IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

KIMBERLY MARIE DIXSON, et al.,	:	
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Plaintiffs,	:	
	:	Case No. 375001-V
v.	:	
	:	
JAMES CHARLES BEATTIE, SR.,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

The plaintiffs, Kimberly Marie Dixson, Kelly Anne Walsh and Catherine Healy Silvestri are sisters. In 1970, the defendant, James Charles Beattie, Sr., began dating their mother, Mary O'Brien. The defendant's relationship with Ms. O'Brien ended in 1978.

On March 15, 2013, the plaintiffs filed a complaint against the defendant alleging the torts of intentional infliction of emotional distress,[1] battery and negligence. The complaint was amended on September 6, 2013. In their amended complaint, the plaintiffs allege that between 1970 and 1978, the defendant repeatedly sexually molested them while they were minors. They allege that this abuse occurred both in their home and while they and their mother traveled with the defendant.

On October 8, 2013, the defendant moved to dismiss the amended complaint or, in the alternative, for summary judgment. The defendant contends that the plaintiffs' claims are barred by the statute of limitations.[2] The claims are barred, the defendant asserts, because they were not

[1] This tort was first recognized in Maryland in *Harris v. Jones*, 281 Md. 560, 566-67 (1977).

[2] The defendant has made clear that he contests the factual assertions of the plaintiffs as well. That issue is not before the court at this time and is not addressed in this opinion.

brought within seven years after the plaintiffs attained the age of majority.[3] The seven year limitations period, enacted by the General Assembly in 2003, is retroactive to claims previously governed by the general three year statute of limitations.[4]

Plaintiff Dixson attained the age of majority on May 10, 1983. Plaintiff Walsh attained the age of majority on May 3, 1984. Plaintiff Silvestri attained the age of majority on July 15, 1986. According to the defendant, the statute of limitations expired long ago, and the plaintiffs' claims are not saved by the 2003 law because it does not operate to revive claims that are already time-barred. For this proposition, the defendant relies on an uncodified section of the statute.[5] To hold otherwise, the defendant contends, would deprive him of a vested right and would, therefore, be unconstitutional.

To avoid a statute of limitations bar, the plaintiffs rely on a two-step analysis. First, they argue that whether the court looks to the original three year statute[6] or the new seven year statute, the accrual of their claims is subject to the discovery rule. Under that rule, created by the Court of Appeals, a plaintiff is not obligated to bring a claim until he knows or reasonably should know

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[3] Section 5-117(b) of the Courts and Judicial Proceedings Article provides: "An action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor shall be filed within 7 years of the date that the victim attains the age of majority."

[4] *Doe v. Roe*, 419 Md. 687, 705-06 (2011). The Court of Appeals specifically did not address the question of whether the new statute applied to claims already barred under the previously applicable three year statute as of October 1, 2003, the effective date of the new law. *Doe*, 419 Md. at 707.

[5] Md. Laws of 2003, Ch. 360, § 2. *See Doe*, 419 Md. at 699 & n.11 (noting that uncodified provisions of a statute generally are legally binding).

[6] Section 5-101 of the Courts and Judicial Proceedings Article provides: "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." The defendant does not contend that the battery claim is governed by the one year statute of limitations for "assault" set forth in Section 5-105 of the Courts and Judicial Proceedings Article. The Court of Special Appeals has held that the general three year statute applies to tort claims for battery. *Ford v. Douglas*, 144 Md. App. 620, 624-25 (2002).

that he has a cause of action.[7] In this case, the plaintiffs contend that the question of when their claims accrued a is question of fact that must be decided by a jury.[8] To reach this result, the plaintiffs have asked the court to decline to follow *Doe v. Maskell*[9] and allow a jury to hear expert testimony on "dissociative amnesia."[10] That condition is defined by the American Psychiatric Association ("APA") as follows: "An inability to recall important autobiographical information, usually of a traumatic or stressful nature, that is inconsistent with ordinary forgetting."[11] According to the plaintiffs, this mental health condition caused them to be unable to recall the alleged assaults by the defendant until the spring of 2011, making the filing of their complaint timely.

I.

In *Doe v. Maskell*, the Court of Appeals confronted the question that is currently before this court. That is, how, if at all, the phenomenon of "lost" or "repressed" memory applies to the discovery rule for the accrual of a cause of action in a child sexual abuse case.

The plaintiffs in *Doe v. Maskell* were high school students at the time of the alleged sexual assaults by their school chaplain, a priest.[12] They graduated in 1971 and 1972, and

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[7] *Poffenberger v. Risser*, 290 Md. 631, 637 (1981). A cause of action does not accrue until all of the elements are present, however trivial. *Mattingly v. Hopkins*, 254 Md. 88, 95 (1969).

[8] *O'Hara v. Kovens*, 305 Md. 280, 298-301 (1986).

[9] 342 Md. 684 (1996).

[10] The Court of Appeals in *Maskell* referred only to the condition known as "repressed memory." The condition has come to be known more accurately as "dissociative amnesia," although the parties use the terms interchangeably.

[11] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 300.12 (Fifth Edition, 2012) [hereinafter DSM-5].

[12] *Maskell*, 342 Md. at 686.

"recovered" their memories in 1992.[13] Suit was filed in 1994. The trial court dismissed the claims on limitations grounds and, at the request of the plaintiffs, the case went directly to the Court of Appeals on a bypass certiorari petition.[14]

The Court of Appeals framed the issue in *Doe v. Maskell* as follows: "We find that the critical question to the determination of the applicability of the discovery rule to lost memory cases is *whether there is a difference between forgetting and repression.*"[15] The Court of Appeals held, based on the record before it, that there was no such difference. If there were a difference, the Court recognized, limitations would not begin to run, even after a person reaches the age of majority, conceivably "until the repression ended and the resurfacing memories put the plaintiffs on sufficient notice."[16] The Court of Appeals affirmed the dismissal on limitations grounds because it was "*unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting.*"[17]

Doe v. Maskell was decided on July 29, 1996. The plaintiffs contend that, since that time, their theory has become generally accepted in the relevant scientific community. As a consequence, they argue that the holding of *Doe v. Maskell* should be re-examined in light of existing scientific knowledge. What they seek is to have the fact finder in the case, the jury, decide this question, as it does in other cases involving conflicting expert testimony.[18]

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[13] *Id.* at 687.

[14] *Id.* at 688-89. *See* Md. Rule 8-302(a) ("A petition for a writ of certiorari may be filed either before or after the Court of Special Appeals has rendered a decision.").

[15] *Id.* at 691-92 (emphasis added).

[16] *Id.* at 687 & n.3.

[17] *Id.* at 695 (emphasis added).

[18] *Walker v. Grow*, 170 Md. App. 255, 275 (2006) ("The weight to be given the expert's testimony is a question for the fact finder.")

The defendant contends that the theory of repressed or suppressed memory, or dissociative amnesia, however labeled, has never attained general acceptance in the scientific community. According to the defendant, the theory remains inadmissible in evidence, and cannot be used to "toll" the statute of limitations because it is not sufficiently reliable under the *Frye*[19] standard for scientific evidence, which was adopted by the Court of Appeals in *Reed v. State*.[20] The plaintiffs disagree with the defendant's contention, arguing that their theory of dissociative amnesia is now generally accepted, as evidenced by the DSM-5 and other peer-reviewed publications. They also contend that the phenomenon of dissociative amnesia is recognized, used and relied on by clinical psychiatrists and psychologists every day.

The court held a *Frye-Reed* hearing on March 27, 2014 and March 28, 2014. For the reasons set forth below, the defendant's motion to dismiss or, in the alternative, for summary judgment, and to exclude the plaintiffs' evidence regarding dissociative amnesia, is denied.

II.

The Court of Appeals adopted the *Frye* standard in *Reed v. State*.[21] Since the adoption of Maryland Rule 5-702 in 1994, the Court of Appeals has consistently held that this evidence rule did not abrogate *Frye-Reed*.[22] Further, the Court of Appeals has flatly declined to adopt the federal approach to scientific evidence outlined by the Supreme Court in *Daubert v. Merrell*

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[19] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[20] 283 Md. 374, 381 (1978).

[21] *Id.*

[22] *Clemons v. State*, 392 Md. 339 (2006); *Wilson v. State*, 370 Md. 191 (2002).

Dow Pharm. Inc.[23] Nevertheless, cases decided under *Daubert* or a *Daubert*-like analysis can be instructive when they discuss the reliability of the analytical framework used by an expert.[24]

In Maryland, a *Frye-Reed* analysis applies, at least, to: (1) novel scientific theories; (2) novel methods that are applied to accepted scientific theories or data; (3) the "analytical gap," *i.e.*, whether accepted methodologies "mesh" with accepted analyses; and (4) previously accepted or rejected theories that are now subject to reconsideration. As a consequence, a *Frye-Reed* hearing is needed when the proffered expert testimony has not been adequately vetted in reported judicial decisions or peer-reviewed scientific literature.[25]

The proponent of the evidence has the burden of establishing that it satisfies the standard of *Frye-Reed*.[26] However, in the *Frye-Reed* context, neither the trial court nor the appellate courts are "cabined" to the information provided by counsel and may consider evidence from other reliable sources.[27]

In *Blackwell v. Wyeth*, the Court of Appeals provided a comprehensive discussion of *Frye-Reed* and how it should be applied by Maryland trial courts.[28] In that case, the trial judge excluded the testimony of the plaintiff's expert because it was unreliable and, as a consequence of that decision, granted summary judgment for the defendants.[29] The Court of Appeals affirmed the trial court's exclusion of the expert's testimony, which purported to link a vaccine

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[23] 509 U.S. 579 (1993). *See Clemons*, 392 Md. at 349 n.7.

[24] *Fleming v. State*, 194 Md. App. 76, 107 n.4 (2010).

[25] *Blackwell v. Wyeth*, 408 Md. 575 (2009); s*ee State v. Baby*, 404 Md. 220, 266-71 (2008); *Tucker v. State*, 407 Md. 368, 384-86 (2009) (Harrell, J., dissenting).

[26] *Reed*, 283 Md. at 380; *Cobey v. State*, 73 Md. App. 233, 238 (1987).

[27] *Clemons*, 392 Md. at 359-60.

[28] *Blackwell*, 408 Md. at 575.

[29] *Id.* at 579.

preservative to neurological defects in children, including autism. The Court of Appeals held that exclusion was appropriate because, although the underlying data was generally accepted, it was used by the expert to support a novel theory that had not been generally accepted in the relevant scientific community.[30] In other words, although the data was reliable, the methodology and reasoning the expert used to connect the data to his conclusion was not generally accepted.[31] This problem in *Blackwell* was termed the "analytical gap."[32]

Important to the decision in *Blackwell* was the earlier conclusion of the National Academy of Sciences' Institute of Medicine that there was no epidemiological evidence of a causal link between thimerosal, the vaccine preservative, and autism.[33] The only published articles supporting this hypothesis were written by the plaintiff's expert.[34]

Shortly after *Blackwell* was decided, the Court of Special Appeals held in *Fleming v. State*,[35] that expert testimony regarding firearms tool mark analysis was properly admitted under *Frye-Reed*. The court reached this conclusion notwithstanding the rejection of tool mark analysis by a number of courts.[36]

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[30] *Id.* at 596.

[31] *Id.* at 607.

[32] *Id.* at 606-08.

[33] *Id.* at 599-600, 603-04.

[34] *Id.* at 600-01.

[35] 194 Md. App. at 99-109.

[36] *Id.*

Most recently, the Court of Appeals discussed *Frye-Reed* in *Chesson v. Montgomery Mutual Insurance Co.* (*Chesson II*).[37] In that case, the Court of Appeals reversed the trial court's determination that an expert's opinion linking the exposure to mold to certain non-respiratory diseases was generally accepted.[38] The Court of Appeals reiterated that the "general acceptance test imposes a significant gate-keeping role on the judge to determine whether a scientific theory or methodology should be admitted for consideration by the jury."[39] In that case, the Court of Appeals concluded that there was insufficient scientific evidence to support the witness's testimony that mold in buildings caused specific types of neurocognitive and musculoskeletal disease in humans. As a consequence, the Court held that the trial judge erred in concluding that the evidence satisfied *Frye-Reed*.

III.

Courts in other states remain divided over the admissibility of the type of evidence that the plaintiffs in this case want to bring before the jury. In addition, these courts' treatment of the question has not been wholly consistent.

The Supreme Court of South Carolina permits the statute of limitations to be tolled in cases in which the plaintiff claims to have been sexually abused as a child but did not "recover" the memories of that trauma until after reaching adulthood. According to that court, "repressed memories of sexual abuse can exist and a plaintiff may attempt to recover damages when those memories are triggered and remembered. The condition is known as dissociative amnesia. A

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[37] 434 Md. 346 (2013). In *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314 (2007) (*Chesson I*), the Court of Appeals reversed the circuit court's decision to deny exclusion of the evidence without holding a *Frye-Reed* hearing.

[38] That mold caused respiratory diseases was not in question. Only the new hypothesis that mold caused non-respiratory diseases was at issue. *See Montgomery Mut. Ins. Co. v. Chesson*, 206 Md. App. 569, 602 n.10 (2012).

[39] *Chesson II*, 434 Md. at 351.

cause of action based on such a theory is valid in South Carolina."[40] In so ruling, the Supreme Court of South Carolina commented on what it considered to be Maryland's unduly truncated approach to the issue in *Doe v. Maskell*, stating that "equating a repressed memory to merely 'forgetting' ignores advances in the understanding of the human mind."[41]

In contrast, the Supreme Court of North Carolina has declined to promulgate a general rule regarding the admissibility of "repressed memory" evidence.[42] Instead, that court has elected to examine the issue on a case-by-case basis.[43] In *King*, the Supreme Court of North Carolina held that the trial court did not abuse its discretion in declining to admit expert testimony on this issue, which was offered by the State, in a criminal trial. Although holding that the evidence likely was relevant, the Supreme Court affirmed the determination that it was unduly prejudicial to the defendant.

The Supreme Court of New Hampshire has also adopted the case-by-case approach, albeit with much skepticism.[44]

In *Commonwealth v. Shanley*,[45] the Supreme Judicial Court of Massachusetts rejected a criminal defendant's challenge to a rape conviction on the ground that the State was allowed to use "repressed memory" evidence at trial to explain why the victim had waited to come

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[40] *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 675 (S.C. 2000). The Supreme Court of South Carolina expressly approved the extensive discussion and reasoning of that state's intermediate appellate court on this issue. *Moriarty v. Garden Sanctuary Church of God*, 511 S.E.2d 699, 702-05 (S.C. App. 1999).

[41] *Moriarty*, 534 S.E.2d at 677.

[42] *State v. King*, 733 S.E.2d 535, 541 (N.C. 2012).

[43] *King*, 733 S.E.2d at 540-41. Like Maryland, North Carolina has rejected the federal test set forth in *Daubert*, 509 U.S. at 579. *See Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 689 (N.C. 2004) (placing emphasis on whether the expert's method of proof is sufficiently reliable).

[44] *State v. Hungerford*, 697 A.2d 916, 923 (N.H. 1997).

[45] 919 N.E.2d 1254 (Mass. 2010).

forward.[46] The court affirmed the trial judge's decision to allow the evidence to be presented to the jury after conducting the Massachusetts equivalent of a *Frye-Reed* hearing.[47]

In *Doe v. Archdiocese of Saint Paul*,[48] the Supreme Court of Minnesota affirmed the trial court's rejection of "repressed" memory evidence, which the plaintiff needed to toll the statute of limitations. That court rejected the theory as not generally accepted.[49]

In *Maness v. Gordon*,[50] the Supreme Court of Alaska held that expert testimony was required in order to invoke the discovery rule in a childhood sexual abuse case. The court did not decide whether it would allow "properly supported allegations of repressed memory syndrome" to extend the statute of limitations, but, in its discussion, the court seemingly aligned itself with decisions that permit the theory if supported by the testimony of an expert.[51]

In *Clark v. Edison*,[52] after holding an evidentiary hearing, a federal district court determined that the plaintiff's expert on "repressed" memory would be allowed to testify at trial.[53] The judge specifically concluded that, "notwithstanding the methodological criticisms

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[46] *Id.* at 1260-63.

[47] *Id.* at 1265-66.

[48] 817 N.W.2d 150 (2012). One justice dissented on the ground that the evidence should have been analyzed under Rule 702, not *Frye*, and that there was legally sufficient evidence to make the accrual of the plaintiff's cause of action a jury question.

[49] *Id.* at 169-70.

[50] No. S-14753, 2014 WL 1133587, at *2 n.20 (Alaska Mar. 21, 2014).

[51] *Id.* at *2 n.15.

[52] 881 F. Supp. 2d 192 (D. Mass. 2012).

[53] Although the case was decided under *Daubert* principles, the linchpin was reliability. Consequently, the reasoning of the decision is instructive.

raised by Dr. Pope, the court finds that memory repression is a sufficiently testable and tested hypothesis to permit it to be submitted to the jury."[54]

IV.

The plaintiffs' expert witness at the *Frye-Reed* hearing was Joyanna Lee Silberg, Ph.D. Dr. Silberg received her undergraduate degree in psychology from the University of Maryland in 1973, and a Ph.D. in psychology from Ohio State University in 1977. Dr. Silberg has taught at the Maryland Psychological Association and Ohio State University.

Dr. Silberg has been licensed in Maryland since 1982 and, since 1997, has been the head of the Childhood Trauma Unit of the Sheppard Pratt Health System. She has done extensive clinical work, testing and treatment of children suffering from a wide variety of trauma, including sexual abuse. She has treated hundreds of patients who were abused in one form or another. Dr. Silberg is responsible for all psychological and neurological testing performed in the Sheppard Pratt Health System. She has published widely in peer-reviewed journals on child abuse and childhood trauma, participated in national and international task forces and is a reviewer for professional journals. Dr. Silberg provided the court with journal references on dissociative amnesia, including a chapter from her latest book,[55] which discusses some of the current scientific literature on dissociative amnesia and childhood trauma.

Dr. Silberg also testified that the DSM-5, published in 2012 by the APA, specifically recognizes a clinical diagnosis of dissociative amnesia. This condition can be tested through generally accepted assessment instruments and psychological tests. She further testified that the diagnostic criteria set out in Section 300:12 of the DSM-5 are generally accepted in the scientific

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[54] 881 F. Supp. 2d at 215.

[55] J.L. SILBERG, THE CHILD SURVIVOR: HEALING DEVELOPMENTAL TRAUMA AND DISSOCIATION (Routledge Press 2013).

community, which includes psychologists and psychiatrists who treat patients. She testified that the type of memory impairment at issue in this case is generally accepted as a form of dissociative amnesia.

Dr. Silberg described dissociative amnesia as a memory impairment that prevents an individual from consciously recalling all or part of a traumatic event and that clinically produces significant distress. Dr. Silberg testified that this phenomenon is generally accepted in the scientific community – psychiatrists and psychologists – although the precise mechanism of its operation is not well understood. She was clear, however, that the condition has been repeatedly observed clinically and recognized scientifically in peer-reviewed journal articles and studies.[56] According to Dr. Silberg, when an event such as child sexual abuse is dissociated, a person "represses" it, not because she does not want to remember it, but because she cannot remember it.

Dr. Silberg also testified that modern concepts of cognitive neuroscience and psychology have confirmed some of the active brain processes involved in this condition. She referred the court to an article authored by Dr. Michael Anderson, entitled "Neural Systems Underlying the Suppression of Unwanted Memories," published in January 2004 in the journal *Science*. Dr. Silberg also referred the court to a 2001 non-clinical study by Dr. Valerie J. Edwards, of the Centers for Disease Control and Prevention, "Autobiographical Memory Disturbances in Childhood Abuse Survivors," which evaluated 13,493 patients of a major health maintenance organization. The article was the culmination of "a large, epidemiologic study of the long-term

[56] The studies referred to by Dr. Silberg are discussed in a number of articles. *See, e.g.*, C. Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, And Accepted in the Relevant Scientific Community*, TRAUMA, VIOLENCE & ABUSE, Oct. 2006; Daniel Brown et al., *Recovered Memories: The Current Weight of Evidence in Science and in the Courts*, 27 J. PSYCHIATRY & L. 5 (1999).

effects of childhood abuse on adult health." In her view, this study by Dr. Edwards further confirms that the impairment is recognized in the scientific community.

Dr. Silber also directed the court to the work of James A. Chu, M.D., an associate professor at Harvard Medical School,[57] which was published in the American Journal of Psychiatry in 1999.[58] In that article, Dr. Chu and his colleagues studied ninety female patients admitted to McLean Hospital, Harvard's psychiatric teaching hospital. Each participant completed two self-report instruments and underwent structured interviews. Various statistical protocols were then applied to the data.[59] Dr. Chu concluded that childhood abuse is statistically related to high levels of dissociative amnesia for child abuse memories.

Dr. Silberg also testified that the DSM-5 recognizes dissociative amnesia as a specific mental health disorder and that this further reflects a general consensus among mental health professionals that a person may experience a total but reversible memory loss that is too pervasive to be explained by the normal process of forgetting. She described this as an emotional response to a traumatic event, such as child sexual abuse, and that the memory loss is not controlled by the individual's conscious thought processes. Dr. Silberg further described it

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[57] "Dr. Chu is a licensed psychiatrist and the chief of clinical services at McLean Hospital. His specialty is the diagnosis and treatment of adults who have been seriously traumatized as children, and he has treated patients suffering from such trauma for nearly thirty years. He is certified by the American Board of Psychiatry and Neurology and Adult Psychiatry, and is a distinguished fellow within the American Psychiatric Association." *Commonwealth v. Shanley*, 919 N.E.2d 1254, 1260 n.8 (Mass. 2010).

[58] James A. Chu et al., *Memories of Childhood Abuse: Dissociation, Amnesia, and Corroboration*, 156 AM. J. PSYCHIATRY 749 (1999).

[59] As explained by Dr. Chu: "For most analyses of data, non-parametric statistics were used, given the type of data and the non-normal distribution of Dissociative Experiences Scale scores. Kruskal-Wallis analyses were used to compare Dissociative Experiences Scales scores across levels of amnesia for each type of abuse. Further, the Mann-Whitney U Wilcoxon rank sum W test was used to test differences in Dissociative Experiences Scale scores (across types of abuse) between levels of frequency of abuse and levels of amnesia. Spearman correlation coefficients (two-tailed) were used to evaluate whether age at onset of abuse was correlated with the degree of amnesia and to examine the relationship between onset of abuse and Dissociative Experience Scale scores." *Id.* at 751.

as a memory impairment, albeit reversible, that precludes a person from consciously recalling an event or a portion of an event. She called this "autobiographic amnesia" and noted that there are neuro–psychiatric underpinnings.[60] This brain process, she explained, has been tested by recognized scientific methods.[61]

The defendant's expert witness was Harrison G. Pope, Jr., M.D., a professor of psychiatry at Harvard Medical School. Although Dr. Pope has treated some patients who reported memory problems, his principal focus is research. Dr. Pope has co-authored a number of articles that critique other articles on repressed memory or dissociative amnesia.[62] Dr. Pope discussed a number of types of memory loss that he agreed could occur, such as biological amnesia due to brain development or head injuries, but disagreed with the notion that a patient could completely forget a traumatic event but recall it at some later date. He testified that there was no sound science to support this hypothesis and that Dr. Silberg's notion of "dissociative disorder" or "repressed memory" is not generally accepted in the scientific community.

Dr. Pope provided the court with a list of thirty-three publications (some of which are his) in which the authors have questioned the validity of "repressed memory" and criticized the methodology employed by its proponents.[63] The court has reviewed the articles relied on by Dr. Pope. These authors, for a variety of reasons, contend that there is insufficient scientific

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[60] Avi Mendelsohn et al., *Mesmerizing Memories: Brain Substrates of Episodic Memory Suppression in Posthypnotic Amnesia*, 57 NEURON 159 (2008); Michael C. Anderson et al., *Neural Systems Underlying the Suppression of Unwanted Memories*, 303 SCIENCE 232 (2004).

[61] David W. Brown et al., *Adverse Childhood Experience and Childhood Autobiographic Memory Disturbance*, 31 CHILD ABUSE & NEGLECT 961 (2007).

[62] *See. e.g.*, Harrison G. Pope, Jr. et al., *Repressed Memories: Scientific Status of Research on Repressed Memories, in* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (West 2011); Harrison Pope et al., *Questionable Validity of 'Dissociative Amnesia' in Trauma Victims: Evidence from Prospective Studies*, 172 BRIT. J. PSYCHIATRY 210 (1998).

[63] Dr. Pope has used these same thirty-three publications in each of his twelve court appearances as a witness for defendants, for which he charges $6,000 per day.

evidence to verify the existence of dissociative amnesia as it relates to this case, specifically, the total lack of recall due to child sexual abuse.

To further support his position, he discussed his own article in which he "counted" the number of articles which mentioned repressed memory between 1984 and 2003.[64] He viewed the comparatively small number of articles published as evidence of lack of general acceptance. He also testified that most of the neurological studies relied on by Dr. Silberg were irrelevant and that Dr. Silberg's version of dissociative amnesia is not generally accepted. He dismissed the retrospective studies Dr. Silberg relied on because they were based largely on interviews in which the subjects self-reported that there had been an earlier period in their lives when they had been unable to recall the memory of sexual abuse. Of the prospective studies relied on by Dr. Silberg, he criticized them because the original traumatic event had not been adequately documented or other possible causes of the apparent amnesia had not been excluded.

During his testimony, Dr. Pope downplayed the importance of a mental health condition, such as dissociative amnesia, being included in any of the four editions of the DSM (III, IV, IV-TR and 5).[65] His testimony at the hearing in this regard mirrored the criticisms he made in a 1999 article in which he "surveyed" the attitudes of psychiatrists regarding the DSM-IV's diagnostic criteria for dissociative disorders.[66] Although there are some 36,000 physician members of the APA,[67] Dr. Pope sent a questionnaire to 406 individuals. He received 301

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[64] Harrison G. Pope, Jr. et al., *Tracking Scientific Interest in the Dissociative Disorders: A Study of Scientific Publication Output 1984-2003*, 75 PSYCHOTHERAPY & PSYCHOMETRICS 19 (2006).

[65] The APA changed from roman numerals to Arabic numerals with the Fifth Edition of the DSM.

[66] Harrison G. Pope, Jr. et al., *Attitudes Toward DSM-IV Dissociative Disorder Diagnosis Among Board-Certified American Psychiatrists*, 156 AM. J. PSYCHIATRY 321 (1999) [hereinafter Pope, *Attitudes toward DSM-IV*].

[67] Worldwide, the APA has over 135,000 members.

responses. Out of these responses, he calculated that only one-third of those responding believed, without reservation, that the dissociative amnesia disorders should be included in DSM-IV. From this, he reasoned that there was "little consensus on these issues."[68] Dr. Pope believes that his survey supports his conclusion that "DSM-IV fails to reflect a consensus of board-certified American psychiatrists regarding the diagnostic status and scientific validity of dissociative amnesia and dissociative identity disorder."[69] At the evidentiary hearing, Dr. Pope made similar criticisms of the DSM-5.

Dr. Pope's after-the-fact "survey" of a small number of psychiatrists who are dissatisfied with the work of the DSM committees,[70] is not persuasive evidence of anything other than that some doctors disagree.[71] In the court's view, Dr. Pope's criticisms of the DSM in general,[72] and the DSM-5 in particular, are not well founded.[73] As the authors of the latest edition note, the creation of the DSM-5 was a massive, twelve-year undertaking, involving thousands of hours of empirical research and study.[74] The DSM exists because "[r]eliable diagnoses are essential for guiding treatment recommendations, identifying prevalence rates for mental health service

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[68] Pope, *Attitudes toward DSM-IV*, *supra* note 65, at 322.

[69] *Id.* at 323.

[70] *Id.*

[71] Only 301 psychiatrists responded to this survey, a number smaller than that used in many of the studies which Dr. Pope dismisses as bunk. Although the charts are fancy, the methods are flawed.

[72] The DSM was first published by the American Psychiatric Association in 1952.

[73] Dr. Pope testified that the DSM is merely "a dictionary." Interestingly, Dr. Pope "helped draft the diagnostic criteria for psychotic disorders used in the DSM-III and DSM-IV." *United States v. Greene*, 389 F.3d 1060, 1064 (10th Cir. 2004).

[74] DSM-5, *supra* note 11, §1 "Introduction."

planning, identifying patient groups for clinical and basic research, and documenting important public health information such as morbidity and mortality rates."[75]

The DSM-5 revision process was herculean by any standard and included close and frequent consultation with the World Health Organization and the National Institutes of Mental Health.[76] There were thirteen international planning conferences involving 400 participants from thirty-nine countries and a review of the "world literature in specific diagnostic areas to prepare for revisions in developing both DSM-5 and the International Classification of Diseases."[77] Under the leadership of David J. Kupfer, M.D. and Darrell A. Regier, M.D., M.P.H., a task force of twenty-eight members was formed and appointments were made to 130 working groups.[78] In addition, 400 non-voting advisors were appointed to assist the working groups. Thereafter, field trials were employed "to empirically demonstrate reliability" to "test hypotheses on reliability and clinical utility of a range of diagnoses in a variety of patient populations; the latter supplied valuable information about how proposed revisions performed in everyday clinical settings among a diverse sample of DSM users."[79] Changes from DSM-IV were required to be supported by scientific evidence by the Scientific Review Committee "and scored according to the strength of the supporting scientific data."[80] After further review, the APA's Assembly Committee, a deliberative body representing a diverse swath of psychiatrists across the United States, voted in

[75] *Id.*

[76] The APA estimates that it spent over $20 million in connection with the publication of DSM-5. American Psychiatric Association, *Frequently Asked Questions,* DSM-5 DEVELOPMENT (May 2, 2014), http://www.dsm5.org/about/pages/faq.aspx.

[77] DSM-5, *supra* note 11, §1 "DSM-5 Revision Process."

[78] The work groups included experts in neuroscience, biology, genetics, statistics, epidemiology, social and behavioral sciences, nosology, and public health. All participated on a strictly voluntary basis.

[79] DSM-5, *supra* note 11, §1 "DSM-5 Field Trials."

[80] *Id.*, "Expert Review."

November 2012 to recommend the approval of the publication of the DSM-5, and the APA Board of Trustees voted to approve publication in December 2012.

It is true that the DSM is primarily a diagnostic, not a forensic, tool. However, when used appropriately, the APA notes that the DSM-5 may be "used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders."[81] The Court of Appeals has referred to earlier versions of the DSM favorably and has cited to DSM criteria in making its decision in a variety of contexts.[82]

The court finds that the DSM-5 "is the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders."[83] It is the "gold standard" by which mental health professionals diagnose patients and, ultimately, bill private and public health insurers for treatment. The court finds that its mental health criteria, including dissociative amnesia, are generally accepted in the relevant scientific community. The court finds that dissociative amnesia has been subject to peer-reviewed studies which have been published in well-respected journals. The court finds that the methodological criticisms made by Dr. Pope of the studies and literature offered into evidence by the plaintiffs, were effectively rebutted by the testimony of Dr. Silberg, the plaintiffs' hearing exhibits and the well-regarded medical literature, including the DSM-5.

The court finds that these, and other, research methods discussed by Dr. Silberg have produced sufficient empirical evidence to include dissociative amnesia in the DSM-5 (and prior

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[81] *Id.*, "Cautionary Statement for Forensic Use of DSM-5."

[82] *Menefee v. State*, 417 Md. 740, 745 n.7 (2011); *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 264 (2003); *King v. Bd. of Educ. of Prince George's Cnty.*, 354 Md. 369, 372 n.1 (1999); *Lititz Mut. Ins. Co. v. Bell*, 352 Md. 782, 795-96 (1999); *Means v. Baltimore County*, 344 Md. 661, 671-72 & n.6 (1997); *Hutton v. State*, 339 Md. 480, 483 n.1, 488-89 (1995); *State v. Allewalt*, 308 Md. 89, 98-100 & n. 6 (1986); *see also Pettit v. Erie Ins. Exch.*, 117 Md. App. 212, 228 (1997).

[83] *Frequently Asked Questions, supra* note 76.

editions), the standard diagnostic criteria for the entire medical profession. The scientific evidence that the plaintiffs propose to introduce to the jury is dissociative amnesia. Based on the record before it and the court's independent review of the literature, the court finds that dissociative amnesia has been sufficiently tested by the psychiatric and psychological community using research methods generally applied in those fields and that it is generally accepted.

General acceptance under *Frye-Reed* does not require "unanimity of opinion within a scientific community, nor universality, and is not subject to a quantum analysis."[84] Although the clinical studies that support the application of dissociative amnesia to cases of this type are the subject of some criticism, the court finds that the existence of this criticism does not preclude a finding of general acceptance and that the level of testing required by Dr. Pope and his associates is unrealistic and unnecessary. "[E]thically, no complete laboratory study could ever be completed on repression of events as traumatic as sexual abuse."[85] The test is general acceptance, not gospel.[86]

In apparent contrast with the record in *Doe v. Maskell*, this court concludes that the record in this case shows that the opinions of Dr. Silberg are generally accepted within the relevant scientific community.

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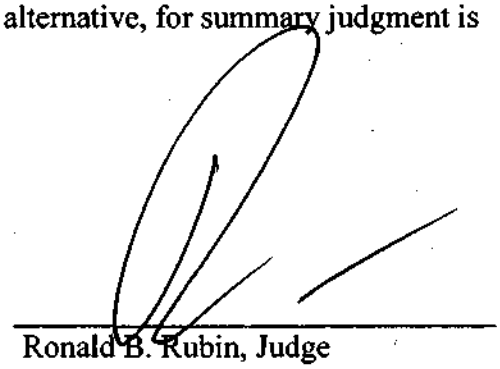
[84] *Chesson II*, 434 Md. at 356; *see Wilson*, 370 Md. at 210.

[85] *Hungerford*, 697 A.2d at 926.

[86] The carefully written and reasoned opinion of the federal judge in *Clark v. Edison*, 881 F. Supp. 2d at 192, is a further indication that the theory has attained general acceptance. *See also Doe v. Freeburg Cmty. Consol. Sch. Dist.*, No. 10-cv-458-JPG, 2012 WL 3996826, at *3 (S.D. Ill. Sept. 12, 2012), which held that "although dissociative amnesia has not been subject to rigorous scientific testing using the strictly controlled experiments, the gold standard of scientific research, it has been sufficiently tested by the psychiatric and psychological community using research methods generally applied in those field of study."

The defendant's motion to dismiss or, in the alternative, for summary judgment is DENIED, this 7th day of May, 2014.



Ronald B. Rubin, Judge