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Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse

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LITIGATING NIGHTMARES: REPRESSED MEMORIES OF CHILDHOOD SEXUAL ABUSE

I. INTRODUCTION

In childhood sexual abuse cases, courts must balance the right of victims to litigate their valid claims with the right of accused perpetrators to be free from the burdens of litigation and false allegations.[1] These policies were closely scrutinized by the South Carolina Court of Appeals in *Moriarty v. Garden Sanctuary Church of God*.[2] In this case, Amy Ferrell Moriarty did not recall memories of being sexually abused as a child until twenty years later,[3] past the time allotted by the statute of limitations.[4] Moriarty brought her claim of childhood sexual abuse before the South Carolina courts claiming to be a victim of Repressed Memory Syndrome (RMS), a psychological defense mechanism in which an individual "represses" a traumatic event.[5] However, the trial court refused to hear her evidence, ruling her claim was barred by the statute of limitations, and Moriarty appealed.[6] The South Carolina Court of Appeals reversed the ruling and officially recognized RMS as a valid theory.[7] In addition, the court ruled that the discovery rule may toll the statute of limitations for childhood sexual abuse claims upon presentation of objective verifiable evidence of the sexual abuse and testimony of an expert witness.[8]

While controversy and skepticism have surrounded RMS over the past few decades both in the court system and in the medical arena,[9] South Carolina is

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1. Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 LAW & PSYCHOL. REV. 103, 116-17 (1998) ("Often the issues come down to balancing the rights of a victim to achieve vindication versus the rights of a defendant to obtain and present credible evidence in his or her defense, a task often complicated by the lapse in time from the alleged act to the time of accusation.").

2. 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999).

3. Moriarty attended Kiddie Kollege between August 1973 and May 1976. *Id.* at 153, 511 S.E.2d at 700. She commenced her legal action in November 1995. *Id.* at 154, 511 S.E.2d at 701.

4. *Id.* at 154, 511 S.E.2d at 701-02. South Carolina at this time required plaintiffs to bring a cause of action for personal injury "within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action," S.C. CODE ANN. § 15-3-535 (Law. Co-op. 1976), or before one year after the twenty-first birthday, if the action accrued before 1988, S.C. CODE ANN. § 15-3-40 (West Supp. 1998).

5. *Moriarty*, 334 S.C. at 152, 511 S.E.2d at 700-01.

6. *Id.* at 155, 511 S.E.2d at 702.

7. *Id.* at 161, 511 S.E.2d at 705.

8. *Id.*

9. *See* Stan Abrams, *False Memory Syndrome v. Total Repression*, 23 J. PSYCHIATRY & L. 283, 283 (1995).

not a pioneer state in recognizing the validity of RMS.[10] Many states, through their courts and legislatures, have weighed the finality of the statute of limitations against the frequent inability of victims of childhood sexual abuse to raise an otherwise valid claim,[11] and many states recognize RMS as a valid theory.[12] However, not all states have permitted victims of RMS to litigate claims of childhood sexual abuse barred by the statute of limitations.[13]

The purpose of this Note is to explore the policies both for and against allowing victims of Repressed Memory Syndrome to have their day in court. Part II of this Note gives an overview of *Moriarty* and its recognition of RMS as a valid theory. Part III analyzes the current debate in both the legal and medical fields concerning RMS as well as its counter theory, False Memory Syndrome. Part IV analyzes the court of appeals ruling in *Moriarty* by addressing the arguments regarding the application of the discovery rule, exploring the accuracy and efficiency of the "objective verifiable evidence" requirement the court of appeals proposed, and examining the requirement of an expert witness. Finally, Part V contemplates the impact of *Moriarty* in South Carolina.

II BACKGROUND

Amy Ferrell Moriarty, in her early twenties, suddenly became obsessed with masturbation while reading her nursing textbook and a popular magazine.[14] She uncontrollably began picturing a little girl's hand masturbating a male and soon recognized the hand as her own.[15] She subsequently recalled the dress she was wearing during an episode of sexual abuse and the physical characteristics of her abuser.[16] She experienced a "strong reaction" when revisiting her childhood daycare center, Kiddie Kollege Day Care Center.[17]

Moriarty filed suit against Garden Sanctuary Church of God, the operator of Kiddie Kollege Day Care Center, within three years after the initial recollection of the alleged childhood sexual abuse.[18] Moriarty alleged causes of action for negligent infliction of severe emotional distress, invasion of privacy, negligent supervision, and breach of warranty.[19] She sought damages

10. *See infra* note 117 and accompanying text.
11. *See infra* notes 117, 121 and accompanying text.
12. *See infra* note 117.
13. *See infra* note 121.
14. *Moriarty*, 334 S.C. at 153, 511 S.E.2d at 701.
15. *Id.* at 153-54, 511 S.E.2d at 701.
16. *Id.* at 154, 511 S.E.2d at 701. Moriarty recalled that her abuser had "crooked teeth, bushy eyebrows, and frizzy hair." *Id.* Moriarty also had a "strong reaction" when viewing a picture of an individual with bushy eyebrows and frizzy hair. *Id.*
17. *Id.*
18. *Id.* The claim that Moriarty filed her action within three years was based on the affidavit of her mother. *Id.*
19. *Id.*

for mental and emotional injuries.[20] The trial court granted summary judgment to the Garden Sanctuary Church of God based on the statute of limitations.[21]

In hearing the case, the South Carolina Court of Appeals considered two cases where relaxation of the statute of limitations for childhood sexual abuse victims was denied.[22] In *Doe v. R.D.*[23] the South Carolina Supreme Court declined to make an exception to the statute of limitations for a childhood sexual abuse victim who suffered from Delayed Stress Syndrome.[24] The court instead advocated strict compliance with the statute of limitations.[25] Also significant is *Roe v. Doe,*[26] where the Fourth Circuit Court of Appeals denied relief to an alleged childhood sexual abuse victim stating a reluctance to apply an exception to the statute of limitations not recognized by the South Carolina Supreme Court.[27] After analyzing these cases, the court of appeals in *Moriarty* took an alternative approach.

The South Carolina Court of Appeals reversed the trial court's decision of summary judgment, concluding, "repressed memories of childhood sexual abuse can exist and can be triggered and recovered."[28] The court further held that "the discovery rule *may* toll the statute of limitations during the period a victim psychologically represses her memory of sexual abuse"[29] and may be applied in childhood sexual abuse cases upon the presentation of objective verifiable evidence and testimony of an expert witness.[30]

Though the court of appeals provided an opportunity for relief for victims of RMS, the court stated a caveat: "Such memories can be inaccurate, may be implanted, and may be attributed to poorly trained therapists or use of improper therapeutic techniques."[31] The court further noted that "[i]t is important to emphasize the present posture of this case: summary judgment.... Obviously, the trial court will be in a better position to evaluate the efficacy of the repressed memory syndrome as applied to this case."[32] Moriarty still has the burden to convince the court that she is a victim of RMS in addition to proving

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20. *Id.* at 152, 511 S.E.2d at 700. Moriarty had suffered greatly from depression and emotional disturbances and attended counseling regularly over multiple years. *Id.* at 153, 511 S.E.2d at 701.

21. *Id.* at 155, 511 S.E.2d at 702.

22. *Id.* at 167-69, 511 S.E.2d at 708-09.

23. 308 S.C. 139, 417 S.E.2d 541(1992).

24. *Id.* at 142, 417 S.E.2d at 543. Both parties in the *Moriarty* case agreed that *Doe v. R.D.* is distinguishable because it did not involve Repressed Memory Syndrome. *Moriarty*, 334 S.C. at 167, 511 S.E.2d at 708.

25. Doe v. R.D., 308 S.C. at 142, 417 S.E.2d at 543. *See infra* text accompanying note 103.

26. 28 F.3d 404 (4th Cir. 1994).

27. *Id.* at 407.

28. *Moriarty*, 334 S.C. at 161, 511 S.E.2d at 705 (citing Shahzade v. Gregory, 923 F. Supp. 286, 290 (D. Mass. 1996)).

29. *Id.* at 168, 511 S.E.2d at 709.

30. *Id.* at 173, 511 S.E.2d at 711.

31. *Id.* at 161, 511 S.E.2d at 705 (citing Doe v. Roe, 955 P.2d 951 (1998)).

32. *Id.* at 161-62, 511 S.E.2d at 705.

her claim of alleged childhood sexual abuse.[33] Thus, the court of appeals simply provided Moriarty the opportunity to present her claim.[34] However, the question remains whether the action taken by the court of appeals was appropriate or if it should have been left to the South Carolina General Assembly.

II REPRESSED MEMORY SYNDROME

To understand Repressed Memory Syndrome, one must first understand that memory can be broken into stages: encoding, consolidation, storage, and retrieval,[35] but that "repression of memory is something else entirely."[36] Repression is "the forcing of ideas, perceptions or memories associated with psychic trauma from conscious awareness into the unconscious."[37] The majority of mental health professionals will agree that repression of memories occurs, but professionals differ on the frequency of occurrences of RMS.[38]

A. Validity of Repressed Memory Syndrome

Sigmund Freud first proposed the theory of a "defense mechanism that serves to repudiate or suppress emotions, needs, feelings or intentions in order to prevent psychic 'pain.'"[39] Freud theorized that the mind can repress anxiety-provoking ideas and the uncovering of these repressed ideas and desires is

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33. *Id.* at 173, 511 S.E.2d at 711.

34. *Id.* at 168, 511 S.E.2d at 709 ("We express no opinion as to the viability of Moriarty's case and leave this issue to further proceedings.").

35. *See* J. Douglas Bremner et al., *Neural Mechanisms in Dissociative Amnesia for Childhood Abuse: Relevance to the Current Controversy Surrounding the "False Memory Syndrome,"* 153 AM. J. OF PSYCHIATRY 71, 72 (1996).

36. ARLYS N. MCDONALD, REPRESSED MEMORIES: CAN YOU TRUST THEM? 40 (1995). *See also* Linda M. Williams, *What Does it Mean to Forget Child Sexual Abuse? A Reply to Loftus, Garry, and Feldman (1994)*, 62 J. OF CONSULTING AND CLINICAL PSYCHOL. 1182, 1183 (1994) [hereinafter *Reply*] ("Memories of sexual abuse may be encoded, stored, and retrieved differently from other memories, especially when the abuse occurs under circumstances of high arousal, terror, extreme ambivalence, where escape is impossible, or when the meaning of the abuse could be devastating if confronted.") (citation omitted).

37. Abrams, *supra* note 9, at 284; *see also* Doe v. Roe, 955 F.2d 951, 957 (1998) (defining repression as "a psychological defense mechanism that protects the individual from being confronted with the memory of an event that is too traumatic to cope with"); Bremner et al., *supra* note 35, at 71-72 ("In dissociative amnesia, which can be associated with exposure to psychological trauma, information is not available to conscious awareness for an extended period of time, although it may have an influence on behavior.").

38. Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183, 187 (1996) (citation omitted). *See also* Bremner et al., *supra* note 35, at 78 ("From what is known about the effects of stress on brain systems involved in memory, there is evidence that mechanisms other than 'normal forgetting' are probably operative in the delayed recall of childhood abuse.").

39. ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE 50 (1996).

analogous to a "'layer by layer' excavation of a 'buried city'" that should proceed slowly.[40]

In 1994, the American Psychiatric Association (APA) officially recognized RMS, referring to it by its medical term, "dissociative amnesia,"[41] stating:

> The essential feature of Dissociate Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness .... This disorder involves a reversible memory impairment in which memories of personal experience cannot be retrieved in a verbal form (or, if temporarily retrieved, cannot be wholly retained in consciousness) ....

Dissociative amnesia most commonly presents as a retrospectively reported gap or series of gaps in recall for aspects of the individual's life history. These gaps are usually related to traumatic or extremely stressful events.[42] The APA affirmed that dissociative amnesia differs from normal gaps in memory due to "the intermittent and involuntary nature of the inability to recall and by the presence of significant distress or impairment."[43] RMS can be present in any age group, and individuals may regain memories at different times.[44] The APA

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40. *Id.* at 51. Though Freud later recanted his theory about repression, claiming it was sexual fantasies that engaged adult hysteria, other scientists and researchers produced studies that "support Freud's originally hypothesized connection between child sexual abuse, no recall of the abuse, and high levels of psychological symptoms in adulthood, at least in clinical samples." Linda M. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. OF CONSULTING AND CLINICAL PSYCHOL. 1167, 1168 (1994) [hereinafter *Childhood Trauma*].

41. THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 478 (4th ed. 1994) [hereinafter DSM-IV].

42. *Id.* The placement of Dissociative Amnesia in the DSM-IV is not accepted by all psychiatrists. In a survey of 301 psychiatrists, while 35% thought Dissociative Amnesia should be included *without reservations*, 48% responded Dissociative Amnesia should be included in the DSM-IV *with reservations* (e.g., as a 'proposed diagnosis'). Harrison G. Pope et al., *Attitudes Toward DSM-IV Dissociative Disorders Diagnoses Among Board-Certified American Psychiatrists*, 156 AM. J. OF PSYCHIATRY 321, 322 (1999). In addition, while 23% thought Dissociative Amnesia was supported by strong scientific evidence of validity, 48% of those surveyed believed Dissociative Amnesia was supported by only partial evidence of validity. *Id.* This led Harrison G. Pope et al., to conclude "our findings suggest 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." *Id.* at 323.

43. DSM-IV, *supra* note 41, at 481.

44. *Id.* at 479 ("The reported duration of the events for which there is amnesia may be minutes to years."); *see also* R. Joseph, *The Neurology of Traumatic "Dissociative" Amnesia: Commentary and Literature Review*, 23 CHILD ABUSE & NEGLECT 715, 721 (1999) ("Traumatic dissociative amnesia, however, is not limited to children, but includes, "hardened soldiers," as well as, presumably, normal adults.").

recognizes the recent prevalence of RMS claims for "previously forgotten early childhood traumas."[45]

Sexual abuse is a very traumatic experience for children and is especially conducive to Repressed Memory Syndrome.[46] A child who is sexually abused is often physically and psychologically unprepared to cope with the situation which makes escape impossible.[47] The traumatic event creates memories the child-victim simply finds overwhelming.[48] Because of the psychological need to adjust to the feelings of inadequacy to change the circumstance, the child "may become adept at altering her state of consciousness."[49] Thus, the victim may develop coping strategies to "avoid reminders of traumatic events and, ultimately, memories of the event."[50]

Much evidence supports the proposition that "amnesia or memory loss is not at all uncommon following high levels of stress and arousal, or other physical, chemical, or severe emotional insults to the brain."[51] In fact, amnesia with subsequent partial or full recovery of memories has been documented in studies of combat soldiers, victims of kidnapping, victims of physical and sexual abuse, people who have committed murder, individuals experiencing natural disasters and accidents, and victims of torture and concentration camps.[52] Furthermore, various "scientific studies show that 'repressed'

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45. DSM-IV, *supra* note 41, at 479. The APA also recognizes the various interpretations of this increase in RMS cases: "Some believe that the greater awareness of the diagnosis among mental health professionals has resulted in the identification of cases that were previously undiagnosed. In contrast, others believe that the syndrome has been over-diagnosed in individuals who are highly suggestible." *Id.*

46. 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, 135 (1993) ("[I]t is widely accepted by clinicians that the particulars of the trauma are especially conducive to repression of memory of the incident.") [hereinafter *Sleeping Memories*].

47. *Id.* at 136 ("Dependent and vulnerable children, in reality, have few mechanisms by which to leave an abusive environment. Their dependency on the abuser, which is often total, and the abuser's age, authority, or position often make escape an impossibility.").

48. *Id.* at 133.

49. *Reply*, *supra* note 36, at 1183 (citation omitted).

50. *Id.* at 1182. *See also* Mary R. Williams, *Suits by Adults for Childhood Sexual Abuse: Legal Origins of the "Repressed Memory" Controversy*, 24 J. PSYCHIATRY & L. 207, 209 (1996) (The child "develops varying degrees of psychological coping and/or blocking mechanisms, described in the clinical literature as denial, minimization, dissociation, and various degrees of traumatic amnesia.").

51. Joseph, *supra* note 44, at 715. The author continues, "[m]emory . . . is a biological process, and memory loss, including stress-induced traumatic, dissociative amnesia, can probably best be understood from a biological and neurological perspective. To rule out neurology and biology in order to claim that amnesia does not exist, is disingenuous." *Id.* at 715-16.

52. Bessel A. van der Kolk & Rita Fisler, *Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study*, 8 J. OF TRAUMATIC STRESS 505, 509 (1995) (citation omitted). The authors further note that a 1994 study "reported complete or partial traumatic amnesia after virtually every form traumatic experience, with childhood sexual abuse, witnessing murder or suicide of a family member, and combat exposure yielding the

memories are real and are generally as accurate as continuous memories."[53] Of particular interest, Linda Williams conducted a retroactive study in the early 1990s in which 129 women were contacted that had visited the city hospital emergency room for treatment for sexual assault in the 1970s.[54] During the interviews, thirty-eight percent of these woman "did not report the sexual abuse that they experienced in childhood and that had been documented in hospital records."[55] Sixty-eight percent of the women who could not recall the prior abuse informed the interviewer about other sexual assaults they had experienced in childhood, involving different perpetrators and circumstances.[56] Notably, those who did not recall the abuse were "no less likely to report the most highly embarrassing, upsetting, and stigmatizing abuse experiences than those who did recall," as over one-third (35%) of the former group informed the interviewer about other sexual abuse perpetrated by family members.[57] Williams concludes:

> [t]hese findings suggest that having no memory of child sexual abuse is a common occurrence, not only among adult survivors in therapy for abuse but among community samples of women who were reported to have been sexually abused in childhood. On reinterview, nearly two fifths of the women did not report the child sexual abuse that was documented 17 years earlier, and those who did not report appear to not recall the abuse.[58]

Victims of childhood sexual abuse may experience a variety of psychological and behavioral problems throughout their lives. Because these

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highest rates." *Id.*

53. Alan W. Scheflin & Daniel Brown, *Repressed Memory or Dissociative Amnesia: What the Science Says*, 24 J. OF PSYCHIATRY & L. 143, 183 (1996). Scheflin & Brown analyzed twenty-five studies that fit the criteria established by Pope and Hudson, opponents of repressed memories, and concluded:

> all of them reach the same result, confirming the reality of dissociative amnesia in a subpopulation of sexually traumatized children. Furthermore, these studies employed a variety of increasingly more sophisticated designs to overcome the inevitable claims that they are methodologically flawed. Even more significantly, no study has surfaced that refutes the dissociative amnesia hypothesis by failing to get reports of inability to voluntarily recall repeated childhood abuse.

Id. at 145-46.

54. Linda M. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. OF CONSULTING AND CLINICAL PSYCHOL. 1167, 1169 (1994).

55. *Id.* at 1170.

56. *Id.*

57. *Id.*

58. *Id.* at 1173 (citation omitted).

victims often turn to psychotherapy where various techniques are employed to recover these memories, "[i]t is therefore not surprising that traumatic events are often fully recalled for the first time during psychotherapy."[59] While some victims may experience a spontaneous resurfacing of the repressed memories or regain their memories through therapy or counseling, other victims of childhood sexual abuse never regain access to the "repressed traumatic event."[60] These therapeutic methods for recovering memories are especially conducive to critical analysis as the debate continues over the accuracy of recovered memories.[61]

B. Concerns About Repressed Memory Syndrome

Critics of Repressed Memory Syndrome have several concerns. Those opposing the theory of RMS claim that memories are suggestible, malleable, and easily distorted.[62] Accompanied with this criticism is the fear of the creation of false memories.[63] Certainly,

> [W]hen a memory suddenly and explosively resurfaces after nearly two decades, with colors, textures, sounds, smells, and emotions remarkably preserved, and a man is charged with murder based on the details thus revealed, then the clinical import of that memory must at least share the stage with its legal ramifications.[64]

Some are concerned that once a memory is recalled from repression, the person becomes adamantly convinced of its truth.[65] Because sexual abuse is a "private, hidden act . . . determining guilt or innocence is usually a matter of emotion,

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59. *See* Bremner et al., *supra* note 35, at 79. Psychiatrists further explain, "[p]sychotherapy naturally involves the facilitation of recall through encouraging the investigation of feelings related to traumatic events. The psychotherapist may provide a supportive environment that allows the patient to experience strong emotions he or she may be afraid to experience outside of the therapeutic setting." *Id.*

60. *See Sleeping Memories*, *supra* note 46, at 137-38.

61. *But see* Bremner et. al., *supra* note 35, at 79 ("The fact that traumatic events are recalled during therapy does not necessarily imply, however, that they represent false memories.").

62. *See Sleeping Memories*, *supra* note 46, at 167-68.

63. *See* Iris E. Hyman, Jr. & Erica E. Kleinknecht, *False Childhood Memories: Research, Theory, and Applications*, *in* TRAUMA & MEMORY 175, 178 (Victoria L. Banyard & Linda M. Williams eds. 1999) ("The creation of false memories appears to be a reliable phenomenon. It occurs with a variety of events and populations."). The authors emphasize there are "three conditions necessary for the creation of a false memory: event acceptance, memory construction, and a source-monitoring error of claiming the constructed narrative as a personal memory." *Id.* at 179-81.

64. LOFTUS & KETCHAM, *supra* note 39, at 56.

65. Rola J. Yamini, Note, *Repressed and Recovered Memories of Child Sexual Abuse: The Accused as "Direct Victim,"* 47 HASTINGS L.J. 551, 563 (1996).

character, and conviction."[66] Many patients enter therapy "*demanding* to retrieve memories, already having the *feeling* that they were molested as children."[67] Further, therapists often have difficulty discerning the validity of their patients' recollections as "[t]herapists, unfortunately, are no better equipped than the rest of us to discern the genuine light of truth."[68]

Therapists and psychologists are often criticized at both ends of the spectrum–for their avid assistance in the retrieval of memories and for their quick dismissal of memories of these victims.[69] Psychologists often feel threatened by public groups who are opposed to mental health professionals assisting in the retrieval of abusive memories.[70] Often the validity of the therapeutic methods are criticized and questioned.[71]

One concern is the tendency of therapists to identify certain symptoms as latent results of childhood sexual abuse.[72] Therapists may overlook the particular accuracy of a recovered memory because "the memory retrieval is a means toward the ultimate goal of psychological healing . . . ."[73] Because of this obliviation, "the particular attributes of the memory are not a primary concern [for the therapist], certainly not to the extent which the law demands."[74]

Therapists are also accused of implanting notions of childhood sexual abuse into the minds of their patients. Many critics of RMS are concerned that "even conscientious, less culpable therapists often carelessly use the power of

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66. MARK PENDERGRAST, VICTIMS OF MEMORY INCEST: ACCUSATIONS AND SHATTERED LIVES 86 (1995).

67. *Id.* at 199.

68. LOFTUS & KETCHAM, *supra* note 39, at 175.

69. *See* Taub, *supra* note 38, at 193 ("The public should be wary of two kinds of therapists: those who offer instant childhood abuse diagnoses, and those who dismiss claims or reports of sexual abuse without exploration."); *see also* J. G. Benedict & David W. Donaldson, *Recovered Memories Threaten All*, 27 PROF. PSYCHOL.: RES. & PRAC. 427, 427 (1996) ("Accusations are made that these memories may have been either contrived by the individual remembering or come into being as the result of some form of hypnotic or direct suggestion by the clinician."); Hyman & Kleinknecht, *supra* note 63, at 187 (stating therapists "involved must approach the memory with caution, keeping in mind the consequences of either accepting a false (and perhaps traumatic) memory or disregarding a true one").

70. Benedict & Donaldson, *supra* note 69, at 427 ("Most problematic is the danger that many psychologists feel from highly litigious public groups who do not like any mental health professionals being involved with individuals who are dredging up old memories of abuse.").

71. *See* Taub, *supra* note 38, at 189-90 ("There are some recovered memories of [childhood sexual abuse] whose inherent characteristics suggest that they are not accurate and may therefore have been implanted.").

72. *See Sleeping Memories, supra* note 46, at 139; *see also* Williams, *supra* note 50, at 212 (noting the increase of "a new type of litigation: civil malpractice lawsuits and administrative complaints against therapists for implanting or encouraging false memories of abuse").

73. *Sleeping Memories, supra* note 46, at 161; *see also* PENDERGRAST, *supra* note 66, at 200 ("Almost all [therapists] assert that it doesn't matter whether the memories are literally true or not.").

74. *Sleeping Memories, supra* note 46, at 161.

suggestion to prompt patients to come up with [false] memories of abuse."[75] This "power of suggestion" is incredibly influential since it can "convince children and adults alike that they have repressed the memory of an event even though the event exists only in the mind of the person supplying the suggestions."[76]

These therapeutic techniques used to recover repressed memories must be scrutinized for their "high level of suggestibility."[77] The danger of suggestibility centers on the highly impressionable mind of the patient who is seeking psychological help which "may easily lead to the creation, reinforcement, and internalization of abuse memories that never occurred. Therapeutically induced pseudomemories may be just as passionately believed in and just as elaborately detailed as true memories; without independent corroboration, there may be no way of distinguishing the two."[78] Even the APA cautions that "[c]are must be exercised in evaluating the accuracy of retrieved memories because the informants are often highly suggestible."[79]

Courts and legislatures must also concern themselves with the individuals who are falsely accused of sexually abusing a child.[80] False accusations may destroy families and further deteriorate "mildly disturbed" individuals.[81] In response to several unfounded sexual abuse claims, the False Memory Syndrome Foundation (FMSF) arose in 1992 consisting of numerous individuals who claim they were wrongly accused of committing sexual abuse.[82] False Memory Syndrome (FMS), not medically recognized by the

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75. Yamini, *supra* note 65, at 561 (citing Robert Sheridan, *Salem Redux: Mixing Memory and Desire*, LEGAL TIMES, Oct. 24, 1994, at 24).

76. E.A. Foster, Comment, *Repressed Memory Syndrome: Preventing Invalid Sexual Abuse Cases in Illinois*, 21 S. ILL. U. L.J. 169, 179 (1996); *see also* MCDONALD, *supra* note 36, at 88 (1995) ("Most people want the approval or at least the attention of their therapist. You want to be a good client. As a result, the therapist has a subtle power over what you say . . . . This therapist-pleasing is a natural, documented phenomenon.").

77. *Sleeping Memories*, *supra* note 46, at 161.

78. Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 LAW & SOC. INQUIRY 653, 685 (1997).

79. *See* DSM-IV, *supra* note 41, at 480; *see also* Bremner et al., *supra* note 35, at 79 ("Because of the on-going questions regarding the effects of suggestibility on recall of abuse, it is important for the therapist to avoid imposing on the patient the therapist's own ideas regarding a past history of abuse. Patients with PTSD and dissociative disorders may be even more susceptible to suggestion than normal persons.").

80. *See* Cynthia V. McAlister, Comment, *The Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under Daubert?*, 22 N.C. CENT. L.J. 56, 56 (1996) (citing Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995) ("While it is imperative that society protect its children from sexual abuse, it must also consider the frightening prospect that a person may be falsely accused of sexually abusing a child.")).

81. *See* Taub, *supra* note 38, at 214.

82. *See* Leo, *supra* note 78, at 688 (noting that one study found "thousands of parents have been accused (and presumed guilty) of unspeakably abusive acts that almost certainly did not occur, and in the process have seen their families shattered, their reputations ruined, their

APA, can be described as a "phrase that has come to be used mainly by persons who believe that they have been falsely accused of abusing someone, often a child or younger relative, in the past."[83] Those falsely accused of sexual abuse often subsequently suffer estranged relationships with friends and family members because "[p]eople don't want to believe that a completely innocent person could be accused of such an awful crime by his or her children. If that were true, it could happen to anyone–it could happen to *them*."[84] FMSF members assert "such unsubstantiated and highly suspect claims of abuse should not be allowed in civil or criminal actions."[85]

False Memory Syndrome cannot discredit RMS.[86] Criticism of therapeutic techniques does not discount the theory of RMS because memory retrieval may occur without the employment of therapy,[87] and "[e]ven many of the supporters of 'false memory syndrome' agree that repression does occur, though they are quick to point out that there are many claims of repressed memories that are not true."[88] Further, skeptics of RMS cannot *disprove* RMS.[89]

IV ANALYSIS

After a lengthy analysis, the South Carolina Court of Appeals in *Moriarty* recognized Repressed Memory Syndrome as a valid theory,[90] with the caveat

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finances depleted, and their adult children forever lost to the recovery moment"). FMSF-inspired literature claims False Memory Syndrome "is created by the suggestions and encouragements of overzealous therapists who, negligently or intentionally, mislead large numbers of therapy clients into having false memories of [childhood sexual abuse] as a way of explaining their clients' problems and justifying years of misguided treatment." Williams, *supra* note 50, at 211(citation omitted).

83. Benedict & Donaldson, *supra* note 69, at 427.

84. PENDERGRAST, *supra* note 66, at 276. Pendergrast, who was personally accused by his own child of sexual abuse, further states that "*anyone could be accused of incest without any foundation in fact.*" *Id.*

85. Yamini, *supra* note 65, at 558; *see also* Williams, *supra* note 50, at 211. *But see* Benedict & Donaldson, *supra* note 69, at 427 (stating False Memory Syndrome is "used as a defense against the accusation by attempting to invalidate the memory information, even if independently corroborated").

86. *See* Doe v. Roe, 955 P.2d 951, 959 ("Thus the psychological process of memory repression and recall is not discredited by the possibility that a false memory has been implanted. Rather, either of these processes may explain a particular factual allegation of therapy-induced memory recall."); *see also* Wendy E. Hovdestad & Connie M. Kristiansen, *A Field Study of "False Memory Syndrome": Construct Validity and Incidence*, 24 J. OF PSYCHIATRY & L. 299, 330 (1996) ("In sum, the weak evidence for the construct validity of the phenomenon referred to as FMS . . . lends little support to FMS theory.").

87. Doe v. Roe, 955 P.2d at 959.

88. MCDONALD, *supra* note 36, at 71.

89. *See* Leo, *supra* note 78, at 667 ("Moreover, even in the absence of a coherent theoretical framework or any corroborating empirical evidence for recovered memories of abuse, it remains impossible for skeptics [of repressed memory syndrome] to prove a negative.").

90. Moriarty v. Sanctuary Church of God, 334 S.C. 150, 161, 511 S.E.2d 599, 705 (Ct. App. 1999).

that "such memories can be inaccurate, may be implanted, and may be attributable to poorly trained therapists or use of improper therapeutic techniques."[91] The court of appeals subsequently observed that many victims of RMS are barred from bringing their claims by traditional statutes of limitations, which forbid claims to be litigated after a maximum time period from the time the wrong is committed.[92] The court addressed this concern by concluding "the discovery rule *may* toll the statute of limitations during the period a victim psychologically represses her memory of sexual abuse."[93] The court further required "objective verifiable evidence" of the childhood sexual abuse claim and the testimony of an expert witness concerning the phenomenon of memory repression for application of the discovery rule.[94]

A. Discovery Rule

The discovery rule is an evidentiary mechanism used in certain cases that tolls the statute of limitations until the date of discovery of the cause of action.[95] The purpose of any statute of limitations is straightforward: to protect people from the litigation of stale claims.[96] However, in some situations where litigants were unable to discover their claim before running afoul of the statute of limitations, courts have applied the discovery rule[97] which tolls the commencement of the statute of limitations until the victim discovers, or by reasonable diligence should have discovered, the wrongful action.[98] By enforcing this alternative time frame, claims may be litigated past the statute of limitations. Yet, a constant battle remains between the right of a victim to litigate a claim versus the right of a defendant to be free from lawsuits after a substantial delay in time.[99]

1. South Carolina

The *Moriarty* decision was not the first attempt in South Carolina to expand the relief available to childhood sexual abuse victims. Two prior South Carolina decisions explored the proposal to extend relief to childhood sexual abuse victims: *Doe v. R.D.*[100] and *Roe v. Doe.*[101] In *Doe v. R.D.* the South

91. *Id.* at 161, 511 S.E.2d at 705 (citing Doe v. Roe, 955 P.2d 951 (1998)).
92. *Id.* at 163, 511 S.E.2d at 706.
93. *Id.* at 168, 511 S.E.2d at 709.
94. *Id.* at 173, 511 S.E.2d at 710, 711.
95. BLACK'S LAW DICTIONARY 322 (6th ed. 1991).
96. *Moriarty*, 334 S.C. at 163, 511 S.E.2d at 706.
97. The United States Supreme Court first recognized the discovery rule for a negligence claim of exposure to silicosis disease in *Urie v. Thompson*, 337 U.S. 163 (1949).
98. *See supra* note 95.
99. *See supra* note 1.
100. 308 S.C. 139, 417 S.E.2d 541 (1992).
101. 28 F.3d 404 (4th Cir. 1994).

Carolina Supreme Court declined to apply the discovery rule to an alleged victim of sexual abuse diagnosed with Delayed Stress Syndrome.[102] The court concluded: "While the result [of extending relief] may be appealing, we are without authority to amend our statute. An exception to the plain and unambiguous language of our statute of limitations must come from our legislature."[103] In *Moriarty* the court of appeals distinguished *Doe v. R.D.* because Doe was fully aware of his sexual abuse as a child and thus did not allege Repressed Memory Syndrome.[104] In response to *Doe v. R.D.*, the South Carolina General Assembly introduced a bill which would allow an action based on sexual abuse or incest to be brought four years after "discovering the injury and the casual [sic] relationship between the injury and the abuse or incest."[105] Though the bill passed the South Carolina House of Representatives, it was buried in the Senate Judiciary Committee and was never enacted.[106]

In 1994, the Fourth Circuit Court of Appeals in *Roe v. Doe*[107] refused to make an exception to the statute of limitations for a childhood sexual abuse case from South Carolina.[108] The court expressed reluctance to provide an exception for the plaintiff because the South Carolina Supreme Court had rejected any additional relief in *Doe v. R.D.*[109] The court in *Roe v. Doe* concluded: "What we decline to do is to make the leap urged by plaintiff; that is, to determine that the South Carolina Supreme Court would make an exception to the statute of limitations, or apply it differently, in personal injury cases brought by plaintiffs alleging repressed recollection."[110] The court noted only a few states at this time had provided for additional relief beyond the statute of limitations for victims of childhood sexual abuse.[111]

Four years later, the *Moriarty* court noted that over half of the states had applied the discovery rule to childhood sexual abuse cases.[112] The South Carolina Court of Appeals revisited the proposal to make an exception to the statute of limitations for childhood sexual abuse cases and examined the balance of the "harm of denying a remedy to a plaintiff who had no access to

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102. *See* Doe v. R.D., 308 S.C. at 142, 417 S.E.2d at 543.

103. *Id.* (citation omitted). However, the South Carolina Supreme Court noted "at least three state legislatures amended the statute of limitations to accommodate adult survivors of sexual abuse in the wake of decision [sic] such as the one we issue today." *Id.* at 142 n.4, 417 S.E.2d at 543 n.4.

104. *Moriarty*, 334 S.C. at 168, 511 S.E.2d at 709. In addition, both parties acknowledged the distinction. *Id.* at 167, 511 S.E.2d at 708.

105. *See* H.R. 3927, 110th Leg., 1st Sess. (S.C. 1993).

106. *Id.*

107. 28 F.3d 404 (4th Cir. 1994).

108. *Id.* at 407.

109. *Id.* at 407-08. The trial court denied a motion to certify the question to the South Carolina Supreme Court. *Id.* at 406.

110. *Id.* at 407.

111. *Id.* at 408, nn.1-2 (Hall, J., concurring).

112. *See Moriarty*, 334 S.C. at 164, 511 S.E.2d at 707.

her memory against the hardships faced by a defendant defending against such longstanding claims."[113] The court then decided to apply the South Carolina discovery rule to childhood sexual abuse cases,[114] which allows a claim to be brought within three years of the "discovery" of the cause of action.[115]

2. Other Jurisdictions

Washington was the first state to apply the discovery rule to civil cases of childhood sexual abuse.[116] Since then, many states have followed and allowed for some form of relief from the statute of limitations to childhood sexual abuse victims who suffer from repressed memory syndrome.[117] Many states have simply adopted the discovery rule or extended the statute of limitations for some fixed amount of time after reaching the age of majority.[118] However, very few states require, as *Moriarty* does, objective verifiable evidence before a

113. *Id.*

114. *Id.* at 168, 511 S.E.2d at 709.

115. S.C. CODE ANN. § 15-3-535 (West Supp. 1998). The statute states "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Id.*

116. *See* WASH. REV. CODE ANN. § 4.16.340 (1) (West Supp. 1999).

117. *See* ALASKA STAT. § 9.10.140 (Michie 1999); ARK. CODE ANN. § 16-56-130 (Michie Supp. 1999); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1999); COLO. REV. STAT. ANN. § 13-80-103.7 (West 1999); FLA. STAT. ANN. § 95.11(7) (West Supp. 1999); ILL. COMP. STAT. ANN. 110/13-202.2 (West Supp. 1999); IOWA CODE ANN. § 614.8A (West 1999); KAN. STAT. ANN § 60-523 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 260, § 4C (West Supp. 1999); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1999); MINN. STAT. ANN. § 541.073 (West Supp. 1999); MO. ANN. STAT. § 537.046 (West Supp. 1999); MONT. CODE ANN. § 27-2-216 (1999); NEV. REV. STAT. ANN. § 11.215 (Michie 1998); N.H. REV. STAT. ANN. § 508:4 (Supp. 1992); N.J. STAT. ANN § 24:61 B-1 (West Supp. 1999); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1999); OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 2000); OR. REV. STAT. § 12.117 (Supp. 1999); R.I. GEN. LAWS § 9-1-51 (1997); S.D. CODIFIED LAWS § 26-10-25 (Michie 1999); UTAH CODE ANN § 78-12-25.1 (Supp.1999); VT. STAT. ANN. tit. 12 § 522 (Supp. 1999); VA. CODE ANN § 8.01-249(6) (Michie Supp. 1999); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1999); WIS. STAT. ANN. § 893.587 (West 1997); WYO. STAT. ANN. § 1-3-105 (Michie 1999); *see also* Peterson v. Huso, 522 N.W.2d 83, 86 (N.D. 1996) (interpreting N.D. CENT. CODE § 28-01-18(1) (1991), which allows 2 years to sue for assault "after the claim for relief has accrued" as "two years from the time of discovery to begin an action for sexual assault and battery").

118. S.V. v. R.V., 933 S.W.2d 1, 21 (Tex. 1996) ("Essentially, there are two generations of statutes addressing the problem of delayed accrual for childhood sexual abuse cases. The first generation simply adopted the discovery rule or extended the statute of limitations for some fixed, extended period after the minor reached majority."); *see also* Taub, *supra* note 38, at 197 ("These statutes place essentially no limit on the time in which a plaintiff can bring an action for child sexual abuse.").

childhood sexual abuse claim may be heard.[119] These states generally impose additional requirements to avoid a flood of fraudulent claims.[120]

Despite the expansion in the number of states applying the discovery rule for RMS cases, many states still refuse to apply the discovery rule in childhood sexual abuse cases.[121] The courts and legislatures of these states cite concerns for the lack of evidence to support the theory of repression[122] and the unfairness of bringing expired charges against defendants.[123] These courts adhere to strict compliance with the statute of limitations and decline to make a policy change.[124] In *Dalrymple v. Brown*,[125] the Supreme Court of Pennsylvania noted the plaintiff's lack of evidence of the injury and stated:

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119. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1 (West Supp. 1999); OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 2000).

120. *See* S.V. v. R.V., 933 S.W.2d 1, 21 (Tex. 1996) ("The second generation of statutes, including amendments to existing statutes, is more complex and gives greater weight to avoiding the danger of possibly fraudulent claims."). The Texas Supreme Court further stated: "Legislatures have begun to strike a more complex balance between the risk of cutting off meritorious claims and the dangers of fraudulent claims." *Id.* at 22.

121. *See, e.g.*, Doe v. Maskell, 679 A.2d 1087 (Md. 1996). The Maryland court held:

> We are unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting. Because we find these two processes to be indistinguishable scientifically, it follows that they should be treated the same legally. Therefore we hold that the mental process of repression of memories of past sexual abuse does not activate the discovery rule. The plaintiffs' suits are thus barred by the statute of limitations. If the General Assembly should wish to rewrite the law, that is its prerogative and responsibility.

Id. at 1092; *see also* Schmidt v. Bishop, 779 F. Supp. 321, 330 (S.D.N.Y. 1991) (declining to apply the discovery rule); Dalrymple v. Brown, 701 A.2d 164, 171 (Pa. 1997) ("Pennsylvania's traditional approach to application of the discovery rule is preferable to the subjective analysis employed by other jurisdictions.").

122. *See* Christina J. D'Appolonia, Note, *Nuccio v. Nuccio: The Doctrine of Equitable Estoppel Will Not Bar the Statute of Limitations Defense in a Child Sexual Abuse Case Involving Repressed Memory*, 49 ME. L. REV. 235, 241 (1997) ("Judicial wariness in deciding cases of child sexual abuse involving repressed memory generally stems from the lack of empirical evidence supporting the theory of repression.").

123. *See* Leo, *supra* note 78, at 676. Leo writes:

> The changes in statutes of limitations for allegedly repressed memories of childhood sexual abuse are. . . . deeply unfair to defendants who must confront allegations of abuse many years or decades later, after evidence is likely to have been lost or destroyed, witnesses are likely to have disappeared or become unavailable, and memories have decayed.

Id.

124. *E.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 329 (S.D.N.Y. 1991) (holding "there is no authority for the adoption of such a rule in child sex abuse cases in New York"). The District Court further stated: "[b]elieving it unwise and unjustified to do so, this Court declines to work a total revision of the state's policy in this area, and accordingly declines to invent a delayed discovery doctrine for this case." *Id.* at 330.

125. Dalrymple v. Brown, 701 A.2d 164 (Pa. 1997).

> To require an alleged tortfeasor, no matter how heinous the allegations, to respond to claims of an injury many years after the fact, where the only 'evidence' of the actual injury is held in the 'memory' of the accuser, would allow the exception known as the discovery rule, to swallow the rule of law embodied within the statute of limitations itself.[126]

Many fear "the mere accusation of child abuse has a dramatic and negative effect on the professional, personal and social relationships of an accused."[127] Adhering to the statute of limitations "prevents the innocently accused of being dragged through the legal system, and families from being further wrenched apart."[128] Further, applying the discovery rule in childhood sexual abuse cases may prove dangerous since judges may not be able to distinguish "between memories that are a result of suggestion and memories that are a result of a true perception or experience."[129]

3. Policy

Courts in recent years have generously applied the discovery rule in cases where the victim was helpless in bringing a claim before the close of the statute of limitations.[130] A strong policy rationale exists for applying the discovery rule in situations where the victim was unable to bring a claim because memories of childhood sexual abuse were repressed.[131] Because RMS is recognized as a

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126. *Id.* at 170.

127. *Sleeping Memories, supra* note 46, at 168.

128. *Id.* at 165. *But see* Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199, 212 (1995). Ferrante states:

> The debate regarding the validity of repressed memories should not prevent the discovery rule from bringing relief to those adult survivors of sexual abuse who have meritorious claims. The argument that no adult survivor of childhood sexual abuse should have access to redress because of the potential for false claims is misguided.

Id.

129. *Sleeping Memories, supra* note 46, at 162-63 (citations omitted). Further, "[w]hen false memories are created by misinformation, the holders of these memories can describe these false creations in great detail and with great conviction. Moreover, studies have shown that a subject's confidence in a specific memory is not necessarily related to the accuracy of that memory . . . ." *Id.*

130. *See supra* text accompanying notes 117, 118.

131. *See* Scheflin & Brown, *supra* note 53, at 182 ("[T]here is a scientifically provable class of sexual trauma victims who later in life will recover generally accurate memories of the abuse. These individuals have rights worth protecting, especially because the 'repressed' memory was a foreseeable consequence of, and was indeed caused by, the trauma perpetrator's unlawful acts."); Ferrante, *supra* note 128, at 229 ("Arguments against applying the discovery rule to cases of childhood sexual abuse . . . are easily overcome by the interests of those who are sexually abused as children.").

valid disorder by the American Psychiatric Association,[132] the Massachusetts Federal District Court noted in *Shahzade v. Gregory*[133] that "[f]or the law to reject a diagnostic category generally accepted by those who practice the art and science of psychiatry would be folly. Rules of law are not petrified in the past but flow with the current of expanding knowledge."[134] The Arizona Supreme Court in a recent RMS case described the policy rationale behind employing the discovery rule as "logically appropriate given that the intentional act of the tortfeasor caused both the damage and the repression of memory. To hold otherwise would be to effectively reward the perpetrator of the egregious nature of his conduct and the severity of the resulting emotional injury."[135]

Permitting the litigation of valid claims is a fundamental attribute of the justice system. The argument that false claims may enter the courtroom does not discredit the policy behind applying the discovery rule for the litigation of valid RMS claims.[136] Because the litigation of repressed memory cases will ultimately exclude the false claims, use of the discovery rule will not necessarily correlate with an increased amount of verdicts for invalid claims.[137] Applying the discovery rule simply permits the plaintiffs to bring their claims

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132. *See* DSM-IV, *supra* note 41.

133. 923 F. Supp. 286 (D. Mass. 1996).

134. *Id.* at 290.

135. Doe v. Roe, 955 P.2d 951, 960 (Ariz. 1998) (citation omitted). The Supreme Court of Arizona further held "the issues of accrual of a cause of action under the discovery rule and tolling for unsound mind are questions of fact for the jury." *Id.* at 969.

136. Scheflin & Brown, *supra* note 53, at 183 ("[J]udges and legislators deciding whether the delayed-discovery doctrine should be applied to toll the running of the statute of limitations in 'repressed' memory must acknowledge that a class of sexual victims with repressed memories truly exists."); Ferrante, *supra* note 128, at 212 ("The justice system is capable of handling false claims; it does so every day. Credibility is the special province of the fact-finder. If the possibility of false claims were a basis for restricting access to court, virtually all civil claims would never be heard."). The District of Columbia Court of Appeals has stated:

> [T]he fundamental complaint of lost witnesses and impaired memories is common to all cases in which the running of the statute of limitations has been deferred or interrupted. In each case, considerations of staleness have been trumped by the unfairness of requiring plaintiffs to sue at a time when, though no fault of their own, the injury was not apparent and they could not reasonably have known about it

.Farris v. Compton, 652 A.2d 49, 58 (D.C. Cir. 1994).

137. *See* Susan J. Hall, *Adult Repression of Childhood Sexual Assault: From Psychology to the Media and into the Courtroom*, 22 N.C. CENT. L.J. 31, 54 (1996) ("Once the statutes of limitation have been lifted for repressed memories, the litigation itself will exclude those claims that are based on false memories or false therapeutic input. Those plaintiffs who are victims of repressed memories should be allowed to prove their case in a courtroom."); *see also Farris*, 652 A.2d at 63 (concluding that applying the discovery rule for purposes of denying the motion to dismiss will not deprive the defendant of "his opportunity to contest the timeliness of the suit at later stages of the litigation.").

to court and will not cause defendants undue prejudice because the plaintiffs must still adequately prove their claims.[138]

B. The Objective Verifiable Evidence Requirement

Cases of childhood sexual abuse are often a fight between the "accuser's vividly detailed, highly emotional tale of unspeakable acts versus the accused's simple statement that it did not happen."[139] Therapists who aid in the retrieval of memories are often accused of failing to independently corroborate the patient's story to the level of proof necessary for the legal system.[140] The APA recognizes "considerable controversy concerning amnesia related to reported physical or sexual abuse, particularly when abuse is alleged to have occurred during early childhood."[141] Also, the APA has concluded that "[t]here is currently no method for establishing with certainty the accuracy of such retrieved memories in the absence of corroborative evidence."[142]

1. South Carolina

In *Moriarty*, the South Carolina Court of Appeals recognized that "[c]ourts, commentators, and the medical community recognize the horrific possibility of false accusations"[143] and held the presentation of objective verifiable evidence regarding the claim for childhood sexual abuse is a prerequisite to applying the discovery rule.[144] The court of appeals cited the concurring opinion from *Roe v. Doe*[145] in which Judge Hall proclaimed that courts in childhood sexual abuse cases "should not allow the discovery rule to toll the statute of limitations absent corroborative evidence of both the abuse and the repression of memory

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138. *See* Ault v. Jasko, 637 N.E.2d 870, 872-73 (Ohio 1994). The court stated:

> [The] application of the discovery rule will not cause defendants undue prejudice, as plaintiffs still bear the burden of proving their claims. Also, defendants will be able to present expert testimony to rebut testimony offered by plaintiffs. Furthermore, application of the discovery rule is fair to defendants in light of the hardship that would be visited upon plaintiffs by refusing them a remedy for an injury they were unaware existed until after the expiration of the statute of limitations. Plaintiffs with valid claims should not be denied the opportunity to prove that repression of memory precluded them from bringing their claims within the statute of limitations period.

Id.

139. McAlister, *supra* note 80, at 71.

140. *See Sleeping Memories*, *supra* note 46, at 161.

141. DSM-IV, *supra* note 41, at 480-81.

142. *Id.* at 481.

143. Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 168, 511 S.E.2d 699, 709 (Ct. App. 1999).

144. *Id.* at 171, 511 S.E.2d at 710.

145. 28 F.3d 404 (4th Cir. 1994).

of the abuse."[146] Judge Hall also cited examples for what he considered corroborative evidence.[147]

The court in *Moriarty* also examined the requirements set forth in *S.V. v. R.V.*,[148] in which the Texas Supreme Court required childhood sexual abuse claims to be "inherently undiscoverable" and "objectively verifiable."[149]

Similar to the requirements suggested by the Fourth Circuit Court of Appeals and the Texas Supreme Court, the South Carolina Court of Appeals provided the following examples of objective verifiable evidence:

> (1) admission by the abuser; or
> (2) a criminal conviction; or
> (3) documented medical history of childhood sexual abuse; or
> (4) contemporaneous records or written statements of the abuser, such as diaries or letters; or
> (5) photographs or recordings of the abuse; or
> (6) an objective eyewitness's account; or
> (7) evidence the abuser had sexually abused others; or
> (8) proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.[150]

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146. *Id.* at 408 (Hall, J., concurring in part, dissenting in part).

147. *Id.* Judge Hall wrote:

> Corroboration of the act itself could be obtained anecdotally from siblings or other household members, from a documented medical history of childhood sexual abuse, or by the defendant's admission, perhaps via a letter or diary. Evidence of a prior criminal conviction for the abuse at issue could suffice to corroborate, as could evidence that the defendant had sexually abused others—subject, of course, to the rules regarding proof of 'other bad acts.' Evidence that the plaintiff had actually repressed the memory of the abuse should be provided only by a psychiatrist or psychologist, and then only after a thorough clinical evaluation.

Id.

148. 933 S.W.2d 1, 8 (Tex. 1996).

149. *Id.* at 15. The Texas Supreme Court suggested the following examples of objective verifiable evidence:

> a confession by the abuser; a criminal conviction; contemporaneous records or written statements of the abuser such as diaries or letters; medical records of the person abused showing contemporaneous physical injury resulting from the abuse; photographs or recordings of the abuse; an objective eyewitness's account; and the like. Such evidence would provide sufficient objective verification of abuse, even if it occurred years before suit was brought, to warrant application of the discovery rule.

Id. at 15 (citation omitted).

150. *Moriarty*, 334 S.C. at 171, 511 S.E.2d at 710. Only two judges agreed with the eighth example.

All three judges agreed that the first seven examples are sufficient to qualify as "objective verifiable evidence."[151] However, Judge Howell in his concurring/dissenting opinion questioned the wisdom of the final example of objective verifiable evidence given by the majority.[152] He expressed his concern that circumstantial evidence[153] may be mistaken for "objective, verifiable evidence."[154] Judge Howell concluded that "by allowing plaintiffs in repressed memory cases to corroborate their claims through circumstantial evidence, I believe the majority opinion eviscerates the very corroboration requirement it seeks to impose."[155]

Certainly "proof of a chain of facts and circumstance" is more ambiguous than the first seven examples and has great potential for use as a floodgate entrance for claims of childhood sexual abuse that lack any direct evidence that would support the sexual abuse claim. Nevertheless, restricting the objective verifiable evidence requirements to simply the first seven examples will drastically limit the number of claims. Because childhood sexual abuse is inherently a private act, "photographs or records of the abuse" and an "objective eyewitness's account" will rarely be introduced as objective, verifiable evidence. Further, "documented medical history of childhood sexual abuse" will be extremely rare because medical evidence is rarely obtained unless the child is examined very soon after the abuse, which is generally not the case if the child has repressed memories of the abuse. Thus, without the "proof of a chain of facts and circumstances" example, the childhood sexual abuse victim is still effectively barred from bringing a claim unless the alleged perpetrator is a criminal,[156] has sexually abused others, or has confessed by admission or contemporaneous records or written statement to the abuse. Further, the eighth example provided by the court goes beyond circumstantial evidence because it requires "*sufficient probative force to produce a reasonable and probable conclusion* that sexual abuse occurred."[157] Thus, any potential danger may be minimized by the court's comprehensive requests.

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151. *Id.* at 174, 511 S.E.2d at 712.

152. *Id.* at 175, 511 S.E.2d 712 (Howell, J., concurring in part, dissenting in part).

153. Circumstantial evidence is defined as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved." BLACK'S LAW DICTIONARY 166 (6th ed. 1991).

154. *Moriarty*, 334 S.C. at 175, 511 S.E.2d at 712. Judge Howell further stated: "The majority concludes that 'objectively verifiable corroboration' can be established through circumstantial evidence. In my view, only some form of direct evidence can satisfy the requirement of objectively verifiable corroboration of the sexual abuse." *Id.*

155. *Moriarty*, 334 S.C. at 175, 511 S.E.2d at 713.

156. Allowing a "criminal conviction" to stand as objective, verifiable evidence might be overly broad because it does not at all relate to an individual's tendency to sexually abuse children.

157. *Moriarty*, 334 S.C. at 171, 511 S.E.2d at 710 (emphasis added).

2. Other jurisdictions

Very few states have set up requirements for the application of the discovery rule in childhood sexual abuse cases that approach the comprehensiveness of the standards established by the court of appeals.[158] Other courts and legislatures have initiated a variety of methods to apply the discovery rule to childhood sexual abuse cases.[159] In some states, the plaintiff must produce corroborative evidence before naming a defendant.[160] Specifically, California and Louisiana attorneys must file a "certificate of merit" with the original complaint in which the attorney and a licensed mental health practitioner must verify that there is a reasonable basis for asserting that the plaintiff has been subject to the sexual abuse during her childhood.[161]

California protects the identity of the defendant until the court has reviewed in camera the certificate of merit.[162] Vermont compels sealing of the complaint,[163] and some states encourage use of fictitious names for the parties.[164] New Jersey specifically forbids the admission of evidence of a victim's previous sexual conduct[165] and protects the identity of the victim.[166] Further, several states forbid the litigation of a claim against a deceased or incapacitated defendant.[167]

A few states require treatment of the accuser by a licensed mental health practitioner,[168] and Colorado has limited the amount of damages a plaintiff may

158. The minority of courts and legislatures simply apply the discovery rule without the additional requirement of corroborative evidence. Roe v. Doe, 28 F.3d 404, 408 nn.1-2 (4th Cir. 1994).

159. *See infra* notes 160-171 and accompanying text.

160. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1 (g), (j) (West Supp. 1999) (delaying service of the complaint until the court finds there is reasonable cause for filing the lawsuit and requiring corroboration of abuse before naming the defendant); LA. STAT. REV. ANN. § 9:2800:9D (West 1997) (stating that a petition filed by plaintiffs over the age of twenty-one "may not name the defendant or defendants until the court has reviewed the certificates of merit filed and has determined, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for filing of the action"); OKLA. STAT. ANN. tit. 12, § 95(6) (West 2000) (requiring that a victim must produce objective verifiable evidence to recover damages).

161. *See* CAL. CIV. PROC. CODE § 340.1 (d),(e) (West Supp. 1999); LA. STAT. REV. ANN. § 9:2800:9B (West 1997). Further, in both states the attorneys may be sanctioned for failure to comply with the provisions. *Id.*

162. CAL. CIV. PROC. CODE § 340.1(m) (West Supp. 1999).

163. VT. STAT. ANN. tit. 12, § 522(b) (Supp. 1999).

164. *See Sleeping Memories*, *supra* note 46, at 168 ("The use of fictitious names during a lawsuit protects both parties from unwanted and perhaps undeserved publicity.").

165. N.J. STAT. ANN. § 24:61B-1(d)(1) (West 1995).

166. N.J. STAT. ANN. § 24:61B-1(f) (West 1995) (stating that the victim's identity will not be released unless the victim consents to disclosure or the court determines in a hearing good cause for the release of the information).

167. *See* COLO. REV. STAT. § 13-80-103.7 (West 1999); OKLA. STAT. ANN. tit. 12, § 95(6) (West 1994); UTAH CODE ANN. § 78-12-25.1 (Supp. 1999).

168. *See* N.M. STAT. ANN. § 37-1-30(A)(2) (Michie Supp. 1993); VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1999).

receive.[169] If the sexual abuse occurred through a series of acts, some states apply the discovery rule to the last act in the series.[170] Finally, many states have enacted statutes of repose, which set a maximum limit of years a plaintiff may bring a suit past the age of majority.[171]

3. *Policy*

South Carolina's additional requirement of objective verifiable evidence may be viewed either as a hindrance to the litigation of sexual abuse claims or a safeguard for protection against false memory claims. Advocates of the objective verifiable evidence requirement claim corroborative evidence is necessary: "In the absence of objectively corroborating evidence of abuse—such as medical or school records, photographs, or the defendant's own admissions—there is no justification to apply the delayed discovery rule in cases of therapeutically de-repressed memories of abuse because these memories of abuse are almost certainly false."[172]

However, this corroboration for the claim is often difficult or impossible for the childhood sexual abuse victim to obtain because the act occurred several years prior to the claim, and the victim might have severed relations with friends and family members of the past.[173] Even the courts that permit application of the discovery rule for RMS cases admit that the authenticity and

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169. COLO. REV. STAT. ANN. §13-80-103.7 (3.5)(c) (West 1999) (allowing recovery only for damages for medical and counseling treatment and costs and attorney fees once the plaintiff reaches the age of 33).

170. *See* COLO. REV. STAT. ANN. §13-80-103.7 (West 1999); 735 ILL. COMP. ANN. STAT. 5/13-202.2 (West 1994); KAN. STAT. ANN § 60-523 (Supp. 1992); OKLA. STAT. ANN. tit. 12, § 95 (1994); VT. STAT. ANN. tit. 12, § 522 (Supp. 1999).

171. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 95(6) (West 1994); VA. CODE ANN. § 8.01-249(6) (West Supp. 1999).

172. Leo, *supra* note 78, at 677.

173. *See Sleeping Memories*, *supra* note 46, at 167. Experts argue:

> It must be acknowledged that the requirement of corroboration might have the effect of unfairly barring valid suits. Imagine the difficulty faced by a survivor of childhood sexual abuse trying to obtain corroborating evidence for acts that occurred ten, twenty, or more years previously. Additionally, survivors may have long since severed all ties with their families, friends, and past, making collection of corroborating evidence difficult or impossible.

Id. To the contrary:

> Actions by adults are arguably in some ways more appropriate for the judicial process. In light of the fact that without an extension of time most victims of CSA are deprived of a meaningful opportunity to sue for their injuries, most courts and legislatures so far have agreed that an extension of time to sue is appropriate.

Williams, *supra* note 50, at 219.

reliability of these recovered memories will be an issue at trial.[174] One lawyer notes: "The judicial policy issue really comes down to whether adult [childhood sexual abuse] actions are, as a general rule, so lacking in probative evidence as to render them unfit for the judicial process."[175]

Considering the difficulty of providing direct evidence for childhood sexual abuse claims and the high number of states that simply apply the discovery rule without additional requirements, the first seven examples of objective verifiable evidence provided by the South Carolina Court of Appeals appear rigid. However, the final example provided by the Court of Appeals which allows for a "proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred"[176] will advance the most litigation of childhood sexual abuse claims in the South Carolina courts and give the greatest deference to trial court judges. Moreover, allowing claims to advance that comprise of a "proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred" is consistent with the policy reasons behind applying the discovery rule to childhood sexual abuse cases. Further, plaintiffs who wish to litigate claims under the discovery rule in South Carolina are not required to meet such demanding, objective standards.

C. The Expert Witness Requirement

Many courts and legislatures advocate the testimony of an expert witness during trial to explain the ambiguous nature of RMS to the jury. In *Moriarty* the court of appeals required an expert witness in childhood sexual abuse cases to prove the allegations of repressed memory.[177] The court noted the importance of expert testimony since "repressed memory syndrome is an area which is outside the common knowledge and experience of most lay persons."[178]

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174. *See* McAlister, *supra* note 80, at 77.

175. Williams, *supra* note 50, at 219.

176. *Moriarty*, 334 S.C. at 171, 511 S.E.3d at 710.

177. *Id.* at 173, 511 S.E.2d at 711.

178. *Id.* (citing Spartanburg Reg'l Med. Ctr. v. Bulso, 308 S.C. 322, 417 S.E.2d 648 (Ct. App. 1992)). The court of appeals noted the authority of a trial judge to qualify an expert witness according to Rule 702 of the South Carolina Rules of Evidence which provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." S.C. R. EVID. 702. *See also* Armstrong v. Union Carbide, 308 S.C. 235, 238, 417 S.E.2d 597, 599 (1992) (holding that in that case "expert testimony was important because the medical effect of inhalation of ethylene glycol is not a matter within the common knowledge and experience of most individuals").

Other courts also require expert testimony in RMS cases.[179] Expert witnesses are valuable because they emphasize the extent of scientific knowledge concerning memory and its accuracy of recalled events, as well as external factors and surrounding circumstances which may influence memory.[180] In *State v. Hungerford*,[181] the New Hampshire Supreme Court held the testimony of the plaintiffs concerning RMS "could not be understood by the average juror without the assistance of expert testimony. Their memory of the events described above, according to the theory, has undergone a physiological process unlike ordinary memory, with which an average juror would be familiar."[182] One professor also notes:

> [T]he concept of repressed memory is likely to be beyond the ordinary experience and understanding of the average juror. Yet, at the same time, because the concept of recovered memory is so intuitively plausible and because American society is currently so obsessed with allegations of childhood sexual abuse, cases based on highly questionable repressed memories are unusually fraught with the potential for wrongful conviction. If there is one psychological issue which requires scientific knowledge to be properly understood, it is the concept of repressed memory.[183] Certainly expert witnesses can be vital in determining the outcome of the case, as the expert's perspective on memory and its recovery may be influential.[184]

However, the expert witness requirement may be a useless burden on the plaintiff if viewed as merely an additional cost in proving the case. Judge

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179. *See, e.g.*, Shahzade v. Gregory, 923 F. Supp. 286, 287 (D. Mass. 1996) ("The Court acknowledges the appropriateness of an expert in this type of case . . . ."); Barrett v. Hyldburg, 487 S.E.2d 803, 807 (N.C. Ct. App. 1997) (ruling on a motion in limine that the "plaintiff may not proceed with evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression"); State v. Hungerford, 697 A.2d 916, 921-22 (N.H. 1997) ("[E]xpert testimony is required when the issues in a case are particularly esoteric or when the matter to be determined by the trier of fact is so distinctly related to a particular science, occupation, business, or profession that it is beyond the ability of the average layperson to understand.") (citation omitted);. *But see* McAlister, *supra* note 56, at 71 (citation omitted) (noting defendants have challenged the expert witness testimony in some RMS cases by "raising scientific arguments to exclude both lay witness testimony and expert testimony").

180. *See Sleeping Memories*, *supra* note 46, at 172-73.

181. 697 A.2d 916 (N.H. 1997).

182. *Id.* at 922.

183. Leo, *supra* note 78, at 681.

184. *See* PENDERGRAST, *supra* note 66, at 93 ("In court, 'expert' psychological witnesses such as Lenore Terr of Elizabeth Loftus have swayed juries toward crucial decisions. Because of such testimony, innocent people may have been jailed or fined, or the guilty may have gone free.").

Howell noted in his opinion in *Moriarty* that "[t]he majority opinion clearly imposes an additional burden on plaintiffs in repressed memory cases by requiring expert testimony to establish the fact of the plaintiff's repressed memory."[185] Judge Howell goes on to state: "if circumstantial evidence is sufficient to satisfy the corroboration requirement, the requirement [of an expert witness] becomes meaningless."[186] However, though expert witnesses do come at a price, the risk of the jury not understanding the implications of RMS is a far weightier matter. The primary purpose of an expert witness in a trial is to assist the trier of fact. RMS is a complex and controversial area that must be fully explained to the jury. Further, "defendants have a right to an impartial jury, and one informed about the difficult authenticity issues surrounding previously repressed memories."[187]

VI. CONCLUSION

Sexual abuse cases embody controversial issues and are often characterized by an insufficiency of evidence. By adding decades of time between the abuse and litigation, the theory of Repressed Memory Syndrome only increases the sensitivity of the subject. Caution is imperative in this context because the therapeutic techniques used to recover memories can lead to the "recovery" of false memories. Further, a false accusation of sexual abuse may virtually destroy a person's life.

Prior to *Moriarty*, South Carolina recognized several of these concerns through its courts, which denied relief to a childhood sexual abuse victim suffering from Delayed Stress Syndrome, and through its legislature, which buried a proposed bill providing additional relief to childhood sexual abuse victims in a committee. The Fourth Circuit Court of Appeals also refused to extend South Carolina's statute of limitations for childhood sexual abuse cases without the leadership of the South Carolina courts or legislature.

Yet the American Psychiatric Association has since recognized Dissociative Amnesia as a valid theory. Many studies and research now support the theory of RMS. Further, the majority of states now apply the discovery rule to childhood sexual abuse cases, notably without additional requirements. At its core, the South Carolina Court of Appeals's decision in *Moriarty* effectively recognized the advancement in medical understanding regarding RMS as well as its treatment in other states and has thus balanced the need for legal relief for victims of RMS by providing them with the opportunity to litigate their claims, provided that the claims are supported by objective verifiable evidence.

Notably, few states have initiated this exception to the statute of limitations through the courts. Most states have relied on their legislatures to change this

185. *Moriarty*, 334 S.C. at 175, 511 S.E.2d at 712 (Howell, J., concurring in part, dissenting in part).

186. *Id.*

187. *See Sleeping Memories*, *supra* note 46, at 173.

area of the law. Though it is quite appropriate for the South Carolina Court of Appeals to initiate this exception, it would be wise for the General Assembly to follow through with a statutory application of the discovery rule to childhood sexual abuse cases. Regardless, the application of the discovery rule to childhood sexual abuse cases is an important progression for South Carolina because valid claims of childhood sexual abuse, supported by objective verifiable evidence and expert testimony, should be litigated.

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