

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. )

CONCURRING OPINION

I agree with the majority that the "discovery rule" should not be applied to plaintiff's claim. The *Teeters* court held that the statute of limitations was tolled until the plaintiff discovered or by the exercise of reasonable care should have discovered the factual basis for her cause of action.

In this case, it is plaintiff's theory that at the time of the alleged event she was aware of the tortious conduct, but she repressed the memory of these facts for a period of years. It is perhaps an oversimplification, but simple logic that one cannot "discover" facts known or previously known. The discovery rule as announced in this jurisdiction presupposes that the plaintiff was ignorant of

the true facts which had been wrongfully concealed. Compare *Doe v. Coffee County Board of Education*, 852 S.W2d 899 (Tenn. App. 1992) holding the discovery rule did not toll the statute of limitations, where plaintiffs knew of the abuse previously, but only filed later upon "discovering" that they had been emotionally harmed.

I do not agree that we should defer the determination of this issue to the Legislature as the majority suggests. I would follow the lead of the New Hampshire court in *State of New Hampshire v. Joel Hungerford*, 1995 WL 378571 (N.H. 1995), which held that expert testimony is required for the victim's testimony to be admissible.

Generally, expert testimony is necessary when the subject matter requires that the court and jury have the aid of knowledge or experience not held by ordinary witnesses. *Lawrence County Bank v. Riddle*, 621 S.W2d 735 (Tenn. 1981), and where common knowledge furnishes no criteria for judgment or where proof depends on observation and analysis outside the common experience of jurors, expert testimony is required to establish the proof. The *Hungerford* court also cited the following from American Jurisprudence:

A jury...is often confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood, and which are not subject to an intelligent determination simply on the basis of deductions made and inferences drawn from ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life...On such issues, the testimony of a witness with special knowledge and skill is *required* in order to arrive at an intelligent conclusion.

31A Am Jur.2d §32 (1989) (emphasis added by the court).

The attention given to some well publicized

accusations may mean that much of the population has heard of the concept of repressed memories. However, given the state of scientific knowledge, ordinary persons cannot be expected to have the experience or background for analyzing such claims without assistance from experts.

Expert scientific testimony is admissible "if scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue". Tennessee Rules of Evidence 702. The factors to test admissibility are whether the hypotheses are falsifiable, refutable, or testable, whether the expert's theory has been subjected to peer review and publication, or for a particular scientific technique, the known or potential rate of error and the general acceptance of the theory. *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 113 S.Ct. 1286, 2796-2797 (1993).

Since *Daubert*, few courts have addressed the admissibility of expert testimony for repressed memory theories. Clearly, the U.S. Supreme Court held that FRE 702 has superseded *Frye's* "general acceptance" test. Under *Daubert* the scientific testimony need not be known to a certainty. However, the *Daubert* court renders the trial judge a "gatekeeper" on the admission of expert scientific testimony. The court teaches that when scientific testimony is proffered, it is the trial court's responsibility to determine whether the expert is testifying to scientific knowledge that will assist the trier of fact to understand and determine a factual issue, which entails a preliminary assessment of whether the reasoning or methodology underlying

the testimony is scientifically valid, and whether that reasoning or methodology properly can be applied to the facts at issue. *Daubert*, p. 2796.

*Daubert* requires the trial judge to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable". I believe it is well documented that the current state of scientific knowledge about repressed memory is too contradictory and inconclusive to be a reliable basis for expert testimony at this stage of scientific knowledge and development. The concurring opinion of Justice Weaver in *Lennerman* observes:

There is no agreement, on the viability and reliability of repressed memory syndrome within the American Medical Association or the American Psychiatric Association.

The justice footnotes numerous works discussing the issue.<sup>1</sup> When and if scientific evidence can meet the *Daubert* test for the admission of repressed memory evidence, the statute of limitations can equitably be tolled by the court as courts have done in other circumstances. This does not require an additional act of the Legislature. Indeed, a statutory exception excepting claims based on repressed memories from the general statute could validate a scientific theory not generally accepted.

I agree the Trial Court's judgment should be affirmed for the reasons stated herein.

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<sup>1</sup>Additionally, Brown University's Child and Adolescent Behavior Letter, Vol. 10, #4, April, 1994, in a special report "*Is Children's Memory Reliable*" vividly demonstrates the need for more scientific research before allowing experts to give general credence to recalled childhood memories.

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Herschel P. Franks, J.