STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1707

C. A. H.,
Respondent,

vs.

William Holden,
Appellant.

Filed September 10, 2012
Reversed and remanded.
Stoneburner, Judge

Stearns County District Court
File No. 73-CV-09-7108

L. Michael Hall, III, Jeffrey E. Dilger, Hall Law, P.A., St. Cloud, Minnesota (for respondent)

Keri A. Phillips, Gary R. Leistico, Rinke Noonan, St. Cloud, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges the district court's denial of his motion for judgment as a matter of law (JMOL) reversing a jury's verdicts for respondent on three child-sexual-abuse claims that appellant asserts are barred by the applicable statute of limitations. In the alternative, appellant challenges the district court's denial of his motion for a new trial, asserting that the prejudice from the district court's erroneous denial of his request for a *Frye-Mack* hearing and admission of evidence of repressed memory that lacks foundational reliability entitle him to a new trial. We conclude as a matter of law that the statute of limitations bars two of respondent's claims and that the district court abused its discretion by admitting evidence of repressed memory without an evidentiary hearing on the foundational reliability of the proffered repressed-memory evidence on the third claim. We therefore reverse the denial of appellant's motion for JMOL on the two claims that did not depend on recovered-repressed memory, and we also reverse the denial of appellant's motion for a new trial on the claim that is dependent on recovered-repressed memory and remand for further proceedings consistent with this opinion.

FACTS

Respondent C.A.H., whose date of birth is August 15, 1970, was sexually abused by her father and appellant, her paternal uncle, William Holden, from 1977 through July 1984, when C.A.H. was between the ages of seven and fourteen. The abuse stopped in 1984, when C.A.H.'s father was prosecuted for abusing her and her three siblings. In 1986, C.A.H. revealed abuse by Holden, which led to his conviction of criminal sexual

conduct in the third degree. Holden's wife, D.H., was also convicted for abusing C.A.H.'s brother, T.H., in the same time period. On at least two occasions, D.H. and Holden simultaneously abused C.A.H. and T.H. while all four were in the same bed. C.A.H. testified at D.H.'s trial about one of these instances, which is identified in these proceedings as the trial-transcript incident.

C.A.H. has always remembered three other specific incidents of abuse by Holden, and she has always suspected, but has no specific recollection, that Holden engaged in sexual intercourse with her. After C.A.H. reached the age of majority on August 15, 1988, she periodically discussed the child-sexual abuse by Holden with her first husband, her mother, and her siblings, but C.A.H. never asked T.H. about what he had witnessed and never investigated or inquired about other possible incidents of abuse Holden may have perpetrated against her beyond the three specific incidents she recalled.

In 2008, after her father and Holden inherited money from their father, C.A.H. and two of her siblings consulted an attorney about the possibility of pursuing civil actions against their father and Holden. While consulting with the attorney, C.A.H. had a flashback about another specific act of abuse, the paper-route incident, that she asserts was repressed until that moment. C.A.H. sued Holden for damages for the paper-route incident in June 2009. C.A.H. asserted in her complaint that, due to the incidents of abuse that she has always remembered, she developed "psychological coping mechanisms" that prevented her from remembering this specific instance of sexual abuse until recently. Holden answered and asserted the statute of limitations as an affirmative defense.

During the course of the litigation, C.A.H. reviewed her trial testimony from D.H.'s trial and discovered that she had testified about the trial-transcript incident. C.A.H. has no memory of this incident. And C.A.H. learned about another incident of which she has no memory: the sexual-intercourse incident. After C.A.H. testified at her deposition that she suspected but could not recall that Holden had sexual intercourse with her, T.H. told C.A.H. that he had witnessed Holden having sexual intercourse with her. C.A.H. also learned that the incident was reported to law enforcement by D.H. during the 1986 prosecutions. The district court granted C.A.H.'s motion to amend her complaint to add claims regarding the trial-transcript incident and the sexual-intercourse incident.[1]

C.A.H. retained Susan Phipps-Yonas, Ph.D., as an expert witness. Dr. Phipps-Yonas evaluated C.A.H. and opined that C.A.H. suffers from "dissociative amnesia," which she contends is synonymous with "repressed memory." C.A.H. asserts that repressed memory is a mental disability that tolls the statute of limitations for victims of sexual abuse.

Holden moved for summary judgment, arguing that, for purposes of the statute of limitations, C.A.H. knew or had reason to know about all of the incidents of sexual abuse asserted in her complaint more than six years before she brought this action and that her claims are barred by the statute of limitations. Holden also moved for a *Frye-Mack* hearing, arguing that repressed memory is a novel scientific principle and that the

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[1] The specific sexual conduct involved in these three incidents is not relevant to this appeal. The terms paper-route incident, trial-transcript incident, and sexual-intercourse incident are the terms used throughout the litigation for the three incidents on which C.A.H.'s claims are based.

proffered testimony and opinions of C.A.H.'s expert witness failed to meet the "foundational reliability" standard. Holden supported the motion with two scientific articles discussing repressed-memory research, each referencing the controversy and debate in the field of psychology about the nature and even existence of recovered-repressed memories of traumatic abuse. Holden also submitted the affidavit of his expert witness who evaluated C.A.H. and opined that C.A.H. does not meet the criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) for diagnosis of dissociative amnesia because she has not met the third criterion of clinically significant distress or impairment in social, occupational, or other important areas of functioning as a result of the alleged abuse. Holden's expert's affidavit asserts that the criteria used by C.A.H.'s expert to diagnose dissociative amnesia do not match the criteria set out in the DSM-IV, making her diagnosis invalid and unreliable.[2]

The district court denied Holden's motion for a *Frye-Mack* hearing, but purported to engage in a *Frye-Mack* analysis. The district court noted that the supreme court, in dicta, has mentioned repressed memory as an example of a mental disability that could toll the statute of limitations but has not specifically addressed whether repressed

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[2] The three criteria for a diagnosis of dissociative amnesia in the DSM-IV are:

A. The predominant disturbance is one or more episodes of inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness.
B. The disturbance does not occur exclusively during the course of [listed disorders].
C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 300.12, 523 (4th ed. 2000).

memory is a novel scientific principle. Based on the inclusion of repressed memory in the DSM-IV, the district court concluded that repressed memory is generally accepted within the relevant scientific community of psychologists, meeting the first prong of the *Frye-Mack* standard. And, concluding that the methodology used by Dr. Phipps-Yonas to diagnose C.A.H. "is common diagnostic practice in the field of psychology," the district court held that the test used to diagnose C.A.H. "has foundational reliability," satisfying the second prong of the *Frye-Mack* analysis. The district court briefly referenced Minn. R. Evid. 702, noting that neither party had challenged the qualifications of the proffered experts. The district court denied Holden's summary-judgment motion, noting that the date on which a plaintiff knows or has reason to know that he or she was sexually abused is a fact question, and that there were genuine issues of material fact about when C.A.H. knew or had reason to know about the incidents alleged in her complaint and whether C.A.H. suffered from repressed memory.

At trial, both parties presented expert testimony about repressed memory. The jury found that Holden had committed each of the acts of abuse alleged and that, for each incident, C.A.H. did not know or have reason to know of the incident until after June 16, 2003 (six years prior to initiating the action).[3] The jury also found that C.A.H. was

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[3] Holden moved in limine to preclude the jury from having any information concerning the effect of answering the question about the date on which C.A.H. knew or had reason to know of each incident of sexual abuse. The district court denied the motion and instructed the jury that the statute of limitations bars a claim if the claim is not brought within a certain period of time and that, for each incident alleged in this case, the statute of limitations expires six years from the date "when a reasonable person standing in Plaintiff's shoes would either know, or have reason to know, of the particular incident of

entitled to punitive damages. Based on the special-verdict forms, judgment was entered against Holden in the amount of $10,777,315.54. Holden moved for JMOL and, in the alternative, a new trial. The district court denied the motion for JMOL, concluding that the record supports the jury's determination that C.A.H. was not aware of the three incidents alleged in her complaint until after June 16, 2003.[4] The district court also denied Holden's motion for a new trial, rejecting Holden's renewed challenge to the foundational reliability of repressed-memory evidence for the reasons stated in its pretrial order. This appeal followed.

D E C I S I O N

I. Scope of review

Holden argues as a matter of law that C.A.H.'s claims are barred by the applicable statute of limitations and that the district court erred by denying summary judgment because the undisputed facts asserted established as a matter of law that C.A.H. had reason to know about the claims more than six years before the lawsuit was brought. But the supreme court has held that denial of a motion for summary judgment is not properly

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abuse." The jury was also instructed: "In determining whether or not Plaintiff knew, or had reason to know, of each incident of sexual abuse, you may consider whether she suffered from a repressed memory. A victim can suffer from repressed memory of the abuse, which could prevent a reasonable person in the same or similar circumstances from knowing, or having reason to know, that they were sexually abused." C.A.H.'s attorney specifically argued the effect of the statute of limitations in closing argument. Holden does not challenge the jury instructions or C.A.H.'s closing argument on appeal.

[4] The district court did not specifically address the issue of whether C.A.H. "had reason to know" of the incidents before that date.

within the scope of review on appeal from a judgment entered after trial on the merits. *Bahr v. Boise Cascade, Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

Holden also moved for JMOL, asserting that the evidence is conclusive that C.A.H. had reason to know about the claims asserted in the complaint more than six years before the lawsuit was brought. Holden's appeal of the denial of JMOL is within the scope of our review and is reviewed under the same standards as denial of summary judgment. *See id.* at 918 (citing *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 545 n.9 (Minn. 2001), for the proposition that "standards for granting summary judgment and for granting [JMOL] are the same").[5]

II. Standard of review

This court reviews a denial of a motion for JMOL de novo. *Id.* at 919. "[JMOL] should be granted: 'only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). We review the evidence in the light most favorable to the prevailing party. *Bahr*, 766 N.W.2d at 919.

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[5] In his motion for JMOL, Holden argued, in part, that both Minn. Stat. § 541.073, and caselaw treat "knowledge of injury caused by 'a continuous series of sexual abuse acts' as sufficient to preclude lawsuits for injuries caused by discrete acts that are part of that series." Holden has abandoned that argument on appeal and relies solely on the assertions as a matter of law that C.A.H. had reason to know of the discrete acts on which the lawsuit is based more than six years before she sued Holden, and that to allow continuous lawsuits based on newly recovered memories of sexual abuse would create endless litigation and result in unfair trials, which he asserts occurred in this case.

III. Delayed-discovery rule for claims of personal injury caused by sexual abuse

The Minnesota legislature has provided a specific statute of limitations for claims of personal injury caused by sexual abuse. The statute, frequently called the delayed-discovery statute, provides, in relevant part:

> 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.
>
> b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury.
>
> c) The knowledge of a parent or guardian may not be imputed to a minor.
>
> d) This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.

Minn. Stat. § 541.073, subd. 2 (2010). Minn. Stat. § 541.15 (2010) lists disabilities, including insanity and infancy, which, if existing at the time when a cause of action accrued, suspends the running of the limitation period until the disability is removed. In the case of infancy, the maximum extension of the limitation period is one year after the disability ceases. "[A]bsent any other disability, a victim of sexual abuse who is under infancy disability at the time abuse occurs . . . has until age 25 to bring a personal injury action." Minn. Stat. § 541.15; *Bertram v. Poole*, 597 N.W.2d 309, 313-14 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999).

For purposes of the delayed-discovery statute, one knows of injury caused by sexual abuse when one knows of the sexual abuse. *Blackowiak v. Kemp*, 546 N.W.2d 1,

3 (Minn. 1996) (rejecting as "a distinction without a difference" the argument that the statute begins to run when a plaintiff should have been aware that sexual abuse caused his injuries and stating as a matter of law that one is injured if one is sexually abused).

IV. JMOL

Under existing caselaw, we conclude that the district court erred by denying Holden's motion for JMOL reversing the jury's verdicts on C.A.H.'s claims for the trial-transcript incident and sexual-intercourse incident. The evidence is conclusive that these incidents occurred and that evidence, independent of C.A.H.'s memories, of the occurrence of these incidents was available more than six years prior to the commencement of this action. The trial-transcript incident is documented in C.A.H.'s 1986 trial testimony, and the sexual-intercourse incident was witnessed by D.H., who gave a statement to law enforcement about it in 1986, and by T.H., who could have confirmed the incident to C.A.H. at any time after it occurred. The jury's findings that C.A.H. did not *have reason to know of* these incidents more than six years before she sued Holden is manifestly against the entire evidence, entitling Holden to JMOL on these claims. These claims are not dependent on a diagnosis of repressed and recently recovered memory because C.A.H. does not claim to have recovered any memories of these events. Evidence of these incidents has been readily available to C.A.H. since long before she sued Holden. That she chose not to investigate until recently available evidence of suspected or additional abuse that Holden inflicted on her in childhood is not sufficient to toll the statute of limitations.

Minnesota courts have rejected a subjective approach to the question of when a plaintiff knew or had reason to know of sexual abuse. *See id*. at 3 (stating that the question of the time at which the complainant knew or had reason to know that he or she was sexually abused is answered by application of the objective, reasonable person standard); *see also ABC & XYZ v. Archdiocese of St. Paul and Minneapolis*, 513 N.W.2d 482, 486 (Minn. App. 1994) (stating that a subjective standard to determine when a plaintiff should have known that she had been a victim of sexual abuse "has no basis in law" and holding that "the case should be viewed under an objective standard: whether a reasonable person in [plaintiff's] situation 'should have known' of the abuse").

C.A.H. has always known that she was sexually abused by Holden and that she was involved in criminal trials surrounding that abuse. A reasonable person with that knowledge would have sought information concerning the extent of the abuse within the extended statute of limitations available to C.A.H. With minimal inquiry into what occurred at the 1986 trials and what her brother witnessed, C.A.H. could have discovered the evidence she now relies on to support these claims. We reverse the denial of the motion for JMOL on these claims and remand for vacation of the judgments on these claims.

Because the paper-route incident is not documented and was not witnessed by anyone other than C.A.H. and Holden, the district court correctly concluded that genuine issues of material fact precluded summary judgment on that claim, even though the incident was readily recalled once C.A.H. turned her attention to the abuse she acknowledged. But the timeliness of that claim is dependent on the admissibility of

repressed-memory evidence. As discussed below, we conclude that the district court erred by denying Holden's motion for an evidentiary hearing on the foundational reliability of C.A.H.'s proffered repressed-memory evidence and by denying Holden's motion for a new trial based on the prejudicial admission of repressed-memory evidence absent a hearing to determine the foundational reliability of the proffered evidence.

V. Motion for new trial

Holden challenged the admissibility of expert testimony on repressed memory prior to trial as lacking foundational reliability and moved for a new trial, arguing that the admission of the repressed-memory evidence was prejudicial error. In support of his motion for a new trial, Holden noted that repressed memory is not a diagnosis in the DSM-IV but rather is a term used in connection with a variety of psychological disorders, including dissociative amnesia, the diagnosis that Dr. Phipps-Yonas gave C.A.H. Citing one of the articles presented to the district court in connection with his summary-judgment motion, Holden pointed out that "[e]xperts dispute whether memories of emotional events may be blocked from consciousness, and if so, whether they can subsequently be recovered. . . . Other experts believe that recovered memories of sexual abuse may be false memories." Holden also noted that, at the time he made the motion, "Minnesota courts ha[d] not yet reviewed and confirmed repressed memory as a concept that is generally accepted in the psychiatric or psychological communities" and that Minn. Stat. § 541.15 does not include repressed memory as a disability that tolls the statute of limitations. Holden noted that despite references to repressed memory in caselaw as a possible legal disability that makes a reasonable person incapable of

recognizing or understanding that he or she had been sexually abused, no reported case had yet addressed the scientific soundness of the application of repressed memory to toll the statute of limitations for claims of sexual abuse.

Holden reiterated that Dr. Phipps-Yonas's testimony failed to establish that C.A.H. met the third criteria for a diagnosis of dissociative amnesia. Dr. Phipps-Yonas testified only that C.A.H. was depressed and anxious and was not able to have the kind of relationship with her husband that she would like to have, but she failed to explain how or testify that the depression and anxiety caused "clinically significant distress or impairment," as required by the diagnostic criteria. Holden argued that Dr. Phipps-Yonas's testimony that she *always* finds a diagnosis of repressed memory when a patient does not remember a traumatic event, except when the patient is a very young child, has a cognitive impairment, is drugged or asleep, or has a multiple-personality disorder, makes the first criteria of dissociative-amnesia diagnosis meaningless. Similarly, he argued that her testimony that she diagnoses dissociative amnesia every time a patient does not remember a traumatic event and does not have one of the disorders listed in the second criterion is contrary to the DSM-IV criteria for such diagnosis. The district court summarily denied Holden's motion for a new trial based on its pretrial order rejecting Holden's challenge to admission of repressed-memory evidence.

Literally as this case was being argued to this court, the supreme court issued its decision in *Doe 76C v. Archdiocese of St. Paul and Minneapolis*, 817 N.W.2d ___, ___, A10-1951, slip op. at 34-37 (Minn. July 25, 2012), holding that the district court in that case did not err by excluding, as lacking in foundational reliability, expert testimony

about repressed and recovered memory offered to prove a disability delaying the accrual of a cause of action for sexual abuse, and did not err in granting summary judgment to respondents dismissing plaintiff's claims for sexual abuse that were untimely absent proof that he suffered from repressed memory.

The opinion details the expert testimony presented in that case during a three-day evidentiary hearing and explains that the standard for foundational reliability under *Frye-Mack* is nearly identical to the standard for determining foundational reliability under Minn. R. Evid. 702, such that evidence lacking foundational reliability under the *Frye-Mack* standard is also not admissible under Rule 702.[6] *Id.*, slip op. at 35 n.8.

The supreme court stated that the rule 702 foundational-reliability test focuses on the foundational reliability of the expert's opinion, "requir[ing] that the theory forming the basis for the expert's opinion or test is reliable." *Id.*, slip op. at 27. If the district court determines that the evidence is foundationally reliable under rule 702, however, that evidence is admissible only as "syndrome" evidence, and such testimony may consist of only "a description of the general syndrome and the characteristics which are present in an individual suffering from the syndrome," not the ultimate fact that the particular individual suffers from the syndrome. *State v. MacLennan*, 702 N.W.2d 219, 234 (Minn. 2005). The foundational reliability test in *Frye-Mack* requires that "the particular

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[6] As noted in *Doe 76C*, if evidence of repressed memory is admissible only as "syndrome" evidence, the expert's testimony is limited to a description of the syndrome and the characteristics that are present in an individual suffering from the syndrome, and the expert cannot testify to the ultimate fact of whether the plaintiff suffered from the syndrome. *Doe 76C*, slip op. at 21 (citing *Doe 76C v. Archdiocese of St. Paul & Minneapolis*, 801 N.W.2d 203, 209 (Minn. App. 2011)).

scientific evidence in each case must be shown to have foundational reliability[, which] requires the proponent of a . . . test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability." *Doe 76C*, slip op. at 25 (citing *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000)). "Because the district court [in *Doe 76C*] concluded that Doe's experts' opinions were based on studies with overwhelming methodological flaws, it found that evidence on the theory of repressed and recovered memories was not foundationally reliable." *Id.*, slip op. at 28. The supreme court stated:

> The district court's order cut to the heart of the foundational reliability question, analyzing the underlying reliability, consistency, and accuracy of the theory of repressed and recovered memory . . . [T]he court, in a thorough and painstaking analysis found that evidence on the theory of repressed and recovered memory lacked foundational reliability when offered to prove a disability delaying the accrual of a cause of action.

Id., slip op. at 32. The district court found that, despite the hundreds of studies on the theory of repressed and recovered memory, it was unconvinced that any of the studies had proved the existence of, much less the accuracy or reliability of, repressed and recovered memories. The supreme court stated that "this finding is more than adequately supported by the record" and held that,

> [b]ecause there is ample evidence in the record supporting a conclusion that the theory of repressed and recovered memory lacks foundational reliability when offered for the purpose of proving that Doe had a disability delaying the accrual of his causes of action, the district court did not abuse its discretion when it excluded Doe's expert testimony.

Id., slip op. at 34-35.

The *Doe 76C* opinion is narrowly tailored to address the district court's exercise of discretion in that case; therefore we cannot conclude that it bars C.A.H.'s claims as a matter of law. But the opinion leads us to conclude that the district court in this case erred by denying Holden's motion for an evidentiary hearing on the foundational reliability of C.A.H.'s proffered repressed-memory evidence, which would have given the district court the opportunity to review the vast amount of information on this subject before determining the admissibility of the proffered evidence. The district court acknowledged that the supreme court has stated that even if it appears likely that in the course of a *Frye-Mack* hearing the district court will find the scientific evidence offered to have gained general acceptance within the relevant scientific community, that likelihood should not be the basis for denying a *Frye-Mack* hearing but nonetheless purported to apply the *Frye-Mack* standard without the benefit of a hearing. We conclude that the district court erred by denying Holden's motion for a *Frye-Mack* hearing prior to trial and abused its discretion by admitting the evidence on repressed memory, including Dr. Phipps-Yonas's diagnosis of C.A.H. with dissociative amnesia. And to the extent that the district court found the evidence admissible under rule 702, it erred by admitting evidence of C.A.H.'s diagnosis. Admission of repressed-memory evidence and C.A.H.'s diagnosis was plainly prejudicial. We reverse the denial of Holden's motion for a new trial on the claim involving the paper-route incident, and we remand for a new trial preceded by an evidentiary hearing on the admissibility of repressed-memory evidence. If, after an evidentiary hearing, the district court concludes that the proffered evidence is inadmissible, Holden is entitled to summary judgment on

the paper-route incident. And if the district court concludes that the evidence is admissible under rule 702 only, expert testimony must be limited to a description of memory repression and the characteristics that are present in an individual suffering from repressed memory and cannot include testimony on the ultimate fact of whether C.A.H. suffered from repressed memory. *See Doe 76C*, slip op. at 21.

Reversed and remanded.