

CASE NO. A10-1951

STATE OF MINNESOTA
IN SUPREME COURT

John Doe 76C,

Respondent,

vs.

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

Appellants.

RESPONDENT'S BRIEF AND ADDENDUM

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

Counsel for Respondent John Doe 76C

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

*Counsel for Amicus Curiae Minnesota
Religious Council*

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

*Counsel for Appellant Archdiocese of St.
Paul and Minneapolis*

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

Counsel for Appellant Diocese of Winona

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

MURNANE BRANDT

Daniel A. Haws

Stacy E. Ertz

30 East Seventh Street, Suite 3200

St. Paul, MN 55101

Counsel for Amicus Curiae Minnesota Defense Lawyers Association

QUINLIVAN & HUGHES, PA

Michael J. Ford

Cally R. Kjellberg

400 South First Street, Suite 600

PO Box 1008

St. Cloud, MN 56302

Counsel for Amicus Curiae False Memory Syndrome Foundation

KNUTSON, FLYNN & DEANS

Thomas S. Deans

Michelle D. Kenney

1155 Centre Pointe Drive, Suite 10

Mendota Heights, MN 55120

Counsel for Amicus Curiae Minnesota School Boards Association

LAMEY LAW FIRM, PA

John D. Lamey III

980 Inwood Avenue North

Oakdale, MN 55128

Counsel for Amicus Curiae Leadership Council on Child Abuse and Interpersonal Violence

Amy J. Russell

2nd Floor, Maxwell Hall

Winona, MN 55987

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

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STATEMENT OF LEGAL ISSUES

1. Where John Doe intended to introduce expert testimony on the general condition of repressed memory to explain why victims of sexual abuse might repress and later recover memories of traumatic events, did the trial court abuse its discretion when it conducted a *Frye-Mack* hearing and excluded such testimony from consideration.

Appellants sought to exclude expert testimony of the condition of repressed memory to explain why victims of sexual abuse might repress and later recover memories of traumatic events offered by John Doe 76C (hereafter “John Doe”). Over John Doe’s objection, the trial court conducted a *Frye-Mack* hearing and ruled that the proffered evidence did not meet the requirements of *Frye-Mack* and the trial court excluded the proffered expert testimony.¹ John Doe appealed the trial court’s ruling to the Court of Appeals and the Court of Appeals reversed the trial court, ruling that the trial court abused its discretion by incorrectly using the *Frye-Mack* standard which is designed to evaluate physical, biological or chemical tests, techniques or protocols when the trial court should have evaluated the proffered testimony under Minn. R. Evid. 702.²

Most apposite cases: *State v. MacLennan*, 702 N.W.2d 219, 231-234 (Minn.2005); *Goeb v. Tharaldson*, 615 N.W.2d 800, 815-16 (Minn. 2000); *Blakowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996); *W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989).

Most apposite rule/statute: Minn. R. Evid. Rule 702.

¹Brief and Addendum of the Archdiocese of St. Paul and Minneapolis and Diocese of Winona (hereafter “Appellants’ Brief”) Add. 35.

²Appellants’ Brief Add. 67-71.

2. Did the trial court abuse its discretion when it granted summary judgment on John Doe's negligence and vicarious liability counts without considering whether the running of the statute of limitations on those counts was delayed due to John Doe involuntarily repressing the memories of the sexual abuse?

After the trial court ruled that evidence of repressed memory was excluded under *Frye-Mack*, the trial court ruled that the statute of limitations had expired on John Doe's negligence and vicarious liability claims because John Doe could not prove that the applicable statute of limitations was delayed due to disability.³ This issue was appealed to the Court of Appeals and the Court of Appeals reversed the trial court, ruling that the trial court should have considered the expert testimony of repressed memory and whether the statute of limitations was delayed due to John Doe involuntarily repressing the memories of the sexual abuse.⁴

Most apposite cases: See Legal Issue 1 *Infra*.

Most apposite statute: Minn. Stat. § 541.073.

3. Did the trial court abuse its discretion when it ruled that John Doe's fraud claims accrued in the 1980's when John Doe was unaware that he had been a victim of the fraud until 2001 or 2002?

The trial court ruled that the statute of limitations had expired on John Doe's fraud claims because John Doe should have commenced his fraud claim within six years from the mid-1980's, which the trial court ruled was the time that John Doe learned that

³Appellants' Brief Add. 58.

⁴Appellants' Brief Add. 70-71.

Fr. Adamson was a danger to children, despite the fact that the Plaintiff had no awareness that he himself was a victim of Fr. Adamson.⁵ This issue was appealed to the Court of Appeals and the Court of Appeals reversed the trial court's ruling stating that in a case where John Doe was unaware that he had been sexually abused as a result of the fraud, the statute of limitation for fraud did not begin to run until John Doe was put on notice that he had an action for fraud.⁶

Most apposite cases: *Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 431 (Minn. 1989); *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985); *John Doe 1 v. Archdiocese of Milwaukee*, 734 N.W.2d 827, 843-845 (Wis. 2007).

Most apposite statute: Minn. Stat. § 541.05 (2010).

⁵Appellants' Brief Add. 58-59.

⁶Appellants' Brief Add. 71-73.

STATEMENT OF THE CASE

Between 1963 and 1981, the Appellants received nine separate reports that Fr. Thomas Adamson had sexually abused parish boys at his many assignments during that period. Respondent John Doe, was sexually abused by Fr. Thomas Adamson in 1981. Shortly after the sexual abuse, John Doe repressed the memories of sexual abuse. In the summer of 2001 or 2002, John Doe began having flashbacks of the sexual abuse by Fr. Adamson. John Doe did not have any memory of the sexual abuse by Fr. Adamson before that. Sometime after his memories of abuse surfaced, John Doe learned that the Appellants had appointed Fr. Adamson to Risen Savior parish despite knowing that Fr. Adamson was a child molester. John Doe commenced this action in 2006.

Prior to the trial in the above matter, the Appellants filed a motion to exclude expert testimony regarding repressed memories and over John Doe's objection, the trial court conducted a *Frye-Mack* hearing. During the *Frye-Mack* hearing, John Doe called expert witnesses Constance Dalenberg, Ph.D. and James Chu, M.D. who testified about the reliability and general acceptance of repressed memory as a general condition. In support of their testimony, Respondent introduced that fact that repressed memory appears in the DSM-IV-TR and is the subject of over one thousand scientific research articles that proved that repressed memory exists and is reliable. Respondent introduced 328 of those research articles as examples of the breadth and depth of scientific research that has been conducted on repressed memory. The Appellants introduced the expert testimony of Harrison Pope, M.D., Elizabeth Loftus, Ph.D. and William Grove, Ph.D., who testified that repressed memory is not generally accepted in the scientific community

and is not reliable. Ultimately, the trial court ruled that the psychiatric condition of repressed memory should be excluded from evidence because it did meet the requirements of *Frye-Mack*.

Subsequent to the trial court's ruling to exclude expert testimony of repressed memory, the Appellants moved for summary judgment claiming that the statute of limitations had expired on John Doe's claims. After arguments were heard, the trial court ruled that since John Doe could not introduce evidence that he had repressed the memories of sexual abuse, John Doe would not be able to prove that he had a disability that would delay the running of the applicable statute of limitations on the negligence and vicarious liability claims. The trial court then granted summary judgment and dismissed John Doe's negligence and vicarious liability claims because the statute of limitations had expired. Similarly, the trial court also ruled that the statute of limitations on John Doe's fraud claim had expired and the trial court dismissed that claim.

John Doe appealed the trial court's orders excluding expert testimony on repressed memory, dismissing John Doe's negligence and vicarious liability claims, and dismissing John Doe's fraud claims to the Minnesota Court of Appeals. The Minnesota Court of Appeals reversed all three of the trial court's rulings. The Court of Appeals ruled that the general expert testimony on the psychiatric condition of repressed memory should not have been subjected to the *Frye-Mack* standard. Instead, the Court of Appeals ruled that the expert testimony should have been evaluated under Minn. R. Evid. 702 for helpfulness to the jury. Further, the Court of Appeals ruled that the trial court erred when it did not consider possible delayed running of the applicable statutes of limitations as a

result of the repressed memories on John Doe's negligence, vicarious liability and fraud claims.

This appeal followed.

STATEMENT OF THE FACTS

A. Knowledge of Adamson’s Sexual Abuse of Children Before Assigning Fr. Adamson to John Doe’s Parish.

Both Appellants, the Diocese of Winona (“Diocese”) and the Archdiocese of St. Paul and Minneapolis (“Archdiocese”), knew that Fr. Adamson was a danger to children long before he ever was assigned to John Doe’s parish and given access to John Doe.

The following chart summarizes some of that knowledge:

<u>YEAR</u>	<u>REPORTS/ADMISSIONS</u>	<u>INSTITUTIONAL RESPONSE</u>
1960s	<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>1st REPORT 1963 - Three Winona Priests know of Adamson’s homosexual problems with little boys (RA 1-6)</p> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>2nd REPORT/1st ADMISSION 1964 - The Bishop and 3 different priests found out that Adamson had sexual contact with boys. Adamson admitted the abuse to one of the priests. (RA 30, 32-35, 45, 47-48)</p> </div> <div style="border: 1px solid black; padding: 5px;"> <p>3rd REPORT/2nd ADMISSION 1964-67 – Adamson admitted to a different Winona priest that he asked a boy to undress in his office. (RA 18, 26)</p> </div>	<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>1963- Moved to parish and school in Caledonia (RA 8-9)</p> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>1964 – Moved to a high school in Rochester. (RA 49, 52)</p> </div> <div style="border: 1px solid black; padding: 5px;"> <p>1967 – Sent for 15 therapy sessions and moved to a parish in Albert Lea. (RA 14-16, 53-54)</p> </div>

THE DIOCESE OF WINONA

The following chart summarizes some of that knowledge:

<p>1970s</p>	<p>4th REPORT/3rd ADMISSION 1973 – Adamson admitted to a priest of the Diocese that he had sexual contact with a boy in 1973 in Rochester. (RA 36-41)</p> <p>5th REPORT 1973 - Victims' brother reported to Bishop that Adamson had molested his 3 brothers when they were children and asked the Bishop to follow up with other victims. (RA 56-59, 60-62)</p> <p>6th REPORT/4th ADMISSION 1973 – Adamson admitted to the Bishop that he had sexually molested a boy. (RA 42-43, 46)</p> <p>7th REPORT 1974- Bishop, principal and 3 other priests learned of Adamson's abuse of 4 minor male students. (RA 66-74)</p> <p>8th REPORT Late 1974 – Other priests and nuns in the Diocese find out about Adamson's abuse of boys and tell the Bishop. (RA 102-122) Victim's Family public exposure if Adamson allowed work at a parish. (RA 44, 50-51)</p>	<p>1973 - Allowed to remain at parish in Rochester.</p> <p>1973 - Bishop told the victims' brother no follow up was needed because "little boys heal." (RA 60-62)</p> <p>1973 – Allowed to remain at a parish in Rochester.</p> <p>Summer 1974- Adamson sent to CT for treatment. Diagnosed with Sexual Orientation Disturbance. (RA 90, 96-100)</p>
<p>1975</p>	<p><u>TRANSFERRED TO ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS (A.123-25)</u></p> <p>Winona Bishop told Archdiocese that Adamson was accused of molesting boys and that Adamson didn't begin to appreciate the numbers of people in 5 communities over a 15 year span that are heart-broken and bewildered over what Adamson did to their sons. (RA 130-140)</p>	<p>1975 – Adamson working at St. Leo's in St. Paul (RA 127)</p>

1976-1980	<p>1977 – Adamson arrested for indecent exposure to a 16 year old boy. (RA 143)</p>	<p>1976- Assigned Adamson to St. Boniface in St. Boniface (RA 142)</p> <p>1979 – Adamson transferred to Immaculate Conception in Columbia Heights.</p>
1980	<p>9th REPORT/5th ADMISSION Late 1980 – Adamson admitted to an Archdiocesan official that he sexually molested a boy from Immaculate Conception. Official wrote that the situation was just below the surface and that he thought it wasn't an isolated instance. (RA 144-148)</p>	<p>1981 – Adamson sent for a month of treatment and then assigned to Risen Savior in Apple Valley (RA 149-150)</p>

Overall, the Archdiocese and Diocese received at least 9 reports of Fr. Adamson’s sexual abuse of children and Adamson admitted to the molestation on 5 separate occasions. Despite this, Fr. Adamson was transferred to John Doe’s parish, Risen Savior.

B. Appointment of Adamson to Risen Savior.

Less than a month after Fr. Adamson’s hospitalization, on February 2, 1981, he was assigned as an Associate Pastor at the Church of the Risen Savior in Apple Valley.⁷ According to the letter from Archdiocese Archbishop Roach to Fr. Adamson: “This appointment will not be published in the Catholic Bulletin at this time.”⁸ To Archdiocese Auxilliary Robert Bishop Carlson’s knowledge, as of 1984, no parishioners had been informed of Adamson’s history of molestation of children at any time in any parish

⁷RA 150.

⁸*Id.*

before 1984 by the officials of the Archdiocese or the officials of the Diocese of Winona.⁹ In a letter to Fr. Adamson, Archbishop Roach wrote that “Priests, thank God, do enjoy the immediate and full confidence of our people.”¹⁰ When a Bishop appoints someone to a parish, he acknowledges that the priest can be trusted.¹¹

C. John Doe and His Family’s Involvement with Risen Savior.

John Doe was involved in numerous activities at Risen Savior: altar boy, youth group, youth retreats, and leader/teacher for younger students.¹² Additionally, Doe’s family was involved in all aspects of Risen Savior and much of their social life revolved around Risen Savior activities.¹³ John Doe’s dad was a trustee at Risen Savior for 10 years, on the parish council for 10 years, was on the steering committee, was a Eucharistic minister and trained altar boys.¹⁴ John Doe’s mother was on the parish council at Risen Savior, she was a befriender minister (listening/caring ministry to ill or those that lost a loved one), and she taught grade school religion.¹⁵

D. Fr. Adamson’s Involvement with the Minor John Doe.

John Doe’s parents allowed John Doe to play golf, tennis and go to the racquet ball club with Fr. Adamson.¹⁶ John Doe’s dad trusted Father Adamson.¹⁷ Adamson was

⁹RA 152.

¹⁰RA 157.

¹¹RA 159.

¹²RA 161.

¹³RA 164.

¹⁴RA 167.

¹⁵RA 172.

¹⁶RA 168-169; RA 173-174; RA 188.

¹⁷RA 170.

an honored guest in John Doe's home.¹⁸ Adamson supervised John Doe as an altar boy.¹⁹ Adamson taught John Doe's religious education class.²⁰ Finally, Adamson discussed the possibility of John Doe becoming a priest with John Doe.²¹ It was an honor for John Doe to golf with a priest.²² It was also an honor for John Doe and his family to have Adamson in John Doe's life.²³ John Doe did not know about Adamson's long history of abuse.²⁴

E. Fr. Adamson's Sexual Abuse of the Minor John Doe.

When John Doe was in the 8th grade, in approximately 1981, Fr. Adamson repeatedly sexually molested him.²⁵ The abuse occurred in Adamson's car, in the golf course parking lot, at the racquetball club, and in John Doe's parents' home.²⁶ Some of the abuse involved Fr. Adamson touching John Doe's genitals.²⁷

F. John Doe's Discovery of the Abuse in 2001 or 2002 and Later His Discovery of the Fraud.

In the summer of 2002, John Doe was in his backyard sitting at a picnic table with his wife.²⁸ During the conversation, John Doe's wife prodded him as to the reasons why

¹⁸RA 162-163.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²RA 187.

²³RA 161.

²⁴*Id.*

²⁵RA 176-187.

²⁶*Id.*

²⁷A.177-180.

²⁸Deposition of John Doe 30:14 – 23, attached as Exhibit 212 to the Affidavit of Michael Finnegan, filed in the trial court on July 12, 2010.

he was having low moods.²⁹ John Doe became very angry and tipped over the table. At that time, he kept seeing himself in Father Tom's car at the corner on the way to golf. And it was more of a series of a series of snapshots versus a – you know, a sequential movie, if you will.”³⁰ John Doe remembered “feeling hyperventilation and making grunting noises. My wife later told me I had said things like my box is opening. I don't recall saying it. And I just recall seeing those flashes of pictures of being inside his car and having his hand up in my upper thigh area, groin area, like a flash.”³¹ John Doe had never had a memory like that before.³² The flashback memory lasted between 10 to 30 seconds.³³ Further John Doe remembered Adamson being “in the car him talking to me about wanting – that I should be a priest, that I should go into the priesthood.”³⁴ John Doe hyperventilated, experienced elevated heart rate, felt rage, fear, panic, anger, disbelief and absolute confusion as a result of the memories.³⁵ Later, memories involving three more sexually abusive incidents returned where Fr. Adamson sexually abused him near a golf course, at a health club and at John Doe's home.³⁶

After the memories came back, John Doe attended counseling therapy and focused on the rage that he felt.³⁷ Sometime after his memories of the abuse came back John Doe learned that the Diocese and Archdiocese appointed Adamson to Risen Savior despite

²⁹RA 176.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴RA 177-178

³⁵RA 178.

³⁶RA 179-182; RA 184-185.

³⁷RA 183.

knowing he was a serial child molester.

G. Lawsuit Commenced.

John Doe commenced this action in 2006.

H. *Frye-Mack* Hearing Held.

As part of the lawsuit, the Archdiocese/Diocese filed a motion to exclude expert testimony regarding repressed memories under the *Frye-Mack* standard. During a three-day *Frye-Mack* hearing, John Doe presented the testimony of two expert witnesses, Constance Dalenberg, Ph.D. and James Chu, M.D., and introduced 340 exhibits that included 328 scientific research articles that proved that repressed memory was much studied, that repressed memory is a condition that is generally accepted within the relevant scientific community and that the diagnosis of repressed memory is scientifically reliable. In response, the Archdiocese/Diocese presented the testimony of three expert witnesses, Harrison G. Pope, M.D., William M. Grove, Ph.D. and Elizabeth F. Loftus, Ph.D. as well as a number of exhibits.

After the hearing, the trial judge issued an order titled Findings of Fact, Conclusions of Law and Order dated December 8, 2009 where the Court granted the motion to exclude expert testimony.³⁸

I. Archdiocese/Diocese's Motion for Summary Judgment.

Subsequent to, and based on the trial court's exclusion of the expert testimony, the Appellants brought a summary judgment motion. The summary judgment motion

³⁸Brief and Addendum of The Archdiocese of St. Paul and Minneapolis and Diocese of Winona (hereafter "Appellants' Brief") Add. 6-35.

claimed that the statute of limitations had expired on all of John Doe's claims prior to him filing the current action. After a hearing, the trial judge issued an Order dismissing John Doe's claims because the trial court found that the statute of limitations had expired.³⁹

J. Minnesota Court of Appeals Reverses the District Court.

On appeal to the Minnesota Court of Appeals, the Court of Appeals reversed the ruling of the district court. Drawing guidance from this Court, the Court of Appeals cited to *State v. MacLennan*⁴⁰, when ruled that the trial court erred in conducting a *Frye-Mack* hearing.⁴¹ The Court of Appeals reasoned that in cases involving expert testimony of behavioral science evidence explaining conduct, application of the analytic framework established by *Frye-Mack* is improper.⁴² Accordingly, the Court of Appeals held that the trial court erred in conducting a *Frye-Mack* hearing on general expert testimony about repressed memories.⁴³ The Court of Appeals reversed and remanded the case to the trial court for a determination by the trial judge of the admissibility of John Doe's proffered expert testimony under the helpfulness requirement of Minn. R. Evid. 702.⁴⁴ In addition, the Court of Appeals also ruled that the district court erred when it granted summary judgment after erroneously applying *Frye-Mack* analysis to exclude John Doe's expert

³⁹Add. 31-52.

⁴⁰702 N.W.2d 219, 230 (Minn. 2005).

⁴¹Add. 67.

⁴²*Id.*

⁴³*Id.*

⁴⁴Add. 68.

testimony regarding repressed memory.⁴⁵ The Court of Appeals ruled that if expert testimony on repressed memory was admitted under Minn. R. Evid. 702, that testimony would create a genuine issue of material fact as to whether John Doe had a disability that suspended the running of the child sexual abuse statute of limitations.⁴⁶ Finally, the Court of Appeals also ruled that the district court erred when granting summary judgment against John Doe on his claims of fraud.⁴⁷ The fact that John Doe did not have any memories of being sexually abused until 2001 or 2002, created a genuine issue of material fact as to when John Doe discovered the facts constituting the fraud.⁴⁸ The Court of Appeals then remanded the case to the district court.⁴⁹

The Archdiocese of St. Paul and Minneapolis and Diocese of Winona appealed the Court of Appeals decision to this Court.

STANDARD OF REVIEW

In the current case, the trial court should have considered the expert testimony of repressed memory under Minn. R. Evid. 702. This Court reviews a trial court ruling on the admission of evidence, including expert testimony evidence admitted under Rule 702, for abuse of discretion.⁵⁰ Because the trial court did not apply Rule 702 to determine whether the expert testimony regarding repressed memory would be helpful to the jury, this case should be remanded to the trial court for the proper application of Rule 702.

⁴⁵Add. 70.

⁴⁶Add. 71.

⁴⁷Add. 73.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009).

Here, the trial court mistakenly applied the *Frye-Mack* standard when deciding whether to admit the expert testimony regarding repressed memory. This application of *Frye-Mack* was erroneous and unworkable due to the nature of the evidence. When applicable, when considering an appeal from a trial court's ruling after conducting a *Frye-Mack* hearing, this Court must consider two standards of review. First, on the issue of whether a particular principle or technique is generally accepted within the relevant scientific community, this Court must review that issue de novo.⁵¹ Second, unlike this case, in cases where a proponent of a physical, biological or chemical test, technique or protocol that is used in the case and the proponent must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability, this Court must review that issue using the abuse of discretion standard.⁵²

In an appeal from summary judgment, this Court determines whether there is a genuine issue of material fact for trial and whether the district court erred in its interpretation or application of the law.⁵³ Summary judgment was not appropriate in this case because John Doe should have been allowed to present expert testimony of repressed memory which created a material factual dispute as to whether John Doe suffered from a disability sufficient to delay the statute of limitations on Doe's negligence and vicarious liability claims. Summary judgment was also not appropriate in

⁵¹*Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

⁵²*Id.*

⁵³*State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *Antone v. Mirviss*, 694 N.W.2d 564, 568 (Minn. Ct. App. 2005).

John Doe's fraud claims because John Doe's repressed memories caused a material factual dispute about when John Doe reasonably should have discovered the facts constituting the fraud by the Appellants.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED TESTIMONY OF REPRESSED MEMORY.

A. John Doe Intends to Introduce Expert Testimony of the General Condition of Repressed and Recovered Memories and the Characteristics Which are Present in an Individual Suffering from Repressed Memory.

In the case below, John Doe intended to testify about his recovered memories of being sexually abused by Fr. Adamson. In order to help the jury understand the general condition of repressed memories and how a victim of sexual abuse may not be able to access memories of the abuse, John Doe intended to introduce the expert testimony of James Chu, M.D. and or/Constance Dalenberg, Ph.D. to explain whether and why victims of trauma, including sexual abuse, might repress and later recover memories.⁵⁴ This is necessary evidence to assist the jury in determining a critical question of fact: whether John Doe suffered a disability that affected his ability to know he was sexually abused and therefore delayed the sexual abuse statute of limitations from running. If allowed to testify at trial, neither Dr. Chu or Dr. Dalenberg will testify that John Doe, in fact, experienced repressed memories. But rather Drs. Chu and Dalenberg will limit their testimony to explaining the general repressed memory condition for the purpose of

⁵⁴Appellants' Brief Add. 68-69.

helping the jury understand John Doe's conduct following the sexual abuse and his testimony at trial regarding the same.

B. General Testimony Informing About Repressed Memory is Admissible Under Minn. R. Evid. 702.

In Minnesota, scientific testimony by expert witnesses is governed by the Minnesota Rules of Evidence. According to Minn. R. Evid. 702:

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.

In *State v. Hennum*, this Court considered the admissibility of battered woman syndrome under Minn. R. Evid. 702.⁵⁵ In *Hennum*, the Court ruled that expert testimony on battered woman syndrome should be admitted under Rule 702 when it is helpful to the jury. According to the Court, expert testimony is sufficiently helpful where it would help to explain a phenomenon not within the understanding of an ordinary lay person⁵⁶ and is beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility.⁵⁷

⁵⁵441 N.W.2d 793, 797-799 (Minn. 1989).

⁵⁶Courts have admitted expert testimony on this subject (1) to dispel the common misconception that a normal or reasonable person would not remain in such an abusive relationship, (2) for the specific purpose of bolstering the defendant's position and lending credibility to her version of the facts, and (3) to show the reasonableness of the defendant's fear that she was in imminent peril of death or serious bodily injury. *Hennum*, 441 N.W.2d at 798.

⁵⁷*Id.*

1. General Testimony About Post-Trauma Repressed Memories by an Expert Witness to Explain Subsequent Conduct is Not Subject to the Requirements of *Frye-Mack*.

Generally, Minnesota courts have divided expert testimony into two separate categories: (1) Expert testimony relating to the behavioral sciences comprised of clinical observations offered to explain conduct and (2) expert testimony relating to tests, techniques and protocols based upon chemical, biological, or other physical sciences. As a rule, cases from this Court, and the Court of Appeals have held that expert testimony offered to explain post-sexual assault behavior of the victim falls within the first category of behavioral sciences and are not evaluated under the *Frye-Mack* standard.

In *State v. MacLennan*, this Court concluded that expert testimony relating to battered child syndrome which describes the general syndrome and the general characteristics that which are present in an individual suffering from the syndrome in order to explain conduct, fit within the behavioral science category of expert testimony.⁵⁸ In its analysis, this Court was guided by the analysis of the Michigan Supreme Court case *People v. Beckley*, which held that when the purpose of behavioral science evidence is to offer an explanation for certain behavior, the *Frye* test is inapplicable.⁵⁹ When drawing on *Beckley*, this Court language cited language which recognized the distinction between hard sciences and behavioral sciences:

[There is] “a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and

⁵⁸702 N.W.2d 219, 231-234 (Minn. 2005).

⁵⁹*MacLennan* citing *People v. Beckley*, 456 N.W.2d 391, 403-04 (Mich. 1990). Like Minnesota, Michigan has affirmed the *Frye* standard as opposed to *Daubert*. See *MacLennan*, 702 N.W.2d at 232.

assumptions that are based on the behavioral sciences.”⁶⁰

In the case of behavioral or social science testimony that is offered to explain certain conduct, the concerns underlying the use of the *Frye* test were not present, so the *Frye* test is inapplicable to such evidence.⁶¹

In addition, the Court in *MacLennan* stated that it also drew guidance from the Connecticut Supreme Court's analysis in determining the proper method for determining the admissibility of social science evidence.⁶² The Connecticut Supreme Court had held that the *Frye* test was appropriate "when the experimental, mechanical or theoretical nature of the scientific evidence has the potential to mislead lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed."⁶³ The court had further stated that "expert testimony need not satisfy the *Frye* test in cases where the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge."⁶⁴

As the Michigan and Connecticut Supreme Courts recognized, it is cross-examination and rebuttal evidence that is the proper way of challenging an expert's testimony regarding repressed memory that is not based on highly technical or obscure scientific theory and not the exclusion of the evidence under a *Frye-Mack* analysis.⁶⁵

⁶⁰702 N.W.2d at 231.

⁶¹702 N.W.2d at 231.

⁶²*Id.* at 232 discussing *State v. Borrelli*, 227 Conn. 153, 629 A.2d 1105, 1111 (1993).

⁶³*Id.*

⁶⁴*Id.* quoting from *Borelli*, 629 A.2d at 1110-11.

⁶⁵*Id.* at 232.

After thoughtful discussion and analysis, this Court concluded that the *Frye-Mack* framework did not apply to battered child behavioral science:

Unlike a case involving physical science such as DNA testing, in the area of “syndromes” experts do not administer a specific set of tests to discern whether a defendant suffers from either battered woman syndrome or battered child syndrome. Further, such experts may not testify about whether a particular defendant actually suffers from a syndrome. Rather, experts on “syndromes”-including battered child syndrome-are only permitted to testify about the syndrome in a general manner, provided that the testimony is “helpful” to the jury. Thus, expert testimony on syndromes, unlike DNA evidence or other physical science, is not the type of evidence that the analytic framework established by *Frye-Mack* was designed to address. Accordingly, we conclude that the *Frye-Mack* standard does not govern the admissibility of expert testimony on battered child syndrome.

Id. at 233. (Citations omitted.)⁶⁶

Comparing the above cases to cases where this Court has required *Frye-Mack* analysis, it is clear that *Frye-Mack* analysis applies to chemical, physical or biological scientific tests, techniques or protocols and not testimony to explain conduct.⁶⁷ Most of

⁶⁶See also *State v. Hennem*, 441 N.W.2d 793, 797-99 (Minn. 1989) (This Court allowed expert testimony on the topic of battered woman syndrome in order to explain the conduct of the defendant without subjecting that testimony to the *Frye-Mack* standard); *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987) (This Court allowed expert testimony concerning the behavioral characteristics typically displayed by adolescent victims of sexual assault in order to explain conduct of a victim without requiring *Frye-Mack* analysis.).

⁶⁷*Goeb v. Tharaldson*, 615 N.W.2d 800, 815-16 (Minn. 2000) (*Frye-Mack* analysis required for expert witness testimony about the technique used to test plaintiffs for exposure to the insecticide chlorpyrifos.); *State v. Roman Nose*, 649 N.W.2d 815, 820-23 (Minn. 2002) (*Frye-Mack* analysis required for expert witness testimony for the PCR-STR method of testing DNA evidence.); *State v. Traylor*, 656 N.W.2d 885, 892 – 898 (Minn. 2003) (*Frye-Mack* analysis required for the PCR-STR method of testing DNA evidence.); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 824-25 (Minn. 2000) (*Frye-Mack* analysis required to determination the admissibility of expert testimony relating to tests used for asbestos contamination.); *State v. Bailey*, 677 N.W.2d 380, 397-400 (Minn. 2004) and 732 N.W.2d 612 (Minn. 2007) (*Frye-Mack* analysis

these cases involve DNA testing evidence. In contrast to the current case, in a DNA test there are specific testing protocols that must be adhered to in order to reach a scientifically reliable result.⁶⁸ Because this type of scientific testimony is so highly technical, it would be very difficult for jurors to know if the tests were properly conducted and produced accurate results. Given the technical nature and complexity of this type of testing, there is a legitimate concern that expert testimony about the laboratory protocols and scientific tests could give an “aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed” and mislead the jury into believing that the tests are more accurate than they really are.⁶⁹ That is why this type of chemical, physical or biological scientific tests, techniques or protocols require the structure and evaluation of a *Frye-Mack* hearing. It is also clear that application of the *Frye-Mack* standard to the expert testimony on repressed memory proffered here does not fit because there are no tests, techniques or protocols to

required to determine whether use of Bunsen burner during PCR-STR DNA testing was foundationally reliable.); *State v. Kromah*, 657 N.W.2d 564 (Minn. 2003) (*Frye-Mack* analysis required in PCR-STR DNA Testing.); *State v. Jobe*, 486 N.W.2d 407 (Minn. 1992) (*Frye-Mack* analysis appropriate to evaluate DNA RFLP testing method.); *State v. Loving*, 775 N.W.2d 872 (Minn. 2009) (*Frye-Mack* analysis proper when evaluating SEM/EDX testing for gunshot residue.); *State v. Jones*, 678 N.W.2d 1 (Minn. 2004) (*Frye-Mack* proper for PCR-STR testing of DNA.); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989) (*Frye-Mack* proper for RFLP DNA testing method.); *State v. Johnson*, 498 N.W.2d 10 (Minn. 1993) (*Frye-Mack* appropriate to evaluate DNA testing.); *Conwed Corp. v. Union Carbide Chemicals & Plastics Co., Inc.*, 634 N.W.2d 401 (Minn. 2001) (*Frye-Mack* appropriate to evaluate test for asbestos contamination.).

⁶⁸See RA 189-205, excerpts from *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities*, Office of the Inspector General, May 2004.

⁶⁹*MacLennan*, 702 N.W.2d at 232 citing *Borelli*, 629 A.2d at 1110-11.

evaluate.⁷⁰ Instead, the expert testimony here is offered to explain conduct of John Doe. There is no scientific test, technique or protocol at issue here – let alone whether the test, technique or protocol was followed appropriately in order to insure reliability. As such, prong two simply is not applicable to this behavioral science.

It is here that the trial court made its most grievous error. In its ruling, the trial court found as follows:

The court finds that even though plaintiff relies on a number of retrospective studies, prospective studies, case studies, and accuracy studies in an attempt to establish that the theory of repressed and recovered memory is foundationally reliable, ***plaintiff failed to prove the studies have foundational reliability.***⁷¹

The standard in the second prong of *Frye-Mack* is the foundational reliability of the scientific test or technique administered in the specific case, not the foundational reliability of the hundreds of scientific studies that are admitted into evidence.⁷²

Finally, application of *Frye-Mack* is improper because general testimony about post-sexual assault repressed memories is not novel or new. As discussed above, post-sexual assault repressed memory first recognized by the Minnesota Legislature in 1989 – more than 20 years ago - and is one of the reasons for passing the delayed-discovery

⁷⁰*Goeb v. Tharaldson*, 615 N.W.2d at 814 (Minn. 2000) (Under the second prong of *Frye-Mack* the proponent of a 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. Roman Nose*, 649 N.W.2d 815, 818-19 (Minn. 2002) (Second prong of *Frye-Mack* requires the particular evidence derived from the technique that is used in the individual case must have foundation that is scientifically reliable.)

⁷¹ Appellants' Brief Add. 31.

⁷² See *Goeb v. Tharaldson*, 615 N.W.2d at 814; *State v. Roman Nose*, 649 N.W.2d at 818-19.

statute of limitations for childhood sexual abuse.⁷³ Consistently, this Court and the Court of Appeals have repeatedly recognized post-sexual assault repressed memory as a disability that delays the running of the childhood sexual abuse statute of limitations.⁷⁴ Further, numerous states have admitted repressed memory in their courts.⁷⁵

In addition, repressed memory is universally accepted within the scientific community. Repressed memory appears in the DSM-IV, which is the official manual of the American Psychiatric Association that is the authoritative guide, or the “Bible,” of diagnoses of psychiatric disorders.⁷⁶ There have been over a thousand scientific research studies studying and confirming repressed memory as a valid psychiatric condition and 328 of these studies are admitted in evidence in this case.⁷⁷ These studies span almost 25 years and across multiple areas of trauma such as combat veterans, car accidents, sexual abuse, physical abuse, Holocaust survivors, and war refugees⁷⁸ and include every type of research study: case studies, prevalent studies, clinical studies, professional surveys, accuracy studies, mechanism studies, dissociation and repression studies, physiological and medical studies, therapy studies, and literature reviews.⁷⁹

Significantly, despite presenting three rebuttal expert witnesses, the Appellants in this case did not introduce a single study involving test subjects or other medical

⁷³See *infra* Section I C.

⁷⁴See *infra* Section I D.

⁷⁵See *infra* Section I E.

⁷⁶Transcript of *Frye-Mack* Hearing (“T.”) 206.

⁷⁷T. 28.

⁷⁸T. 36., See *infra* Section I B 2.

⁷⁹T. 29-110; *Frye-Mack* Hearing Exhibits (“Ex.”) 401 through 728. See *infra* Section I B 2.

evidence that proved that trauma victims do not or cannot repress traumatic memories and then recover them at a later time. The scientific studies and medical evidence universally support the existence of post-traumatic memory loss of the traumatic events that, in some cases can be recovered later in time.

Consequently, with no novel physical, chemical or biological test or technique to evaluate, the application of the *Frye-Mack* analysis is improper. Instead, the proffered expert testimony involves behavioral science that is offered to explain certain conduct of John Doe which should be evaluated under Minn. Rule Evid. 702 for helpfulness to the jury.

2. General Testimony About Post-Trauma Repressed Memories by Dr. Chu and Dr. Dalenberg is Reliable and Based Upon Proper Foundation.

As discussed in *Hennum*, another component to the helpfulness requirement of Minn. R. Evid. 702 is that the behavioral science is beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility.⁸⁰ It is notable that this Court cited to court decisions from other states, and not scientific studies, as support of its conclusion that battered woman syndrome met this requirement.⁸¹

In the current case, repressed memory has gained sufficient acceptance to meet the helpfulness standard of Minn. R. Evid. 702. For example, repressed memory is

⁸⁰See *Hennum*, 441 N.W.2d at 798.

⁸¹*State v. Allery*, 101 Wash.2d 591, 597, 682 P.2d 312, 316 (1984); *Smith v. State*, 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981); *Hawthorne v. State*, 408 So.2d 801, 807 (Fla. Dist. Ct. App. 1982); *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979).

recognized by the Minnesota Legislature and this Supreme Court.⁸² In addition, numerous states have admitted repressed memory in their courts.⁸³ Further, scientific study and support of repressed memory is extensive. For instance, repressed memory appears in the DSM-IV.⁸⁴ There have also been over a thousand scientific research studies studying and confirming repressed memory as a valid psychiatric condition and 328 of these studies are admitted in evidence in this case.⁸⁵ These studies span almost 25 years and across multiple areas of trauma such as combat veterans, car accidents, sexual abuse, physical abuse, Holocaust survivors, and war refugees⁸⁶ and include every type of research study: case studies⁸⁷, prevalent studies⁸⁸, clinical studies⁸⁹, professional

⁸²See *infra* Sections I C and I D.

⁸³See *infra* Section I E.

⁸⁴T. 206.

⁸⁵T. 28; Ex. 401-728.

⁸⁶T. 36.

⁸⁷A case study is an in-depth presentation of a case. T. 41–43. Case studies are usually written to help clinicians understand the phenomenology of something and what it actually looks like when the patient presents him or herself. T. 41–43. One example of a case study is the 1999 study by Dennis Bull. Ex. 468. This case study involved a case where a 40 year old woman with a master’s degree and no previous mental health problems, recovered memories of childhood sexual abuse by her father. T. 43; Ex. 468. In the study, it was noted that the patient’s sister had witnessed the sexual abuse of the patient, yet the patient had no memory of the sexual abuse until she was 40 years old. *Id.* When the patient recovered the abuse memories, she required hospitalization. *Id.* For more examples of case studies, see Exhibits 487, 517, 571, 722, 403, 404, 420, 477, 509, 518, 538, 559, 685, 687, and 704.

⁸⁸Prevalent, or prevalence, studies are typically studies done of groups of people to determine how many of them experienced repressed memory. T. 30. One example of a prevalent study is a study by Plaintiff’s expert James Chu, M.D. et al (1999) in the *American Journal of Psychiatry*, where ninety patients in the trauma unit at McLean Hospital were evaluated for amnesia. Ex. 480. The study found that there was a higher level of dissociative symptoms, including repressed memory/dissociative amnesia, in patients who had been traumatized compared to those who had not been traumatized. *Id.* Further, the study found that the younger the age of the trauma, the higher the number

surveys⁹⁰, accuracy studies⁹¹, mechanism studies⁹², dissociation and repression studies⁹³,

and level of dissociative symptoms. Finally, the study found that the vast majority of recovered memories occurred at home, alone or with family and friends and not during a therapy session. Id. For other examples of prevalent studies see Exhibits 442, 453, 473, 519, 430, 442, 453, 480, 496, 498, 519, 523, 547, 612, 613, 615, 673, 701, 716, and 721.

⁸⁹Clinical studies are typically studies in which inpatient or other clinical groups are studied to determine what percentage experienced repressed memory. T. 30. An example of a clinical study is Dr. James Chu's 1990 clinical research study published in the *American Journal of Psychiatry*. In this clinical study, James Chu and Diana Dill examined whether dissociative symptoms are specific to patients with histories of abuse. Ex. 479. Ninety-eight female psychiatric inpatients completed self-report instruments that focused on childhood history of trauma, dissociative symptoms, and psychiatric symptoms in general. Id. Sixty-three percent of the subjects reported physical and/or sexual abuse. Id. Eighty-three percent had dissociative symptom scores above the median score of normal adults, and 24% had scores at or above the median score of patients with posttraumatic stress disorder. Id. Subjects with a history of childhood abuse reported higher levels of dissociation. Id. Additional examples of clinical studies that are in evidence include Exhibits 422, 474, 554, 565, 600, 653, 664, 692, and 700.

⁹⁰Professional surveys are studies that survey mental health professionals about their experiences with repressed memory. T. 30. For example, in the 1995 survey by Pope (Kenneth) and Tabachnick, the researchers surveyed licensed psychologists and learned that 73% had encountered at least one patient who had recovered a previously forgotten memory. Ex. 645. Additional professional surveys that are admitted into evidence include 413, 416, 417, 526, 528, 599, 632, and 639.

⁹¹Accuracy studies focus on how accurate repressed memories are as compared to continuous memories. T. 90. The study by Williams, 1995, the researchers compared the accuracy of recovered memories to subjects who had not repressed their memories of the abuse. Ex. 717. Williams found that there were some errors in both repressed memories as well as continuous memories, but that both type of memories were equally accurate. Id. Similarly, in a study by Dr. Dalenberg herself, 1996, seventeen patients who had recovered memories of abuse were evaluated to determine which type of memory was more accurate. Ex. 500.

⁹²Mechanism studies are studies that test a particular mechanism for recovered memory. In Mechanic, Resick, et al., 1998, the researchers compared the competing theories of memory decay, normal forgetting versus an unconscious memory process such as dissociation. Ex. 611; T. 98-99. In the study, 37% of the participants experienced memory deficits for parts of the sexual assault at two weeks following the assault. Ex. 611. However, many of those participants' memories improved over the next three months. Id. These findings were seen to be inconsistent with normal forgetting and memory decay because under normal conditions, memory gets worse over time, not better. Id. Thus, the researchers determined that the results were more consistent with an

physiological and medical studies⁹⁴, therapy studies⁹⁵, and literature reviews.⁹⁶

unconscious memory process such as dissociation. *Id.* In addition, the following research articles that are currently in evidence are also mechanism studies: Exhibits 410, 412, 450, 498, 523, 536, 590, 612, 613, 615, 650 and 720.

⁹³Dissociation/repression studies are studies that test the mechanism causing repressed memory. T. 105. In Akyuz et al. (2007), the researchers examined childhood abuse, dissociation and post-traumatic stress disorder (PTSD) among male prisoners. Ex. 401. A sample of 101 randomly selected male prisoners was interviewed using different objective psychological tests to determine the frequency of dissociative experiences, trauma and PTSD. *Id.* The study found that dissociative experiences such as amnesia were more frequent in the population studied than the general population. *Id.* Other dissociation/repression studies include 421, 425, 444, 449, 454, 467, 497, 511, 512, 515, 557, 558, 588, 589, 629, 656, and 663.

⁹⁴Medical studies are studies that measure brain activity and hormone levels of those who experienced repressed memories and those who did not. T. 106-108. In Bremner (1999), the researchers described the neurological and hormonal changes that occur as a result of trauma and the changes in portions of the brain that control memory. Ex. 438. Further, in Bremner (2001) the researcher noted that changes in brain structures and systems mediating memory offer a possible explanation for delayed recall of childhood abuse in patients with abuse-related PTSD. Ex. 439. Patients with PTSD have alterations in a broad range of memory functions. *Id.* PTSD patients also show changes in structure and function in brain regions mediating memory as well as in brain chemical systems involved in the stress response. *Id.*

Moreover, in Kanaan et al. (2007), the researchers performed functional Magnetic Resonance Imaging (fMRI) on a patient who had repressed traumatic memories. Ex. 569. In the study, researchers conducted fMRI scans of the patient's brain while she was thinking about a traumatic event of which the patient had a continuous memory and then conducted fMRI scans of the patient's brain when she thought about the memories that she had recently recovered. *Id.* The results of the study revealed that different portions of the brain were stimulated when the patient thought about the continuous memory than when she thought about the recovered memory. *Id.*

Additional physiological and medical studies that investigate brain and neurochemical activity related to repressed memories are Exhibits 427, 441, 521, 539, 567, 568, 579, 581, 606, 607, 608, 616, 622, 624, 666, 674, 723, and 724.

⁹⁵Therapy studies are studies in which people with recovered memories go through therapy and the studies look at the results of the therapy. T. 108. Two significant examples of this body of research and literature are the books by **James Chu** titled *Rebuilding Shattered Lives: The Responsible Treatment of Complex Post-Traumatic and Dissociative Disorders*, John Wiley & Sons 1998 and **Constance Dalenberg** titled *Countertransference and the Treatment of Trauma*, American Psychological Association 2000. T. 109. Additionally, the following research articles are in evidence and examples

In the Appellant's brief, the Appellants encourage this Court to consider the fact that the Appellants' experts disagree with John Doe's experts about repressed memories as evidence that the scientific foundation of repressed memories is not reliable. This is simply not the case. This disagreement between the experts is nothing more than the same scholarly debate that rages on every college and university campus in almost every area of scientific research every single day.

In the current case, the Court need only apply its standing precedent on Minn. R. Evid. 702, reliability and helpfulness, to conclude that the proffered expert testimony on repressed memories meets the reliability requirements of that Rule. In *Hennum*, the Court stated that "the theory underlying the battered woman syndrome is beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility."⁹⁷ As discussed at length *infra*, the Minnesota statute and an abundance of state supreme court precedence across this country points to the reliability of the phenomenon of repressed memory. Further supporting the reliability of this behavioral science, is that that diagnosis has been included in the DSM-IV-TR. While we do not believe its inclusion is a threshold to a finding of reliability or helpfulness, it is evidence that the amount of acceptability exceeds that which is necessary to allow an expert to testify regarding matters that are beyond the understanding of the average

of therapy studies: Exhibits 428, 452, 472, 488, 490, and 689.

⁹⁶Literature reviews are all kinds of reviews that are on the state of research for repressed memory. T. 110. Examples of this type of research article that are in evidence include Exhibits 443, 445, 447, 456, 462, 463, 466, 501, 507, 510, 529, 532, 542, 544, 574, 576, 577, 597, 633, 641, 649, 670, 677, 683 and 696.

⁹⁷ 441 N.W.2d at 798-799.

person such as battered child or battered woman syndromes.

The DSM-IV-TR is the official manual of the American Psychiatric Association that is the authoritative guide of psychiatric disorders.⁹⁸ The diagnoses in the DSM-IV-TR are developed using task forces in each area of specialty that a diverse group of experts covering the spectrum of philosophies regarding the diagnosis.⁹⁹ As set forth in the Introduction of the DSM-IV-TR:

We took a number of precautions to ensure that the Work Group recommendations would reflect the breadth of available evidence and opinion and not just the views of the specific members. After extensive consultations with experts and clinicians in each field, we selected Work Group members who represented a wide range of perspectives and experiences. Work Group members were instructed that they were to participate as consensus scholars and not as advocates of previously held views.¹⁰⁰

Before a diagnosis appears in the DSM-IV-TR, it must be firmly rooted in the peer-reviewed scientific research. The diagnoses in the DSM-IV-TR are based upon a firm base of both clinical and research evidence.¹⁰¹ The process used by the DSM-IV-TR Work Groups in deciding whether a diagnosis should be included in the DSM-IV-TR involved (1) comprehensive and systematic reviews of the published literature, (2) re-analyses of already-collected data sets, and (3) extensive issue-focused field trials.¹⁰² In fact, the “goal of the DSM-IV literature reviews was to provide comprehensive and unbiased information and to ensure that DSM-IV reflects the best available clinical and research literature.” Add. 58. Repressed memory is found in the DSM-IV-TR as the

⁹⁸T. 199.

⁹⁹T. 202-03; Add. 54.

¹⁰⁰Add. 54.

¹⁰¹T. 200.

¹⁰²Add. 57.

diagnosis of Dissociative Amnesia. T. 206. Inclusion in the DSM-IV-TR is absolute proof that repressed memory is generally accepted in the relevant scientific community. According to Dr. Dalenberg “the fact that it is in the DSM-IV is a sign of the consensus, that we agree as a psychological community that dissociative amnesia exists now . . .”¹⁰³

It is very important to note that all of the arguments by the Appellants against repressed memory are not new arguments. In fact, these same arguments were available and considered by those who produced the DSM-IV-TR. For example, the DSM-IV-TR was published in 2000. In 1998, the American Psychological Association published the findings of its working group on memories of childhood abuse.¹⁰⁴ One of Appellants’ experts, Elizabeth Loftus, Ph.D. was a member of this working group.¹⁰⁵ The issue of memory distortion and contamination was presented.¹⁰⁶ The debate about whether memories are forgotten or involuntarily repressed was presented.¹⁰⁷ The accuracy of repressed memories was discussed.¹⁰⁸ The concern that patients will not accurately report when they recollected traumatic events was discussed.¹⁰⁹ The working group also discussed the strengths and deficiencies of the available empirical research on repressed memories.¹¹⁰ In 1998, after the working group finished its discussions, they published

¹⁰³T. 80.

¹⁰⁴Ex. 419.

¹⁰⁵Id.

¹⁰⁶Id. p. 936. See p. 22 of Appellants’ Brief.

¹⁰⁷Id. p. 933. See p. 23 of Appellants’ Brief.

¹⁰⁸Id. p. 933. See p. 25 of Appellants’ Brief.

¹⁰⁹Id. p. 936. See p. 27 of Appellants’ Brief.

¹¹⁰Id. p. 938. See pp. 29–31 of Appellants’ Brief.

their conclusions in the *Journal of Psychology, Public Policy and Law*.¹¹¹ This article was, of course available to the creators of the DSM-IV-TR.

In addition, during the *Frye-Mack* hearing in the current matter, another of the Respondents' expert witnesses, Harrison Pope, Jr., M.D., introduced an exhibit titled *Examples of papers and books from 1990 – 2007 questioning the validity of “repressed” and “recovered” memory*.¹¹² Contained in that list/exhibit, were articles critical of portions of the repressed memory scientific research.¹¹³ 19 out of the 31 articles on this list/exhibit were available to the creators of the DSM-IV-TR prior to its publication in 2000.¹¹⁴ The remaining articles simply recycled the same issues and arguments that have been the fodder for scholarly debate for many years.

This somewhat granular discussion of the arguments about the reliability of repressed memory made by the Appellants in their brief is extremely important to the issue of the reliability of repressed memory as a psychiatric condition. The leaders in the psychological and psychiatric community that prepared the DSM-IV-TR have already considered each of these arguments, discounted them and included repressed memory in the DSM-IV-TR. This means that the consensus within the psychiatric and psychological communities is that repressed memory is a reliable psychiatric condition.¹¹⁵ The scientists and practitioners have spoken through the DSM-IV-TR. Repressed memory is

¹¹¹Ex. 419.

¹¹²Ex. 1002.

¹¹³Id.

¹¹⁴Id.

¹¹⁵T. 200, Add. 57.

supported by the “best available clinical and research literature.”¹¹⁶

When these scholarly debates spill over to the court system and experts disagree and provide disparate opinions, it is well established law in Minnesota that the jury decides which expert to believe. In *Gardner v. Coca Cola Bottling Company of Minnesota*, this Court stated “[W]hen a trial produces testimony by experts who have divergent opinions, it is largely up to the jury to decide which expert they will believe.”¹¹⁷ Similarly, in *Grondahl v. Bullock*, this Court held “where there are disputed questions of material fact as to whether a plaintiff is barred by a statute of limitations, these questions are to be decided by a jury.”¹¹⁸ Finally, in *State v. MacLennan*, this Court cited to a Connecticut Supreme Court case which stated “where understanding of the method is accessible to the jury, and not dependent on familiarity with highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence.”¹¹⁹ At trial, counsel for both parties will have a chance to cross-examine each expert about the shortcomings of the expert’s opinions and also present rebuttal evidence, should that be needed.

Finally, in their brief, the Appellants cite to *Clark v. Arizona*, as standing for the

¹¹⁶Add. 58.

¹¹⁷27 N.W.2d 557, 562 (Minn. 1964).

¹¹⁸318 N.W.2d 240, 243 (Minn. 1982); *See also Lickteig v. Kolar*, 782 N.W.2d 810, 818 (Minn. 2010) (When the delayed discovery statute for childhood sexual abuse applies “... whether Lickteig suffered memory repression, which affects the timing of her knowledge, is a question of fact.”)

¹¹⁹*See MacLennan*, 702 N.W.2d at 232 citing *State v. Borelli*, 629 A.2d 1105, 1111 (Conn. 1993).

proposition that presence in the DSM-IV-TR does not indicate that a diagnosis is reliable.¹²⁰¹²¹ That is not the issue that was discussed in *Clark*. In *Clark*, the Court ruled that care must be taken to insure that simply because a person has a DSM-IV-TR diagnosis does not mean that the person is insane or lacks the required *mens rea* to commit a crime. In Clark's case, the issue was whether his DSM-IV diagnosable mental disease was severe enough to render him insane under Arizona law.¹²² The Court did not rule that the DSM-IV should not be used as evidence in court.¹²³

3. Both Dr. Chu and Dr. Dalenberg are Qualified Expert Witnesses.

James Chu, M.D. is one of the top trauma clinicians in the world.¹²⁴ Dr. Chu is a practicing board-certified psychiatrist who has treated patients in the area of trauma treatment for 30 years.¹²⁵ Dr. Chu recently retired from his position as an Associate Professor of Psychiatry at the Harvard University Medical School and a psychiatrist at McLean Hospital, Harvard Medical School's psychiatric hospital, where he established innovative clinical programs for the treatment of adults with trauma-related disorders.¹²⁶ Dr. Chu has held numerous positions at McLean Hospital including Chief of Hospital Clinical Services.¹²⁷ He is the author of the book *Rebuilding Shattered Lives: The Rational Treatment of Complex Post-Traumatic and Dissociative Disorders*, (1998),

¹²⁰548 U.S. 735, 774, 126 S.Ct. 2709, 2734 (2006).

¹²¹See p. 37 of Appellants' Brief.

¹²²*Id.*

¹²³*Id.*

¹²⁴Ex. 729

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

which has become an authoritative text concerning the treatment of trauma survivors.¹²⁸ Dr. Chu has been invited to give academic presentations on the issues concerning post-traumatic and dissociative disorders and the validity and reliability of memory throughout the United States, Canada, the Netherlands, Spain and New Zealand.¹²⁹ He is a Distinguished Fellow of the American Psychiatric Association (publisher of the DSM-IV-TR diagnostic manual) and a Fellow and past president of the International Society for the Study of Trauma and Dissociation, and the recipient of several distinguished awards from that organization.¹³⁰ Finally, Dr. Chu was the Editor of the prestigious *Journal of Trauma & Dissociation* for six years.¹³¹

In addition, Dr. Chu is a clinician's clinician. In his practice, Dr. Chu has seen "dozens if not hundreds" of patients who have repressed and recovered memories. T. 217. In addition, Dr. Chu has also trained hundreds of other psychiatrists on issues surrounding repressed memory and trauma. T. 207–208. Dr. Chu believes that it is important that clinical perspectives be considered when evaluating repressed memory because clinicians regularly see a wide variety of patients who have recovered memories where researchers only have access to a very narrow group of simple patients. T. 225–226.

Constance Dalenberg, Ph.D. is the Director of the Trauma Research Institute in San Diego, California and a Full Professor of Psychology at the California School of

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

Professional Psychology.¹³² Dr. Dalenberg has taught and teaches graduate and undergraduate courses in statistics, scientific methods, dynamics, treatment and prevention of sexual and physical abuse of children, forensic evaluation and testimony, cognitive psychotherapy, ethics, and trauma studies (holocaust, family violence, post-traumatic responses).¹³³ Dr. Dalenberg is the author of a book titled *Countertransference and the Treatment of Trauma*, published by the prestigious American Psychological Association in 2000.¹³⁴ Moreover, Dr. Dalenberg has researched and published extensively for over 20 years directly on the issue of child abuse, trauma and memory.¹³⁵

Generally, the competency of an expert witness to provide an opinion depends upon both the degree of the witness' scientific knowledge and the extent of the witness' practical experience relating to the subject of the offered opinion.¹³⁶ Here, it is clear that both Dr. Chu and Dr. Dalenberg are well-qualified in both scientific knowledge and practical experience to testify regarding repressed memory.

C. The Minnesota Legislature Enacted Minn. Stat. § 541.073 to Allow Victims of Sexual Abuse Additional Time to Commence a Legal Action When Prevented From Bringing an Action Within the Normal Period of Limitation.

In 1989, Minnesota Statute § 541.073, Subd. 2, was enacted into law:

An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.

¹³²T. 7.

¹³³Ex. 730.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998).

This statute was premised on the fact that many victims of sexual abuse are unable, due to psychological reasons, to commence a law suit against the perpetrators of the abuse within the normal statute of limitations period. By providing that the statute of limitation does not begin to run until the plaintiff knows or has reason to know this his or her personal injury was caused by the sexual abuse, the legislature has allowed some victims to bring a cause of action beyond the normal six year statute of limitation.

The Supreme Court has repeatedly recognized the purpose of Minnesota Statute § 541.073 in its precedent addressing the application of the statute. A clear summation of the legislative purpose and history of the statute is set forth in the Court's opinion, *D.M.S. v. Barber*.¹³⁷ In *Barber*, the Court addressed the interplay between the minority tolling statute, Minnesota Statute § 541.15 and the delayed discovery statute. In its analysis the Court stated:

In 1989, the legislature, recognizing the unique nature of personal injuries caused by sexual abuse, enacted what is now commonly referred to as the delayed discovery statute. Act of May 19, 1989, ch. 190, § 2, 1989 Minn. Laws 485, 486-87 (codified as amended at Minn. Stat. § 541.073 (2000)) . . . Significantly, the delayed discovery statute also provides that the six-year period of limitation does not begin to run until the plaintiff knows or has reason to know that his or her personal injury was caused by sexual abuse . . . The legislature drafted the delayed discovery statute in response to concerns that victims of sexual abuse, particularly those victimized by someone in a position of authority and those victimized during childhood, often react to the abuse by developing psychological coping mechanisms that prevent them from commencing a legal action within the normal period of limitation for negligence or battery actions. *Bugge*, 573 N.W.2d at 680 n. 5; *see also* Hearing on H.F. 461, H. Comm. Judiciary, Criminal Justice Div., 76th Minn. Leg., Feb. 28, 1989 (audio tape); Hearing on S.F. 315, S. Comm. Judiciary, Criminal Law Div., 76th Minn. Leg., Feb. 17, 1989 (audio tape). These coping mechanisms can take any number of forms, including feelings of denial, shame, and guilt, and repression of memories of the abuse. *See Bugge*, 573

¹³⁷645 N.W.2d 383, 387 (Minn. 2002).

N.W.2d at 680 n. 5 (discussing the psychological effects of childhood sexual abuse); Hearing on S.F. 315. By enacting the delayed discovery statute, the legislature sought to address this phenomenon by giving sexual abuse victims more time to recognize the abuse they suffered. *Bugge*, 573 N.W.2d at 680; Hearing on H.F. 461; Hearing on SW.F. 315.¹³⁸

Given the clear purpose of statute, it would be incongruous for a court to disallow qualified expert testimony to explain the nature of the psychological coping mechanisms that some victims of sexual abuse adopt and for which the legislature enacted the statute.

D. This Court has Acknowledged that Repressed Memories is One of the Coping Mechanisms that Delays the Running of the Statute of Limitations for Childhood Sexual Abuse Cases.

Consistent with the clear legislative intent undergirding the delayed discovery statute, over 15 years ago this Court first acknowledged that repressed memory was legally significant in sexual abuse of limitations analysis. In *Blakowiak v. Kemp*, this Court acknowledged that Minnesota Statute § 541.073 was adopted to accommodate victims of childhood sexual abuse who repressed memories of the traumatic events when it stated:

While perhaps the court of appeals was misled by the phrasing of the statute itself, we view the language 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*.”¹³⁹

(Emphasis added.) Even though there was no evidence of repressed memories in *Blakowiak*, there is clear evidence of repressed memories in the current case that serves to delay the running of the statute of limitations.

¹³⁸645 N.W.2d at 387.

¹³⁹546 N.W.2d at 3.

Similarly, in *W.J.L. v. Bugge*, where this Court considered the timeliness of a sexual abuse case under Minnesota Statute § 541.073, the Court wrote that:

Accordingly, the statute of limitations begins to run once a victim is abused unless there is some legal disability, such as the victim's age, or mental disability, such as repressed memory of the abuse, which would make a reasonable person incapable of recognizing or understanding that he or she had been sexually abused.¹⁴⁰

Despite the Court's clear language that repressed memory is a disability that delays the running of the childhood sexual abuse statute of limitations, the Court found that W.J.L. did not suffer from repressed memory.¹⁴¹ That is not the case in this current case. John Doe presents evidence that he experienced the disability of repressed memory.

Four years later as discussed *supra*, in *D.M.S. v. Barber*, the Court again confirmed that the Minnesota legislature specifically intended that the initiation of the six-year statute of limitations found in Minnesota Statute § 541.073 be delayed in cases where the victim experienced repressed memories. The Court specifically stated that the repression of memories of the abuse was an example of a coping mechanism that can prevent a victim of sexual abuse from commencing a legal action.

Recently, in *Lickteig v. Kolar*, this Court affirmed its longstanding position that repressed memory delays the running of the statute of limitations for childhood sexual abuse.¹⁴² In *Lickteig*, the Minnesota Supreme Court considered a case where the victim

¹⁴⁰573 N.W.2d 677, 681 (Minn. 1998).

¹⁴¹*Id.* at 682.

¹⁴²782 N.W.2d 810 (Minn. 2010).

of sexual abuse repressed her memories of the abuse until 2005.¹⁴³ *Lickteig* was filed in United States District Court for the District of Minnesota and on appeal, the Eighth Circuit Court of Appeals certified a question to the Minnesota Supreme Court asking whether the childhood sexual abuse statute of limitations found in MINN. STAT. § 541.073 should be applied retroactively.¹⁴⁴ When answering in the affirmative, the Minnesota Supreme Court acknowledged that repressed memory affected the time in which the Minnesota Statute of limitations for sexual abuse began to run.¹⁴⁵ Specifically, the Minnesota Supreme Court stated “[I]f we apply the statute retroactively, whether Lickteig suffered memory repression, which affects the timing of her knowledge, is a question of fact.”¹⁴⁶

In addition, the Minnesota Court of Appeals has also ruled that repressed memory constitutes a disability sufficient to delay the running of the statute of limitations found in Minnesota Statute § 541.073. In *Bertram v. Poole*, the Court of Appeals considered a case where there was a dispute about whether the plaintiffs suffered from repressed memory syndrome.¹⁴⁷ In that case, the plaintiffs’ expert opined that the plaintiffs suffered from repressed memories and the defense expert opined that they did not. When making its decision, the court acknowledged that:

Even if the claims are barred by the statute of limitations, Katie and Jeanette may still obtain a disability extension for their repressed memory claims. A determination that the girls suffered from *repressed memory syndrome* may

¹⁴³*Id.* at 811.

¹⁴⁴*Id.* at 818.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷597 N.W.2d 309, 312 (Minn. Ct. App. 1999).

extend the statute of limitations.¹⁴⁸

The court then remanded the case back to the trial court “for a jury determination of whether the [sic] Katie and Jeannette suffered from repressed memory syndrome.”¹⁴⁹

Consequently, this Court has taken a clear position that repressed memory is legally significant in statute of limitations analysis in sexual abuse cases and it follows that evidence regarding repressed memory is to be admitted in Minnesota courts.

E. Courts in Other State Supreme Courts have Admitted Expert Testimony on Repressed Memory.

In addition to Minnesota, Supreme Courts across the United States have admitted expert testimony of repressed memory in order to delay or toll the statute of limitations.

- Massachusetts Supreme Court - In *Commonwealth v. Shanley*, the Massachusetts Supreme Court recently upheld a criminal conviction for sexual abuse of a child that relied on sufficiently reliable expert testimony regarding repressed memories.¹⁵⁰
- Arizona Supreme Court - In *Logerquist v. McVey*, the Supreme Court of Arizona allowed expert testimony on repressed memory noting that repressed memory was so well accepted within the relevant scientific community that it had been incorporated in the DSM and was the topic of

¹⁴⁸*Id.* at 313. (Emphasis added.)

¹⁴⁹*Id.* at 314.

¹⁵⁰919 N.E.2d 1254, 1266 (Mass. 2010).

an official statement by the American Psychiatric Association on Memories of Childhood Sexual Abuse.¹⁵¹

- Indiana Supreme Court - In *Doe v. Shults-Lewis Child and Family Services, Inc.*, the Indiana Supreme Court admitted expert testimony concluding that expert testimony regarding repressed memory syndrome was reliable.¹⁵²
- Utah Supreme Court – In *Colosimo v. Roman Catholic Bishop of Salt Lake City*, the Utah Supreme Court acknowledged that repressed memories delayed the running of the statute of limitations in childhood sexual abuse cases.¹⁵³ See also *Olsen v. Hooley*.¹⁵⁴
- Florida Supreme Court – In *Hearndon v. Graham*, the Florida Supreme Court acknowledged that repressed memories delayed the accrual of the statute of limitations for childhood sexual abuse.¹⁵⁵
- Missouri Supreme Court – In *Powel v. Chaminade College Preparatory, Inc.*, the Missouri Supreme Court ruled that repressed memory delayed the accrual of the statute of limitations for childhood sexual abuse.¹⁵⁶
- North Dakota – In *Peterson v. Huso*, the North Dakota Supreme Court ruled that the accrual of the statute of limitations for childhood sexual abuse was tolled due to repressed memory.¹⁵⁷

¹⁵¹P.3d 113, 117-134 (Ariz. 2000).

¹⁵²718 N.E.2d 738, 750 note 6 (Ind. 1999).

¹⁵³156 P.3d 806 (Utah 2007).

¹⁵⁴865 P.2d 1345, 1348-49 (Utah 1993).

¹⁵⁵767 So.2d 1179, 1186 (Fla. 2000).

¹⁵⁶197 S.W.3d 576, 584 (Mo. 2006); See also *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. 1995).

- Rhode Island – In *Kelly v. Marcantonio*, the Rhode Island Supreme Court ruled that repressed memory was a disability that tolled the statute of limitations for childhood sexual abuse claim.¹⁵⁸
- Iowa – In *Callahan v. State*, the Iowa Supreme Court acknowledged that repressed memories could delay the running of delayed discovery statute of limitations.¹⁵⁹

In addition, a number of Courts of Appeals have also recognized that repressed memory can toll the statute of limitations.¹⁶⁰

In contrast, according to the Appellants' Brief, the states of Alabama, Maryland, Nebraska, North Carolina and Tennessee have ruled that repressed memory does not delay the running of their childhood sexual abuse statute of limitations.¹⁶¹ It is noteworthy that none of these states have a delayed-discovery statute for childhood sexual abuse cases like Minnesota does.¹⁶²

In addition, the Appellants cite to cases from New Hampshire and Utah.¹⁶³ New Hampshire and Utah both currently have delayed-discovery statutes of limitations for child sexual abuse cases; however, all of the cases cited by the Appellants pre-date the

¹⁵⁷552 N.W.2d 83 (N.D. 1996).

¹⁵⁸678 A.2d 873 (R.I. 1996).

¹⁵⁹464 N.W.2d 268, 273 (Iowa 1990).

¹⁶⁰See *Pedigo v. Pedigo*, 292 Ill.App.3d 831, 841 (Ill. Ct. App.1997); *Doe v. Archdiocese of New Orleans*, 823 So.2d 360, 366-67 (La Ct. App. 2002); *Wilson v. Phillips*, 73 Cal App. 4th 250, 255-56 (Cal. Ct. App. 1999) (Testimony of expert witness regarding repressed memory was admitted.).

¹⁶¹See Appellants' Brief, pp. 44-45.

¹⁶²See Ala. Code § 6-2-38; MD Code, Courts and Judicial Proceedings § 5-117; Neb. Rev. St. § 25-207; N.C.G.S.A. § 1-52; T.C.A § 28-3-104.

¹⁶³Appellants' Brief, p. 44.

adoption of that new delayed discovery statutes.¹⁶⁴ It is reasonable to believe that the New Hampshire Supreme Court and Utah Supreme Court would come to very different conclusions if they considered the new statutes that are similar to Minnesota's delayed-discovery statute.

Finally, the same problem arises with the case that the Appellants cite from the Texas Supreme Court.¹⁶⁵ In *S.V. v. R.V.*, the Texas Supreme Court specifically acknowledged that the *S.V.* case was filed before the date that the Texas delayed-discovery statute for childhood sexual abuse was enacted.¹⁶⁶ Consequently, the Texas Court ruled that the new statute did not apply in that case.¹⁶⁷

In conclusion, Minnesota Supreme Court cases contemplate and approve of the introduction of evidence of repressed memory in order to toll any applicable statute of limitations. Further, it is clearly the trend for courts across the country to recognize that repressed memory is generally accepted within the relevant scientific community and that it is scientifically reliable. Finally, the cases that purport to oppose the introduction of repressed memory are factually and legally distinguishable. Thus, there is significant and broad legal support across this nation for the introduction of expert testimony on repressed memory.

¹⁶⁴The Appellants cite to the 1997 cases *State v. Walters*, 698 A.2d 1244, 1248 (N.H. 1997) and *State v. Hungerford*, 697 A.2d 916, 928 (N.H. 1997). The New Hampshire delayed-discovery statute for childhood sexual abuse was not adopted until 2005. N.H. Rev. Stat. § 508:4-g (2005).

¹⁶⁵Appellants' Brief p. 45.

¹⁶⁶933 S.W.2d 1, 4 (Tex. 1996).

¹⁶⁷*Id.*

II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE AND VICARIOUS LIABILITY CLAIMS.

In its December 8, 2009 Order, the trial court found that John Doe failed to meet the requirements of *Frye-Mack* for the proffered expert testimony describing the general psychiatric condition of repressed memory.¹⁶⁸ In addition, in its October 12, 2010 Order, the trial used its December 8, 2009 ruling as the reason for the court's finding that the statute of limitations had expired on all claims.¹⁶⁹ Regarding John Doe's negligence and vicarious liability claims (Counts I, II, III and IV), the trial court ruled that without testimony about repressed memory, John Doe could not prove that he was entitled to the tolling of the statute of limitations due to disability:

Since the Court has already ruled that evidence of repressed and recovered memory must be excluded, Plaintiff is unable to produce evidence of a legal disability which would toll the statute of limitations beyond the six-year period. Thus, Defendants are entitled to summary judgment with respect to Counts I, II, III, and IV of Plaintiff's Complaint.¹⁷⁰

This ruling depends entirely upon the trial court's erroneous December 8, 2009 Order. Had the trial not excluded expert testimony on the issue of repressed memory then John Doe would have had the opportunity of proving that the statute of limitations on his negligence and vicarious liability claims was delayed due to being disabled by experiencing repressed memories of the sexual abuse. It follows that a reversal of the trial court's December 8, 2009 Order will also serve to reverse the trial court's October 12, 2010 Order as it relates to Appellant's negligence and vicarious liability claims.

¹⁶⁸Appellants' Brief Add. 35.

¹⁶⁹Appellants' Brief Add. 57-59.

¹⁷⁰*Id.*

III. THE TRIAL COURT IMPROPERLY DISMISSED JOHN DOE'S FRAUD CLAIMS.

As discussed above, John Doe was defrauded by the Appellants. The Appellants were aware that Fr. Adamson had a long history abusing parish boys beginning in 1963 and continuing through his assignment to Risen Savior parish in 1981 (See Statement of Facts above). Despite knowing that Fr. Adamson was a child abuser and despite having the duty to disclose material facts to John Doe, the Appellants represented to Doe and his family that they believed that Fr. Adamson was safe around children by assigning Fr. Adamson to Risen Savior parish. Add. 51-52.

In his Complaint, John Doe brought claims for intentional fraud¹⁷¹ and for non-disclosure.¹⁷² In response, the Appellants moved for summary judgment claiming that

¹⁷¹Misrepresentation means “[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.” *Blacks Law Dictionary*, 594, 365, 903 (5th ed. 1979); *Webster’s Unabridged Dictionary*, 469, 729, 1150 (2d ed. 1983)(quoted with approval in *State v. Kiminski*, 474 N.W.2d 385, 390 (Minn. Ct. App. 1991), review denied (Minn. Oct. 11, 1991)). See also *Restatement (Second) of Torts* §525 cmt. b(describing a “misrepresentation” as “not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth.”); This representation was made when Defendants placed Fr. Adamson at Risen Savior. When a Bishop appoints someone to a parish, he acknowledges that the priest can be trusted. (RA 159.) Archdiocese Auxiliary Bishop Robert Carlson testified that because priests preside at mass and they preach they have a special relationship to the parishioners. (RA 159.) This is also confirmed in a letter from Archdiocese Archbishop Roach to Fr. Adamson, “Priests, thank God, do enjoy the immediate and full confidence of our people.” (RA 157.) Because the Appellants affirmatively represented Adamson as safe when he wasn’t, they intentionally defrauded John Doe.

¹⁷²Although generally “one party to a transaction has no duty to disclose material facts to the other. . . . One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party.” *Klein v. First Edina Nat. Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). John Doe was simply a child at the time that Defendants placed Adamson at Risen Savior. Defendants

the statute of limitations had expired on Appellant's fraud claim. In its October 12, 2010 Order, the trial court granted the Respondents' motion for summary judgment ruling that as a matter of law, Appellant filed his fraud claim too late. The Court of Appeals disagreed and reversed the trial court on this point.¹⁷³

John Doe's fraud claims are timely. The parties do not appear to disagree on the law that applies in this case. Both parties claim that under Minn. Stat. § 541.05, a fraud cause of action shall be commenced within six years of "the discovery by the aggrieved party of the facts constituting the fraud" This means that "the six-year period begins to run when the facts constituting fraud were discovered or, by reasonable diligence, should have been discovered."¹⁷⁴

on the other hand knew that Adamson was an admitted serial child molester and that Adamson would most likely sexually molest children at Risen Savior. As such, Defendants had a duty to disclose their knowledge to Plaintiff. In addition to having a duty when someone has superior knowledge, a separate basis for a duty to disclose occurs when there is a fiduciary relationship. *Klein v. First Edina Nat. Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Here there is a fact issue regarding the fiduciary relationship. "Whether a fiduciary relationship exists is a fact question." *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. Ct. App. 2007). There is a great deal of evidence that shows that there was a fiduciary relationship. John Doe was a minor at the time of the relationship. Moreover, John Doe was involved in numerous activities at Risen Savior: altar boy, youth group, youth retreats, and leader/teacher for younger students. (RA 162.) Fr. Adamson supervised John Doe as an altar boy. (RA 162.) Fr. Adamson taught John Doe's religious education class. (RA 162-163.) Further, Adamson told John Doe about becoming a priest at the same time he was molesting John Doe. (*Id.*) John Doe had great respect and trust for the Church and its priests. It was an honor for his family and him to have a priest in his life. (RA 161-163.) Bishop Carlson confirmed the type of relationship that a priest has with his parishioners and the children of the parish: the pastor of the parish has the responsibility to safeguard the people of the parish and that he should take steps to keep parish children safe. (RA 155-156.) Accordingly, there are factual issues about Appellants duty to disclose material facts.

¹⁷³Appellants' Brief Add. 71-73.

¹⁷⁴*Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985).

The disagreement among the parties is when John Doe, using reasonable diligence, should have discovered he had been defrauded. Initially, it must be noted that this Court has made it clear that in a fraud case, “the question of when discovery could or should have reasonably been made is one of fact.”¹⁷⁵ Here, John Doe involuntarily repressed all memories of being sexually abused by Fr. Adamson from the time of the abuse until 2001 or 2002.¹⁷⁶

John Doe did not discover that the Respondents knowingly placed a child molester at Risen Savior and allowed that child molester to access kids, including himself, until sometime after he had a memory that he was sexually abused in 2001 or 2002. John Doe commenced this case in 2006. Even though John Doe was aware that Fr. Adamson had sexually abused other boys in the 1980’s and there was extensive media detailing those allegations at that time, this information did not cause, nor could it reasonably have caused John Doe to believe that *he* was sexually abused or that *he* had been defrauded by the Appellants.¹⁷⁷ Even though John Doe experienced emotions such as being paralyzed, shocked, confused, and fear when the sexual abuse occurred, due to the psychological condition where he involuntarily repressed the memories of the traumatic sexual abuse, John Doe had no memory of those emotions until 2001 or 2002 when he recovered those memories. Consequently, John Doe did not have any reason to use reasonable diligence to discover the Appellants’ fraud because, at least as far as he knew at the time, the fraud

¹⁷⁵*Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 431 (Minn. 1989); *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (holding “when fraud reasonably should have been discovered is also a question of fact”).

¹⁷⁶RA 176.

¹⁷⁷Appellants’ Brief Add. 59.

him did not personally involve him.¹⁷⁸ As a result, the fraud statute of limitations did not accrue until, at the earliest, when John Doe recovered the memories that Fr. Adamson had sexually abused him.

The Court of Appeals agreed. According to the Court of Appeals:

We disagree with the district court's conclusion that appellant's fraud claims accrued in the 1980's. While we agree with the court that sometime in the 1980's appellant became aware that the priest had been accused of sexually abusing other children, we disagree that those facts necessarily put appellant on notice that he had a cause of action for fraud. Appellant testified that he did not become aware that he had been abused until 2001 or 2002. At the very least, this evidence creates a genuine issue of material fact as to when appellant discovered the facts constituting the alleged fraud.¹⁷⁹

In this case, there is a dispute of a number of material facts. According to Minn. R. Civ. Proc. Rule 56.03, summary judgment may only be ordered if there is no genuine issue of material fact. The trial court is to draw all reasonable inferences in the light most favorable to the nonmoving party.¹⁸⁰ Summary judgment is not appropriate when reasonable persons might draw different conclusions from the evidence presented.¹⁸¹ The trial court's erroneous factual findings upon which it based its decision violates this longstanding precedent. Therefore, Court of Appeals decision that the trial court's ruling be reversed must be affirmed.

¹⁷⁸ A party is under no duty to investigate a fraud it has no reason to suspect. *Hydra-Mac, Inc. v. Onan Corp.*, 430 N.W.2d 846, 854 (Minn. Ct. App. 1988).

¹⁷⁹ Appellants' Brief Add. 73.

¹⁸⁰ *Nord v. Herreid*, 305 N.W.2d at 339; *Vacura v. Haar's Equip., Inc.*, 364 N.W.2d at 391.

¹⁸¹ *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978).

V. CONCLUSION.

The Court of Appeals ruled that the trial court erred when it required that expert testimony on the psychiatric condition of repressed memory to explain whether and why victims of sexual abuse might repress and later recover memories was subject to the requirements of *Frye-Mack*. The Court of Appeals also ruled that the trial court erred when it granted summary judgment on John Doe's negligence and vicarious liability claims because the trial court's ruling explicitly was built upon the erroneous exclusion of the expert testimony on repressed memories. Finally, the Court of Appeals also ruled that the trial court erred when it granted summary judgment on John Doe's fraud claims because the a reasonable person in the position of John Doe could not have discovered that he had been defrauded by the Appellants until he recovered the memories of sexual abuse. The Court of Appeals decision properly applied this Court's precedent and Minnesota statutes and should be affirmed.

Respectfully submitted,

Dated: November 21, 2011.

JEFF ANDERSON & ASSOCIATES, P.A.



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

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Brief in Case No. A10-1951 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 13,838 words. The brief was prepared using Microsoft Office Word 2007 and complies with the typeface requirements of Rule 132.01.

Dated: November 21, 2011.


