

State of Minnesota  
**In Supreme Court**

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John Doe 76C,

*Respondent,*

vs.

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

*Appellants.*

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

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## SUMMARY

Doe offers no rebuttal to key arguments raised by The Archdiocese of St. Paul and Minneapolis and Diocese of Winona. Instead, Doe continues to misread this Court's cases and rely on dicta to support his claim that this Court has already held that repressed-memory theory is admissible to toll the statute of limitations. Doe also fails to explain why *Frye-Mack* does not apply to his repressed-memory evidence. Although Doe argues that the theory of repressed and recovered memory is generally accepted in the relevant scientific community, he ignores the admissions from his own expert, Dr. Chu, to the contrary. Doe next claims that his memory-repression evidence does not require foundational reliability. But he ignores the language of Minn. R. Evid. 702, which requires that all expert opinion testimony have foundational reliability. And he does not identify any way in which the district court abused its discretion by concluding, based on the evidence offered at the *Frye-Mack* hearing, that the evidence lacked foundational reliability.

On the fraud claims, Doe makes a number of key concessions and does not respond to concerns that adoption of his position would improperly expand the statute of limitations beyond the provisions enacted by the legislature and overrule the long-standing objective "reasonable person" standard for such claims.

These critical shortcomings warrant rejection of Doe's arguments and affirmance of the district court's decision.

## ARGUMENT

- I. In this case of first impression, the Court must decide whether memory-repression evidence is admissible and whether the district court applied the correct standard when assessing the admissibility of evidence offered to toll the statute of limitations for a claim of childhood sexual abuse.
  - A. This Court has never squarely addressed the issue of whether evidence of repressed memory is admissible to toll the statute of limitations.

Doe contends that this Court has “approve[d] of the introduction of evidence of repressed memory in order to toll any applicable statute of limitations.” (Resp. Br., at 44.)<sup>1</sup> That claim is a significant overstatement and based on a clear misreading of the Court’s earlier opinions. Although Doe cites dicta referring to the theory of repression, he cannot cite any case in which this Court permitted memory repression to toll the statute of limitations. The plaintiffs in *D.M.S. v. Barber*, 645 N.W.2d 383 (Minn. 2002), *W.J.L. v. Bugge*, 573 N.W.2d 677 (Minn. 1998), and *Blackowiak v. Kemp*, 546 N.W.2d 1 (Minn. 1996), did not make a claim of memory repression.

The only case decided by this Court that discussed an allegation of repressed memory was *Lickteig v. Kolar*, 782 N.W.2d 810 (Minn. 2010). But *Lickteig* had nothing to do with the repression claim or the scientific support for such a claim. Indeed, this Court refused to consider the merits of arguments regarding repressed memories. 782 N.W.2d at 818 n.6. The Court’s observation that the claim of repressed memory presented a fact question in no way indicates that the Court was

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<sup>1</sup> “Resp. Br.” refers to the brief of Respondent John Doe 76C.

satisfied that repressed memory was itself an accepted phenomenon. At best, the opinion reserved for resolution the very issue that is presented by this case. *See also Bertram v. Poole*, 597 N.W.2d 309 (Minn. Ct. App. 1999) (court did not address the admissibility of repressed-memory evidence under *Frye-Mack*), *review denied* (Minn. Sept. 28, 1999).

This Court has never squarely addressed either the issue of admissibility of memory-repression evidence or the standard by which such admissibility should be measured. These issues are now ripe for resolution in this case.

**B. The sex-abuse statute of limitations does not support Doe's claims.**

Doe also misconstrues the statute of limitations governing sex-abuse claims. The legislature did not intend for the limitations period in Minn. Stat. § 541.073 to be open-ended. *Bugge*, 573 N.W.2d at 680. Rather, to the extent the legislature was concerned about a child's inability to understand the harmful nature of the abuse, the legislature addressed that concern by giving claimants six years from the age of majority to pursue a legal claim. *Barber*, 645 N.W.2d 389–90. As this Court has previously observed, this provides victims of sexual abuse more time than they would have under other statutes of limitation. *Id.*

Even though the legislature gave victims additional time, there is no support for Doe's claim that they have an indefinite amount of time under the statute. The limitations period is not meant to extend more than six years beyond

the age of majority, absent a mental disability. *Id.*, at 390; *Bugge*, 573 N.W.2d at 681.

The Court's interpretation of the statute of limitations in *Bugge* was quite narrow and enforced an objective standard. "The underlying rationale for the limitations period contained in Minn. Stat. § 541.073 is that many sexual abuse victims, especially young children, are psychologically and emotionally unable to recognize that they have been abused." 573 N.W.2d at 680. At the same time, the Court recognized that the extended time period "was not intended to be open-ended." *Id.* In order to fulfill that legislative intent, the Court interpreted the statute to prescribe an objective test. *Id.*; *see also Blackowiak*, 546 N.W.2d at 3 (applying objective, reasonable person standard).

The legislature had opportunities in 2002, 2003, 2005, and 2007 to enlarge the statutory limitations period for sex-abuse claims or to adopt the subjective standard that Doe now advocates for.<sup>2</sup> It did not do so. The legislature's inaction regarding the proposed amendments to Minn. Stat. § 541.073 in the more than 15 years since *Blackowiak* was decided, demonstrates that it accepts this Court's construction of the statute that the onset of the limitations period is governed by an objective, reasonable person standard. *See* Minn. Stat. § 645.17(4).

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<sup>2</sup> *See* Brief of Amicus Curiae Minnesota School Boards Association, at 4–6.

C. Mere “coping mechanisms” do not toll the statute of limitations on claims of childhood sexual abuse.

Doe and his amici contend that “coping mechanisms” should toll the statute of limitations on his claims. But they fail to acknowledge that this Court and the court of appeals have repeatedly rejected that argument: Mere coping mechanisms do not toll the statute of limitations on a claim of childhood sexual abuse under Minn. Stat. § 541.073. *See Bugge*, 573 N.W.2d at 682 (confusion, not thinking about the abuse, and inability to understand the nature of the abuse do not toll the statute of limitations); *Blackowiak*, 546 N.W.2d at 3 (shame and anger do not toll statute); *see also S.E. v. Shattuck-St. Mary’s School*, 533 N.W.2d 628, 632 (Minn. Ct. App. 1995) (limitations period not tolled by failure to “make connection” between injuries and abuse), *review denied* (Minn. Aug. 30, 1995); *ABC v. Archdiocese of St. Paul and Minneapolis*, 513 N.W.2d 482, 486 (Minn. Ct. App. 1994) (inability to comprehend that the situation was abuse does not toll statute).

Ultimately, Doe’s “coping-mechanism” argument is nothing more than an attempt to apply a wholly subjective standard to the statute-of-limitations analysis. But Minnesota courts have long rejected such an approach. *Blackowiak*, 546 N.W.2d at 3; *ABC*, 513 N.W.2d at 486. Instead, courts use an objective, reasonable person standard and require a claimant to demonstrate evidence of a mental disability to toll the statute of limitations beyond the age of majority. *Barber*, 645 N.W.2d at 389; *Bugge*, 573 N.W.2d 681; *Blackowiak*, 546 N.W.2d at 3.

- II. The *Frye-Mack* standard applies to evidence on scientific theories, including Doe’s memory-repression evidence.
  - A. Memory repression evidence is suitable for a *Frye-Mack* analysis.

Doe now claims that *Frye-Mack* does not apply to his evidence on repressed memory. Doe did not raise this issue with the district court or the court of appeals.<sup>3</sup> As this Court has held, the *Frye-Mack* standard applies to evidence that is *novel* and *scientific*. *State v. Obeta*, 796 N.W.2d 282, 294 (Minn. 2011) (“[I]f the testimony involves novel scientific theory, it must satisfy the *Frye-Mack* standard.”). Despite Doe’s arguments to the contrary, the repressed-memory evidence he offers is both scientific and novel.

Doe has recast his theory of the case to reconcile it with the court of appeals’ decision. He now argues that his evidence on memory repression is not scientific. But this argument is contradicted by the testimony of Doe’s own experts and his reliance on what he characterizes as the “*scientific* research studies studying and confirming repressed memory as a valid psychiatric condition.” (Resp. Br., at 24 (emphasis added).) Doe spends 10 footnotes covering nearly three single-spaced pages discussing the various “scientific” studies<sup>4</sup> that supposedly show that his

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<sup>3</sup> Although Doe claims that he objected to the *Frye-Mack* hearing, he offers no citation to the record to support that claim. (Resp. Br., at 4, 13.) In addition, he did not assert on appeal to the court of appeals that *Frye-Mack* was the wrong standard.

<sup>4</sup> Doe suggests that there are numerous kinds of studies supporting the theory of repressed memory. All of those studies can be classified as either retrospective studies or prospective studies, as the dioceses’ experts explained. The district court agreed and explained why the studies were unreliable, regardless of how they were categorized. (Add. 31–34.) The district court also pointed out specific shortcomings

theory of repressed and recovered memory is generally accepted and reliable. (Resp. Br., at 26–29.) No evidence like this is mentioned in either *State v. MacLennan*, 702 N.W.2d 219 (Minn. 2005) or *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989), the two cases cited by Doe. This alone demonstrates that the repressed-memory evidence is scientific evidence and thus suitable for a *Frye-Mack* analysis.

Doe next claims that *Frye-Mack* does not apply to memory-repression theory because no physical, biological, or chemical test, technique, or protocol is used to assess its validity. This argument ignores cases that have applied *Frye-Mack* despite the absence of a fancy device or a laboratory test. *E.g.*, *State v. Mack*, 292 N.W.2d 764 (Minn. 1980) (admissibility of expert testimony on memories recovered through hypnosis); *State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985) (regarding admissibility of graphology); *see also State v. Robinson*, 718 N.W.2d 400, 407 n.3 (Minn. 2006) (stating that a *Frye-Mack* hearing would be used to determine whether it was “generally accepted within the medical profession” that the identity of a perpetrator was pertinent to diagnosis and treatment of domestic-violence victims before adopting hearsay exception regarding such statements). The absence of a particular test or technique thus does not in and of itself render *Frye-Mack* inapplicable, particularly when, as here, the theory is claimed to be *scientific*.

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with the various studies that Doe identified. For example, the district court rejected case studies and clinical studies or observations as too anecdotal and too scientifically unreliable to be of any use. (Add. 33.)

Doe's memory-repression evidence is novel. Doe has not identified any case decided by this Court where evidence on repressed-memory theory was previously vetted through a *Frye-Mack* hearing. Until that happens, the evidence must be viewed as novel. *See State v. Edstrom*, 792 N.W.2d 105, 110 n.1 (Minn. Ct. App. 2010) (explaining that scientific evidence is considered novel when it has not yet been subject to "the rigors of a *Frye-Mack* hearing" despite years of generalized acceptance by courts); *see also State v. Hull*, 788 N.W.2d 91, 103 n.3 (Minn. 2010); *State v. Roman Nose*, 649 N.W.2d 815, 821 (Minn. 2002).

Doe next contends that *Frye-Mack* is not applicable to his repressed-memory evidence because it involves a "behavioral science." In support of that contention, Doe relies heavily on *State v. Beckley*, 456 N.W.2d 391 (Mich. 1990), a Michigan case cited by this Court in *MacLennan*, 702 N.W.2d at 231–32. But *Beckley* was a plurality opinion, and the proposition cited by Doe has been questioned, if not rejected, as a misstatement of the law. In *People v. Hubbard*, 530 N.W.2d 130, 134 n.2 (Mich. Ct. App. 1995), the Michigan Court of Appeals explained that "junk science has no place in our courtroom" and that *Beckley* misstated the law by saying that "theories of behavioral science are not subject to scrutiny" under *Frye*. Further, the holding in *Beckley* was much more limited than Doe's analysis suggests. According to *Beckley*, the *Frye* test is only inapplicable if "the purpose of the evidence is merely to offer an explanation for certain behavior." 456 N.W.2d at 721. Thus where, as here, the evidence is not being offered to explain behavior, but

to create a legal disability capable of tolling the statute of limitations, the *Frye* test must apply.

B. The analysis from *Hennum* and *MacLennan* is unworkable in this context.

Doe fails to acknowledge that the evidence offered in *Hennum*, *MacLennan*, and *Obeta* was offered to explain a behavior that was a common or typical experience. *Hennum*, 441 N.W.2d 793 (battered woman syndrome); *MacLennan*, 702 N.W.2d 219 (battered child syndrome); *Obeta*, 796 N.W.2d at 282 (typical rape victim behaviors). Doe's evidence, however, is being offered to establish what Doe claims to be a rare phenomenon. Further, the evidence in *Hennum*, *MacLennan*, and *Obeta* was being offered to give context to a behavior, not to establish a legal disability that tolls the statute of limitations.

More importantly, Doe fails to explain how a trial involving such evidence would work. Doe provides no analysis showing that a jury would be better suited than the district court to analyze the evidence that was introduced at the *Frye-Mack* hearing. In this case, a jury presumably would need to sit through and evaluate at least three days of extensive expert testimony on the topic. That testimony would explain the science of memory, how memory operates, whether memory can be repressed in any way that is distinct from ordinary forgetting, whether—and how—memories can be falsely implanted, whether recovered memories are accurate, and whether the scientific community has reached any agreement on these issues. Doe would undoubtedly seek to admit the numerous studies that he cites here, in hopes

of persuading the jury that memory repression is not (as the dioceses' experts contend) psychiatric folklore. The dioceses would present testimony on the methodological flaws of such studies and the inaccuracy of clinicians' observations and diagnoses. The jury would have to wade through this science and extensive evidence to determine whether memory repression occurs, and how, or under what circumstances, it can occur. Doe does not explain how such a process would avoid thrusting the jury into the role of scientist. *See Roman Nose*, 649 N.W.2d at 822–23.

Then, after the jury resolves an issue that the scientific community has not been able to resolve (i.e., whether and when repression occurs),<sup>5</sup> the jury will need to determine whether Doe himself *actually* repressed his memories. In other words, assuming the jury believes both that Doe did not remember the actual abuse *and* that repressed memory followed by total recall is scientifically possible, the jury would then need to determine *why* Doe did not remember: Was Doe's lack of memory due to ordinary forgetting or was it due some other rare phenomenon (repressed memory) which caused Doe to involuntarily and inexplicably lose 100% access to his memories at some unknown point in time and suddenly recover them

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<sup>5</sup> This issue is unlike other cases where competing experts apply the facts and come to different conclusions, as in a water intrusion case or a medical causation case. As a result, Doe's reliance on cases like *Gardner v. Coca-Cola Bottling Co.*, 127 N.W.2d 557 (Minn. 1964), is misplaced. Unlike *Gardner*, where the experts disagreed over why glass broke, the experts here dispute whether a particular phenomenon even exists in the first place. In other words, the experts do not only disagree on whether Doe repressed his memories, but on whether memory repression can scientifically occur.

at another? The jury would have to make this determination even though Doe's own expert, Dr. Dalenberg, admits that she does not know if Doe lost all access to a memory. (T. 136–37.)<sup>6</sup> And the jury would need to make that determination, even though Doe has never been able to identify when he lost (or repressed) his memory.

The questions for the jury would not end there, however. To conclude that Doe's claims are timely, the jury would have to determine that Doe had not recovered the abuse memories earlier. Doe has offered no evidence to support his claim that he did not recover the abuse memories earlier. Indeed, Doe cannot provide such information, because he does not remember.

Finally, and even more troubling, the jury would be asked to decide whether Doe "recovered" false memories. The only way to determine whether Doe's recovered memories are true is through independent corroboration. But here there is none.<sup>7</sup>

As envisioned by the court of appeals' decision, the jury will have to make these determinations without the benefit of expert testimony on the issue of whether Doe did in fact repress his memories or suffered from some condition that caused him to lose access to his memory. Instead, once the jurors finish in their role as scientists, they will need to don their doctors' coats and diagnose Doe.

To rebut Doe's claim that he did not remember the abuse, the dioceses will be left only to cross-examine Doe on a purported memory that emerged so long

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<sup>6</sup> "T. \_\_\_" refers to the hearing transcript from June 1, June 2, and June 4, 2009.

<sup>7</sup> See Appellants' principal brief, at 26, for more on the lack of corroboration.

after the alleged facts that it cannot be confirmed or refuted by any available evidence, much less by mere cross-examination. This Court has already recognized that when it comes to “recovered” memories, cross-examination is not effective. *Mack*, 292 N.W.2d at 769–70. Doe does not explain why those concerns from *Mack* are not applicable here.

### III. Repressed-memory theory is not “universally accepted.”

Although the issue before this Court is what evidentiary standard the district court should have applied to Doe’s repressed-memory evidence, both Doe and his amici spend considerable time arguing the merits of the evidence itself. Because Doe and his amici mischaracterize both the record here and the state of scientific thought in this field generally, the dioceses are compelled to devote some space to correcting that mischaracterization.

#### A. Doe’s expert admits that memory-repression theory is not generally accepted in the relevant scientific community.

Doe claims that repressed-memory theory is “universally accepted in the scientific community.” (Resp. Br., at 24.) That claim disregards the testimony of Doe’s own expert, Dr. Chu, who repeatedly admitted that there is a “great” and “heated” debate and controversy in the scientific community on the very concept of repressed and recovered memories.<sup>8</sup> Doe does not address this testimony, and he does not explain how the district court clearly erred in crediting it. (Add. 27.)<sup>9</sup>

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<sup>8</sup> For Dr. Chu’s admissions, see 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;

A theory “cannot be both controversial and generally accepted.” (Add. 27.) Dr. Chu’s admission alone should be enough for the Court to reject Doe’s claims on this record. But in this case, the admission goes much further. It makes the evidence on general acceptance in the scientific community unanimous and unchallenged: Repressed memory, although supported by advocates, has yet to achieve the widespread support required to be admissible at trial.

B. The dioceses’ experts testified that the memory wars rage on and that there is no consensus.

Doe also ignores the testimony from the dioceses’ experts, including Dr. Loftus and Dr. Pope, who testified in detail about the heated disputes in the scientific community on this issue. Doe does not contend that the dioceses’ experts are not qualified or that they are not part of the “relevant *scientific* community.” Dr. Loftus and Dr. Pope are leading researchers in this area.

Doe similarly sidesteps—without analysis—the numerous recent studies identified by Dr. Pope that questioned the validity of repressed memories. Doe tries to dismiss them, claiming they simply regurgitate old arguments. But he ignores the articles challenging repression theory that continue to be published by leading

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AA 53, at 189:14–190:5. In fact, in his book, Dr. Chu writes, “Ever since the introduction of dissociative identity disorder . . . , controversy has swirled around the nature and validity of this diagnosis.” JAMES A. CHU, REBUILDING SHATTERED LIVES: THE RATIONAL TREATMENT OF COMPLEX POST-TRAUMATIC AND DISSOCIATIVE DISORDERS 195 (1998). “AA \_\_\_” refers to Appellants’ Appendix.<sup>9</sup> “Add.” refers to the Addendum to Appellants’ principal brief.

organizations and in prominent and mainstream journals.<sup>10</sup> And he offers no basis for this Court to conclude that the district court clearly erred in crediting this evidence and concluding that Doe’s repressed-memory theory lacks general scientific acceptance. (Add. 24–30.)

C. Doe and his amici mischaracterize reports from professional organizations expressing skepticism about repressed-memory theory.

Although Doe and his amici claim that professional organizations agree on the existence of repressed memory, they ignore the numerous statements to the contrary. Dr. Loftus testified that numerous professional organizations have expressed doubt over the existence and reliability of repressed and recovered memories. (T. 504–05.) Doe’s amicus curiae, The Leadership Council on Child Abuse and Interpersonal Violence, cites statements from the 1990s which it claims show a consensus or general acceptance amongst professional organizations; however, other independent commentators have reviewed the same reports and concluded that there is no general acceptance. A Rutgers Law Review article from 1999 examined the reports issued by seven national scientific societies across the globe and concluded there was no general acceptance on the existence of repressed

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<sup>10</sup> E.g., Richard J. McNally, *Dispelling Confusion About Traumatic Dissociative Amnesia*, 82 MAYO CLINIC PROCEEDINGS 1083 (2007) (included at AA 133); 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) (included at AA 138); Y. Rofe, *Does Repression Exist? Memory, Pathogenic, Unconscious, and Clinical Evidence*, 12 REV. GEN. PSYCHOL. 63 (2008); George A. Bonanon, *The Illusion of Repressed Memory*, as *Commentary, The Unified Theory of Repression*, 29 BEHAV. & BRAIN SCI. 499 (2006).

and recovered memories and that the evidence supporting the condition was “remarkably weak.”<sup>11</sup> Recent commentary published in another leading journal continues to point out that the major professional organizations do not accept the repressed-memory theory:

Further evidence that scientific authorities *do not generally accept repressed and recovered memory concepts* is shown by position papers of several major professional societies. The American Medical Association, the American Psychiatric Association, the (British) Royal College of Psychiatrists, the Canadian Psychiatric Association, and the Australian Psychological Society have all voiced skepticism about these notions.<sup>12</sup>

Furthermore, a review of the actual statements shows that these professional organizations have not reached a consensus on or generally accepted the theory of memory repression.

- **American Medical Association (1995):**
  - Recovered memories of childhood sexual abuse are of “uncertain authenticity” and the “use of recovered memories is fraught with problems of potential misapplication.”<sup>13</sup>
  - “Considerable controversy has arisen in the therapeutic community” on the issue of the existence of repression.<sup>14</sup>

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<sup>11</sup> Robert T. Reagan, *Scientific Consensus on Memory and Repression*, 51 RUTGERS L. REV. 275, 319 (1999).

<sup>12</sup> Piper, *supra* note 10, at 230 (AA 145).

<sup>13</sup> *Id.* (citing Am. Med. Ass’n Council on Scientific Affairs, 1995. p. 117).

<sup>14</sup> Reagan, *supra* note 11, at 291 (citing American Med. Ass’n Council on Scientific Affairs, Report on Memories of Childhood Abuse, *reprinted in* 43 INT’L J. CLINICAL & EXPERIMENTAL HYPNOSIS 114, 114 (1995)).

- “At one extreme are those who argue that such repressed memories do not occur, that they are false memories, created memories, or implanted memories, while the other extreme strongly supports not only the concept of repressed memories but the possibility of recovering such memories in therapy.”<sup>15</sup>
- **Canadian Psychiatric Association** (1996): Acknowledging that there is no clear evidence that recovered memories could be reliable.<sup>16</sup>
- **Australian Psychological Society** (1994): “The available scientific and clinical evidence does not allow accurate, inaccurate, and fabricated memories to be distinguished [from one another] in the absence of independent corroboration.”<sup>17</sup>
- **American Psychiatric Association** (1994): Admitting that it is “not known what proportion of adults who report memories of sexual abuse were actually abused,” and that “there is no completely accurate way of determining the validity of reports in the absence of corroborating information.”<sup>18</sup>
- **(British) Royal College of Psychiatrists** (1997): Raising concerns about ostensibly recovered memories where the patient reports having no memory of the abuse for many years.<sup>19</sup>
- **British Psychological Society** (1995): “[E]xperimental evidence for repression and other forms of not knowing about trauma is scant.”<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Piper, *supra* note 10, at 230 (citing Canadian Psychiatric Ass’n, 1996, p. 305) (AA 145).

<sup>17</sup> *Id.* at 230–31 (citing Australian Psychol. Ass’n, Limited, 1994, p. 2) (alteration in the original) (AA 145–46).

<sup>18</sup> Reagan, *supra* note 11, at 290 (citing Am. Psychiatric Ass’n, Fact Sheet: Memories of Sexual Abuse (Apr. 1994)).

<sup>19</sup> *Id.* at 296 (citing Royal College of Psychiatrists’ Working Group on Reported Recovered Memories of Child Sexual Abuse, *Reported Recovered Memories of Child Sexual Abuse: Recommendations for Good Practice and Implications for Training, Continuing Professional Development and Research*, 21 PSYCHIATRIC BULL. 663, 663 (1997)).

<sup>20</sup> *Id.* at 294 (citing The Working Party of the British Psychol. Soc’y, *Recovered Memories, reprinted in The Recovered Memory/False Memory Debate* 373, 389 (Pezdek & Banks eds., 1996)).

Doe does not explain to this Court how the district court clearly erred in accepting the testimony of Dr. Loftus, the conclusions of commentators and law review articles, or the actual statements from the organizations.

D. Doe ignores well-reasoned cases rejecting repressed-memory evidence.

Doe argues that the decisions of other jurisdictions are important because some admit evidence on repressed memory. But Doe wants this Court to ignore other cases rejecting such evidence. Doe cannot have it both ways.

Certainly, there are some cases where courts have permitted the introduction of evidence on repressed memory. But those cases are easily distinguished. Some courts used a different evidentiary standard.<sup>21</sup> Most, if not all, lacked the benefit of hearing testimony from experts, like Dr. Pope and Dr. Loftus, who are the internationally recognized leaders in their scientific fields.<sup>22</sup> Other cases, which relied heavily on the DSM,<sup>23</sup> failed to acknowledge the cautionary comments in the

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<sup>21</sup> *Doe v. Archdiocese of New Orleans*, 823 So.2d 360 (La. Ct. App. 2002) (applying *Daubert* standard without addressing general acceptance). Additionally, federal cases applying a *Daubert* standard are not informative here, because it is well-established that Minnesota's *Frye-Mack* approach is more conservative than *Daubert*. See *Góeb v. Tharaldson*, 615 N.W.2d 800, 812 (Minn. 2000).

<sup>22</sup> See *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000); *Wilson v. Phillips*, 786 Cal.Rptr.2d 204 (Cal. Ct. App. 1999); *Doe v. Shults-Lewis Child and Family Services, Inc.*, 718 N.E.2d 738 (Ind. 1999); *Commonwealth v. Shanley*, 919 N.E.2d 1254, 1267 n.20 (Mass. 2010) (indicating that the experts provided affidavit testimony on appeal and that Dr. Loftus's testimony was very limited during the trial).

<sup>23</sup> *Logerquist*, 1 P.3d 113.

DSM and from the United States Supreme Court.<sup>24</sup> Many of the cases that Doe cites as having “admitted expert testimony of repressed memories” do not in fact address the admissibility of such testimony,<sup>25</sup> and it is misleading for Doe to suggest that they do. (Resp. Br., at 41.) In fact, the Rhode Island case cited by Doe supports the dioceses’ position. There, the Rhode Island Supreme Court determined that the trial court should make a legal determination on whether repression is a legal disability that tolls the statute of limitations, *after* considering the medical and scientific evidence for such a theory and *after* determining whether it is *scientifically accepted* and valid. *Kelly*, 678 A.2d at 879–80. That is the very process that was followed here.

E. The DSM is not the adjudicator.

Ultimately, Doe’s general-acceptance argument boils down to the DSM. According to Doe, inclusion of the diagnosis of dissociative amnesia in the DSM is “absolute proof” that the theory of repressed memory is generally accepted in the relevant scientific community. (Resp. Br., at 31.) But the DSM is, by its own admission, not dispositive in these matters, and its use as an expert authority in courtrooms has been greeted with skepticism by the United States Supreme Court.

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<sup>24</sup> See Section III.E, *infra*.

<sup>25</sup> *Hearndon v. Graham*, 767 So.2d 1179 (Fla. 2000); *Pedigo v. Pedigo*, 686 N.E.2d 1180 (Ill. Ct. App. 1997); *Callahan v. State*, 464 N.W.2d 268 (Iowa 1990); *Powel v. Chaminade Coll. Prep.*, 197 S.W.3d 576 (Mo. 2006); *Sheehan v. Sheehan*, 901 S.W.2d 57 (Mo. 1995); *Peterson v. Huso*, 552 N.W.2d 83 (N.D. 1996); *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996); *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806 (Utah 2007); *Olsen v. Hooley*, 865 P.2d 1345 (Utah 1993).

Although Doe glosses over this criticism, it is particularly relevant in this case where Doe is trying to use the DSM as the final arbiter of what is accepted in the scientific community. As the Supreme Court explained in *Clark v. Arizona*, 548 U.S. 735, 775–76 (2006), a clinical diagnosis in the DSM is not sufficient to establish the existence—for legal purposes—of a mental disease.

Indeed, the very authority that Doe relies on, the DSM-IV-TR, cautions against its use in a legal setting, stating that “there are significant risks that diagnostic information [from the DSM-IV-TR] will be misused or misunderstood” when “employed for forensic purposes.”<sup>26</sup> Again, Doe ignores that.

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<sup>26</sup> The DSM-IV-TR provides:

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. *In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a “mental disorder,” “mental disability,” “mental disease,” or “mental defect.”* In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or *disability*), additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual’s function. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

DSM-IV-TR, *Introduction*, at xxxii-iii (emphasis added).

The DSM-IV-TR notes that it is most appropriately used as a tool for making a clinical diagnosis. But that does not mean it is helpful here, where Doe is trying to establish a mental disability that tolls the statute of limitations. To attempt to elevate the DSM-IV-TR to de facto adjudicator, as Doe does, is to ignore the DSM's own admonishments, the analysis of the United States Supreme Court, and this Court's decision in *Roman Nose*, 649 N.W.2d at 821, which requires an assessment of general acceptance by the court.

IV. Repressed-memory theory has no foundational reliability.

A. The scientific studies referred to by Doe are not reliable.

Doe claims that the district court “made its most grievous error” when it examined the reliability of the more than 300 studies Doe offered. (Resp. Br., at 23.) But these are the very studies that Doe relied on, continues to rely on, and proposes to have the jury rely on to support his claim that his expert testimony is reliable. (Resp. Br., at 26–29.) As explained by the district court<sup>27</sup> and the dioceses' experts<sup>28</sup> (and as conceded by Doe's expert<sup>29</sup>), these studies are too flawed to have any scientific value. It does not matter how many such studies are done; as Dr. Pope observed, “A hundred [studies] times zero is still zero.” (T. 351.) Doe has not shown that the district court abused its discretion when it determined that the methodological flaws in the studies precluded a determination that the studies had

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<sup>27</sup> Add. 31–34.

<sup>28</sup> See Appellants' principal brief, at 29–31.

<sup>29</sup> *Id.* at 30–31 (discussing Dr. Chu's testimony on flaws of retrospective and prospective studies).

foundational reliability. *See Goeb*, 615 N.W.2d at 814–16 (affirming exclusion where methodology was unreliable).

B. Doe’s claim that he does not need to show foundational reliability lacks merit.

Doe argues that he is not required to meet the foundational reliability standard under *Frye-Mack*. Instead, he claims that the evidence must only satisfy the “helpfulness” analysis described in *Hennum* and *MacLennan*. That argument is wrong and ignores the fact that Minn. R. Evid. 702 was different and did not incorporate the *Frye-Mack* standard when *Hennum* and *MacLennan* were decided.

Rule 702 was amended in 2006 to read:

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.

Minn. R. Evid. 702 (2010) (emphasis added).<sup>30</sup> The comments to the rule further explain that all expert testimony must have a reliable foundation. Minn. R. Evid.

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<sup>30</sup> Prior to this amendment, Rule 702 provided:

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

702, adv. comm. cmt.—2006 amendments. Furthermore, this Court recently confirmed that all expert testimony must have foundational reliability. *Obeta*, 796 N.W.2d at 289. Doe’s failure to acknowledge this requirement further undermines his argument for affirming the court of appeals’ decision.

C. Doe has the burden of establishing foundational reliability.

Doe misconstrues the law when he claims that the dioceses must offer proof that repressed memories do not exist. First, it is axiomatic that one cannot prove a negative. Second, it is Doe, as the proponent of the evidence, who bears the burden of establishing that his evidence has foundational reliability. Minn. R. Evid. 702; *Goeb*, 615 N.W.2d at 816. Third, and importantly, the dioceses did in fact offer substantial evidence,<sup>31</sup> which the district court relied on, showing that Doe’s evidence on repressed and recovered memories was not foundationally reliable. (Add. 23.) For instance, Dr. Pope testified about a study that showed that people can forget that they were able to remember certain events in the past. (T. 347–49.) And Dr. Loftus testified about her extensive research on implanted memories. (T. 488–92.) That research is particularly important in this case because it shows how easily memory can be distorted and contaminated and that once implanted the memory can

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education, may testify thereto in the form of an opinion or otherwise.

Minn. R. Evid. 702 (2004).

<sup>31</sup> See Appellants’ principal brief, at 22–23 & 27–28, for more discussion.

be held with complete conviction. As a result, it is virtually impossible to determine whether the memory is real or a product of some other process.

At a minimum, Doe has not shown that the district court abused its discretion by concluding that the expert testimony on repressed and recovered memories lacked foundational reliability. Thus the evidence was properly excluded, regardless of which evidentiary standard applies.

V. The district court did not abuse its discretion in excluding Doe's evidence on repressed and recovered memories. Summary judgment was proper.

Doe identifies no basis for concluding that summary judgment is improper on his negligence and vicarious liability claims, if the district court's evidentiary ruling stands. (Resp. Br., at 45.) In other words, if this Court concludes that the district court correctly applied the *Frye-Mack* standard to Doe's proposed repressed-memory evidence, Doe offers no basis on which the Court could conclude that the district court abused its discretion when (applying that standard) it excluded the expert testimony on the repressed and recovered memories.<sup>32</sup> There is thus no

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<sup>32</sup> Without this expert testimony, there is no basis for tolling the statute of limitations on Doe's negligence and vicarious liability claims. His claim amounts to nothing more than a claim of ordinary forgetting, which does not toll the statute of limitations. Any testimony from Doe would lack the appropriate foundation. *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

basis for concluding that his claims are timely under Minn. Stat. § 541.073, subd. 2(a), and summary judgment was appropriate.

VI. The district court properly dismissed Doe’s fraud claims.

To address claims of childhood sexual abuse, the Minnesota Legislature enacted Minn. Stat. § 541.073. Doe has not explained why his fraud claims should not be governed by that statute. Doe’s counsel has acknowledged that he pled fraud merely to avoid the statute of limitations in Section 541.073. His effort to avoid the controlling statute by artful pleading should not succeed.

Even under a fraud analysis, Doe’s claims are time-barred, as evidenced by the undisputed facts, including Doe’s concession that he was aware—in the 1980s—of Adamson’s abuse history and the extensive publicity surrounding those allegations. Although Doe contends that he did not know that the purported fraud “personally involve[d] him,” his argument ignores the evidence, including Doe’s testimony about his relationship with Adamson. (Resp. Br., at 48–49.)

Doe’s claimed lack of memory is immaterial in the fraud context, where the claimant must show that the fraud could not have been discovered earlier.

Ultimately, Doe’s argument pushes the envelope so far that it renders the statute of limitations a nullity. This Court must reject his arguments, which would otherwise

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required.”). Doe admitted that he is not qualified to testify on issues of repressed and recovered memories. (AA 2, at 8:14–9:16; AA 3, at 26:24–27:20; AA 15–16, at 119:17–123:7.)

have far-reaching consequences, and reinstate the summary-judgment order of the district court.

- A. Doe identified no basis for concluding that his fraud claims are actionable in this context.

Doe offered no response to the dioceses' contention that his fraud claims should be barred as nothing more than an attempt to circumvent the statute of limitations in Minn. Stat. § 541.073. In other contexts, Doe vigorously argues that the legislature enacted that statute of limitations so as to provide victims of childhood sexual abuse with a special provision to address their unique claims. Doe has identified no authority supporting his assertion that his fraud claims should be carved out of that statute. This issue is ripe for decision by this Court which should reject Doe's fraud claims—just as other courts have done. *See, e.g., Doe ex rel. Doe v. White*, No. 08-CV-2169, 2009 WL 268823, at \*11 (C.D. Ill. Feb. 3, 2009); *Mars v. Diocese of Rochester*, 196 Misc.2d 349, 352 (N.Y. Sup. 2003); *Doe v. Dilling*, 888 N.E.2d 24 (Ill. 2008); *see also United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961) (explaining that an action in tort of misrepresentation has been largely confined to “the invasion of interests of a financial or commercial character in the scope of business dealing”); *Tolliver v. Visiting Nurse Ass'n of Midlands*, 771 N.W.2d 908, 916 (Neb. 2009); *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D. N.Y. 1991).

B. Doe's admissions show that his fraud claims are untimely.

Doe makes a number of key concessions that demonstrate that his fraud claims are untimely. In particular, Doe concedes:

- He "was aware that Fr. Adamson had sexually abused other boys in the 1980s." (Resp. Br., at 48.)
- He knew that the abuse was wrong when it occurred; Doe felt paralyzed, shocked, confused, and fear. (Resp. Br., at 48.)

Because of these concessions, Doe necessarily must agree that he knew in the 1980s that any implicit representation by the dioceses that Adamson was safe or fit for ministry was false.

Doe also does not dispute several important facts from the 1980s and early 1990s, including that:

- The dioceses' knowledge about Adamson's past was publicly revealed, and the dioceses admitted responsibility for it in the 1980s.
- Doe's parents discussed the allegations against Adamson with Risen Savior's pastor at least twice.
- There was an announcement at Doe's parish, Risen Savior, about the allegations against Adamson.
- Risen Savior brought in a psychologist to discuss the abuse allegations against Adamson with parishioners.
- The Archdiocese held a meeting at Risen Savior to discuss the allegations against Adamson.
- Doe, his wife, and his family regularly discussed Adamson and the allegations against him with each other throughout the mid-to-late 1980s and the 1990s.

- There was extensive litigation and media publicity in the early 1990s, which laid bare the dioceses knowledge of Adamson’s history of misconduct. *See Mrozka v. Archdiocese*, 482 N.W.2d 806, 809–10 (Minn. Ct. App. 1992), *review denied* (Minn. May 24, 1992).

The plain language of the fraud statute of limitations states that a cause of action accrues upon “the discovery by the aggrieved party of the facts constituting the fraud.” Minn. Stat. § 541.05, subd. 1(6).<sup>33</sup> Those undisputed facts show that Doe was aware in the 1980s and no later than the early 1990s of the facts he claims constituted the fraud—the implicit misrepresentation about Adamson’s past. The six-year fraud statute of limitations started then and expired long before 2006 when Doe started his lawsuit. Those claims must be dismissed on that basis.

C. Doe’s fraud claims are untimely because Doe did not exercise reasonable diligence to discover his fraud claims.

Under Minn. Stat. § 541.05, subd. 1(6), the facts constituting the fraud are deemed to have been discovered when, “with reasonable diligence,” they could and ought to have been discovered. For more than 100 years, Minnesota courts have applied this objective standard to fraud claims. *See Bustad v. Bustad*, 116 N.W.2d 552, 555 (Minn. 1962); *First Nat’l Bank of Shakopee v. Strait*, 73 N.W. 645 (Minn. 1898); *Blegen v. Monarch Life Ins.*, 365 N.W.2d 356, 357 (Minn. Ct. App. 1985).

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<sup>33</sup> Contrary to Doe’s assertion, the dioceses do not concede that Doe’s fraud claims are governed by the statute of limitations in Minn. Stat. § 541.05, subd. 1(6), as opposed to the delayed-discovery statute, Minn. Stat. § 541.073, subd. 2(a). *See* Appellants’ principal brief, at 49–50 n.51. Doe identified no legal authority supporting his position.

Doe claims that he “involuntarily repressed all memories of being sexually abused by Fr. Adamson from the time of abuse until 2001 or 2002.” (Resp. Br., at 48.) He claims, therefore, that he had no reason before then to believe he had been defrauded by the dioceses. But Doe’s memory-repression theory collapses under the reasonable-diligence standard. Under that standard, a plaintiff bears the burden of alleging and proving that the facts constituting the fraud could not have been discovered until six years before commencing the action. *Blegen*, 365 N.W.2d at 357. Doe must therefore show that a reasonable person could not have discovered the facts constituting the fraud earlier.

Doe cannot make such a showing here, because Doe cannot show that his inability to remember the abuse is based on anything other than his unverifiable, subjective assertions. Neither Doe, his experts, or the multitude of studies he relies on can establish:

- when Doe forgot the abuse,
- whether Doe’s forgetfulness was continuous,
- whether Doe’s forgetfulness was interrupted by one or many periods where Doe’s memory was recalled before being subsequently forgot again, or
- whether Doe was aware of his own abuse during the period when he was admittedly aware of Adamson’s history of abuse and the extensive media coverage.

Doe cannot provide any evidence about any of those facts precisely because Doe claims he had no memory about anything related to the abuse until the summer of 2002, including no memory of any period when he was aware of his own abuse.

Doe's inability to show that he was unaware of his own abuse *at any time* before 2002 (other than his own unverified claim) cannot be the basis upon which a fraud claim can proceed. His analysis would open the floodgates to stale fraud claims and allow a plaintiff to avoid the statute of limitations by simply claiming ignorance of the fraud (without any application of the reasonable diligence standard). If the statute of limitations could be overcome by such a simple, self-serving statement, it would be eviscerated.

Finally, allowing Doe's fraud claims to proceed based solely on his claim that he "repressed" his memories of the abuse until 2002 would require this Court to make a factual determination that memory-repression theory is reliable and applicable here. Regardless of whether that determination was made under Rule 702 or *Frye-Mack*, it would conflict with the district court's decision which, as discussed at length in the dioceses' principal brief and above, is fully supported by the evidence. Doe's fraud claims must therefore be dismissed.

## CONCLUSION

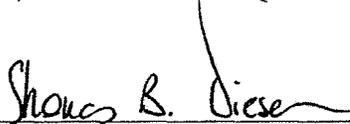
Doe has mischaracterized reports of professional organizations and ignored the testimony of experts, including his own witness, Dr. Chu, showing that the theory of repressed and recovered memory is not generally accepted in the relevant scientific community. Doe has also failed to show that the numerous studies he relies on are reliable. Because the evidence was properly excluded, there is no basis for concluding that Doe's claims were timely and summary judgment was appropriate on all of Doe's claims.

Doe's fraud claims must be rejected. They are nothing more than a recasting of his untimely negligence and vicarious liability claims and in that regard are a blatant attempt to circumvent the statute of limitations in Minn. Stat. § 541.073. In any event, the claims are untimely and summary judgment was appropriate.

Respectfully submitted,

MEIER, KENNEDY & QUINN, CHARTERED

Dated: December 7, 2011

  
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Dated: December 7, 2011



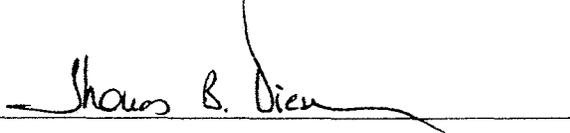
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CERTIFICATION OF COMPLIANCE

I hereby certify that the Reply Brief of The Archdiocese of St. Paul & Minneapolis and Diocese of Winona in Case No. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, subd. 3(b)(1) and that the brief contains 6,312 words. The brief was prepared using Microsoft Office Word 2007 and complies with the typeface requirements of Rule 132.01.

Dated: December 7, 2011

  
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