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Court to decide how repressed memory evidence is admitted

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The delayed discovery statute, Minn. Stat. sec. 541.073, has been in effect since 1989. It states that 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.

And since 1998, the Minnesota Supreme Court has recognized that repressed memory is a legal disability that can toll the statute of limitations. That year, in *W.J.L. v. Bugge*, the court observed in a footnote, “The Minnesota Legislature, in drafting the delayed discovery statute, acknowledged that repressed memory, denial, shame and other similar factors may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion.”

But how does repressed memory evidence get admitted? Is it “scientific,” and thus subject to the high standard of Minnesota’s two-pronged *Frye-Mack* test? That test requires a showing that the scientific theory supporting the evidence is generally accepted in the applicable medical or scientific community and that the principles and methodology used to generate the evidence are reliable.

Since the 2000 Minnesota Supreme



Patrick Noaker

Court ruling in *Goeb v. Tharaldson*, courts generally have applied the *Frye-Mack* test to new or novel types of evidence, said professor Peter Knapp of William Mitchell College of Law. “There have been cases where *Frye-Mack* is used for a kind of testimony that is not

new, but we don’t have appellate court guidance on that,” Knapp said.

Last year, the Minnesota Court of Appeals said in *John Doe 76C v. Archdioceses of St. Paul & Minneapolis, et al.*, repressed memory evidence is admissible under Rule 702

Memory ‘The jury will be severely hamstrung if there is no evidence’

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and need not meet the *Frye-Mack* standard. Under the rule, the evidence must be have foundational reliability, and, in the case of a scientific theory, general acceptance in the scientific community. “If an opinion could assist the trier of fact it should be admitted subject to proper qualification of the witness,” the comment to the rule states.

The Supreme Court has the *John Doe* case advisement after oral argument on Jan. 9. It will be decided by a six-person court, as Justice David Stras recused.

Evidence excluded

The lawsuit alleges negligence, negligent supervision, negligent retention, vicarious liability and fraud in connection to the sexual abuse of the plaintiff by a priest between 1980 and 1982, when the plaintiff was between 13 and 15 years old.

The plaintiff alleged that he had a repressed memory, thus tolling the statute of limitations. The Ramsey County District Court judge granted the defendants’ request for a *Frye-Mack* hearing to determine the admissibility of repressed and recovered-memory evidence and concluded that the plaintiffs did not meet their burden of proof. The court said that the plaintiffs failed to show that the concept of repressed and recovered memory is generally accepted in the scientific community and is reliable and trustworthy.

The court excluded the evidence and granted summary judgment to the defendants. It also granted summary judgment on the fraud claims, reasoning that with reasonable diligence the plaintiff could have discovered the alleged fraud in the 1980s and therefore the statute of limitations under Minn. Stat. sec. 541.05 had expired.

The Court of Appeals reversed. It said that *Frye-Mack* was not the appropriate test and the court should use Minn. R. Evid. 702 to determine whether the evidence is helpful to the jury.

‘Junk science?’

St. Paul attorney Thomas B. Wieser, attorney for the defendants, argued that the Court of Appeals was plainly wrong and departed from long-standing case law. “[It] ignored a long line of cases up to and including this court’s decision last year in the [*State v.*] *Obeta* case [in 2011], which held that evidence to be admissible must be reliable,” Wieser said.

“To allow a jury to decide whether memory repression is a valid scientific theory when the experts are not in consensus on that concept is simply to invite junk science into the courtroom,” he continued.

Chief Justice Lorie Gildea started the questioning by asking whether repressed memory evidence was “new” or “novel,” which is when the *Frye-Mack* test is typically used. Weise responded that the theory had not been “vetted” by the court so it was essentially “new or novel.”

“The Legislature has incorporated the concepts in this case. Doesn’t that inform the analysis?” Gildea asked. There are references to the repressed memory concept in case law and the statute, but there has never been an opinion directly addressing it, Weise said.

After counsel’s time had expired, Justice Paul Anderson said that it was odd that the court was 25 minutes into the argument and hadn’t discussed the standard of review. Weise replied that there is a split standard of review, with an abuse of discretion review of reliability and a de novo review of general acceptance.

Anderson asked whether the high court could decide whether it is a novel, emerging science just as well as the trial court. Yes, Weise replied. But the evidence fails on both prongs of *Frye-Mack* and both prongs of Rule 702 because it is not generally accepted in the scientific community and not reliable, and if it is not reliable it is not helpful to the jury, he concluded.

Patrick Noaker of St. Paul, representing the plaintiff, said that if the case got to trial he would present evidence that repressed memory is a real reaction to trauma, and the jury would decide if the plaintiff experienced it, pursuant to *Lickteig v. Kolar*, a 2010 Minnesota Supreme Court opinion. “The jury will be severely hamstrung if there is no evidence,” Noaker said. “That is exactly why the expert testimony needs to be vetted under Rule 702.”

Noaker said that he had to show that the evidence was helpful and had foundational reliability, which is encompassed under Rule 702. The jury will still have to decide if the memory is accurate, he said. The Court of Appeals correctly concluded that a *Frye-Mack* analysis does not work because there is no methodology or protocol used to demonstrate repressed memory, Noaker said.

It’s also not true that repressed memory evidence is a new or novel theory, Noaker pointed out, which is generally when a *Frye-Mack* analysis is done. He pointed to the repressed-memory statute and a long history in the medical profession of addressing repressed memory. It has been discussed for 30 years, he said.

Never before in considering behavioral science evidence has this court had so much support, Noaker said. There’s never been a statute in place for 20 years and there’s never been a line of decisions like this court has to rely on, he said.

He also pointed out that there are differences among experts about memory in general, not just repressed memory. “Surely this court is not going to be in the position where no one can testify from memory,” he said.

“All we’re asking it to be able to put a case on. The jury’s still going to have to make a decision,” Noaker said. “We have to let the scientists be the scientists,” he said. “We should not make the judges be scientists.” 