

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**NUMBER 2011-11683**

**DIVISION "H"**

**SECTION "12"**

**JEAN-FRANCOIS MANNINA**

**VERSUS**

**JOHN A. BELSOM**

**JUDGMENT ON DAUBERT CHALLENGE**

The above-captioned matter came before this court for hearing on March 6, 2012. The following counsel appeared:

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**IT IS ORDERED, ADJUDGED, AND DECREED** that the court **DENIES** Defendant's *Daubert* challenge.

Signed at New Orleans, Louisiana, this 17<sup>th</sup> day of May, 2013.

  
**MICHAEL G. BAGNERIS**  
**J U D G E, Civil District Court**  
**Division "H"**

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**REASONS FOR JUDGMENT**

**I. Background**

Plaintiff Jean- François Mannina (Mannina) alleges that between 1985 and 1991, when he was between the ages of 11 and 17, he was groomed and sexually abused by defendant John (“Jack”) Belsom (“Belsom”), an “uncle”-like figure in the family. Mannina avers that he did not recall the abuse until after he shattered his knee in 2005, when he gradually recovered fragmentary memories over a six-month period. This lawsuit was brought in November 2011, more than two decades after the alleged childhood sexual abuse [“CSA”] ended.<sup>1</sup>

Ordinarily, such a claim would be barred by the one-year liberative prescription period set forth in La. C.C. art. 3496.1. However, in 1993, Louisiana extended the prescriptive period for CSA to 10 years<sup>2</sup> and suspension of prescription for CSA based on *contra non valentem*<sup>3</sup> via a diagnosis of dissociative amnesia and/or posttraumatic stress disorder (PTSD) has been jurisprudentially

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<sup>1</sup> By CSA, the court refers to “contacts or interactions between a child and an adult when the child is being used as an object of gratification for adult sexual needs or desires.” Note, *Minnesota’s Hearsay Exception for Child Victims of Sexual Abuse*, 11 Wm. Mitchell L.Rev. 799, 799 n. 1 (1985).

<sup>2</sup> LA R.S. 9:2800.9.

<sup>3</sup> “Prescription does not run against one who is unable to act.”

created in *Doe v. Archdiocese*<sup>4</sup> and *Held v. State Farm Ins. Co.*<sup>5</sup> Plaintiff argues that his claim did not accrue until his recovery of memory, beginning in May 2005, when the ten-year prescriptive clock was firmly in place, or that the 10-year prescriptive clock should be retroactively applied to an action that accrued in 1991, or that prescription was tolled until November, 2010 by a combination of psychological disorders triggered by the CSA and his subsequent recovered memory. Thus, plaintiff argues, the lawsuit was filed timely.

The parties have retained expert witnesses to testify at trial as to the theories of memory repression, PTSD, Adult Attachment Inventory (AAI) and betrayal trauma theory (BTT) as it relates to plaintiff's inability to file his lawsuit until 2011. On February 11, 2013, Belsom filed a Motion for a *Daubert*<sup>6</sup> Hearing to preclude or limit the scope of the testimony of Mannina's psychological expert, Dr. Daniel A. Brown, and requested that it be set on February 22, the date the Exception of Prescription was scheduled to be heard after limited discovery had been completed.<sup>7</sup> Because this was defendant's first declaration of his expert witness, the Exception of Prescription Hearing was continued without date and a *Daubert* Hearing was scheduled for March 6, 2013.

Unlike in *State v. Burke ex rel. County of La Paz*,<sup>8</sup> where the Arizona Court of Appeal found that the trial court abused its discretion by failing to perform its gatekeeping role because the "evidentiary record available to the court . . . was insufficient to permit it to make a legally adequate determination that [plaintiff's expert's] testimony was admissible," this court thoroughly investigated the

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<sup>4</sup> 823 So. 2d 360 (2002).

<sup>5</sup> 610 So. 2d 1017 (La. App. 1<sup>st</sup> Cir. 1992), *writ denied*, 613 So. 2d 975 (La. 1993).

<sup>6</sup> 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

<sup>7</sup> At that time the prescription hearing was reset, Belsom did not yet have a declared expert, despite the fact that at a status conference with the Court on September 26, 2012, defense attorneys predicted that they would have a defense expert before week's end.

<sup>8</sup> 1 CA-SA 12-0028, 2012 WL 1470103 (Ariz. Ct. App. Apr. 26, 2012).

reliability of Dr. Daniel A. Brown, Mannina's expert witness, by conducting a *Daubert* Hearing. To compensate for the absence of live testimony by either party's expert witness, the Court thoroughly examined the written affidavits and CVs of both parties' expert witnesses, and Dr. Brown's extensive deposition transcript. With this Order, the Court denies defendant's motion, subject to two limitations. This memorandum sets forth the Court's reasoning for its decisions.

## **II. Synopsis of Parties' Viewpoints**

Dr. Brown is expected to provide testimony in support of the argument that the cause of action did not accrue at the time of the grooming and sexual abuse but later when Doe remembered the events and began experiencing the most appreciable emotional injury by them. In his testing of Mannina, Dr. Brown drew 3 major conclusions:

- 1) Plaintiff suffered from dissociative amnesia (popularly known as repressed memory) over a 14-year period from approximately ages 17 to 31 and did not begin to recover the abuse memories until after his knee injury in 2005.
- 2) Plaintiff was prevented from seeking judicial redress until 2011 because of psychiatric disorders, including PTSD and BTT,<sup>9</sup> combined with "unresolved disoriented status" as indicated on the AAI,<sup>10</sup> which surfaced *after* he recovered the CSA memories in 2005.
- 3) "From 2005-2010, Mannina was not able to fully grasp that the sexual abuse was not his fault and to confront his abuser in a court of law, until

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<sup>9</sup> "The other [operating factor] is that there's some residual, what we call invisible loyalty towards the perpetrator. [Belsom] is a major figure in his life. He is conflicted, he is terribly ambivalent about going after this guy. At the same time, he's enraged at him and he wants to punish him." Brown depo 162.

<sup>10</sup> In his deposition, Dr. Brown explained that Mannina uses "a coping style of dissociation to deal with difficult issues in his life, and he scored in the top 5 percentile of the general population. . . . He's exactly the type of individual who would put something highly conflictual and traumatic out of his mind." Brown depo at 159-60.

after he completed the Eye Movement Desensitization Therapy [EMDR] with Jori Ross, a licensed social worker, in 2010.”<sup>11</sup>

“All of Dr. Brown’s opinions,” according to plaintiff, “are the product of reliable principles and methods, generally accepted in the medical field and supported by an extensive, peer reviewed scientific literature.”

Dr. Brown’s position, in defendant’s words, is that “... due to the prior PTSD and Dissociative amnesia, Plaintiff is susceptible to disorganized thought and that this *could* keep him from filing suit.”<sup>12</sup> Belsom characterizes AAI and BTT as “stretch[ing] the existing science to include what can best be described as ‘distraction.’” Mannina’s ability to function well at his job, according to Belsom, means he should have been able to file the lawsuit in 2006. Specifically, defendant worries that Dr. Brown’s testimony will be used by plaintiff to “to stretch the limits of the law of prescription by gerrymandering what is actually sound scientific theory and creating a sub-species of dissociative amnesia in order to avoid dismissal of plaintiff’s claim.” In his motion, the defendant argues that BTT and the results of the AAI lack scientific reliability and validity. Therefore, defendant urges the Court not to recognize either.

After careful deliberation, defendant’s motion to exclude expert testimony on CSA-related traumatic and dissociative theories and diagnostic tools will be denied. Dr. Brown will be permitted to testify regarding dissociative amnesia theory, PTSD, AAI, and BTT, their limitations, their level of general acceptance in the academic community, and the traits likely to be present in individuals who have experienced dissociative amnesia.

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<sup>11</sup> EMDR, according to Dr. Brown, works to calm PTSD symptoms. Brown depo, 165.

<sup>12</sup> Quoting selectively from Dr. Brown’s deposition transcript, page 162, lines 2 and 24.

### III. Analysis

The crucial issue before the Court is whether any or all of the psychological theories and diagnostic tools Dr. Brown testified about during his deposition that purport to shed light on plaintiff's state of mind from 1991-2010 should be stricken, either because one or more fail to survive a *Daubert* analysis for scientific validity or are found unduly prejudicial for a fact finder.

#### A. *Daubert/Foret* Generally

Taken together, the three cases of the *Daubert* trilogy<sup>13</sup> generated a new body of law surrounding the admission of expert testimony in federal court by replacing the old *Frye* test of general acceptance within the scientific community<sup>14</sup> with a new standard preserving the role of judges as gatekeepers and affirming that judicial decisions were reviewable only for abuse of discretion.<sup>15</sup> In 1993, five months after *Daubert*, the Louisiana Supreme Court, in *State v. Foret*,<sup>16</sup> adopted the *Daubert* test for admissibility for expert testimony in Louisiana. The Supreme Court expanded the *Daubert* analysis from scientific testimony to all expert testimony in *Kumho Tire v. Carmichael*.<sup>17</sup> The latter case is particularly significant in the matter at hand because all of the theories plaintiff's expert wants to discuss are regarded as psychological evidence, rather than what is traditionally regarded as "scientific."<sup>18</sup>

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<sup>13</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 578 (1993); *Joiner v. Gen. Electric Co.*, 522 U.S. 139 (1997); *Kumho Tire Co., LTD. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

<sup>14</sup> *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

<sup>15</sup> *Kumho Tire*, 526 U.S. at 158; *Daubert*, 509 U.S. at 593.

<sup>16</sup> *State v. Foret*, 628 So. 2d 1116 (1993).

<sup>17</sup> See generally 526 U.S. 137 (1999).

<sup>18</sup> Paige A. Nichols, *Attacking the Invisible: Tools for Preventing the Admission of "Recovered Memory" Evidence at Trial*, Forensic-Evidence.com, available at [http://www.forensic-evidence.com/site/Behv\\_Evid/BhvE\\_Paige.html](http://www.forensic-evidence.com/site/Behv_Evid/BhvE_Paige.html) (last visited Feb. 29, 2004).

With regard to the judge's first determination--the requirement of scientific knowledge--the *Daubert* Court explained that “the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.” Rather, “the term ‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’” In the scientific context, however, a fact need not be known to a level of certainty, but instead must be “derived by the scientific method.”<sup>19</sup> The Court then offered some factors which it viewed as indicative of a true scientific basis, including 1) “[g]enerating hypotheses and testing them to see if they can be falsified”<sup>20</sup> and 2) determining the technique's rate of error.<sup>21</sup>

Simultaneously, the United States Supreme Court confirmed that judges have discretion to determine how to apply these criteria by using some, all, or none of the factors listed.<sup>22</sup> In the words of Justice Stephen Breyer, “Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged.”<sup>23</sup>

## **B. National Trend<sup>24</sup>**

Typically, when *Daubert* challenges are brought in CSA cases, psychological theories are challenged as being inadmissible as to determinations of

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<sup>19</sup> *Daubert*, 113 S. Ct. at 2795 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986)).

<sup>20</sup> *Id.* at 2797.

<sup>21</sup> *Id.*

<sup>22</sup> See generally, Susan Haack, *Of Truth, in Science and in Law*, 73 Brook. L. Rev. 985, 991 (2008).

<sup>23</sup> *Kumho Tire*, 526 U.S. at 151.

<sup>24</sup> In *Doe v. Archdiocese*, the leading 4<sup>th</sup> Circuit case on CSA and dissociative memory, the Court of Appeal held that it was appropriate for the trial court to consider jurisprudence beyond the borders of Louisiana because of the scarcity of decisions on point in Louisiana. In this case, defendant challenges BTT and AAI, which have similarly not been addressed by local judges.

liability,<sup>25</sup> particularly in cases without independent corroborating evidence.<sup>26</sup> In fact, the only case Dr. Brown has ever been “*Dauberted out*” of was *State v. Hungerford*,<sup>27</sup> a criminal case where the defendant fiercely contested his guilt and the Court refused to allow “repressed memory” testimony to be used against the defendant.

Here the *Daubert* challenge is not to limit use of psychological expert testimony to infer guilt from the plaintiff’s behavior. Moreover, in this case, there are three independent forms of corroborative evidence the plaintiff proposes to use at trial:

1) Belsom’s 2005 letter to Mannina claiming that the then under-age Mannina was an enthusiastic participant in the various types of intercourse; 2) Mannina’s mother’s affidavit recalling her conversation with Belsom during which he confessed to molesting her son for 7 years, beginning when Mannina was 11<sup>28</sup>; and 3) the negative inference that can be drawn from Belsom’s taking of the Fifth Amendment privilege against self-incrimination<sup>29</sup> 122 times during his deposition. Among the questions to which he took the fifth are:

- Did you have sex with Mannina over a period of several years when he was growing up?
- Did that sexual activity begin when he was approximately 11 years old?
- And did it not continue until he was approximately 17 years old

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<sup>25</sup> Joshua Lushnat, *Sexual Abuse Memory Repression: The Questionable Injustice of Demeyer*, 13 J. L. Society 529, 534-35 (2012).

<sup>26</sup> See *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606, 610 (1988) and *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich. App. 632, 692 N.W.2d 398 (2004).

<sup>27</sup> *State v. Hungerford*, 142 N.H. 110, 697 A.2d 916 (1997).

<sup>28</sup> Affidavit of Marie-Louise Mannina, sworn to March 28, 2012 (“Mannina Affidavit”), Exhibit A of Plaintiff’s Brief in Opposition to Defendant’s Exception of Prescription filed May 3, 2012.

<sup>29</sup> *Boyd v. Boyd*, 26, 292 (La. App. 2 Cir. 12/7/94), 647 So. 2d 414, 415-16 & fn. 2. See generally *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976)



- Did it include fellatio?
- Did it include oral rape?
- Did it include anal intercourse?
- Other than my client, Jean-Francois Mannina, have you engaged in sexual activities with other boys or girls under the age of 18 years old?
- Have you ever had sex with a high school foreign exchange student who lived in your home?
- Did you have sex with a boy by the name of Jeffrey Theiler, whose mother you met at St. Louis Cathedral when she was separated from her husband and he was still a youth and you acted as a father figure for?

Instead, defendant seeks to limit or curtail Dr. Brown's testimony as to the psychological effects *on the plaintiff* of the childhood sexual abuse and the sudden recovery of at least half of the memories of the abuse in 2005. This is not for the purpose of protecting their client from allegations he is denying, but rather to block plaintiff's attempt to overcome prescription via suspension for mental incapacity, in part, because of defendant's alleged actions.

### **C. Roadmap**

The first step to fulfilling the court's role as "gatekeeper" of expert testimony in this case requires the Court to ascertain whether a foundation has been laid for the admission of the proposed expert testimony by a showing that the expert is qualified by virtue of his/her training and education.<sup>30</sup> After that is determined, we will examine whether Dr. Brown has personal experience in treating people who have experienced the disorders about which he theorizes.<sup>31</sup>

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<sup>30</sup> *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1063-64 (E.D. Mich. 1995).

<sup>31</sup> *Id.*

Subsequently, the *Daubert* trilogy and its progeny outlined four criteria for judges to consider: (1) whether the expert's theory or technique has been tested ("testability"); 2) whether the theory or technique has been subjected to peer review and publication ("peer review"); 3) the known or potential rate of error ("error rate"); and 4) whether the methodology is generally accepted within the relevant scientific community ("general academic acceptance").<sup>32</sup>

Dr. Brown relies on three interrelated psychological theories and one diagnostic tool to interpret Mannina's test results and to answer defense counsel's questions: dissociative amnesia, PTSD, the AAI, and BTT. We will examine the 3 theories and 1 diagnostic tool of relevant psychological disorders to establish that the theory/tool, itself, does have the necessary degree of validity and reliability. "This latter step can be met by showing whether the theory has been subjected to empirical testing, and/or peer review."<sup>33</sup>

At this juncture, Belsom is only challenging the scientific validity/relevance of the latter three theories. However, because defendant has also reserved his right to challenge the dissociative amnesia component at a later time,<sup>34</sup> we will review the latest literature and jurisprudential trend on dissociative memory as well.

# **1. DR. BROWN'S BACKGROUND/TRAINING IN, and PERSONAL EXPERIENCE WITH THEORIES OF CSA-INDUCED TRAUMA AND DISSOCIATION**

As in *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*,<sup>35</sup> the defendant does not challenge Dr. Brown's scientific and specialized knowledge. Dr. Brown earned

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<sup>32</sup> *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, 10-CV-458-JPG, 2012 WL 3996826 (S.D. Ill. Sept. 12, 2012) (citing *Happel v. Walmart Stores, Inc.*, 602 F. 3d 820, 824 (7<sup>th</sup> Cir. 2010) (citing *Daubert*, at 592-94).

<sup>33</sup> *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995).

<sup>34</sup> See *Daubert* hearing transcript.

<sup>35</sup> *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, 10-CV-458-JPG, 2012 WL 3996826 (S.D.

his Ph.D. at the University of Chicago in 1981.<sup>36</sup> He is a licensed and board certified psychologist. In 1990, he was appointed Assistant Clinical Professor in Psychology at Harvard Medical School (HMS). In 2006, he was tenured and promoted to Associate Clinical Professor in Psychology at HMS, where he still teaches today. His CV reads like a Who's Who of famous, well decorated psychologists. For example, he served as the Chairman of the Task Force of Division 56 of the American Psychological Association Liaison to DSM-V on Trauma-Related Disorders. Since 1998, he has served as an expert witness for the United Nations' Office of the Prosecutor, International War Crimes Tribunal for the Former Yugoslavia. He has won countless awards, has published exhaustively on CSA, trauma, and dissociation in the most notable, peer-reviewed psychological journals of our time, and gives public lectures frequently. He has also written and edited book chapters and books in the field.

Moreover, Dr. Brown's CV clearly demonstrates that "he has sufficient background and training specifically related to his theory to be able to testify as to the theory's validity and reliability."<sup>37</sup> Echoing the words of Judge Phil Gilbert, who recent conducted a *Daubert* hearing on Dr. Brown in an Illinois case, "Indeed, [Dr. Brown] has the credentials and experience to render a helpful opinion in the field of psychology . . . ."<sup>38</sup>

Dr. Brown administered 48 psychological tests over a two-day, 16-20 hour period in March 2012, during which time he also interviewed Mannina. Belsom suggest that this is an insignificant amount of time. However, given Dr. Brown's expertise and decades of practice administering similar tests, and in contrast with

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Ill. Sept. 12, 2012) (Gilbert, J.).

<sup>36</sup> This and all of the below facts are found in Dr. Brown's CV.

<sup>37</sup> *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995).

<sup>38</sup> *Id.*

Dr. Shwery's absolute lack of time spent with the plaintiff, this criticism is unsubstantiated.

Moreover, according to Dr. Brown's testimony, unchallenged by Dr. Shwery, the structured psychological interviews, normative psychological tests and empirically-derived tools he used to test Mannina were chosen precisely because of their higher validity and reliability than open-ended interviews would have given, according to scientists. Dr. Brown gave Mannina all of the psychological inventories relevant to every diagnosis that one might possibly have in the DSM except for schizophrenia because it was irrelevant.<sup>39</sup> As a result of the 48 tests, a comprehensive analysis was conducted.<sup>40</sup> Moreover, included in the battery of tests was the SIRS, the Structured Interview of Reported Symptoms, which is "the most detailed way of assessing the possibility of malingering in the context of a lawsuit."<sup>41</sup>

## **2. DR. BROWN'S TESTIMONY ON DISSOCIATIVE AMNESIA**

On the whole, CSA-induced dissociative amnesia remains accepted in courts across the country,<sup>42</sup> especially in cases where the memories were not recovered as part of therapy<sup>43</sup> nor as a result of having been administered a "memory drug,"<sup>44</sup>

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<sup>39</sup> Brown Depo 40.

<sup>40</sup> Brown depo.

<sup>41</sup> Brown depo 62.

<sup>42</sup> Many jurisdictions accept repressed memories as a way to toll the statute of limitation for sexual abuse. In addition to Louisiana, Nebraska, Nevada, Ohio, North Dakota, Arizona, Wisconsin, California, and many other jurisdictions accept repressed memory as a means of suspending prescription.

<sup>43</sup> *Stogner v. California*, 539 U.S. 607, 631, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) (warning of the dangers of "uncertain" recollection and "faulty" recovered memories in CSA cases brought decades after the alleged assaults). On the problem of therapists "planting" false memories, see Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 Am. Psychologist 518 (May 1993) (urging that therapy-induced recovered memories be probed for accuracy rather than accepted uncritically).

<sup>44</sup> *Ramona v. Ramona*, 57 Cal. App. 4<sup>th</sup> 107 (1997).

and where corroborating evidence exists.<sup>45</sup> A minority of courts has rejected the theory,<sup>46</sup> like the Maryland Court of Appeals case, *Doe v. Maskell*,<sup>47</sup> where the court's lay opinion was that repression "as a phenomenon separate and apart from the normal process of forgetting" might not exist.<sup>48</sup> A more sophisticated decision, respectful of highly trained, licensed psychologists' expertise, is that of Judge Richard Kopf, who ruled, in *Anonymous v. Vella*, that the dissociative amnesia diagnosed by Dr. Brown in *Vella*, was the "mental disorder of the type contemplated by the Nebraska statute on child abuse."<sup>49</sup> He drew a bright line between dissociative amnesia and the ordinary "forgetfulness" that had doomed another CSA plaintiff's case in *Duffy*, where the plaintiff remembered and reported the abuse as a child, then claimed to have "forgotten" it, but could provide no expert testimony to suggest that his memory had ever been "repressed."<sup>50</sup>

#### *a. General Academic Acceptance & Peer Review*

Although dissociative amnesia brought on by severe sexual trauma remains questioned by some psychologists of equally high rank as Mannina's expert, such

<sup>45</sup> *Olsen v. Hooley*, 865 P.2d 1345 (Utah 1993); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780 (1991). See also *Clark v. Edison*, 881 F. Supp. 2d 192, 197 (D. Mass. 2012) (reluctantly allowing expert testimony on repressed memory, despite the absence of "confirming medical or scientific evidence"). Even the most vociferous of opponents to repressed memory acknowledge that independent corroboration enhances certainty of the accuracy of the recovered allegations. See, for example, Elizabeth Loftus & Katherine Ketcham, THE MYTH OF REPRESSED MEMORY 48, 90 (1994).

<sup>46</sup> For an early summary of the split among the courts and jurisdictions, see Peter E. Smith, *The Massachusetts Discovery Rule and Its Application to Non-Perpetrators in "Repressed Memory" Child Sexual Abuse Cases*, 30 New Eng. J. on Crim. & Civ. Confinement 179, 200 (2004) ((comparing *State v. Hungerford*, 697 A.2d 916 (N.H. 1997); *State v. Quattrocchi*, 1999 AWL 284882 (R.I. Apr. 26, 1999); *Franklin v. Stevenson*, 987 P.2d 22 (Utah 1999) with *Isley v. Capuchin Province*, 877 F. Supp. 1055 (E.D. Mich. 1995); *Shahzade v. Gregory*, 923 F.Supp. 286 (D. Mass. 1996); *Wilson v. Phillips*, 73 Cal.App.4th 250 (1999); *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000)).

<sup>47</sup> 679 A.2d 1087 (Md.App.1996).

<sup>48</sup> *Keller v. Maccubbin*, CIV.A. K11C-03015RBY, 2012 WL 1980417 (Del. Super. May 16, 2012) (pointing out that *Doe v. Maskell*, a case relied upon by defendants, was an aberration in the overall modern trend across jurisdictions).

<sup>49</sup> *Anonymous v. Vella*, 64 Fed. R. Serv. 3d 585 (D. Neb. 2006) (Kopf, J.) ("[Dissociative amnesia] truly precludes one from suing since one cannot elect to bring suit if one cannot remember that one has been injured.")

<sup>50</sup> 2006 WL 208832, at 4.

as Dr. Brown's colleague at Harvard, Dr. Pope, as of this writing, it remains widely accepted as having validity in the psychology community. Dr. Constance Dalenberg, Founder & Director of the Trauma Research Institute in San Diego, suggests that in the field of recovered memory of trauma, there are two small groups of extremists on opposite ends of the spectrum.<sup>51</sup> One group, "largely lay authors, argued that the recovered memory of trauma was more likely to be accurate than was the continuous memory." At the other extreme, an equally small group of largely "professional expert witnesses,"<sup>52</sup> argued that the recovered memory was virtually never true.<sup>53</sup> In between these two extremes, however, Dalenberg explains, are the "vast majority of psychologists" who "disagree as Dawkins and Gould disagree about evolution. They concede recovered memory and false memory are possible, but differ as to prevalence of the two phenomena, likely mechanisms for recovered memory or false memory, and other details."<sup>54</sup>

"Less than 10% of experimental psychologists and less than 5% of clinical psychologists hold the point of view that accurate recovered memory is not possible."<sup>55</sup> In a 1997 study,<sup>56</sup> only 7% of experimental psychologists, 3% of

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<sup>51</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence, & Abuse 274, 277 (2006).

<sup>52</sup> See Richard Ofshe & E. Watters, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA (1994) and H. Wakefield & R. Underwager, RETURN OF THE FURIES: AN INVESTIGATION INTO RECOVERED MEMORY THERAPY (1994).

<sup>53</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence, & Abuse 274, 281 (2006) (citing a study that shows that only "fourteen percent of experimentalists, 2% of clinical researchers, and 1% of nonresearcher clinicians take the position of the extreme false memory advocates . . .").

<sup>54</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence, & Abuse 274, 277 (2006).

<sup>55</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence, & Abuse 274, 275 (2006).

<sup>56</sup> M. Dammeyer, N. Nightingale, & M. McCoy, *Repressed Memory and Other Controversial Origins of Sexual Abuse Allegations*, 2 Child Maltreatment 252 (1997).

clinical psychologists with research involvement, and 2% of clinicians with no research involvement reported that they held the view that accurate recovered memories of trauma are not possible.<sup>57</sup> The majority of all three groups views the current evidence as supporting a more probable than not decision (6 to 8 on an 10-point scale) or are certain of the validity of the phenomenon (9 to 10).<sup>58</sup>

By 1999, more than 60 studies, the majority of which were peer reviewed, had been published that reported dissociative amnesia related to childhood sexual abuse.<sup>59</sup> Moreover, traumatic amnesia has been discussed in narratives by child sexual abuse victims.<sup>60</sup> Lastly, many national and international major psychology organizations have memorialized their views on the possibility of recovered memory of abuse, while cautioning that the danger of an occasional falsely “recovered” memory also exists.<sup>61</sup> As the *Kumho* Court aptly stated, when there is

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<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Daniel Brown, A. Schefflin, & C. Whitfield, *Recovered Memories: The Weight of the Evidence in Science and in the Courts*, 27 J. of Psychiatry & L. 5 (1999). For a thorough review of the recovered memory samples, see Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence, & Abuse 274, 279-281 (2006).

<sup>60</sup> T. Brewerton, B. Dansky, D. Kilpatrick, and P. O’Neil, *Bulimia nervosa, PTSD, and forgetting: Results of a National Women’s Survey* In TRAUMA AND MEMORY 127 (1999); J. Dorado, *Remembering Incest*. In TRAUMA AND MEMORY 245 (1999); L. Williams, *Recall of Childhood Trauma: A Prospective Study of Women’s Memories of Child Sexual Abuse*, 62 J. of Consulting and Clinical Psychology 1167 (1994); L. Williams, *Recovered Memories of Abuse in Women with Documented Child Abuse Sexual Victimization Histories*, 8 J. of Traumatic Stress 649 (1995).

<sup>61</sup> See American Psychological Association, *Final Conclusions of the American Psychological Association Working Group on Investigation of Memories of Childhood Abuse*, 4 Psychology, Public Policy, and L. 933, 933 (1996) (concluding that all agreed that “it is possible for memories of abuse that have been forgotten for a long time to be remembered”); American Medical Association, *Report on Memories of Childhood Abuse*, in C.S.A. REPORT 5, A-94, at 1 (1994); American Psychiatric Association, *Statement of Memories of Sexual Abuse*, 42 International J. of Clinical and Experimental Hypnosis 261, 262 (1993); International Society for Traumatic Stress Studies, *CHILDHOOD TRAUMA REMEMBERED: A REPORT ON THE CURRENT SCIENTIFIC KNOWLEDGE BASE AND ITS APPLICATIONS* 15 (1998) (finding “consensus across the scientists of North America, Europe, Australia, and New Zealand” that “traumatic memories may be forgotten, then remembered at some later time”).

a “range where experts might reasonably differ,” “the jury must decide among the conflicting views.”<sup>62</sup>

#### b. Error Rates

Dr. Dalenberg explains:<sup>63</sup>

*Daubert* refers to the standards and controls (and error rate) for a particular technique (e.g., fingerprinting, blood spatter analysis). The procedures for evaluating the error rate of a technique generally involve use of the technique (compared to others) in a controlled setting, leading to agreement as to the standards for varying decisions (e.g., the decision on number of ridge comparisons that must be identical in a fingerprint before it is called a match).

According to peer-reviewed articles,<sup>64</sup> recovered and continuous memory is equally likely to have a 70-80% chance that “the details of the accounts will be accurate.”<sup>65</sup> Error rates are also available from studies of the mechanisms underlying recovered memory. “At the .05 level or better [for significance of a research project], dozens of reviewed studies have established that . . . avoidance of emotion associated with painful experiences can both harm memory for that experience and lead to increased levels of painful affect.”<sup>66</sup> The statistical significance criteria met here appear to be used to meet *Daubert* error rate criteria in other areas.<sup>67</sup>

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<sup>62</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999).

<sup>63</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 *Trauma, Violence, & Abuse* 274, 300 (2006).

<sup>64</sup> L. Williams, *Recovered Memories of Abuse in Women with Documented Child Abuse Sexual Victimization Histories*, 8 *J. of Traumatic Stress* 649 (1995) and Constance Dalenberg, *Accuracy, Timing and Circumstances of Disclosure in Therapy of Recovered and Continuous Memories of Abuse*, 24 *J. of Psychiatry & L.* 229 (1996).

<sup>65</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 *Trauma, Violence, & Abuse* 274, 301 (2006).

<sup>66</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 *Trauma, Violence, & Abuse* 274, 301 (2006).

<sup>67</sup> R. Thatcher, C. Biver, & D. North, *Quantitative EEG and the Frye and Daubert standards for Admissibility*, 34 *Clinical Electroencephalography* 1 (2003).



### c. Testability

According to Dr. Brown, European studies have used scans of the brain to substantiate the memory's ability to repress certain types of memories.<sup>68</sup> "A number of instruments now exist to measure depersonalization, emotional constriction, detachment, and memory disturbance."<sup>69</sup> A significant body of scholarly research demonstrates a relationship between apparent amnesia and victimization. After conducting a thorough literature review in 1999, Dr. Brown, A. W. Schefflin, and C. L. Whitfield concluded: "In just this past decade alone, 68 research studies have been conducted on naturally occurring dissociative or traumatic amnesia for childhood sexual abuse. Not a single one of the 68 data-based studies failed to find it."<sup>70</sup> This body of work includes retrospective methods.<sup>71</sup> Cases of amnesia have also been documented for corroborated cases of abuse.<sup>72</sup> A large epidemiological study conducted by V. J. Edwards, et al demonstrated that general autobiographical memory loss was strongly associated with a history of sexual or physical child abuse, i.e. twice as high for women and 1.5 times as high for men.<sup>73</sup>

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<sup>68</sup> Brown depo.

<sup>69</sup> Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 *Trauma, Violence, & Abuse* 274, 302 (2006).

<sup>70</sup> *Recovered Memories: The Current Weight of the Evidence in Science and in the Courts*, 27 *J. of Psychiatry & the L.* 5, 126 (1999).

<sup>71</sup> D. M. Elliot, *Traumatic Events: Prevalence and Delayed Recall in the General Population*, 65 *J. of Consulting & Clinical Practice* 811 (1997); T. M. Schultz, J. Passmore, & C. Y. Yoder, *Emotional Closeness with Perpetrators and Amnesia for Child Sexual Abuse*, 12 *J. of Child Sexual Abuse* 67 (2003); L. R. Stoler, *Recovered and Continuous Memories of Childhood Sexual Abuse: A Quantitative and Qualitative Analysis*, Doctoral Dissertation, University of Rhode Island (2000).

<sup>72</sup> R. E. Cheit, *The Recovered Memory Project*, [www.brown.edu/PublicPolicy/Recovmem](http://www.brown.edu/PublicPolicy/Recovmem) (2005).

<sup>73</sup> V. J. Edwards, R. Fivush, R. F. Anda, V. J. Felitti, & D. F. Nordenberg, *Autobiographical Memory Disturbances in Childhood Abuse Survivors*, 4 *J. of Aggression, Maltreatment, Trauma* 247 (2001).

#### **d. Helpfulness to Fact Finder**

There is also evidence that expert testimony regarding long-term battering's typical effects on a woman is helpful to juries. A recent study of a sample of jurors awaiting duty compared the jurors' responses on a questionnaire with those of experts. "[S]ignificant differences between the experts and the sample of laypersons" were found,<sup>74</sup> indicating that expert testimony would be helpful to the average juror.<sup>75</sup> A dissent in a repressed memory case argued in favor of admitting expert testimony on child sexual abuse, because "[a] victim's reaction to childhood incestuous abuse is also unique, complex, and beyond the ken of ordinary laymen."<sup>76</sup> Even an event as traumatic as a Nazi concentration camp experience has been found to produce amnesia. In a mid-1980s' study by two psychologists, K. Kuch and B. Cox, a 3.8% rate of "psychogenic amnesia" was discovered among the general population of concentration camp survivors in the mid-1980s and a "10% rate in the tattooed survivors of Auschwitz."<sup>77</sup> And yet, to a reasonable lay mind, it might be difficult to fathom, without an expert's aid, how memories of Auschwitz could be repressed.

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<sup>74</sup> Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 L. & Human Behavior 273, 282 (1992) (describing a recent study designed to assess the differences between lay and expert conceptions of the circumstances of battered women).

<sup>75</sup> Id. at 282-283.

<sup>76</sup> *Lindabury v. Lindabury*, 552 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 1989) (Jorgenson, J., dissenting).

<sup>77</sup> K. Kuch & B. Cox, *Symptoms of PTSD in 124 Survivors of the Holocaust*, 149 American J. of Psychiatry 337 (1992). See generally W. Wagenaar & J. Groenweg, *The Memory of Concentration Camp Survivors*, 4 Applied Cognitive Psychology 77 (1990).

In light of all these factors, the Court finds the theory of dissociative amnesia an appropriate subject for expert testimony by Dr. Brown. Additionally, there is no suggestion in the defendant's motion that Dr. Brown has not reliably applied the theory of dissociative amnesia to his examination and diagnosis of Mannina.

### **3. DR. BROWN'S TESTIMONY ON PTSD**

Of PTSD, two noted scholars of the development and implications of psychiatric diagnoses recently observed that “drawing boundaries is not just a matter of diagnostic convenience but also of justice and injustice.”<sup>78</sup> “Few courts have used *Daubert* or other evidence rules to limit the admissibility of PTSD testimony,” discovered Professor Deirdre M. Smith, University of Maine School of Law, after a survey of the legal history of PTSD through 2011.<sup>79</sup> Courts regard it as relevant, useful, and appropriate for fact finders to employ and rely upon the adversarial process to flesh out the limitations of such evidence.<sup>80</sup> The diagnosis had been “widely, although not universally, accepted by other jurisdictions as a reliable form of expert testimony in this context,” although the specific purpose for which it could be offered was still subject to some controversy.<sup>81</sup>

#### **a. General Academic Acceptance & Peer Review**

Courts that allow evidence of PTSD often base their rulings primarily on the fact that PTSD had been included in the Diagnostic and Statistical Manual of Mental Disorders (DSM),<sup>82</sup> the American Psychiatric Association's (APA)

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<sup>78</sup> Jerome C. Wakefield & Allan V. Horwitz, *Normal Reactions to Adversity or Symptoms of Disorder?*, in Clinician's Guide to PTSD, at 33, 42.

<sup>79</sup> Deirdre M. Smith, *Diagnosing Liability*, 84 Temp. L. Rev. 1, 46-47 (2011).

<sup>80</sup> Id.

<sup>81</sup> *Chapman v. State*, 18 P.3d 1164, 1172 (Wyo. 2001).

<sup>82</sup> See AM. Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2000). The DMS-V has been approved, and will be available for the public in May, 2013.

standardized classification.<sup>83</sup> For example, in 2001, the Supreme Court of Wyoming, applying *Daubert*, concluded that the broader question of admissibility of PTSD testimony in sex abuse cases was resolved<sup>84</sup> because PTSD's inclusion in the DSM was in itself evidence that it had "achieved acceptance in the fields of psychiatry and psychology."<sup>85</sup> PTSD is included in the DSM-V in the chapter on "Trauma- and Stressor-Related Disorders."<sup>86</sup>

### **b. Testability**

Unlike the psychologist in *Alvarado v. Shipley Donut Flour & Supply Co., Inc.*,<sup>87</sup> whose testimony a federal district court judge excluded in an employment discrimination claim brought by twelve employees because of the psychologist's failure to use any of the standardized diagnostic instruments available for PTSD evaluations,<sup>88</sup> Dr. Brown used CAPS, the Clinically Administered PTSD Scale,<sup>89</sup> instead of SCID-1,<sup>90</sup> because CAPS is the "gold standard in the field."<sup>91</sup> It is notable that Belsom's expert did not challenge Dr. Brown's choice of diagnostic tests nor his ability to administer or interpret them.

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<sup>83</sup> See, e.g., *People v. Taylor*, 552 N.E.2d 131, 134-35 (N.Y. 1990) ("[T]he diagnostic criteria for posttraumatic stress disorder that are contained in DSM III-R have convinced us that the scientific community has accepted that rape as a stressor can have marked, identifiable effects on a victim's behavior ....").

<sup>84</sup> *Chapman*, 18 P.3d at 1173 (Wyo. 2001) (rejecting defendant's argument that the trial court erred in allowing the state to offer a psychiatrist's testimony that the complainant had PTSD. "The pivotal question in determining the admissibility of PTSD testimony in sexual assault cases is the testimony's relevance to the issues in the case."). See also *State v. Alberico*, 861 P.2d 192, 208 (N.M. 1993) and *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995).

<sup>85</sup> *Chapman*, 18 P.3d at 1171. See also *Attewalt v. State* (Allewalt II), 517 A.2d 741, 751 (Md. 1986) (reasoning that due PTSD's acceptance in the DSM makes it a "medically recognized disorder").

<sup>86</sup> On traumatic and dissociative disorders and the DSM-V, due out in May, 2013, see Mark Moran, *Trauma Disorder Criteria Reflect Variability of Response to Events*, 48 *Psychiatric News* 6 (March 2013).

<sup>87</sup> Civil Action No. H-06-2113, 2007 WL 4480134 (S.D. Tex. Dec. 18, 2007) (where the federal district court excluded plaintiffs' expert testimony in an employment discrimination claim brought by twelve employees).

<sup>88</sup> *Id.* at 4-6.

<sup>89</sup> Brown Depo 36.

<sup>90</sup> He used the other sections of SCID to test other conditions.

<sup>91</sup> Brown depo 61.

### **c. Helpfulness to Fact Finder**

Another relevant evidentiary inquiry is whether the behavioral expert's testimony is "helpful" to the fact finder in the sense required by the Louisiana code of evidence analogous to LCE 702. Professor Mark S. Brodin suggests two threshold questions: "Would a jury need assistance on the matters addressed by the testimony? And, if so, does the evidence approach the level of certainty and precision necessary to render it of assistance in resolving the case?"<sup>92</sup>

A recent study of a sample of jurors awaiting duty compared the jurors' responses on a questionnaire with those of experts. "[S]ignificant differences between the experts and the sample of laypersons" were found, indicating that expert testimony regarding psychological "syndromes" would be helpful to the average juror.<sup>93</sup> In the instant case, evidence of PTSD is being offered to help the fact finder understand the plaintiff's behavior post-awareness of allegedly repeated CSA, generally an experience outside the ordinary fact finder's daily experience.

### **d. Fit and Risk of Prejudice**

Moreover, we find that Dr. Brown's expert testimony on Mannina's PTSD is relevant to the disputed issue in this particular case. There is a close "fit" between the issue of prescription and Mannina's condition of PTSD. Any risk that the fact finder might be confused, distracted, overwhelmed, or unfairly prejudiced by the evidence can be rectified by cross examination and defendant's own expert witness.

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<sup>92</sup> Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of A Skeptic*, 73 U. Cin. L. Rev. 867, 870 (2005)

<sup>93</sup> Schuller & Vidmar, at 282-83 (describing a recent study designed to assess the differences between lay and expert conceptions of the circumstances of battered women).

Where a Louisiana court has “*Dauberted out*” PTSD evidence is when it was offered as proof of liability that the sex abuse had occurred in the first place.<sup>94</sup> In *Held v. State Farm Ins. Co.*, for example, the First Circuit ruled that evidence of PTSD was admissible precisely to illuminate why Stephanie Held, the plaintiff, had not been able to file her CSA claim before it facially prescribed.<sup>95</sup> In the case *sub judice*, as in *Held*, evidence of PTSD is being offered to help the fact finder understand the plaintiff’s behavior post-awareness of repeated childhood sexual abuse. Unlike in *Chauvin*, Mannina does not seek to have Dr. Brown’s expert testimony on PTSD admitted in order to prove Belsom’s liability. For the above-articulated reasons, Dr. Brown is deemed qualified to discuss PTSD in this case.

#### **4. DR. BROWN’S TESTIMONY ON ADULT ATTACHMENT INVENTORY**

Defendant’s expert, Dr. Shwery, claims that the adult attachment inventory administered by Dr. Brown is not recognized in the field.<sup>96</sup> He further dismisses on Dr. Brown’s testimony by describing it as “‘clinical opinions’” at best that do not rise to the level of an accepted scientific theory upon which this Court can rely.”<sup>97</sup> Lastly, Dr. Shwery claims that AAI is not used in psychology to assess the ability to understand legal rights.<sup>98</sup>

Plaintiff responds by pointing out that Dr. Shwery lacks appropriate training and certification in the interpretation of the AAI. By contrast, in 2006, Dr. Brown

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<sup>94</sup> See, e.g., *State v. Chauvin*, 846 So. 2d 697, 705, 709 (La. 2003). Some states have even admitted PTSD evidence to prove guilt. See, e.g., *State v. Alberico*, 861 P.2d 192, 208 (N.M. 1993) (accepting the reliability of PTSD evidence as proof of sexual abuse because the testimony was “grounded in valid scientific principle”) and *Jarrett v. Jones*, 258 S.W.3d 442, 449 (Mo. 2008) (allowing expert testimony of PTSD to show causation).

<sup>95</sup> *Held v. State Farm Ins. Co.*, 610 So. 2d 1017, 1020 (La. Ct. App. 1992) *writ denied*, 613 So. 2d 975 (La. 1993) and *writ denied*, 613 So. 2d 975 (La. 1993).

<sup>96</sup> See Shwery Affidavit attached to Defendant’s Motion for a *Daubert* Hearing.

<sup>97</sup> See Shwery Affidavit attached to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion for a *Daubert* Hearing.

<sup>98</sup> Dr Shwery’s affidavit attached to the two-page Defense reply to Plaintiff’s Opposition to Motion for *Daubert* Hearing.

passed the full 30-case reliability testing at a high reliability level. His training was with Dr. Deborah Jacobvitz; Mary Main & Erik Hesse supervised his reliability testing.<sup>99</sup>

Defendant identifies no cases, in Louisiana or beyond, where testimony on AAI has not been admitted into evidence. Plaintiff suggests that Dr. Shwery does not understand the fundamental concepts underlying AAI, or he would not be surprised by Mannina's ability to handle his job, a requirement that does not trigger reminders of the abuse, but not file a sex abuse lawsuit.<sup>100</sup>

#### **A. General Academic Acceptance & Peer Reviews**

Although the AAI is more recent than the literature on PTSD and dissociative memory, it is not true, as defendant implies, that it is viewed as "junk science" in the field of psychology. In fact, there are many peer reviewed articles on AAI. In Dr. Brown's second affidavit, he directs the Court's attention to a list of peer-reviewed journal articles on AAI in *Clinical Applications of the Adult Attachment Inventory*.<sup>101</sup> The Court's own internet search uncovered many scientific articles on the subject.

This criterion of acceptance by the professional community's view of the technique would only come into play if the scientific evidence was not new. The failure of a piece of evidence to gain general acceptance, over time, would be fatal to its admissibility; the same is not true for novel scientific evidence, however, which has not had the opportunity for wide distribution and review.<sup>102</sup> As the Arizona Supreme Court reasoned, in admitting expert testimony on "repressed

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<sup>99</sup> Dr. Brown's CV.

<sup>100</sup> Plaintiff's Opposition to Defendant's Motion for a *Daubert* Hearing.

<sup>101</sup> H. Steele & M. Steele, CLINICAL APPLICATIONS OF THE ADULT ATTACHMENT INVENTORY (2008). Book reviews There are several peer reviewed articles on the subject and even reviews of the book on "googlescholar."

<sup>102</sup> Krista L. Duncan, "Lies, Damned Lies, and Statistics"? Psychological Syndrome Evidence in the Courtroom After *Daubert*, 71 Ind. L.J. 753, 756 (1996).

memory” in 2000,<sup>103</sup> testimony from Einstein might have been rejected if “general acceptance” in the scientific community is required.

### **b. Testability**

Plaintiff points out that AAI has “a scoring system for assessing whether an individual shows situation-specific cognitive and behavioral disorganization when reminded of past traumas or losses.” In particular, “Mannina’s outcome would show that he had good cognitive and behavioral organization in his life in general . . . and specific cognitive/behavioral disabilities around reminders of the abuse.”

### **c. Helpfulness to Fact Finder & Undue Prejudice**

In Belsom’s view, Dr. Brown’s testimony “makes the water murkier.” Defendant argues that plaintiff’s expert “presents no scientifically sound, legally admissible theory upon which to deny this Defendant’s exception of prescription.”<sup>104</sup> Neither Defendant nor Dr. Shwery presented a single critical, peer reviewed article of AAI. Moreover, a psychologist’s testimony, as expert testimony, is treated as any other expert testimony. “It is merely an aid to the trier of fact and may be accepted or rejected by the jury.”<sup>105</sup> In justifying the DSM-V’s new categorization of “Trauma- and Stressor-Related Disorders” as separate from “dissociative disorders,” Dr. Matthew Friedman, chair of the Trauma, Stressor, and Dissociative Disorders Work Group, explained: “Criteria for both now reflect

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<sup>103</sup> *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000) (*Logerquist* is no longer good law in Arizona, only because the Supreme Court used the *Frye* test to decide admissibility, and *Daubert* has now replaced *Frye* in Arizona).

<sup>104</sup> Defendant’s Motion for a *Daubert* hearing.

<sup>105</sup> *Tyson v. Tyson*, 107 Wash. 2d 72, 85-86, 727 P.2d 226, 233 (1986) (Pearson, J., dissenting with Dolliver, C.J. and Utter and Brachenbach, JJ. concurring; subsequently, the Washington legislature made the dissent’s position in *Tyson* the law by statute) (citing *Gerberg v. Crosby*, 52 Wash.2d 792, 795, 329 P.2d 184 (1958)).



much research that has indicated the high degree of variability in how people initially react to distressing or traumatic events.”<sup>106</sup> Given the complexity and the individuality of each case, we believe that expert witnesses thoroughly steeped in the latest research on both subjects will be able to clarify these theories to the fact finder.

It is the court’s appreciation that plaintiff intends to use Dr. Brown’s testimony regarding AAI to shed light on plaintiff’s actions or inactions from 2005-2010, rather than to address the question of Mr. Belsom’s liability. As such, the court sees no reason why a jury should not be able to hear Dr. Brown’s expert testimony. Defendant will again be able to rigorously cross examine the plaintiff and Dr. Brown. Moreover, defendant will have the ability to call its own expert to challenge Dr. Brown’s testimony. Finally, at trial, defendant will have the prerogative of asking for a limiting jury interrogatory.

##### **5. DR. BROWN’S TESTIMONY ON BTT**

According to defendant, “Dr. Brown does not offer any specific scientific reason why Plaintiff would be distracted to a point where he could not realize a cause of action, yet still function as a risk manager and executive for an insurance company. No learned treatises have been provided. Only one researcher, Jennifer [Freyd] of Oregon University, was mentioned at deposition as a person who is exploring this idea of betrayal trauma.”

Plaintiff argues that BTT is a well-established scientific method for evaluating the sexual abuse of children.

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<sup>106</sup> Mark Moran, *Trauma Disorder Criteria Reflect Variability of Response to Events*, 48 *Psychiatric News* 6 (March 2013).

a. **Peer Review & General Academic Acceptance**

First, Professor Jennifer Freyd, Ph.D. is not a crackpot.<sup>107</sup> She received her Ph.D. in Psychology from Stanford University. Her first book, *Betrayal Trauma*, was published by Harvard University in 1996. She earned tenure at the University of Oregon, a Tier-1 research university. She is the editor of the *Journal of Trauma and Dissociation*. She is a member of numerous professional organizations. And she has published exhaustively over two decades in numerous, national and international peer-reviewed journals.

Second, Professor Jennifer Freyd was meant by Dr. Brown to be illustrative, not exhaustive. Dr. Brown's second affidavit makes clear that there is an extensive, peer reviewed scientific literature on trauma bonding.<sup>108</sup> Moreover, defense counsel failed to ask any questions at Dr. Brown's deposition about this extensive scientific literature.<sup>109</sup>

b. **Testability**

Studies from this correlational line of research also indicate reduced recall in the case of abuse by caregivers or close others.<sup>110</sup> J. A. Sheiman reported that, in a sample of 174 students, those participants who reported memory loss for child sexual abuse were more likely to experience abuse by people who were well known to them, compared to those who did not have memory loss.<sup>111</sup> "Although there is much for future research to clarify about the nature of memory for

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<sup>107</sup> <http://psychweb.uoregon.edu/people/freyd-jennifer-j>

<sup>108</sup> Brown affidavit #2.

<sup>109</sup> See Brown Deposition.

<sup>110</sup> See, e.g., V. J. Edwards, J. J. Freyd, S.R. Dube, et al, *Health Effects by Closeness of Sexual Abuse Perpetrator: A Test of Betrayal Trauma Theory*, Poster presented at the 22<sup>nd</sup> Annual Meeting of the International Society for Traumatic Stress Studies (November 4-7, 2006) and T. M. Schultz, J. Passmore, & C. Y. Yoder, *Emotional Closeness with Perpetrators and Amnesia for Child Sexual Abuse*, 12 J. of Child Sexual Abuse 67 (2003).

<sup>111</sup> *Sexual Abuse History with and without Self-Report of Memory Loss: Differences in Psychopathology, Personality, and Dissociation*. In TRAUMA AND MEMORY 139 (1999).

traumatic experiences, the relationship between betrayal and reported reduced recall has been observed in at least seven data sets.”<sup>112</sup> The Multiscale Dissociation Inventory, for instance, published by Psychological Assessment Resources<sup>113</sup> was normed on a large general population sample, a clinical sample, and a trauma-exposed community sample—the first such measure with published probability statistics for the individual’s match to clinical populations.<sup>114</sup>

**c. Fit**

BTT is an approach to conceptualizing trauma that points to the importance of social relationships in understanding post-traumatic outcomes, including reduced recall.<sup>115</sup> “Betrayal and dependence cannot be equated with parents only; non-parental abuse may also include dependency in the victim-perpetrator relationship (priests and ministers, coaches, superior officers, babysitters, possibly extended family).”<sup>116</sup> In a short autobiographical statement of another man abused as a child by a trusted male authority figure, Frank Fitzpatrick, who recovered memories of sexual abuse and then initiated the investigation of his male abuser, which led to a successful prosecution in part because dozens of victims came

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<sup>112</sup> Jennifer J. Freyd, Anne P. DePrince, and David H. Gleaves. *The State of Betrayal Trauma Theory: Reply to McNally—Conceptual Issues and Future Directions*. 15 Memory 295, 301 (2007).

<sup>113</sup> J. Briere, MULTISCALE DISSOCIATION INVENTORY: PROFESSIONAL MANUAL (2002).

<sup>114</sup> Constance Dalenberg, Recovered Memory and the *Daubert* Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community, 7 Trauma, Violence, & Abuse 274, 302 (2006).

<sup>115</sup> Jennifer J. Freyd, Anne P. DePrince, and David H. Gleaves. *The State of Betrayal Trauma Theory: Reply to McNally—Conceptual Issues and Future Directions*. 15 Memory 295, 297 (2007).

<sup>116</sup> Jennifer J. Freyd, Anne P. DePrince, and David H. Gleaves. *The State of Betrayal Trauma Theory: Reply to McNally—Conceptual Issues and Future Directions*. 15 Memory 295, 301 (2007).

forward, described the feelings of betrayal he had during his memory recovery process: “I felt an immense, monstrous betrayal by someone that I loved.”<sup>117</sup>

In the instant matter, in his deposition, Mannina speaks at length about the void left by an emotionally unavailable father that was filled by “Uncle Jack.” This testimony is further corroborated by the personal correspondence written between 1992 and 1998, saved by the defendant, and asked about at length during Mannina’s deposition. A fact finder may be helped by hearing about BTT by an expert tenured at Harvard Medical School.

“By and large, in child sexual abuse cases, courts have accepted evidence of a broad range of psychopathological and behavioral problems . . . .”<sup>118</sup> Most psychiatric evidence generally fared well under Frye as being “generally accepted.”<sup>119</sup> Few courts have used *Daubert* or other evidence rules to limit the admissibility of PTSD testimony, or indeed most other forms of clinical psychiatric evidence.<sup>120</sup> Where there is dispute within the scientific community about a theory, *Daubert* supports admission of testimony expressing a view within “the range where experts might reasonably differ.”<sup>121</sup> For the foregoing reasons, Dr. Brown’s testimony on BTT is admitted.

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<sup>117</sup> F. L. Fitzpatrick, *Isolation and Silence: A Male Survivor Speaks Out about Clergy Abuse*, 3 Moving Forward 4, 5 (1994).

<sup>118</sup> Elizabeth A. Wilson, *Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA Women’s L.J. 145, 206 (2003).

<sup>119</sup> Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 Wm. & Mary L. Rev. 1, 34 (1998).

<sup>120</sup> See Slobogin, at 118-24 (discussing psychological syndrome evidence specifically and concluding that courts “seldom examine closely all four of the evidentiary components described here (materiality, probative value, helpfulness, and prejudice)”).

<sup>121</sup> *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, 10-CV-458-JPG, 2012 WL 3996826 (S.D. Ill. Sept. 12, 2012) (Gilbert, J.) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (citing *Daubert*, 509 U.S. at 596)).

#### **IV. Holding:**

For the foregoing reasons, Dr. Brown is qualified to render expert opinion regarding dissociative amnesia, posttraumatic stress disorder, adult attachment inventory, and betrayal trauma theory. Likewise, the Court finds that plaintiff's expert's testimony regarding the aforementioned trauma- and dissociation-related theories and diagnostic tools satisfied *Daubert* and is admissible expert evidence, sufficiently relevant and reliable to render it admissible at trial under LCE 702. In addition, the Court finds that Dr. Brown's testimony regarding the above-named theories is not too speculative or unduly prejudicial so as to be inadmissible under LCE 403. The probative value of expert testimony regarding the above-itemized theories would not be substantially outweighed by any unfair risks. Academic disputes among psychologists may be explored on cross-examination, and confusion or prejudice may be prevented or cured by appropriate limiting instructions.

In sum, Dr. Brown may testify as to his theories and opinions concerning PTSD, repressed memory, etc., and testify as to whether Mr. Mannina's behavior is consistent with someone who is suffering from the afore-mentioned disorders.

For these reasons, the defendant's Motion to Strike or Limit Dr. Daniel A. Brown's expert testimony is **DENIED**.

**NEW ORLEANS, LOUISIANA, this 17th day of May, 2013.**

  
JUDGE