IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JASON KELLER,	:	
	:	**C.A. No: 11C-03-015 (RBY)**
Plaintiff,	:	
	:	
v.	:	
	:	
LARRY MACCUBBIN, and	:	
JAMES M. BENNETT,	:	
	:	
Defendants.	:	

Submitted: February 21, 2013
Decided: April 30, 2013

Upon Consideration of Defendants' Revised
Motion for Summary Judgment
GRANTED

ORDER

Thomas C. Crumplar, Esq., Jacobs & Crumplar, P.A., Wilmington, Delaware and Stephen Neuberger, Esq., The Neuberger Firm, Wilmington, Delaware for Plaintiff.

Roger D. Landon, Esq., and Kelley M. Huff, Esq. Murphy & Landon, Wilmington, Delaware for Defendants.

Young, J.

DISCUSSION

We are confronting here a situation where Plaintiff has made a claim that he was the victim of tortuous activity of Defendants, the completion of which occurred some 20 years before the claim was legally asserted. On the face of that, of course, Plaintiff's claim would be long time barred. On that bases, Defendants moved to have Plaintiff's claim dismissed. That motion ultimately led to a thorough *Daubert* hearing regarding Plaintiff's proffered expert testimony, which concluded with the rejection of the expert's testimony on the subject of when any repression existed.

Plaintiff has asserted that, the foregoing notwithstanding, his claim is not time barred. His position is founded on the basis that facts, while disputed, nevertheless exist that support the claim that, prior to the expiration of the otherwise limiting time frame, his memory of the event was repressed. Thus, he says, his claim would not be barred until two years had passed after the recovery of his previously repressed memory, within which time Plaintiff did perfect his claim.

For Plaintiff's theory to prevail, he must prove three things: (1) that his memory was, in fact, repressed; and (2) that it was repressed within 2 years of the event; and (3) that it stayed repressed until a period within 2 years of his making his claim.

For the purposes, Plaintiff has satisfied the first criterion to the extent of creating a jury issue.

Because of this and other decisions, Plaintiff has not been called upon to

confront the third criterion.

As to the second criterion, This Court has held that Plaintiff's proffer of expert evidence relative to the timing of Plaintiff's repression fails to meet the necessary standards for admission into evidence.

As a result, Defendants have re-asserted their Motion to Dismiss on the position that, without such expert testimony to establish – at least to the point of jury presentation – the timing of the repression within 2 years of the alleged event, the Plaintiff perforce has failed to create any, even arguable, exception to the statute of limitations bar to his claim.

Plaintiff asserts that, despite the absence of expert testimony on the timing, facts exist which would permit a jury to conclude that the repression did take place within the 2 years following the alleged tort. That evidence, Plaintiff asserts, is the record extant related to Plaintiff's arrest shortly after the alleged conduct, which indicates that Plaintiff was asked if he'd ever been sexually assaulted as of that time, to which Plaintiff responded in the negative. That, Plaintiff claims, is evidence that the repression had occurred as of that point (a point which is admittedly well within 2 years of the alleged torts).

Defendants respond that Plaintiff's proposal is ethereal. The notation in the paper record of Plaintiff's denial could be incorrect; or could indicate that no such activity ever occurred; or that Plaintiff simply forgot to mention it; or that Plaintiff did remember it, but elected not to admit to it; or that Plaintiff did not consider anything that occurred to be abusive; or other possibilities in addition to Plaintiff's memory having been traumatically repressed.

Plaintiff, though, points out that, all of the foregoing notwithstanding, it could mean that, as of that point, the memory had been repressed. If that were the case, Plaintiff adds, a ruling that prevented Plaintiff's extrapolation would effectively debilitate the use of repressed memory as a concept – a concept which has been accepted in the past. That is the case, Plaintiff says, because this Court has held that the expert testimony proffered by Plaintiff (and examined at length in the *Daubert* hearing, which yielded the prior Order to this Court) has been rejected.

Two facts might be mentioned: first, while the repressed memory concept has been accepted by some trial court decisions, it has not yet been tested on appeal; second, while Plaintiff's expert was not able to withstand *Daubert* examination, perhaps others could. All of that aside, the crucial fact is that, in this case, we have circumstances requiring expert testimony by the Plaintiff to get the concept of repressed memory to a jury, but do not have that regarding the critical – in this case – point of when it existed.

The one possibility suggested by Plaintiff is far too speculative, given the plethora of other at least equally possible ruminations.

Hence, Plaintiff has a claim first asserted many years after the expiration of the applicable statute of limitations of actions. To survive Defendants' Motion, Plaintiff must demonstrate that his case is excepted from the normal operation of that statute. To do so, he has raised the distinction of memory repression. For that theory to exist, he must show not only that it existed, but that it existed from a point prior to the expiration of two years post alleged incident through a point not

more than two years prior to his filing of this claim.

As previously found, Plaintiff is unable to do that through his proffered expert. Additionally, he cannot do it through speculation among factual possibilities.

Accordingly, Defendants' Motion is well taken and **GRANTED**. Plaintiff's case is **DISMISSED**. _____

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
Opinion Distribution
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