

NO. A10-1951

State of Minnesota
In Supreme Court

John Doe 76C,

Respondent,

vs.

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

Appellants.

**BRIEF AND APPENDIX OF AMICUS CURIAE
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INTEREST OF THE AMICI

The Minnesota Defense Lawyers Association (MDLA), a non-profit corporation, has representatives from over 180 law firms and more than 700 individual members who specialize in civil defense practice.¹ The MDLA's goals include protecting the rights of civil litigants, improving the areas of law in which its members regularly practice, maintaining integrity and fairness in the judicial system, and promoting laws so all litigants are provided a level and fair playing field.

The MDLA's interest in this case is public as the outcome will affect all civil litigants in Minnesota. The court of appeals' decision drastically alters the law on two major legal issues: (1) changing accrual of actions seeking damages for sexual abuse from an objective reasonable person standard to a subjective standard which can be avoided by the mere denial of knowledge by a claimant, despite what he or she should have learned with due diligence; and (2) the standard which experts are required to follow before testifying about a novel scientific theory in order to prevent the jury from receiving testimony regarding potentially specious claims. As *amicus curiae*, the MDLA seeks to assist the Court by providing insight and legal analysis on the impact these decisions have within the civil justice system.

¹ Pursuant to Minn. R. Civ. P. 129.03, the amici state that no counsel for any party in this action authored this brief in whole or part. Nor has anyone made a monetary contribution for its preparation or submission. Daniel A. Haws and Stacy E. Ertz, Murnane Brandt, authored this brief at the request of and on behalf of the MDLA.

LEGAL ISSUES

1. Did the court of appeals err in finding a genuine issue of material fact exists by relying on a claimant's subjective statements as to when he remembered the abuse in determining the date the statute of limitations accrued, and by ignoring the long-standing objective, reasonable person standard contained in both Minn. Stat. § 541.073 and § 541.05, subd. 1(6) for fraud claims?

Yes.

- Minn. Stat. § 541.073 and § 541.05, subd. 1(6);
- *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996);
- *D.M.S. v. Barber*, 645 N.W.2d 383, 386 (Minn. 2002);
- *Lickteig v. Kolar*, 782 N.W.2d 810, 813 (Minn. 2010); and

2. Did the court of appeals err when it concluded that Minn. R. Evid. 702, and not the *Frye-Mack* standard, governed the admissibility of expert testimony?

Yes.

- *State v. Hennem*, 441 N.W.2d 793, 789-99 (Minn. 1989);
- *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000); and
- *State v. Roman Nose*, 649 N.W.2d 815 at 822-23 (Minn. 2002).

STATEMENT OF THE CASE

Summary judgment in favor of the Archdiocese of St. Paul and Minneapolis and Diocese of Winona (hereinafter "Archdiocese") was granted on the ground that the tort and fraud claims arising out of John Doe 76C's alleged childhood sexual abuse were time-barred. The court of appeals reversed the district court, ruling that (1) the *Frye-Mack* standard does not govern the admissibility of expert testimony about repressed-memory "syndrome" in an action based on claims of childhood sexual abuse; and (2) a genuine issue of material fact exists as to when John Doe 76C subjectively discovered the facts supporting his fraud claim.

STATEMENT OF UNDISPUTED FACTS

John Doe 76C, age 42, was born on June 11, 1967. (App. 2) His family began attending the Risen Savior Catholic Church (“Risen Savior”) in 1968. (App. 2)

Prior to 1981, Thomas Adamson (“Adamson”) served in a number of parishes in the Archdiocese. (App. 2) From 1981 until 1984, Adamson was an Associate Pastor at Risen Savior. (App. 2 & 5) When John Doe 76C was 13 or 14 years old, he claims to have been touched inappropriately by Adamson. (App. 2)

In the mid to late 1980s, lawsuits were commenced against Adamson and the Archdiocese claiming that Adamson had inappropriately touched the minor plaintiffs. (App. 2) Between 1987 and 1991, the Star Tribune and Pioneer Press reported 139 stories on the subject of Adamson’s lawsuit. (App. 2)

John Doe 76C’s father recalls hearing about the lawsuits in the newspaper, through other parishioners and during mass. (App. 2-3) In response to the publicity surrounding Adamson and the lawsuits, John Doe 76C’s mother attended a church-sponsored meeting to discuss the sex abuse allegations in approximately 1984. (App. 3 & 21) During that meeting conducted by representatives of Risen Savior, parishioners including John Doe 76C’s mother, were told that the allegations of abuse were the basis for Adamson’s removal from the parish. (App. 3)

In 1986, when John Doe 76 was approximately 19 years old, his mother asked if he had ever been abused by Adamson. (App. 2 & 3) He responded in the negative. (App. 3) In the 1990s, John Doe 76C discussed the allegations and alleged abuse with his girlfriend. (App. 21)

In 2006, John Doe 76C commenced suit against the Archdiocese. (App. 5) During a 2009 meeting with Father Thomas Doyle, John Doe 76C shared that at the time of the abuse incidents, he felt emotionally paralyzed, shocked, isolated and confused. (App. 3) John Doe 76C reported being deathly afraid of telling of the abuse when it occurred, due to his family's relationship with the church. (App. 3)

STANDARD OF REVIEW

On appeal from summary judgment, the appellate court reviews “whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *STAR Centers, Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76 (Minn. 2002). The court reviews “de novo whether a genuine issue of material facts exists.” *Id.* at 77. “[A] de novo standard of review is used to determine whether the district court erred in its application of the law.” *Emp. Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998).

“Determination of whether summary judgment was properly granted on statute of limitations grounds depends in part on construction of the implicated statutes. Statutory construction is a question of law subject to de novo review.” *D.M.S. v. Barber*, 645 N.W.2d 383, 386 (Minn. 2002) (internal citation omitted). Under the *Frye-Mack* standard, “the trial judge defers to the scientific community’s assessment of a given technique, and the appellate court reviews de novo the legal determination of whether the scientific methodology has obtained general acceptance in the scientific community.” *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000).

ARGUMENT

I. THE OBJECTIVE, REASONABLE PERSON STANDARD CONTAINED IN MINN. STAT. § 541.073 AND/OR § 541.05 SHOULD APPLY TO DETERMINE ACCRUAL OF STATUTE OF LIMITATIONS; NOT A SUBJECTIVE STANDARD APPLIED BY THE COURT OF APPEALS

A. Minn. Stat. § 541.073 Should Apply To All Personal Injury Claims Seeking Damages Caused By Sexual Abuse

John Doe 76C has attempted to recast his personal injury claim arising out of the alleged sexual abuse by Adamson into a fraud claim against the Archdiocese in order to circumvent the objective, reasonable person standard for determining accrual of the six-year statute of limitations contained in Minn. Stat. § 541.073. In enacting Minn. Stat. § 541.073, the legislature sought to give sexual abuse victims additional time to recognize the abuse they suffered while placing a limit on when such claims may be brought. *See W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); *see also Bertram v. Poole*, 597 N.W.2d 309, 313 (Minn. Ct. App. 1999) (recognizing that “personal injury caused by sexual abuse, as opposed to personal injury caused by any other activity, is subject to a different limitation period because of its uniqueness.”). In this case, John Doe 76C seeks personal injury damages for sexual abuse as a remedy for his fraud claims.

The delayed discovery statute provides, in relevant part, as follows:

Subd. 2. Limitations period. (a) 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.

* * *

Subd. 3. Applicability. This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.

Minn. Stat. § 541.073, subds. 2-3 (emphasis added).

Under this statute, an action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time plaintiff knew or had reason to know that the injury was caused by the abuse. *See* Minn. Stat. § 541.073. Whether the victim of abuse knew or had reason to know of the abuse is answered through the application of the objective, reasonable person standard. *Barber*, 645 N.W.2d at 387; *see also Bugge*, 573 N.W.2d at 682 (noting that “[a] discussion of what W.J.L. claims she knew is not helpful to this court, as we rejected the application of a ‘wholly subjective inquiry into an individual’s unique circumstance’ in *Blackowiak*”); *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996) (recognizing that the objective standard in the delayed-discovery statute is not a “subjective inquiry into an individual’s unique circumstances, e.g., when did the victim ‘acknowledge’ or ‘appreciate’ the nature and extent of the harm resulting from the abuse.”).

The rationale for applying an objective, reasonable person standard is best described as follows:

Under appellant’s argument, no claim would ever be barred by the statute of limitations. All claimants would just keep insisting they did not know their injuries were caused by the sexual abuse. To avoid a flood of claims there must be a reasonable and definitive standard. The standard is objective, for there must be some definable guidelines for a court to apply when the victims insist they did not know the abuse caused their injuries. If the victim’s actions are such that a reasonable person in the victim’s situation should have known their injuries were caused by the abuse, their

claim will be barred. We reject the application of a purely subjective standard in interpreting Minn. Stat. § 541.073, subd. 2(a).

S.E. v. Shattuck-St. Mary's School, 533 N.W.2d 628, 632 (Minn. Ct. App. 1995).

Similar to the reasoning cited in *Shattuck-St. Mary's School*, in *ABC & XYZ v. Archdiocese of St. Paul & Minneapolis*, the victim of abuse claimed she was unable to see the situation clearly or recognize that she had been a victim of abuse and therefore argued the statute of limitations should not begin to run until she realized that the defendant's actions amounted to sexual abuse. 513 N.W.2d 482, 486 (Minn. Ct. App. 1994). The court disagreed stating:

ABC is asking the court to apply a subjective standard, based upon her own mental and emotional state, in order to determine whether ABC "should have known" that she had been a victim of sexual abuse. Such a standard had no basis in law. ABC's inability to comprehend that her situation had been abusive does not toll the statute of limitations. We hold that the case should be viewed under an objective standard: whether a reasonable person in ABC's situation "should have known" of the abuse.

Id.; see also *Britten v. The Franciscan Sisters*, 2008 WL 1868334 at *4 (Minn. Ct. App. 2008) (unpublished opinion, cited pursuant to Minn. Stat. § 480A.08(3))² (rejecting subjective standard urged by plaintiff who claimed that her own mental and emotional state, including her post-traumatic stress disorder and presence of coping mechanisms such as self-blame, should be used to determine whether she should have known that she was a victim of sexual abuse, and instead applying objective reasonable person standard under delayed discovery statute) (App. 22-25). Thus, under Minn. Stat. § 541.073, the Court must determine the time at which a reasonable person standing in the sexual abuse

² All subsequent unpublished opinions are cited pursuant to Minn. Stat. § 480A.08(3).

victim's shoes would have known he or she was sexually abused. *See Barber*, 645 N.W.2d at 387.

Unlike the delayed discovery statute, the fraud statute of limitations, which also has a six year limitations period, begins to run when the aggrieved party discovers facts constituting "the fraud," and not damages caused by the fraud. *See Minn. Stat. § 541.05*, subd. 1(6) (emphasis added). The fraud statute of limitations specifically provides:

Subdivision 1. Six-year limitation. Except where the Uniform Commercial Code otherwise prescribes, the following actions shall be commenced within six years:

* * *

(6) for relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the **discovery by the aggrieved party of the facts constituting the fraud.**

* * *

Minn. Stat. § 541.05, subd. 1(6) (emphasis added).

John Doe 76C's fraud claim is that the Archdiocese: 1) concealed or misrepresented that Adamson had a history of sexual abuse; or 2) intentionally failed to disclose this history of abuse. The facts supporting both these fraud claims were clearly discoverable when the lawsuit against Adamson and the Archdiocese, and the media coverage surrounding the abuse allegations occurred, in the late 1980s and early 1990s, since the fraud statute is not triggered by John Doe 76C's discovery that he was damaged by the fraud.

In other words, by asserting a fraud cause of action, John Doe 76C attempts to bypass the objective, reasonable person standard for determining whether the victim of sexual abuse knew or had reason to know of the abuse, and replace it with a subjective standard of when the aggrieved party discovered that he had been injured by the fraud in

order to avoid tolling the statute of limitations on his sexual abuse case by § 541.073. However, it is not the subjective knowledge of being damaged by the abuse that should control the Court's determination of the fraud statute of limitations. Rather, because John Doe 76C seeks damages for personal injuries allegedly caused by sexual abuse, Minn. Stat. § 541.073, should apply regardless of the legal theories asserted in the pleadings since there would be no viable claim for fraud against the Archdiocese absent the sexual abuse by Adamson causing injury to John Doe 76C. *See Auto-Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 699 (Minn. 1996) (in coverage case court recognizes that “[a]bsent the sexual assault, there would be no claim of false imprisonment. Here, K.T.’s claim of false imprisonment is inextricably linked to the sexual assault.”)

The Minnesota Supreme Court has not determined whether a fraud claim arising from childhood sexual abuse is governed by the delayed discovery statute or the fraud statute of limitations. The court of appeals has issued differing opinions on this issue. For example, in 2005, a childhood victim of sexual abuse brought claims of battery and breach of fiduciary duty against Father Lee Krautkremer, “and against the archdiocese for vicarious liability, negligent supervision and employment, and **fraud**.” *Krammer v. Archdiocese of St. Paul and Minneapolis*, 2005 WL 14934 at *1 (Minn. Ct. App. 2005) (unpublished opinion) (emphasis added) (App. 26-28). In *Krammer*, the victim of abuse argued that the Archdiocese was barred from asserting the statute of limitations due to its actionable fraud. *Id.* at *2. In discussing the statute of limitations, the court of appeals stated:

Because we affirm the district court’s application of Minn. Stat. § 541.073, the proper statute of limitations governing this sexual-abuse claim, we need not consider respondents’ alternative argument that appellant’s claim is barred by Minn. Stat. § 541.05, subd. 1(6) (2002), the six-year statute of limitations applicable to claims for fraud.

Id. at *2, n. 2.

In 2009, the court of appeals, in another unpublished opinion, stated that a fraud claim is governed by Minn. Stat. § 541.05, but, in that case, “both parties recommended application of the fraud statute of limitations.” *See Jane Doe 43C v. Diocese of New Ulm*, 2009 WL 605749 at *3 (Minn. Ct. App. 2009) (unpublished opinion) (App. 29-38). In *Jane Doe 43C*, the court of appeals concluded that the plain terms of the delayed discovery statute is limited to actions against those who committed sexual abuse or negligently permitted abuse to occur, a decision which is contrary to the Minnesota Supreme Court’s ruling that the legislature’s failure to explicitly refer to respondeat superior claims in the list of actions enumerated in subdivision 3 of Minn. Stat. § 541.073 did not limit its use to only two kinds of action, or require application of the two-year limitation for other torts resulting in personal injury under Minn. Stat. § 541.07(1). *See Barber*, 645 N.W.2d at 390-91. Moreover, nothing in *Jane Doe 43C* discusses the legislative history of the delayed-discovery statute and its application to intentional torts as did the Minnesota Supreme Court in the recent case of *Lickteig v. Kolar*, 782 N.W.2d 810, 813 (Minn. 2010).

In *Lickteig*, the Minnesota Supreme Court concluded that the Legislature, in 1991, amended the statutory language in Minn. Stat. § 541.073 “to create a 6-year statute of limitations for **all claims based on sexual abuse** – whether sounding in intentional torts

or in negligence.” *Lickteig*, 782 N.W.2d at 816 (emphasis added). The *Lickteig* court recognized that “[t]he initial wording of the statute shows that, rather than creating a cause of action for sexual abuse, the Legislature segregated claims based on sexual abuse into two categories – those based on intentional torts and those based on negligence. The subsequent amendment to the statute did nothing to alter those categories.” *Id.*³

The Minnesota Supreme Court’s 2010 recognition that the original delayed discovery statute and “amendments demonstrate that the Legislature did nothing more than establish a specific limitations period for tort plaintiffs who suffer sexual abuse,” should control the application of the delayed discovery statute in all sexual abuse cases regardless of the fact that a plaintiff may also assert intentional tort claims including fraud. *See Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986) (holding that “fraud is an intentional tort”).

³ As enacted in 1989, the delayed discovery statute required an action based on personal injury caused by sexual abuse, in the case of an intentional tort, be commenced within two years, or, in the case of a negligence action, within six years. *Lickteig*, 782 N.W.2d at 813. In 1991, the Legislature deleted the two year limitations for intentional tort claims based on sexual abuse and enacted the longer six year period for all sexual abuse claims. *Id.* There is absolutely no evidence that the Legislature intended victims of sexual abuse to obtain a longer period than that contained in Minn. Stat. § 541.073 simply by asserting a fraud cause of action. In fact, in 1991-1992, the Legislature enacted a provision stating “[n]otwithstanding any other provision of law, a plaintiff whose claim would otherwise be time-barred under Minnesota Statutes 1990 has until August 1, 1992, to commence a cause of action for damages based on personal injury caused by sexual abuse if the action is based on an intentional tort committed against the plaintiff.” *Id.*; *see also Sarafolean v. Kaufman*, 547 N.W.2d 417, 420 (Minn. Ct. App. 1996) (recognizing that “[i]n May 1991, the legislature amended the statute again, making the statute of limitations for sexual abuse six years for *both* intentional tort and negligence claims.”) (original emphasis).

This Court should prevent John Doe 76C from circumventing the exclusive system for sexual abuse claims established by the Legislature simply by alleging a fraud cause of action exactly as has been done when plaintiffs attempt to avoid the two-year statute of limitations governing malpractice cases. *See Paulos v. Johnson*, 597 N.W.2d 316, 320-21 (Minn. Ct. App. 1999) (concluding that fraudulent misrepresentation claim was not governed by Minn. Stat. § 541.05, subd. 1(6), because claim sounded in medical malpractice which is governed by two-year statute of limitations); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997) (holding, “despite counsel’s creative characterizations,” that breach of fiduciary duty claim against doctor is governed by two-year limitations for medical malpractice). This Court of Appeals decision risks encouraging litigants to recast all types of claims for the same damages under different causes of action in order to avoid legislature intent to limit claims.

In summary, the MDLA urges the Court to clarify the inconsistent decisions of the Minnesota Court of Appeals, in *Krammer* and *Jane Doe 43C*, regarding the applicability of the delayed discovery statute of limitations to all actions arising out of sexual abuse, and, for the sake of judicial consistency apply the objective, reasonable person standard contained in Minn. Stat. § 541.073 to all claims asserted by John Doe 76C, as his damages arises out of personal injury caused by his alleged sexual abuse. Such a ruling will provide reliability for practitioners in this field and will uphold the legislative goal of providing an extended, but not unlimited, statute of limitations for sexual abuse victims as recognized by this Court in *Barber* and *Lickteig*. This holding will necessarily provide courts and litigants faced with personal injury sexual abuse cases

with certainty, whether the action is pled in negligence or some other intentional tort, including fraud or misrepresentation, and will prevent courts from applying various statutes of limitation with differing accrual standards based on creatively pled allegations.

B. Even If Fraud Claims Are Governed By Minn. Stat. § 541.05, The Court of Appeals Erred In Applying Doe’s Subjective Statement as to When He Discovered “He Had Been [Sexually] Abused,” as Opposed to the Long-Standing Standard of When a Reasonable Person, Using Due Diligence, Could Have Discovered the “Facts of Fraud”

In the event the fraud allegations in this sexual abuse case are governed by Minn. Stat. § 541.05, then the appellate court still erred by not upholding the district court’s grant of summary judgment. Under the law “[t]he facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered.” *See Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 684 (Minn. Ct. App. 2010). “A plaintiff must exercise reasonable diligence when he or she has notice of a possible cause of action for fraud.” *Id.* “A plaintiff’s due diligence in the statute of limitations context is ordinarily a question of fact.” *Id.* “Where the evidence leaves no room for reasonable minds to differ on the issue, however, the court may properly resolve the issue as a matter of law.” *Id.* at 684-85.

“The requirement of reasonable diligence imposes an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud.” *Jane Doe 43C*, 787 N.W.2d at 685. In other words, once the plaintiff has notice of a potential fraud cause of action, an investigation with reasonable diligence is required. *See DLH, Inc. v. Russ*, 544 N.W.2d 326, 331 (Minn. Ct. App. 1996), *aff’d*, 566 N.W.2d 60 (Minn. 1997).

In this case, the appellate court failed to apply this standard in determining when the facts giving rise to the fraud claim could and ought to have been discovered or that John Doe 76C failed to exercise reasonable diligence for investigating his fraud claims as a matter of law. Instead, the court of appeals applied a subjective analysis as to when Plaintiff discovered his abuse, not the fraud, and incorrectly stated:

While we agree with the court that sometime in the 1980s 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. If, indeed, appellant did not become aware that he had been abused until 2001 or 2002, he could not have known that he had a viable fraud claim until then.

John Doe 76C v. Archdiocese of St. Paul & Minneapolis, 801 N.W.2d 203, 210 (Minn. Ct. App. 2011). This reasoning clearly eradicates the objective reasonable person standard governing sexual abuse cases and it completely ignores both the “ought to have been discovered” and “reasonable diligence” analysis applicable to fraud claims required by Minnesota case law.

In fact, in another sexual abuse case, which coincidentally involved Adamson, the court of appeals concluded that a victim’s fraud claim was barred by the statute of limitations because the victim, just like John Doe 76C in this case, knew that other Adamson victims had successfully sued the churches for damages. *See John Doe 76A v. Diocese of Winona*, 2004 WL 2711650 *4 (Minn. Ct. App. 2004) (unpublished opinion) (App. 29). In that case, the appellate court affirmed the district court’s grant of summary judgment dismissing all claims as time-barred noting that “[t]his evidence demonstrates

that appellant [John Doe 76A] knew or reasonably should have known of respondents alleged fraudulent role in the sexual abuse allegations by 1986, and at the latest, by 1994.” *Id.* (emphasis added).

Clearly, if summary judgment was properly granted in *John Doe 76A*, due, in part, to the conclusion that evidence that other victims had sued the Archdiocese as a result of Adamson’s sexual abuse established that John Doe 76A knew or reasonably should have known of the churches alleged fraudulent role in the sexual abuse, then John Doe 76C’s knowledge of lawsuits against Adamson and the Archdiocese in the 1980s for sexual abuse likewise shows, as a matter of law, that John Doe 76C was necessarily put on notice or required further investigation into whether he had a potential cause of action for fraud.

In 2010, the court of appeals reached a different conclusion from *John Doe 76A* when it held that “[t]here is a factual dispute regarding whether appellants were aware of the alleged misrepresentation – that respondents [Diocese of New Ulm] failed to disclose Father Roney’s abuse history – and [were] thereby on notice of a potential fraud claim, before 2003, when respondents publicly disclosed that Father Roney had sexually abused children in the past.” *Jane Doe 43C*, 787 N.W.2d at 685.

In this case, unlike *Jane Doe 43C*, it is undisputed that the Archdiocese did not fail to publicly disclose that Adamson had sexually abused children in the past. The evidence demonstrates that John Doe 76C’s father attended a mass held by a priest during which the allegations against Adamson were discussed, and his mother attended a church-sponsored meeting regarding the publicity surrounding Adamson and allegations

involved in the sexual abuse lawsuits against Adamson and various church defendants, and Adamson's resulting dismissal from Risen Savior. (App. 2, 3 & 21) All of these public disclosures by the churches employing Adamson in the 1980s clearly show that the facts of the fraud could and should have been known, and thereby preclude finding a genuine issue of material fact based on the reasoning of the appellate court in *Jane Doe 43C*.

In fact, as early as May 1992, the type of notice that was lacking in *Jane Doe 43C*, was public knowledge and necessarily permits the Court to conclude, as a matter of law, that the facts giving rise to a claim of fraud ought to have been known or reasonably discovered more than six-years before John Doe 76C filed suit including:

- The Diocese of Winona learned that Adamson had sexually abused a boy in 1964 and of other sexual misconduct in 1966, 1973 and 1974;
- The Diocese responded by reprimanding Adamson, insisting on counseling and transferring him to the Archdiocese of St. Paul and Minneapolis;
- After the Archdiocese first learned of Adamson's sexual misconduct in 1980, they sent him to treatment, but later returned him to priestly duties;
- During the ensuing year, the Archdiocese knew, but for the most part ignored, Adamson's contact with youth, contrary to verbal instructions to avoid youth;
- In 1983, upon learning police were investigating abuse allegations against Adamson, Archbishop Roach allowed Adamson to return to his parish after reducing their no-contact agreement to writing;
- In July 1984, Archbishop Roach removed Adamson after he admitted sexually abusing a boy while at St. Thomas Aquinas parish.
- The Church admitted negligence in allowing Adamson to sexually abuse Mrozka when he was a minor.

Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 809-10 (Minn. Ct. App. 1992).

Based on all of the undisputed facts discussed above, this Court should reverse the appellate court and reinstate the summary judgment order issued by the Ramsey County District Court which properly concluded:

Plaintiff was aware of the fact that Adamson was a danger to children in the 1980s. First, Plaintiff's knowledge of Adamson's harmful conduct towards him is evidenced by the deposition testimony of Fr. Doyle. * * * Plaintiff told Fr. Doyle that, at the time of the alleged abuse, Plaintiff felt emotionally paralyzed, shocked, isolated, confused, and was deathly afraid to tell anyone of the abuse due to his family's relationship to Adamson and the Church. Further, Plaintiff learned through his family and church community in 1984 that Adamson had been accused of sexually abusing children. Plaintiff's mother discussed the allegations with him in the mid-1980s, there was extensive publicity in the media detailing those allegations in the late-1980s, and Plaintiff discussed the allegations and alleged abuse with his girlfriend in the 1990s. **The Court finds that Plaintiff learned, and should have learned in the exercise of reasonable diligence, of the facts constituting fraud in the 1980s.**

(App. 21) (emphasis added).

The "ought to have known" and "reasonable diligence" standard correctly used by the district court applies not only in the context of sexual abuse cases, but also to fraud cases in general. In fact, as early as 1897, courts in Minnesota recognized:

The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence they could and ought to have been discovered. The mere fact that the aggrieved party did not *actually* discover the fraud will not extend the statutory limitation if it appears that the failure to sooner discover it was the result of negligence, and inconsistent with reasonable diligence.

Blegen v. Monarch Life Ins. Co., 365 N.W.2d 356, 357 (Minn. Ct. App. 1985) (citing, *First Nat'l Bank of Shakopee v. Strait*, 71 Minn. 69, 72, 73 N.W.2d 645, 646 (1898)); *Accord Stark v. Equitable Life Assur. Society of the United States*, 205 Minn. 138, 148, 285 N.W. 466, 471 (1939); and *Duxbury v. Boice*, 70 Minn. 113, 120, 72 N.W. 838, 839 (1897) (holding “that a party must be deemed to have discovered the fraud when, in the exercise of proper diligence, he could and ought to have discovered it.”).

More recently, the court of appeals affirmed summary judgment ruling that appellant’s fraud claims were barred by the statute of limitations. *Saclolo v. Shaleen*, 2011 WL 2750706 *1 (Minn. Ct. App. 2011) (unpublished opinion) (App. 44-48). In *Saclolo*, the court agreed that appellant **should have**, as a matter of law, discovered the facts constituting the fraud at the time she purchased the home given its state of disrepair. *Id.* at *5 (emphasis added). The appellate court even stated that appellant’s awareness of the property’s state of repair, put her “on notice that government entities could have cited respondent for code violations or the lack of permits and that, were it a material concern, it would be prudent to investigate whether any such citations had been issued.” *Id.*; see also *Kassan v. Kassan*, 400 N.W.2d 346, 349-50 (Minn. Ct. App. 1987) (ruling that specific proof of fraud is unnecessary and that suspicions of defendant’s actions were enough to trigger the statute of limitations).

Here, the Court should reinstate the district court’s grant of summary judgment since the undisputed evidence demonstrates that John Doe 76C knew Adamson was accused of sexually abusing minors, he was asked if he had been abused by Adamson, he spoke to his girlfriend in the 1990s about the alleged abuse, and, were it a concern, it

would have been prudent to investigate further such that the fraud statute of limitations was triggered, as a matter of law, more than six years before suit was filed in 2006.

II. THE COURT OF APPEALS' NARROW READING OF FRYE-MACK IMPROPERLY OPENS THE DOOR FOR A FLOOD OF CLAIMS BASED ON JUNK SCIENCE

A. Frye-Mack Does Not Apply Only To Physical Sciences

Frye-Mack “governs the admissibility of scientific evidence in Minnesota and requires that scientific evidence be generally accepted and considered reliable by the scientific community to be admissible.” *State v. Edstrom*, 792 N.W.2d 105, 109 (Minn. Ct. App. 2010). A *Frye-Mack* hearing is necessary when the evidence at issue is both scientific and novel. *Id.* Nothing in *Frye-Mack* indicates application of the standard depends on whether the novel, scientific theory emerged from the fields of natural, physical, chemical, biological, social or behavioral science and instead simply indicates that the theory or technique must be generally accepted in the **relevant scientific field**. *See Goeb*, 615 N.W.2d at 815.

Significantly, in *Frye*, the court withheld expert testimony regarding a blood pressure deception test because it “has not yet gained such standing and scientific recognition among physiological and psychological authorities.” *See Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923). Likewise, the Minnesota Supreme Court, in *Mack*, noted that *Frye* was applicable to the results of mechanical and scientific testimony and concluded that a memory recovered from hypnosis—a non-physical science—was inadmissible because “no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation a filling of gaps with

fantasy.” See *State v. Mack*, 292 N.W.2d 764, 768, 772 (Minn. 1980); see also *State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985) (holding that graphology as a predictor of character or state of mind is “not generally accepted in the scientific fields of psychology and psychiatry.”).

If *Frye-Mack* only applies to chemical, biological or other physical sciences or theories that can be subjected to a definitive scientific test, as the court of appeals suggested below, and not to all novel and emerging scientific theories, principles and discoveries regardless of the scientific field developing the theory, then this Court has effectively overruled *Frye-Mack* and the long-line of cases that followed. Such a ruling will necessarily permit introduction of unproven, junk science to juries in a variety of cases involving new theories from non-physical scientific fields such as product liability, fire cause and origin, and psychiatric claims, to name a few, simply because they are not subject to “definitive scientific test” by a “fancy device.” This is not the result intended under Minnesota law.

B. “Syndrome” Evidence Has Been Admitted To Explain Behavior But Only After The Underlying Theory Has Gained General Acceptance

The court of appeals concluded that a *Frye-Mack* analysis was unnecessary because repressed memory is a “syndrome” analogous to battered children or battered women syndrome and is therefore admissible under Minn. R. Evid. 702. A review of the “syndrome” cases, however, demonstrates that the theory underlying the testimony was reliable and had gained general acceptance prior to receipt of expert testimony in a court of law.

To illustrate, in *In Re Child of Mandy Green*, 2003 WL 21652472 (Minn. Ct. App. 2003) (unpublished opinion) (App. 49-56), T.G.’s mother argued that expert testimony regarding shaken-baby syndrome was inadmissible because the county failed to show it satisfied the *Frye-Mack* standard. *Id.* at *5. The district court concluded that the theory that an infant can sustain severe brain injury if violently shaken even without evidence of external trauma is generally accepted in the medical community by physicians treating infants with brain injuries. *Id.* On appeal, the court noted that “[s]cientific evidence is considered ‘novel’ if an appellate court has not considered it before and if it is sufficiently different from a previously accepted standard.” *Id.* Because the shaken-baby syndrome had been considered several times by appellate courts and since it was not a new scientific theory, the court of appeals concluded that the expert medical diagnosis was not novel and did not require the court to determine whether evidence of shaken-baby syndrome met the *Frye-Mack* standard. *Id.* at *5-6. Similarly, in *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989), battered women syndrome testimony was permitted because the theory was no longer novel and had gained enough scientific acceptance to warrant admissibility. *Id.* at 798-99.⁴

Significantly, not a single appellate court in Minnesota has determined that the repressed memory theory has gained general acceptance in the relevant scientific

⁴ The court of appeals reliance on *State v. MacLennan*, 702 N.W.2d 219 (Minn. 2005), was further misplaced since *MacLennan*, which was based on *Hennum*, holds that an expert on “syndrome” evidence “may not testify about whether a particular defendant actually suffers from a syndrome.” *Id.* at 233. If *MacLennan* is the law on “syndrome” cases, an expert cannot testify that John Doe 76C suffered from repressed memory “syndrome” in order to support a disability that would toll the statute of limitations.

community.⁵ In fact, Minnesota appellate courts have recognized the “conflict in the psychiatric community over the validity of discovered memories of sexual abuse.” *K.B. v. Evangelical Lutheran Church*, 538 N.W.2d 152, 157, n. 1 (Minn. Ct. App. 1995). In dicta, the appellate court implied that a *Frye-Mack* analysis would be supported if the record involved “recovered memories.” See *State v. Ness*, 2004 WL 1444952 at *1, n. 1 (Minn. Ct. App. 2004) (unpublished opinion) (App. 57-60). Moreover, the Minnesota Supreme Court has reaffirmed that expert testimony on rape trauma “syndrome” is not helpful to the jury and that typical post-rape behavior testimony must satisfy Rule 702, including the *Frye-Mack* standard if it involves a novel, scientific theory. *State v. Obeta*, 796 N.W.2d 282, 294 (Minn. 2011).

As the validity of repressed or recovered memories of childhood sexual abuse is not generally accepted in the relevant scientific community, a *Frye-Mack* analysis is required. See *State v. Roman Nose*, 649 N.W.2d 815, 818-23 (Minn. 2002). Instead of determining whether the repressed memory theory had gained general acceptance in the relevant scientific community, the court of appeals, apparently taking on the judicial role of scientist, determined, contrary to the holding of *Roman Nose*, that repressed memory is a “syndrome” that has obtained scientific validity. Case law, however, demonstrates that “syndrome” testimony is only admitted after a finding that it has gained general

⁵ John Doe 76C’s own experts apparently conceded that there is no general acceptance in the scientific community on the issue of repressed and recovered memories.

acceptance and then only to explain victim behavior.⁶ See *Obeta*, 796 N.W.2d at 290-91 (discussing admissibility of syndrome evidence to explain typical victim behavior to juries); *MacLennan*, 702 N.W.2d at 230 (same). Since no appellate court has determined whether the phenomenon of repressed or recovered memories are generally accepted by the relevant psychological community, the decision of the court of appeals should be reversed so that the integrity of the *Frye-Mack* standard is upheld in all cases involving novel scientific theories.

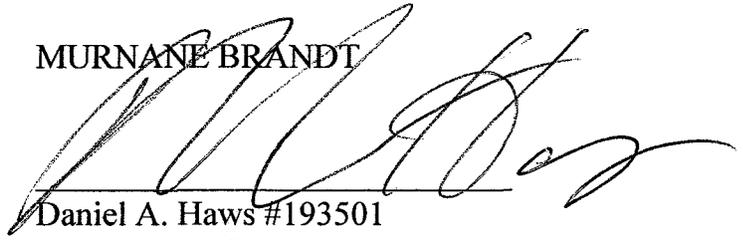
CONCLUSION

The MDLA respectfully asks the Court to reverse the decision of the court of appeals and rule (1) that the statute of limitations governing all claims alleged in this sexual abuse case is the objective, reasonable person standard contained in the delayed discovery statute, Minn. Stat. § 541.073, or, in the alternative, that no genuine issue of material fact exists since no reasonable mind could differ that John Doe 76C ought to have discovered the facts giving rise to his fraud cause of action more than six years before suit was filed; and (2) the *Frye-Mack* general acceptance standard governs all novel scientific theories whether arising in physical, social or behavioral science fields.

⁶ None of the cases relied on by the court of appeals used the “syndrome” as an attempt to toll the statute of limitations. Rather, the syndrome evidence was simply used to explain victim behavior. It is unclear how scientific testimony that is not generally accepted could ever be found reliable under Rule 702.

Dated: October 26, 2011

MURNANE BRANDT

A handwritten signature in black ink, appearing to read 'Daniel A. Haws', written over a horizontal line.

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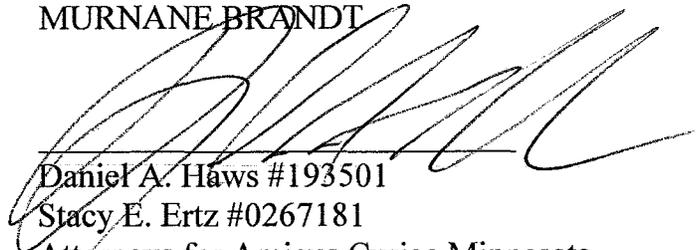
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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Amicus Curiae The Minnesota Defense Lawyers Association certifies that this Brief complies with the requirements of Minn. R. Civ. P. § 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2010 and contains 6,647 words, excluding Table of Contents and Table of Authorities.

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