702 ("The evidence must have foundational reliability.").

More importantly, the trial court here had already concluded that Plaintiffs' proposed expert testimony concerning repressed memory lacked foundational reliability. See Add. 31-34. Thus, even assuming that the Court of Appeals were been correct in concluding that the Frye-Mack standard does not apply here, the trial court's holding that the evidence lacked foundational reliability should nevertheless have permitted the Court of Appeals to affirm the trial court's exclusion of the repressed-memory evidence. But the Court of Appeals did not do so; it instead *overruled* the district court's exclusion of the proposed evidence. The only reasonable inference from this reversal is that the Court of Appeals has abandoned or at least substantially diminished the importance of the foundational reliability requirement in evaluating this type of expert testimony. The MRC respectfully submits that the requirement that the proponent of expert testimony demonstrate that the testimony rests on a reliable foundation is a fundamental and indispensable element of any fair and balanced approach to the admission of scientific

evidence. The MRC urges this Court to make clear in its decision the vitality of this threshold requirement.

**D. The Nature of Plaintiff’s “Repressed Memory” Theory Makes It Ill-Suited for Expert Testimony.**

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

The use of evidence of supposedly “repressed memory” in the fact-finding process is ill-advised because of the fundamental differences between the clinical and legal settings. The purpose of a psychological diagnosis in the clinical environment is inherently directed toward the treatment and therapy of the condition diagnosed. As a result, even an uncertain diagnosis may be useful—or at least more useful than no diagnosis at all—because it allows caregivers to at least try to provide a helpful treatment. In contrast, the purpose of expert testimony in the legal setting is to permit the jury to reach a conclusion regarding which party’s version of the facts is true. Because of this different structure and purpose, a legal advocate presents a psychological diagnosis not as the best-available source of information for treatment but as information that the jury is to regard as absolute fact. Indeed, the presentation of such evidence through the testimony of an expert magnifies this distortion, inasmuch as expert testimony often has a particularly prejudicial impact “by creating an aura of special reliability and trustworthiness.” Saldana, 324 N.W.2d at 230.

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

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

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

## CONCLUSION

The Court of Appeals decision here essentially permits Plaintiff to use "repressed memory" to convert the statute of limitations analysis into a subjective inquiry that ultimately depends solely on (1) a plaintiff's own testimony about his or her own memory and (2) an expert's interpretation of that testimony. This holding runs directly counter to the objective, reasonable person standard the legislature adopted in Minnesota Statute 541.073 and repeatedly affirmed by this Court. As the Court stated in a related context:

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

Blackowiak, 546 N.W.2d at 3 (rejecting a "discovery rule" under section 541.073, subd. 2). The Minnesota Religious Council urges the Court to reverse the Court of Appeals decision and to reinstate the judgment of the District Court.

Dated: Oct. 26, 2011

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STATE OF MINNESOTA  
IN SUPREME COURT

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John Doe 76C,

Respondent,

CERTIFICATION OF  
BRIEF LENGTH

v.

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

Appellate Court  
Case Number: A10-1951

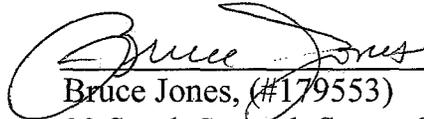
Appellants.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,587 words. This brief was prepared using Microsoft Word 2007 software.

Dated: Oct 26, 2011

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