IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

February 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

REGINA DARLENE HUNTER	)	ROANE COUNTY
	)	03A01-9504-CV-00127
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. RUSSELL E. SIMMONS, JR.,
	)	JUDGE
	)	
ED BROWN, JR.	)	
	)	
Defendant-Appellee	)	AFFIRMED AND REMANDED

JERROLD L. BECKER and LUCINDA M. ALBISTON OF KNOXVILLE FOR APPELLANT

PATRICK C. COOLEY OF KINGSTON FOR APPELLEE

OPINION

Goddard, P.J.

Darlene Hunter filed this action against Ed Brown, Jr., on July 15, 1993, alleging that he sexually abused her during 1981 and 1982. In his answer, Mr. Brown denied the allegations of the complaint and averred that the action was barred by T.C.A. 28-3-104(a), the one-year statute of limitations applicable to personal injury actions. On January 31, 1995, the Trial Court

granted summary judgment to Mr. Brown, ruling that the statute of limitations barred Ms. Hunter's claim. Ms. Hunter appeals the Trial Court's ruling, insisting that her suppressed memory of the event tolled the running of the statute of limitations.

The record, when viewed in a light most favorable to Ms. Hunter in accordance with the dictates of Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993), discloses the following facts. Darlene Hunter was born on October 13, 1967. In 1975, she was placed in the custody of the Roane County office of the Department of Human Services (DHS). She spent the balance of her childhood in various foster homes. In June of 1981, at the age of 12, DHS placed Darlene in the home of Ed Brown, Jr., and his wife Nellie Brown. The following month Mr. Brown began sexually molesting Darlene. The molestation, including rape, continued for several months. During the spring of 1982, at the age of 13, Darlene became pregnant.

Afraid to tell anyone of her condition, Darlene endured the early symptoms of pregnancy in silence. Finally, after noticing changes in Darlene's health, Mrs. Brown took her to a doctor in Kingston. The doctor confirmed the pregnancy and made Darlene tell Mrs. Brown that Mr. Brown had raped her. Mrs. Brown, who did not believe Darlene, became angry, and refused to allow Darlene to return home. Instead, Mrs. Brown took Darlene to her DHS caseworker, Pat Martin. Darlene stayed with Ms. Martin for several days during which time she told Ms. Martin how

Mr. Brown had treated her. Ms. Martin drove Darlene to Knoxville and arranged for her to undergo an abortion at the Knoxville Center for Reproductive Health. She also arranged for Darlene to tell her story to the Roane County District Attorney. Apparently, no investigation ensued.

Darlene spent the next several months in a temporary foster home in Roane County after which DHS transferred her to a group home in Nashville. She spoke to no one regarding the abuse or her abortion for the next 10 years. Sometime during this period she repressed her memory of these events.

In August of 1990, Ms. Hunter, now an adult living in Roane County, gave birth to a daughter at the Harriman City Hospital. In 1992, Ms. Hunter became pregnant again and decided to abort the pregnancy. Ms. Hunter returned to the Knoxville Center for Reproductive Health and underwent an abortion in June of 1992. As she awoke from the anesthesia, Ms. Hunter began to remember being in the clinic and undergoing an abortion years before.[1] In the weeks that followed, bits of her memory began returning and Ms. Hunter sought emotional counselling and legal assistance. Over the next few months, Ms. Hunter, with the aid

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[1] Ms. Hunter specifically stated:

> 5. That I deny any memory of ever having told anyone about my abortion in 1982 while under Dr. Foote's care in 1990 or at Harriman Hospital in 1990.
>
> 6. That I do not know the source of the information in Dr. Clary Foote's medical records.

of a licensed clinical social worker, was able to recall the details of Mr. Brown's abuse, her childhood pregnancy, and the abortion.

Ms. Hunter filed this action within one year of beginning to recover her memory. Prior to granting summary judgment in favor of Mr. Brown, the Trial Court determined that if she could prove repressed memory, the discovery rule would toll the statute of limitations, saving Ms. Hunter's claim. Mr. Brown proffered certain medical records from the Harriman doctors who attended Ms. Hunter during her 1990 pregnancy. Those records contain entries regarding a rape and abortion at an early age. Mr. Brown moved for a judgment on the pleadings (which the Court treated as a summary judgment) arguing there was no disputed issue of material fact regarding the alleged repressed memory since the medical records reflect that someone told the doctors about the rape and abortion. In response, Ms. Hunter filed an affidavit in which she denied any memory of telling her doctors about the occurrence. After reviewing this evidence, the Trial Court granted summary judgment in favor of Mr. Brown finding that although Ms. Hunter swore she did not remember telling the doctors about the rape and abortion, she did not deny telling them. Thus, there was no genuine dispute over whether she remembered the abuse in 1990.[2]

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[2] In his memorandum opinion the Trial Judge held:

> The only conclusion to be drawn from these facts is that since information was given to medical providers that related to the events, the plaintiff did not have a

Although the issues raised by Ms. Hunter question the Trial Court's determination in light of the facts developed, we believe a more significant issue, which is one of first impression in this State, is determinative of this appeal. That issue is whether a repressed memory tolls the statute of limitations until discovery.

The Tennessee Supreme Court adopted the discovery rule in the 1974 medical malpractice case of Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974). The Court wrote:

> [I]n those classes of cases where medical malpractice is asserted to have occurred through the negligent performance of surgical procedures, the cause of action accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury.

Five months later, in a products liability case, the Court expanded the application of the discovery rule to "tort actions, including but not restricted to products liability actions . . . predicated on negligence, strict liability or misrepresentation." McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975). At first blush, the language of McCroskey indicates that the Court intended for the discovery rule to be applied in all tort cases. However, the Supreme Court's opinion in Quality Auto Parts v. Bluff City Buick, 876 S.W.2d 818 (Tenn. 1994), holds otherwise. In declining to apply the discovery rule to

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> repressed memory of the facts on which she bases her claim and there is no genuine issue for trial.

defamation cases, that Court wrote: "When determining whether to apply the discovery rule, this court considers the specific statutory language at issue, and balances the policies furthered by application of the discovery rule against the legitimate policies upon which statutes of limitations are based." We deem it appropriate to follow this same procedure in determining whether to apply the discovery rule to cases involving repressed memories of child abuse.

The basic purposes underlying statutes of limitation are to prevent undue delay in bringing actions on claims and to give defendants notice to preserve the evidence necessary for the defense of the claim. Potts v. Celotex Corp., 796 S.W.2d 678 (Tenn. 1990). Courts developed the discovery rule to avoid the "harsh and oppressive rule" that the statute of limitations begins to run against a plaintiff's claim immediately upon the infliction of the injury regardless of whether the plaintiff is aware of the tortious conduct or resulting injury. Teeters v. Currey, supra.

Although Tennessee has not addressed the question, a review of case law in other jurisdictions discloses three separate resolutions of the question.[3]

[3] See Gregory G Sarno, Annotation, Emotional or Psychological "Blocking" or Repression as Tolling Running of Statute of Limitations, 11 A.L.R. 5th 588 (1993); Russell G. Donaldson, Running of Limitations Against Action For Civil Damages for Sexual Abuse of Child, 9 A.L.R.5th 321 (1993).

Some cases hold an allegation of repressed memory is sufficient to bring the discovery rule into play.[4] In Farris v. Compton, 652 A.2d 49 (D.C.App.1994), the District of Columbia Court of Appeals allowed the discovery rule to toll the statute of limitations where repressed memory was alleged. The Court reasoned that a defendant who purportedly caused the repressed memory should not be allowed to use the repression to profit from his own wrongful conduct and invoke the statute of limitations as a defense. However, the Farris Court noted that there was an uncertainty among attorneys, psychologists and psychoanalysts as to the validity of repressed memory theory.

Likewise, in Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994), the Ohio Supreme Court applied the discovery rule to allow an allegation of repressed memory to toll the statute of limitations in a childhood abuse case. However, Justice Wright dissented vigorously. His dissent was based upon the fact that there was little agreement among psychologists as to whether memories can be recalled at all after they are repressed and, if so, whether they can be recalled accurately. He also cited psychological authority for the proposition that the methods used by psychologists and psychoanalysts to retrieve repressed memories were "unreliable and are not sufficiently established". He

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[4] See Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994); Farris v. Compton, 652 A.2d 49 (D.C.App.1994); Tichenor v. Roman Catholic Church of New Orleans, 32 F.3d 953 (5th Cir.1994) (applying Louisiana law); Vesecky v. Vesecky, 880 S.W.2d 804 (Tex.App.1994); Hoult v. Hoult, 792 F.Supp.143 (D.C.Mass.1992) (applying Massachusetts law); Mary D. v. John D., 264 Cal.Rptr.633 (Cal.App. 1989); Johnson v. Johnson, 701 F.Supp.1363 (N.D.Ill.1988) (applying Illinois law).

paralleled the credibility of repressed memory with that of polygraph tests. Polygraph tests have generally not been accepted by the courts because their reliability did not reach the standard that it be "sufficiently established to have gained general acceptance in the particular field to which it belongs," citing Frye v. United States, 293 F. 1013 (D.C. 1923). Thus, given the disputed reliability of repressed memory and the methods used to retrieve them, Justice Wright would have found the appropriate forum for the determination of this issue to be the State Legislature.

There is a line of cases that apply the discovery rule to toll the statute of limitations in repressed memory cases if there is independent corroboration of the abuse. See Olsen v. Hooley, 865 P.2d 1345 (Utah 1993); Petersen v. Bruen, 792 P.2d 18 (Nev. 1990). In Olsen, the Utah Supreme Court applied the discovery rule to toll the statute of limitations when a plaintiff alleged memory repression. But, the Court stated "this kind of case presents practical difficulties with respect to ascertaining the degree to which memories allegedly repressed and then revived accurately reflect the reality of the past." Also, the Court expressed concern that the methods used to revive the memories "may induce memories of events that never happened." Thus, in light of the questionable validity of the repressed memory theory, the Court found it necessary to require corroborating evidence to support the allegations of abuse in order for the discovery rule to apply.

Other courts refuse to apply the discovery rule in repressed memory cases to toll the statute of limitations.[5] In a recent opinion, the Michigan Supreme Court declined to apply the discovery rule in the repressed memory context in Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995). The Court reasoned that to allow such an application of the discovery rule in absence of objective and verifiable evidence would obviate the policy of statute of limitations which is to encourage plaintiffs to promptly peruse claims and to protect defendants from having to defend against stale and fraudulent claims. *Accord* Quality Auto Parts Co. v. Bluff City Buick, 876 S.W.2d 818 (Tenn. 1994); Hackworth v. Ralston Purina Co., 381 S.W.2d 292 (Tenn. 1964). The Court distinguished products liability and medical malpractice cases by the fact that in those cases there is always objective and verifiable evidence such as an injury or an illness. However, in repressed memory cases this component is absent. Therefore, adoption of the discovery rule in this context "would leave a determination of the onset of a limitations period an open question within the subjective control of the plaintiff." Lemmerman v. Fealk, supra. Thereafter, the Court stated that the Legislature was the appropriate forum for debate on the issue of the application of the discovery rule to repressed memory cases.

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[5] See Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995); Ernstes v. Warner, 860 F. Supp. 1338 (S.D. Ind. 1994); Sanchez v. Archdiocese of San Antonio, 873 S.W.2d 87 (Tex. App. 1994); Seto v. Willits, 638 A.2d 258 (Pa. Super. 1994); Shippen v. Parrott, 506 N.W.2d 82 (S.D. 1993); Doe v. R.D., 417 S.E.2d 541 (S.C. 1992); Lovelace v. Keohane, 831 P.2d 624 (Okl. 1992); Baily v. Lewis, 763 F. Supp. 802 (E.D. Pa. 1991); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Tyson v. Tyson, 727 P.2d 226 (Wash. 1986).

Because we have the same reservations as the Michigan Supreme Court in Lemmerman and Justice Wright in Ault, we decline to apply the discovery rule to toll the statute of limitations in repressed memory cases. Rather, we defer the determination of this issue to the Legislature.

As did Justice Wright, we find that there is simply too much indecision in the scientific community as to the credibility of repressed memory. In general, psychologists have not come to an agreement as to whether repressed memories may be accurately recalled or whether they may be recalled at all.[6] Therefore, it goes without saying that the judiciary does not have the resources needed to make an accurate ruling on the validity of a psychological theory about which professionals in the field disagree. Also, there is considerable doubt about the reliability of memories that are recalled with the assistance of a therapist or psychoanalyst. A California trial court recently upheld a jury award of $500,000 to an accused sexual offender who had brought suit against his daughter's therapist who he alleged had planted false memories of childhood sexual abuse in her patient's mind. See Mark Hansen, *More False Memory Suits Likely*, Aug. 1994 ABA Journal 36.

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[6] For a listing of legal and psychological works debating this issue, see Lemmerman v. Fealk, 534 N.W.2d at 705 (concurring opinion). See also Gary M. Ernsdorff & Elizabeth F. Loftus, ***Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations In Cases of Memory Repression***, 84 J. Crim. L. & Criminology 129 (1993).

Inherent lack of verifiable and objective evidence in these cases distinguishes them from cases in which Tennessee courts have applied the discovery rule. See Teeters v. Currey, supra (applying the discovery rule to medical malpractice claims injury evidenced by pregnancy); McCroskey v. Bryant Air Conditioning Co., supra (defective furnace causing injury was verifiable evidence of a product defect) and Potts v. Celotex Corp., supra (mesothelioma as evidence of discovery of product defect). In those cases, there was an injury that manifest itself in a verifiable form. In the repressed memory context, a plaintiff's allegations are evidenced by his or her own recollection. Given the uncertainty as to the reliability of this recollection, we decline to adopt the discovery rule in such cases. Like the Lemmerman Court we are unwilling to put the determination when the statute of limitations accrues solely in the hands of a plaintiff. The likelihood of abuse is simply too high. Further, we feel that an adoption of the position set forth in Olsen and Bruen, that the discovery rule will apply if there is corroborating evidence to support the allegation, is not sufficient to replace the policy behind statutes of limitations.

The Tennessee General Assembly has yet to enact legislation on the subject of repressed memory in childhood sexual abuse cases. Given the debate among psychologists and psychoanalysts as to the validity of this theory, we, as already noted, hold that the Legislature--which may have the benefit of

the testimony of various experts in the field--is the appropriate forum for addressing the question presented.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against Ms. Hunter and her surety.

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Houston M. Goddard, P.J.

CONCUR:

(Separate Concurring Opinion)
Herschel P. Franks, J.

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Don T. McMurray, J.