IN THE
MISSOURI SUPREME COURT

STATE ex rel. MARIANIST PROVINCE OF THE UNITED STATES,	)	
	)	No. SC88779
Relator-Defendant,	)	
	)	St. Louis County, Missouri
	)	Judge John A. Ross
vs.	)	Circuit Court Cause No. 06CC-000008
HONORABLE JOHN A. ROSS, JUDGE, CIRCUIT COURT, COUNTY OF ST. LOUIS, DIVISION 15,	)	
Respondent.	)	

BRIEF OF RESPONDENT
THE HONORABLE JOHN A. ROSS

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SUPPLEMENTAL STATEMENT OF FACTS

A. Introduction.

As this Court observed in *Powel v. Chaminade*, 197 S.W.3d 576, 586 (Mo. banc 2006), in determining whether certain conduct would place a reasonably prudent person on notice of a potential harm, the plaintiff's "situation" (i.e. the circumstances and context in which the conduct occurs) must be considered. This point is crucial to resolution of the statute of limitations issue in this case because Relator advocates viewing the underlying conduct that plaintiff Visnaw has always remembered in a complete vacuum, without any regard to the context and circumstances in which the conduct occurred.

As Relator points out in its Brief, plaintiff admits always remembering certain ***non-sexual*** details from assisting Brother William Mueller with "psychological experiments" in 1984 and 1985 while an underage student at Vianney High School, including being asked to assist with the experiments, being blindfolded, being asked to hyperventilate, having a knife-like object placed to his neck, and once being asked to strip down to his underwear. *See*, Relator's Brief, p. 11. Relator maintains that this constitutes irrefutable proof that a reasonable person would contemporaneously be placed on notice of a potential harm by being subjected to and always remembering such conduct. *Id*. at pp.18-24. If this conduct were to be viewed in a complete vacuum without regard for the context and circumstances in which it occurred, Relator's argument might have merit.

However, Relator ignores certain critical facts that provide proper context for that conduct and which underpin the trial court's finding that a genuine dispute of material fact exists as to whether the statute of limitations bars plaintiff's claims, thus justifying denial of

summary judgment. For example, Relator failed to provide this Court with certain crucial pieces of undisputed evidence adduced during discovery such as:

- The fact that Brother Mueller was plaintiff's trusted and admired assistant principal and religious mentor at Vianney High School, where he approached plaintiff, then a student, and requested his assistance with legitimate psychological "experiments" he was conducting for a master's degree, with Relator Marianist Province's permission (i.e., this was not some stranger who grabbed plaintiff off the street and began doing strange things to him without explanation or consent);
- The fact that prior to ever touching plaintiff, Brother Mueller explained what he would be doing to plaintiff and why (that he needed to do certain unusual things to him in order to test his "fear" and his various reactions to the conduct);
- The fact that until 2005, everything plaintiff remembered occurring during the "experiments" was completely ***non-sexual*** in nature and always occurred at the school under the pretense of Brother Mueller's legitimate "experiments";
- The fact that this conduct toward plaintiff occurred during a period of time (early to mid 1980's) before priest abuse scandals became widely publicized.

- The fact that Brother Mueller's "experiments" were not legitimate but rather were elaborate ploys to sexually abuse young men while they were rendered unconscious; that he perpetrated this ploy on many other unsuspecting young men over a period of decades, and that <u>all</u> of these now grown men who gave depositions in this matter testified that they too

had sincerely believed that they had participated in legitimate scholastic endeavors at the time the conduct occurred;

- The fact that plaintiff's treating psychologist (the only psychological expert to testify in this case) stated his opinions that (1) plaintiff did not consciously recollect the sexual abuse until 2005; and (2) objective young men in plaintiff's situation would have likely trusted and accepted Brother Mueller's representations as legitimate, as plaintiff did; and,
- The fact that Relator's own representatives (including the former head of the Order) testified that it would be reasonable for young men in plaintiff's situation to have trusted and accepted Mueller's representations as legitimate.

These are just some of the facts that Relator failed to provide this Court that Respondent considered in denying summary judgment, and which establishes that given the ***situation*** in which the underlying conduct occurred, different or contradictory conclusions may be reasonably drawn from the evidence as to whether the statute of limitations has run, thus making it a question of fact for the jury to decide. *Powel*, 197 S.W.3d at 585-586.

B. Background to Plaintiff Visnaw Assisting Brother Mueller With His Psychological "Experiments."

Plaintiff Robert Visnaw was raised in the Catholic faith and was taught to trust and respect his religious authorities. *See*, Relator's Appendix, Vol. 1 ("RA1"), p. 70. He was a student at Vianney High School in St. Louis between 1981 and 1985. During that time, Brother William Mueller, a member of Relator Marianist Province was the assistant principle of Vianney. *See*, RA1 at 272.

One day while at Vianney, Brother Mueller approached Robert and asked him for his assistance. He told Robert that he had been brought to Vianney to determine why other Brothers had been leaving the Marianist Order. *See*, RA1 at 64. Brother Mueller further told Robert that he had been given permission by the Marianist Order to enlist students to help him with his work on his Master's degree. He stated that the thesis of his Master's degree dealt with the psychological issue of "fear." Prior to ever touching Robert, Brother Mueller asked him if he would be willing to help him with this scholastic endeavor, including participating in "experiments" that involved being rendered unconscious. Given the ***context*** in which this request was made (i.e. a trusted religious and educational figure requesting assistance for an allegedly legitimate scholastic endeavor), Robert consented. *See*, RA1 at 64; 70.

Robert subsequently assisted Brother Mueller at the school with approximately four "experiment sessions." He has always remembered the ***non-sexual*** details of these experiments, such as being blindfolded, being asked to hyperventilate and become unconscious, being asked to put gel in his hair, having a knife-like object placed to his neck, and once being asked to strip to his underwear. However, until 2005 Robert ***always*** viewed this non-sexual yet unusual interaction completely within the context of Brother Mueller's legitimate psychological experiments as had been previously explained to him by Mueller, and never believed the conduct had been improper. *See*, RA1 at 297-311. In 2005, after undergoing counseling with a licensed psychologist, plaintiff consciously recovered

memory for the first time of having been genitally ***sexually*** abused by Brother Mueller during two of the experiment sessions. *Id*.

C. <u>Circumstances and Context of the Psychological "Experiments" with Brother Mueller</u>.

With respect to the details of the experiments and the context in which the interaction with Brother Mueller occurred, Robert testified as follows:

Q: What happened at that first incident?

A: We went into his [Brother Mueller's] office, and he asked me -- he'd gone through the same thing he had said before is that the reason he was actually brought to Vianney was to try to find out why brothers were leaving the order, that he was put there by the order itself to talk to them as -- find out why are these people leaving the order when they shouldn't be, when everything seemed to be happy-go-lucky then. ***So he then said he had the permission of the order to use students to complete his master's degree, and he explained that it was a thesis on fear and the, you know, various types of fear, what was being done***. He had asked me if I'd ever been -- I'd ever passed out, and I said no. He asked if I'd ever been rendered unconscious, and I said no. ***He goes, well, I can do that. Do you have any problem with that?*** No, I don't.

See, RA1 at 64.

Q: This first situation or first incident, have you explained it completely?

A: To the best of my recollection, yes.

Q: Have you always recalled what happened at that -- on that instance?

A: ***I've always recalled the passing out and waking up with the questions, but I've always recalled it as part of the quote/unquote test or experiments***.

See, RA1 at 65.

Q: Did you consider or after you left that night, did you consider the incident to be -- I mean, did you believe it was a test or experiment?

A: I believe -- pardon me. I believed it right up until September of 2005 that that's what it was. I had no reason to believe otherwise.

Q: You mean every incident was?

A: I thought every incident of -- out of the four sessions that I partook of was done as part of his master's degree.

Q: ***As far as you could tell, did it seem to be a bona fide type of series of tests to you?***

A: ***At 17 years old, I took him at his word. I mean, he was the assistant vice-principal. He was part of the order that was instructing me, giving me a great education. I had no reason to believe otherwise***.

Q: Did you find any of the -- anything that occurred on that first instance to be or first incident to be physically offensive to you?

A: No.

Q: Harmful to you?

A: No.

Q: Injurious to you?

A: No.

See, RA1 at 65-66.

Q: Did you -- did you mention to your dad during that three day trip [together in 1991] that William Mueller had held a knife to your throat?

A: No.

Q: Did you mention to your dad during the three day trip that he asked you to take your clothes off [down to your underwear]?

A: No.

Q: Did you mention to your dad during that three day trip that he had blindfolded you with [sic]?

A: No.

Q: You knew that at that time, though?

A: ***I knew that as part of the master's degree program that he was working on, yes***.

See, RA1 at 86.

Q: I'm talking about, you know, as a result of any of these incidents which you've described as assaults and batteries that took place in 1984, did you receive any medical treatment or counseling or care at that time?

A: In 1984 or 1985?

Q: Right.

A: No.

Q: Did you -- did you notice anything about your body in the form of an injury after any of these incidents?

A: No.

See, RA1 at 87.

Q: You knew that -- you've always known that he [Brother Mueller] took you through these experiments and made you pass out?

A: That's been established.

Q: ***And you knew that was wrong when he did that?***

A: ***No, I didn't***.

See, RA1 at 91.

Q: You thought it was okay for an adult to make you pass out at age 17½? That's your testimony?

A: ***At the age of 17, 17 ½, an individual who's in a position of authority in my school who's also a man of the cloth comes to me and says I need your help conducting my master's program and I have the okay of my superiors to do so, yes, I thought it was okay***.

Id.

Q: You never thought anything wrong had occurred to you up until September 2005?

A: That's correct.

See, RA1 at 107.

Q: Up to September 2005, to the extent that you remember what occurred, and you've already talked about that, you never thought any of that [the *non-sexual* interaction with Mueller] was wrong?

A: That's correct.

Id.

Q: Okay. So what happened [during the fourth and final incident]?

A: [Previous inapplicable testimony omitted]…And we went in -- we went into the hallway there, and he said, you comfortable? I'm like, yeah. ***He says, well, as part of the experiment, would you have any problem with taking your clothes off down to your underwear? Well, why do you want that to happen? He said, well, its part of the test if you're comfortable. If you are afraid to do so, that would be fine, because that would be one of the responses that we would elicit. And I said, no, if it's -- nothing's going to happen, you know, no big deal. So I did.***

See, RA1 at 78.

Q: Did you find that [Brother Mueller placing a knife-like object to your neck] to be an offensive action by him?

A: ***I found it to be strange, but when I questioned him, again, he covered it up under this is all part of the test. This is everything that we -- your fear is understandable. That's what I'm testing for. That's what I'm working on with my thesis.***

See, RA1 at 79.

D. <u>Circumstances of Plaintiff's Realization That He May Have Been Sexually Abused by Brother Mueller</u>.

The undisputed evidence in this case establishes that it was not until at least September 2005 that Robert began to realize there was cause to believe that he may have been *sexually* abused by Brother Mueller. Robert testified as follows:

Q: Okay. And you didn't recall it until those newspaper articles in September of 2005 [alleging sexual abuse against Mueller by other former students], did you?

A: I had always known about the sessions, and I had always looked at those as part of his testing process for his master's degree. It wasn't until September of 2005 that I realized what was really going on as part of those.

Q: So in September 2005 is when you realized that you'd been sexually abused?

A: That's when I realized at least there was cause to believe that I was.

See, RA1 at 74.

Q: Now my question is you found out about Brother Mueller [allegedly sexually abusing other young men] in September of 2005?

A: Correct.

Q: Okay. And just from what you read in the paper, did that make you believe you were sexually abused?

A: It made me aware that there was reason for me to believe that I was and that I needed to seek the answers to either confirm or deny that.

See, RA1 at 85.

E. <u>Plaintiff's Conscious Recollection of the Sexual Abuse</u>.

In the second of the four "experiments" that he assisted Brother Mueller with, Robert now recalls waking up from unconsciousness as Brother Mueller was massaging Robert's

genitals with one hand while Mueller was masturbating himself with the other hand and making moaning sounds. *See*, RA1 at 72; 75. Robert did not regain conscious memory of this *sexual* abuse until at least September 2005 and after undergoing counseling with his psychologist, Dr. Harris. Specifically, Robert testified as follows:

Q: And is this [the sexual abuse] something that you recalled at the time [it occurred]?

A: No. I mean, as far as what had happened?

Q: Yes, sir.

A: ***No. I didn't -- this didn't come to light until I was going through my counseling in September of 2005***.

Q: This didn't -- you didn't remember it?

A: No, I did not.

Q: So you think, what, you repressed it?

A: Based upon the definition of repressed memory that I've been told since I started counseling, yes.

See, RA1 at 72-73.

Q: Well, let me ask you about that. On the date of the second incident, you recalled that he was fondling you now? I mean, you've testified to that?

A: Yes, sir.

Q: And did you recall on the day it occurred that it happened?

A: In the fact that it happened then, I would have to say I know that it happened. But, again, as far as did I consider myself molested or along those lines? Is that what you're trying to get at?

Q: No. What I'm asking you is on this date -- I think the second incident took place in November [1984]?

A: Early November, yes.

Q: And that's the first incident where you can testify that there was sexual contact?

A: Correct.

Q: All right. And what you told me was that when you came to, you realized that he was massaging your genitals?

A: Uh-huh.

Q: That's true?

A: Yes, sir.

Q: That's what you recollect?

A: Yes, sir.

Q: And you heard him moaning also, and he actually had his hand on his penis?

A: Yes, sir.

Q: Was he touching you above or below your underwear?

A: His hand was actually underneath my pants. I had a sweat suit on with gym shorts on because I had come straight from practice. My actual school clothes were still in the car because I didn't feel like getting them all wet from practice.

Q: Okay. So what you recall now is him actually physically touching your penis and his own penis, his right hand on himself, his left hand on you?

A: Yes, sir.

Q: Did you remember that as you drove home that night?

A: No.

Q: Okay. Did you remember it as you walked out to your car that night?

A: That -- after that episode and the fourth episode [of sexual abuse], a lot of things that happened were kind of a blur for me.

Q: What do you mean a blur?

A: As if it was surreal. I'm looking at it from an adult standpoint now trying to articulate it as a 17 year old. It was almost as if it didn't -- I can't -- here I am walking out. I'm afraid. Did it really happen? I'm starting to tell myself, okay, that just didn't happen, that just didn't happen. So I convinced myself that it didn't. ***And it wasn't until I went through counseling [in 2005 and 2006] that it came out that yes, it did happen and you buried it so you didn't have to relive it again.***

Q: Well, let me just make sure I understand what you're telling me here. In other words, after it occurred, you recognized what occurred? You knew it happened, and you appreciated it happening?

A: No. What I'm saying is that from the time that I went into the locker room until the time that I -- the next recollection I have after being made to pass out is him saying how long were you out, are you afraid, and the answers that I gave at that point then leaving. Until I went through counseling and really started examining everything in

my own mind why things were happening did I realize that there was a part that was missing that I couldn't account for in my own mind from the time that I was waking up until the time that I was fully cognizant of what was going on around me. That was missing, and that came though counseling.

See, RA1 at 84-85.

Q: Okay. And what you did after that is in your mind you said -- you convinced yourself what just happened did not happen?

A: That's what I said. And what I mean by that is from the time that it happened for 20 years, if you were to ask me, tell me about the sessions that you had with Brother Mueller, that was something that would never even come to my mind to relate to anybody.

Q: So it happened, and then you consciously suppressed it is what you did?

A: I don't know if it was consciously or subconsciously, but I can tell you that until I sat down with my counselor and started going through -- you know, not reliving everything but just openly discussing it and having time to reflect on what happened, there was a time period that was lost, and it was found.

See, RA1 at 85.

Q: Was it only as a result of counseling then that you have come to a conclusion that you were sexually abused?

A: I have come to the realization that I was sexually abused. There's no conclusion involved.

Id.

In the fourth and final "experiment" with Brother Mueller, Robert now recalls that Mueller put his hand down Robert's underwear and massaged his genitals; Robert also recalls now that after being rendered unconscious he awoke with an erection. *See*, RA1 at 77-80. Robert did not regain memory of this sexual abuse until at least September 2005 and after undergoing counseling with Dr. Harris. *See*, RA1 at 79-80. Robert testified further as follows:

Q: And did you also always remember waking up on one occasion [the fourth occasion] with an erection? Did you always remember that?

A: No, sir.

Q: That's something you forgot?

A: Yes.

Q: Did you --

A: I think the word forgot in that particular instance is a bad word to use. It was just something that I either suppressed or chose not to recall through some state. Knowing -- having it surface since all this has come about, I believe that it wasn't forgotten. It was definitely buried deep enough to where I didn't have to relive it.

See, RA1 at 84.

F. Plaintiff's Post-"Experiment" Conduct Toward Brother Mueller.

Robert did not find it odd that Brother Mueller told him not to tell anyone about the "experiments" because Robert trusted Mueller as a religious authority and accepted his Master's degree explanation. After the last "experiment" session with Brother Mueller

ended, Robert never consciously or purposely attempted to avoid Mueller. Robert testified as follows:

Q: ***Did you think that was odd at all [that he told you not to tell anyone about the experiments]?***

A: ***No, I didn't, because here's a man that I -- because of his position and what he did, he was religious. You know, we're taught from knee high catechism classes that you should be able to trust somebody***.

See, RA1 at 70.

Q: Did you think that was odd at age 17 ½ that somebody would give you that direction?

A: At age 17 ½ presented with -- the way it was presented to me?

Q: Yes, sir.

A: No.

Id.

Q: Do you remember that, talking to him [to Brother Mueller following the incidents]?

A: Talking to him?

Q: Sure.

A: Yeah, I do. I mean, talking to him after this happened, I remember it now. I didn't remember it in conjunction with what happened [sexually]. Talking to him and just, you know, him being the person to try to calm me down from what just happened, ***reassuring me that this was part of the process for him to get his master's degree, that this -- you know, Bob, I told you this is a study in fear, and that's the feeling that I wanted to provoke***.

See, RA1 at 73.

Q: Whose decision was it that that [the fourth session] was the final session?

A: That was mine.

Q: Why?

A: Because we were getting close to graduation. I had other things -- this would have been in -- it was after the state diving competition, so I want to say late February, early March. There was lesser and lesser contact with him at school, and I was trying to get into colleges. I was making applications and whatnot.

Q: Were you trying to avoid him?

A: No, not intentionally, but maybe subconsciously yes, but I wasn't trying to avoid him, you know, see him in the hallway and turn around and walk the other way. I just went about my business at school.

Id.

Q: Did you ever have any other incidents with William Mueller on any occasion after that [fourth incident]?

A: No, sir.

Q: Did you avoid him?

A: Consciously, no, I did not.

Q: Did you avoid him?

A: I did not go out of my way to avoid him.

See, RA1 at 80.

Q: Did you consider him [Brother Mueller] to be a friend of yours during that time period that you were writing him [following high school]?

A: I wouldn't say a friend. I looked at it as somebody that I had developed a relationship with because of, you know, thinking that I was part of his master's degree and he wanted to continue with the communication.

See, RA1 at 67.

G. <u>Testimony of George Harris, Ph.D.</u>

Dr. Harris is plaintiff's treating psychologist. He is the <u>only</u> psychological expert to testify in this matter (Relator did not identify any experts nor seek an independent medical examination). In a lengthy footnote in its Brief, Relator grossly mischaracterizes Dr. Harris' testimony, including omitting follow-up testimony that fully and accurately explains his opinions in this matter. *See*, Relator's Brief, p.17, fn.2.

Contrary to Relator's distortion of his testimony, Dr. Harris is more than qualified to render expert psychological opinions in this matter, including his unequivocal opinions that: (1) Robert did not obtain conscious recollection of the ***sexual*** abuse by Brother Mueller until 2005; and (2) a majority of young men in Robert's circumstances would objectively react in the same way as Robert (i.e., would trust and accept Mueller's representations and

not be placed on notice of harm) to the ***non-sexual*** interaction Robert has always remembered.[1]

In this regard, Dr. Harris testified as follows:

Q: Doctor, let's see if we can maybe bring this to a head here and get you taken care of. Mr. Visnaw is your patient obviously?

A: That is correct.

Q: And you understand that he has reported to you having been subjected to overt genital sexual abuse by William Mueller while a student in high school in the 1980's, correct?

A: That is correct.

Q: And he has reported that to you since the time you started treating him, which would have begun in November of 2005 is that correct?

A: That is correct.

Q: ***Have you formed an opinion as to when Robert first obtained conscious recollection of that overt sexual abuse?***

A: ***It is one of those questions that probably is best answered by an expert witness. I will be happy to respond to it.***

Q: Please.

[1] Dr. Harris' resume and qualifications can be found in Relator's Appendix, Volume 2, ("RA2"), pp. 375-402.

A: When Robert came in he told me that he had read these newspaper articles about Brother Mueller. And I don't recall the exact date of the newspaper articles, but it was just relatively briefly before he came to see his primary care doctor and then to see me. ***And I believe it was those newspaper articles that stimulated him to suspect that he had been sexually abused***. And then after he began seeing me, he believed that he remembered additional things about the abuse. As he thought about it, and as he attempted to recall, he believed that he remembered things that he had never previously remembered. ***And so my operating assumption has been that his realization of being sexually abused occurred after reading the newspaper articles [in 2005].***

See, RA2 at 362.

Q: So this is sort of a related question. Have you formed an opinion as to the moment, then, that Robert would have -- I want you to use a term you are comfortable with. But appreciated or ascertained that he had been sexually abused by William Mueller?

A: ***Yes, about the same time [2005]***. I think that it was the information and the newspaper articles that sent a shockwave of anxiety through him. ***And that's really when this whole thing started for him***.

Id.

Q: You understand the ***context*** in which these experiments took place between Bob and Brother Mueller. What I mean by that is, you understand that this was at his high school?

A: That's what he told me.

Q: And you understand that this was a religious authority over Bob?

A: That is my understanding.

Q: And did he explain to you that this gentleman Mueller, this Brother Mueller approached him that this was going to be a psychological experiment and he needed his assistance and that it was legitimate, and that sort of background that he provided to Robert before the experimentation?

A: That's how Robert explained it to me.

Q: Have you formed any opinions relative to the fact that if it was done in that context, that would cause a young man like Robert to accept at face value what he had been told by a religious authority?

A: ***Yes. I think that that is how this sort of thing happens all the time***. I think that young people from childhood up through teen years, and really even into adulthood, trust authority figures.

See, RA2 at 363.

Q: If I were to point out that Robert has always been consciously, has always consciously recalled the non-sexual parts of the experiments, okay. Such as being tied-up, such as being told he is going to be part of a psychological experiment, things like that, he has always remembered that.

A: Right.

Q: Always recalled that. If I were to suggest that that alone should have been enough for this young man to appreciate that he was being sexually abused or exploited, would you agree with that?

A: ***No.***

Q: Why?

A: ***He would just accept that Brother Mueller was doing a psychological experiment and he would trust him***.

Q: And is that something that would be subjective to Robert Visnaw or something in your experience would be an objective response of young men in his position?

A: ***I don't know what percentage I would put on it, but I would say a large percentage of young people would just accept the authority's explanation***.

See, RA2 at 363.

Q: ***Let's talk on the logical objective basis***.

A: Looking at it from the perspective of a 56-year-old man, me, when I see high school kids whose teachers are taking them in and doing strange experiments with them or taking them on long fishing trips or camping excursions, the suspicious part of me says, "What's up with that?" ***Would I expect that kind of cautiousness from a 17-year-old? No, I wouldn't***.

See, RA2 at 364.

H. Testimony of Father Thomas Doyle.

Father Thomas Doyle is an internationally recognized expert in the field of clergy abuse.[2] He is an ordained Catholic priest and is plaintiff's retained clergy abuse expert in this matter. Underscoring the importance of appreciating the context in which the conduct with Brother Mueller occurred, Father Doyle testified in part that:

> They [defendant Marianist Order] should have been aware of the fact that in ***Catholic culture***, it's commonly known that members of religious orders, be they priests or brothers, are held in a position of very high esteem. ***They're held in a position of great respect and a tremendous amount of trust is requested and required of lay people and students in the brothers or the priests***…. but basically as a religious, as a consecrated person, as one set apart, in general, lay people oftentimes intermingle the two and have the -- ***they see them as, you know, special emissaries of God, as representatives of the Lord, as men set apart because they take vows, they dress differently, they live in community, and they are to be accorded a very high degree of respect***.

See, RA2 at 496-497.

I. Testimony of Similarly Situated Individuals.

[2] Father Doyle's resume and qualifications can be found in RA2 at 489-495; 498-504.

The entire basis of Relator's argument is the contention that there is no genuine dispute of material fact that any reasonably prudent young man in plaintiff Visnaw's circumstances would have been placed on notice of a potentially actionable injury at the time the seemingly legitimate and non-sexual interaction (i.e. assisting with allegedly legitimate psychological experiments that included blindfolding, being rendered unconscious, having a knife-like object placed to the neck, etc.) occurred with Brother Mueller. *See*, Relator's Brief, pp.11-12.[3]

Despite the fact that Mueller deceived dozens of young men to participate in his "experiments" over three decades, Relator has not brought forth any individuals who were subjected to similar conduct by Mueller and admit knowing or suspecting that the conduct was improper. Conversely, several individuals have given depositions to the contrary, that being that they were subjected to similar conduct by Brother Mueller and did not find the seemingly legitimate and non-sexual conduct to be improper at the time it occurred. These individuals include:

1. Harry Suda: Mr. Suda is not a party to any lawsuit involving Brother Mueller. He participated in "psychological experiments" with Mueller in 1965 and 1966 while a student at Vianney. He testified in part as follows:

[3] It is significant to note that Relator does not and cannot provide any evidence that contradicts plaintiff Visnaw's contention that he did not obtain conscious recollection of the ***sexual*** abuse until 2005.

Q: And when he [Brother Mueller] told you that [he needed help on a psychology doctoral thesis] and requested your assistance what was your impression at that time?

A: ***I didn't really think anything of it. You know, I mean, I was very trusting of him I guess and all of the [Marianist] Brothers. Unfortunately, a lot of us were in those days.***

Q: That's what I was going to say, was it your impression that he was being sincere?

A: Oh, of course.

Q: ***Was it your impression that you were, in fact, going to be assisting him with some legitimate experiment?***

A: ***Correct.***

Q: ***And I think you did say that you trusted him?***

A: ***Yes.***

Q: ***And as a Catholic you were raised to trust religious authority figures, weren't you?***

A: ***Yes.***

See, RA2 at 511.

Q: And after that first encounter with Brother Mueller [where you had been rendered unconscious while alone with him] and before the second encounter did you tell anyone about that first encounter?

A: No, I did not.

Q: Was there a reason why you didn't?

A: I think -- I know he asked me not to say anything. Plus, I don't know. Just thought it was strange. Didn't, you know, didn't mention it anything to anyone, no.

Q: He had asked you not to tell anyone?

A: Yes. He said -- kept insisting it was a secret, had to be on the QT, had to be a secret type study. It was a secret study. Didn't want anybody, you know, to know.

Q: ***And you believe you had assisted him in a legitimate experiment*****?**

A: ***Correct.***

See, RA2 at 512.

Q: Okay. And, again, can you explain how that, the second encounter, was initiated from your observations?

A: Similar type situation. ***He just said we needed, you know -- we done it once, we needed to do it at least another time to try to get some type of basis, you know, for the study. He had to do it more than once. So I agreed to it.***

Q: ***And I take it -- well, what was your -- was it your impression he was being sincere at that time*****?**

A: ***Oh, yes, very much so.***

Q: ***And did you still trust him at that time*****?**

A: ***Yes.***

Id.

Q: Okay. And then after the second encounter with Brother Mueller [where you had again been given ether while alone with him] and before the third encounter did you happen to mention to anyone about the first or the second encounter?

A: No, I did not.

Q: ***Okay. At that time did you still believe you were assisting him in a legitimate experiment*?**

A: ***Oh, sure***.

See, RA2 at 512-513.

Q: Okay. And again, can you explain how this third encounter was initiated from your observations?

A: It was initiated similar to the first two in that he wanted to -- try another time to work on the -- the study and needed to try to, I guess, put me out to see what, you know, whatever he was doing.

Q: ***Was it your impression that he was being sincere*?**

A: ***Correct.***

Q: ***Did you still trust him at that time*?**

A: ***Yes.***

See, RA2 at 513.

2. <u>John Doe 12</u>: Mr. Doe 12 is not a party to this lawsuit, but a plaintiff in a claim involving Brother Mueller in the state of Colorado. He participated in a "psychological experiment" with Brother Mueller in 1971 and testified in part:

Q: Did Mueller ever tell you not to tell anyone about that incident [with him]?

A: Well, he had told me right at the get-go, you know, that this is -- this is top secret, highly confidential. He told me that. You know, ***I want you to help me with this project***, and its top secret. If it gets out that this is what I'm doing my master's thesis on, it will ruin the result. ***And to be quite honest with you, I sat through that --***

through the whole thing thinking that -- for several years after that, thinking that he really was working on a master's thesis.

See, Respondent's Appendix, at A-07.

3. <u>Matthew Giegling</u>: A plaintiff in the matter for which Judge Dierker recently granted summary judgment, and which Relator submits as controlling authority. Mr. Giegling has followed ***proper procedure*** and initiated an appeal with the lower appellate court, which is pending. Mr. Giegling participated in "psychological experiments" with Mueller in 1983 while a student at St. Mary's High School in St. Louis, and testified in part:

Q: Tell me about the first encounter.

A: ***He explained to me that he had this project for his -- I want to say it was his Master's Degree*** -- and that part of the research meant that I could not tell anyone that this was happening; that would -- that would ruin the project, basically is what he told me. That would ruin the project and ruin the research. ***And that there were things that he would do that would require my trust.***

Q: Did he tell you what he was going to do?

A: ***Before he would do everything he would explain to me what he was going to do***. He would blindfold me and he would tell me prior to that, "I am going to blindfold you."

See, RA2 at 535.

Q: Reading these articles or these reports that you found that came to light in September 2005, did that rekindle memories for you?

A: Yes.

Q: Did that make your memories clearer or did it confuse memories?

A: It opened up my memories to a whole new light.

See, RA2 at 538.

Q: Whether you knew it was wrongful or not, you remembered what happened to you. It was only in 2005 that you put a wrongful motive to it, is that a fair statement?

A: It was in 2005 that I learned what the allegations were of what he was really doing that, yes, at that point I realized that there was no research project and that there was no Master's Degree and this was some kind of fraud.

Id.

Q: I mean, what happened to you wasn't anything that seemed to embarrass or shame you at the time, did it?

A: I can't say it would have been anything that would have -- at that time that I thought would embarrass or make me shameful of. Did I think maybe something -- that it was weird sometimes, yes.

Q: Okay. And even at the time did you think it was unusual and weird, these experiments?

A: Yeah, I may have thought they were odd, but --

Q: Okay.

A: -- you know, again, ***I had no reason not to trust him. And you went to a Catholic school, too. You know what the Brothers and the Priests -- you looked up to them.***

See, RA2 at 540.

Q: After the incidents involving Mueller took place, and after they stopped but, before he left the school, did you ever take any steps to avoid him for any reason?

A: ***No, because I completely trusted the man***.

See, Respondent's Appendix, at A-56.

4. **<u>Timothy Kluempers</u>:** Mr. Giegling's co-plaintiff in the matter which Judge Dierker recently granted summary judgment, and which Relator submits as controlling authority. Mr. Kluempers too has followed ***proper procedure*** and initiated an appeal that is pending before the Eastern District Court of Appeals. Mr. Kluempers participated in one "psychological experiment" with Brother Mueller in 1983 while a student at St. Mary's and testified in part:

Q: Okay. And the -- you had -- How did Mr. Mueller ask you to become involved in whatever you became involved in? You knew he was principal, you saw him in the hallways. Take me through the scenario on how you and he had conversations which led up to the incident, okay?

A: I don't recall exactly when, but ***he approached me and asked me to help him out. He was getting his Master's in psychology and he had some experiments that he needed to do for his Master's, and he was wondering if I could help him***.

See, RA2 at 550.

Q: And while you were in there and he was conducting this alleged experiment that he claimed, were you ever really afraid for your physical safety that he would harm you?

A: No.

Q: You never feared that he would do anything that would be malicious towards you during this time frame, correct?

A: Absolutely not. I trusted him --

Q: Sure.

A: -- and never felt or thought that he would ever do anything inappropriate.

See, RA2 at 553.

J. <u>Testimony of Relator Marianist Province's Representatives</u>.

Relator's own representatives provided their learned perspectives, based on decades of religious and educational interaction with young Catholic men, as to how a young man in plaintiff's situation would interpret the conduct of Brother Mueller given the ***context*** in which it occurred. Those individuals include:

1. <u>Father Quentin Hackenwerth</u>:

During his deposition taken in this matter, Father Hackenwerth was asked, based upon his vast experience and knowledge relating to Catholic education and religion, how he would expect young men in plaintiff's circumstances to react when confronted with the conduct of Brother Mueller as described by plaintiff and the other similarly situated individuals. Father Hackenwerth's testimony is of particular value and insight, in that from 1971 to 1979 he was the Provincial of Relator Marianist Province (i.e. the head of the Order) and was the ultimate supervisor over Brother William Mueller. Relevant to the issue before this Court, Father Hackenwerth testified as follows:

Q: By way of background, you [would] have been the Marianist provincial over Brother William Mueller from 1971 to 1979; is that correct?

A: That's correct.

See, Respondent's Appendix, at A-38.

Q: And I think you said if you had a teacher and you trusted him -- or you liked him, you would trust him.

A: Yeah.

Q: Is that right?

A: Yeah.

Q: And that's what I'm asking --

A: Well --

Q: ***-- would you have found it unreasonable that these young men would have trusted and believed Brother Mueller when he told them he needed their help on these experiments?***

A: Mm-hmmm. ***No, I would not find that unusual***.

Q: And, actually, I asked unreasonable. Would you find it --

A: ***Unreasonable, no***.

Q: Yes or no?

A: ***No***.

Q: Okay. Now, Father --

A: No.

Q: -- if you would, tell the jury how many years you have been an ordained priest.

A: I was ordained in 1960.

Q: Okay. So --

A: Thirty -- 30 --

Q: Forty-seven.

A: Forty-seven years.

Q: And how many years have you been a member of the Marianist Province?

A: Fifty-nine years. I, I was -- 1948, I made first confession.

Q: So how many years have you been an educator of young Catholic men?

A: I began teaching at St. Mary's High School in 1951. But I have not been -- I have not been a teacher all those years, but I did start in 1951.

See, Respondent's Appendix, at A-48 to A-49.

Q: Okay. I guess why I'm asking that is because I think you had said that, as you understood it, Father -- Brother Mueller was a well liked teacher, right?

A: I think he was, yes.

Q: And I think --

A: He was accepted, he was -- he was liked.

Q: And when I say "well liked," by his students?

A: Yeah. By students, yeah.

Q: Okay. ***And I think you stated that you would not find that unusual or unreasonable that a student would trust Brother Mueller***.

A: ***No.***

Q: Correct?

A: ***No, I wouldn't.***

Q: And including would trust his representations about needing their help for an experiment. Correct?

A: No, I don't know.

[Speaking objection by defense counsel, then instruction by defense counsel to witness to continue answer].

A: Yeah, I, I really don't know. ***I don't think I would find it unusual that -- that -- that students would -- would do that --***

Q: Would trust --

A: ***-- for him. Trust him. Would trust him***.

Q: Even doing things like going into a dark room alone with him?

A: Well, they -- they did. They went into the room with him, and so I --

Q: Well, I want to know in your -- in your experience --

A: Yeah.

Q: -- based on your knowledge, your decades of knowledge and experience as a Catholic educator, would you find that odd or unreasonable that a student would trust Brother Mueller in that capacity?

A: ***Yeah, I, I would not find it unusual***. I --

Q: In other words, you would --

A: Yeah, I -- if I remember correct -- yeah, if I remember correctly, these -- these were -- they were freshmen. I think they were freshmen in high school, if I remember correctly. And ordinarily, you know, they're trusting people.

Q: So based on --

A: I don't --

Q: -- your experience, ***you would find that to be a natural reaction, to trust Brother Mueller, correct?***

A: I don't know if I could say that that would -- that I would say that was a natural reaction, but ***that they would trust him I would not find unusual***.

Q: Okay.

A: ***I would not find unusual***.

See, Respondent's Appendix, at A-49 to A-50.

2. <u>Father Richard O'Shaughnessy</u>: Father O'Shaughnessy is and has been a member of Relator Marianist Province since 1936 (72 years). He is an ordained priest (since 1947), and is a lifelong educator of young Catholic men who, quite literally, has taught throughout the world. *See*, Respondent's Appendix, at A-16 to A-17.

During his deposition taken in this matter, Father O'Shaughnessy was specifically asked about the issue raised by Relator, that being whether typical young Catholic men, under circumstances similar to plaintiff Visnaw, would trust Brother Mueller when he presented his bogus psychological experiment ploy to them, or whether they would/should know that his motives were improper and that they were being harmed when the interaction

occurred. In this regard, Father O'Shaughnessy was asked, based on his decades of experience as a Catholic educator and religious mentor, how he would expect young men under such circumstances as plaintiff Visnaw to interpret the *non-sexual* aspects of the "experiments" with Brother Mueller. Father O'Shaughnessy testified as follows:

Q: Now, I believe, what you say, you have about 60-plus years of experience in working with students and children, is that right?

A: Right.

Q: Okay. And you understand that this, relative to these bizarre experiments, Mueller apparently had some story he would tell these students about he had a psychological experiment he needed to do on them, something like that?

A: Right.

See, Respondent's Appendix at A-22.

Q: We talked about how before Mueller did these bizarre things to these young men, he started with some sort of ploy --

A: Yes.

Q: -- about needing their help for a psychological experiment, do you recall that?

A: Yes.

Q: ***And we talked about how at that time young Catholic men were encouraged and in fact did trust their religious authorities, correct?***

A: ***You're right, you're right.***

Q: And given the approach that Mueller took before the actual experiments themselves, in other words, the ploy of needing their help for a psychological experiment, would

you find it unreasonable that they accepted that story that he was telling them and actually believed what he was telling them?

A: I would say probably, yes.

Q: What do you mean, "probably"?

A: Well, I would think that they would, as I said before, 30 years ago, or 20 years ago --

Q: ***Yes, let's talk about the early 1980's.***

A: ***Okay. Yes, they would have trusted.***

See, Respondent's Appendix at A-22 to A-23.

K. Procedural History.

Plaintiff's underlying Petition for Damages was filed on January 3, 2006. In March, 2006, the matter was set for jury trial to commence the week of August 20, 2007. On May 25, 2007, after over one year of litigation and discovery in this matter, Relator filed a Motion for Summary Judgment. Relator's sole basis for summary judgment was that plaintiff's claims are barred by the applicable statute of limitations, not because plaintiff allegedly always remembered the sexual abuse (since it is not disputed that plaintiff first recollected the sexual abuse in 2005), but rather because he admits to having always remembered certain non-sexual details of his encounters with Brother Mueller. On July 30, 2007, after a full briefing and oral argument, Respondent issued an order denying summary judgment.

Thereafter, on August 10, 2007, Relator filed its Petition for Writ of Prohibition with the Eastern District Court of Appeals. On August 14, 2007, the Eastern District entered its preliminary order in prohibition, thus precluding the jury trial of this matter that had been set for almost one and one-half years, and was set to commence six days later. On August 24, 2007, Respondent submitted Suggestions in Opposition. On August 28, 2007, the Eastern District quashed the preliminary Order and denied Relator's Petition for Writ of Prohibition. Relator subsequently filed its Petition for Writ of Prohibition before this Court on September 6, 2007. On October 30, 2007, this Court issued a preliminary Writ in Prohibition. On December 31, 2007, Relator filed its Brief.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT RESPONDENT LACKED JURISDICTION OR ACTED IN EXCESS OF HIS JURISDICTION; BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT IT LACKS AN ADEQUATE REMEDY BY TRIAL AND APPEAL; BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT THIS IS A PECULIARLY LIMITED SITUATION, OR AN ANOMALOUS, PHENOMENAL AND EXIGENT INSTANCE WHERE ABSOLUTE IRREPARABLE HARM WILL RESULT; AND BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT

PLAINTIFF'S CLAIMS ARE CLEARLY BARRED BY THE STATUTE OF LIMITATIONS.

State ex rel. Morasch v. Kimberlin, 654 S.W.2d 889 (Mo. banc 1983).

State ex rel. Dick Proctor Imports, Inc. v. Gaertner, 671 S.W.2d 273

(Mo. banc 1984).

Powel v. Chaminade, 197 S.W.3d 576 (Mo. banc 2006).

ARGUMENT

I. RELATOR IS NOT ENTITLED TO A PERMANENT ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER DENYING RELATOR'S MOTION FOR SUMMARY JUDGMENT BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT RESPONDENT LACKED JURISDICTION OR ACTED IN EXCESS OF HIS JURISDICTION; BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT IT LACKS AN ADEQUATE REMEDY BY TRIAL AND APPEAL; BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT THIS IS A PECULIARLY LIMITED SITUATION, OR AN ANOMALOUS, PHENOMENAL AND EXIGENT INSTANCE WHERE ABSOLUTE IRREPARABLE HARM WILL RESULT; AND BECAUSE RELATOR HAS FAILED TO ESTABLISH THAT PLAINTIFF'S CLAIMS ARE CLEARLY BARRED BY THE STATUTE OF LIMITATIONS.

A. Introduction.

The writ of prohibition is not a substitute for appeal. This must be stressed at the outset because Relator's Brief is simply a brazen attempt to obtain interlocutory review of alleged trial court error. Relator's Brief is in reality nothing more than an Appellant's brief, with Relator spending only a moment attempting to justify application of the extraordinary writ procedure in this matter.

Relator's Petition should be denied because ***none*** of the conditions precedent necessary to justify applying such an extraordinary remedy have been met. Relator has failed to establish that in denying Relator's Motion for Summary Judgment, Respondent lacked jurisdiction or acted in excess of his jurisdiction. Relator has failed to establish that it lacks an adequate remedy by trial and appeal as a result of Respondent's denial of summary judgment. Relator has failed to establish that this is a "peculiarly limited situation" or an "anomalous, phenomenal and exigent instance" where absolute irreparable harm will result if such an order is not entered. Relator has failed to establish that the material facts in this matter are not in dispute. Relator has failed to establish that plaintiff's claims are "clearly barred" by the statute of limitations.

Relator's sole basis for justifying application of the writ procedure is that the trial court erred in denying Relator's Motion for Summary Judgment because plaintiff's claims are "clearly barred" by the statute of limitations. *See*, Relator's Brief, p.1. In support of this theory however, Relator merely provides argument for the conclusion that it believes should be drawn from the evidence rather than actually provide indisputable proof that plaintiff's claims are truly time-barred. As will be demonstrated in this Brief, Judge Ross did not take

leave of his senses in finding that different conclusions could be reasonably drawn from the evidence as to whether the statute of limitations has run, thus making the issue a question of fact for the jury and summary judgment inappropriate.

In short, Relator's Petition is a gross misuse of the writ of prohibition procedure. In addition to requesting that Relator's Petition be denied, plaintiff implores this Court to sanction Relator in an appropriate manner (e.g., taxation of attorney fees and costs) in order to denounce such conduct and deter it in the future. If the only result of Relator's Petition is a mere denial, then Relator ultimately will be rewarded with over a one-year continuance of the trial date and will not incur any negative consequences for its improper conduct. Denial of Relator's Petition without requiring Relator to be held accountable in some way for its conduct will only encourage Relator and other litigants in the future to institute Petitions for Writ anytime they are simply unhappy with how a trial court has ruled on an issue of law. The writ procedure is not in place for such whimsical purposes. For this reason, plaintiff respectfully requests that a sanction of some sort be levied against Relator if this Court agrees that Relator's Petition was improperly instituted.

Because Relator has failed to establish a proper basis for absolute prohibition in this matter, plaintiff Visnaw respectfully requests that this Court deny Relator's Petition for Writ of Prohibition, sanction Relator appropriately, and remand this matter back to the trial court for final and proper adjudication.

B. Standards Governing Issuing a Writ of Prohibition.

In 1983, this Court delineated the propriety of issuing a writ of prohibition for the purposes of reviewing a denial of summary judgment or to correct trial court error in *State ex rel. Morasch v. Kimberlin*, 654 S.W.2d 889 (Mo. banc 1983). Subsequent to this Court's opinion in *Morasch*, certain exceptions to the pronounced rule have emerged, but the case nevertheless remains controlling law as a guiding principle. *See*, *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 863 (Mo. banc 1986) ("Modified to this extent, we believe that *Morasch's* goal of a workable guideline is attainable.").

The facts in *Morasch* are substantially similar to those presented in this pending matter: The Relator/Defendant filed a motion to dismiss alleging the plaintiff's cause of action was barred by the ***statute of limitations***. The trial judge overruled the motion to dismiss. Relator subsequently filed an application for prohibition with the Western District Court of Appeals. A preliminary and then absolute order was issued, and the matter was then transferred to the Supreme Court on certification of a dissenting judge. *Id*. at 890.

The issue then for this Court to decide was whether a preliminary rule in prohibition should be made absolute against a circuit judge who intends to proceed to trial after ruling that the statute of limitations does not bar the plaintiff's claims. *Id*.

In analyzing the issue, this Court drew upon long-standing precedent, citing to *State ex rel. Union Depot Ry. Co. v. Southern Ry. Co.*, 100 Mo. 59, 61, 13 S.W. 398 (1890), to state as follows:

> We must recognize that the constitutional limits on judicial authority to effect appellate jurisdiction are violated by over-generous use of the writ of prohibition. We are persuaded that we should not continue the unfettered use of the writ of prohibition to allow interlocutory review of trial court error. The *Union Depot* position is as sound today as it was in 1890.

Morasch, 654 S.W.2d at 892. (internal citations omitted).

This Court then proceeded to hold that, "[w]e need not decide whether respondent Kimberlin was right or wrong on the question of law in his case…. [w]here, as here, the statute does not restrict the power of the court but merely sets up a condition precedent to the establishment of the plaintiff's cause of action, we think the violation of the statutory provision constitutes an error of law rather than excess of jurisdiction." *Id*. at 892. Thus, the preliminary order in prohibition was ***quashed***. *Id*.

It merits pointing out that Justice Blackmar issued a concurring opinion whereby he questioned the principal opinion's "very broad changes in the law of extraordinary remedies…." *Id*. However, even in taking exception to the breadth of the principal opinion, Justice Blackmar nevertheless ***concurred*** with quashing the preliminary order in prohibition given the circumstances, observing that:

> Statute of limitations, furthermore, is an affirmative defense under Rule 55.08, and the defendant has the burden of proof. The trial judge might not have been satisfied that the defendant's affidavits negated the possibility that some authorized agent of the defendant or his insurance company, with which the plaintiff had been negotiating, had agreed to procure an entry of appearance. Or the trial judge might have considered it wise to let the case remain pending because of the possibility that the missing lawyer might be found and a full explanation made. ***The Court of Appeals, in making the rule absolute, effectively deprived the trial court of its discretionary authority. This is a clear misuse of the writ of prohibition***.

Id. at 892-893. (emphasis added).

Thus, both the principal and concurring opinions agreed that an absolute rule in prohibition against a circuit judge who intends to proceed to trial after ruling the statute of limitations does not bar a plaintiff's claim is improper. ***Id.***

As has been previously noted, *Morasch* continues to be controlling law as to this issue. An example is the Eastern District Court of Appeals' opinion in ***State ex rel. Less v. O'Brien***, 814 S.W.2d 2 (Mo. App. E.D. 1991). In *Less*, the Relators/Defendants moved to dismiss plaintiff's claim on the ground of abandonment. The trial court denied the motion to dismiss. The appellate court then issued a preliminary order in prohibition and the issues were briefed and heard to determine whether the order should be made absolute or quashed. *Id*. at 3. The *Less* Court began its analysis by observing the general principle that:

> The primary purpose of the writ of prohibition is to prevent usurpation of judicial power, § 530.010, RSMo 1986, not to provide a remedy for all legal difficulties nor serve as a substitute for appeal. ***Generally, a lack of jurisdiction and lack of an adequate remedy by appeal must be established before issuance of a writ***. ***Furthermore, prohibition will not be granted unless an act in excess of jurisdiction is clearly evident and the presumption of correct action in favor of the trial judge is overcome by relators***.

Id. (internal citations omitted) (emphasis added).

The *Less* Court proceeded to note that "[t]he propriety of issuing a writ of prohibition was delineated in *State ex rel. Morasch v. Kimberlin*, 654 S.W.2d 889 (Mo. banc 1983), where the Supreme Court stated, 'we should not continue unfettered use of the writ of prohibition to allow interlocutory review of trial court error.'" *Id*. The *Less* Court then noted an "exception" that was created by the *Noranda* Court which permitted entertainment of a writ where a trial court's improper opinion may, through inertia or some other cause, somehow become precedent. *Id.* at 4. However, the *Less* Court observed that "[t]he Supreme Court recently reinforced the limited applicability of the writ outside the usual two part test in *State ex rel. Dally v. Elliston*, 811 S.W.2d 371 (Mo. banc 1991)." The *Less* Court further observed that:

> The *Dally* Court warned that departure from the usual application of prohibition requires a ***peculiarly limited situation*** where ***irreparable harm*** may come to a litigant if some type of justifiable relief is not made available to respond to a trial court's order. This ***precedent*** requires us to apply the two part test, unless the *Noranda* considerations would justify dispensing it.

Id. (emphasis added).

In applying this precedent to the facts at hand, the *Less* Court found that the Relators did not establish that it was "clearly evident" the trial court had acted in excess of its jurisdiction by not dismissing plaintiff's claim. *Id*.

The *Less* Court also observed that "Relators can certainly attack the denial of the motion to dismiss on appeal as improper. The extraordinary writ of prohibition should not be used to allow an interlocutory appeal of alleged trial court error, especially when the circumstances do not fit under the *Noranda* exception." (internal citation omitted). *Id.*

The *Less* Court then arrived at its ultimate holding, which is absolutely applicable to the pending matter here:

> ***As we have said so often, the writ of prohibition is not a substitute for appeal. It is not to be used to adjudicate grievances which may be adequately addressed in an ordinary course of judicial proceedings. If the respondent commits error, that error can be preserved and presented on an appeal from the final judgment.*** Relators have not satisfied the traditional two part test nor shown that this case merits issuance of the writ under the

Noranda exception. We therefore hold that our preliminary writ of prohibition was improvidently issued and we quash the writ.

Id. at 5. (emphasis added).

Another example of the *Morasch* principle in application is *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. banc 1984). In that case, the Relators filed a motion to dismiss based upon improper venue. The trial court overruled the motion. *Id.* at 274.

Relators then sought a writ of prohibition from the lower appellate court which was denied, and Relators then sought relief from this Court. *Id*. In their petition to this Court, Relators' argument was that the trial court had exceeded its jurisdiction by failing to dismiss the case for improper venue. *Id*. at 275.

In analyzing the matter, this Court summarily rejected Relators' argument. Citing to *Morasch*, this Court held that:

Relators' position is merely an attempt to achieve interlocutory review of alleged trial court error via the extraordinary writ of prohibition. ***We reject such an abuse of the writ***.

Id. at 275. (emphasis added).

An example where the circumstances were extraordinary enough to make a writ of prohibition appropriate with respect to an issue involving something other than the question of a trial court's jurisdiction is *State ex rel. Richardson v. Randall*, 660 S.W.2d 699 (Mo. banc 1983). In this criminal case, the trial court ordered the defendant to disclose the name and address of an expert whom the defendant consulted with but chose not to use at trial.

The defendant/relator brought the matter for relief to the Supreme Court, which issued a preliminary rule in prohibition. *Id*. at 700.

This Court cited to *Morasch*, stating, "[t]his Court has denounced promiscuous and expansive use and abuse of prohibition to allow review of trial court error, particularly in circumstances other than those concerning the question of trial court jurisdiction." This Court duly noted the rare exception to this rule:

> But from time to time in ***peculiarly limited situations*** there are instances in which ***absolute irreparable harm*** may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order. In such circumstances, the extemporaneous character of prohibition may be the remedy to be applied.

Id. at 701. (emphasis added).

Given the rare circumstances presented in *Richardson*, this Court determined that prohibition was an available remedy:

> This case fits into that ***phenomenal and exigent instance*** in which the trial court's ruling would result in irreparable harm to relator, and she faces the plight of being without other relief. Once the state has the handy bit of information regarding the anonymous expert, it always has it and may consult with him to the detriment of the relator. ***No adequate remedy exists by trial***

or appeal. Prohibition, therefore, affords an immediate and adequate remedy for her in this ***anomalous situation***.

Id. (emphasis added).

Another example where a writ was appropriate with respect to an issue involving something other than the question of a trial court's jurisdiction is the Eastern District's opinion in *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498 (Mo. App. E.D. 1985). In *O'Blennis*, a criminal defendant who was convicted of assault with intent to kill but later had his conviction overturned, sued for legal malpractice against the public defender who had represented him in the criminal trial. After initiation of the civil malpractice suit however, the criminal defendant entered a guilty plea to the original charge of assault with intent to kill which had been remanded back to the trial court. Subsequently, the public defender who had been sued for malpractice filed a motion for summary judgment on the basis of the guilty plea. The trial court denied summary judgment and the appellate court entered a preliminary writ. *Id*. at 499-500.

In assessing the situation, the *O'Blennis* Court observed:

> We turn first to the availability of prohibition to review the denial of the motion for summary judgment. Normally we are reluctant to utilize the writ for the purposes of reviewing a denial of summary judgment or to correct trial court error. But as stated in *State ex rel. General Electric Co. v. Gaertner*, 666 S.W.2d 764 (Mo. banc 1984) (Rendlen, J concurring): "Forcing upon a defendant the expense and burdens of trial when the claim is ***clearly barred*** is unjust and should be prevented"….***The issue before the trial court and us is***

> ***solely a matter of law. There is no dispute regarding the facts which present that issue***….Under the factual situation here, we conclude that prohibition is an available remedy.

Id. at 500. (emphasis added).

Thus, given the ***undisputed*** facts presented (i.e. the civil plaintiff having voluntarily pled guilty to the criminal charge that was the sole basis for his legal malpractice claim), the *O'Blennis* Court determined that deviation from the general *Morasch* rule was appropriate and that prohibition was an available remedy. ***Id.***

In a concurring opinion to this case, Judge Satz reviewed the applicability of *Morasch* as well as its subsequent progeny. Judge Satz then provided a summary of the general rule along with its various exceptions:

> In light of these cases, I now believe *Morasch* made no change in the procedural principles governing the issuance of the writ. An appellate court can use the writ to determine whether the trial court is acting without jurisdiction over the subject matter or the person, whether the trial court, having such jurisdiction, is acting in "excess of its jurisdiction," whether the trial court's act will cause irreparable harm, or whether a claim is clearly barred.

Id. at 505. (internal citations omitted).

Also deserving consideration is the case cited by the *O'Blennis* Court for the proposition that prohibition is an available remedy where the "claim is *clearl*y barred," that being *State ex rel. General Electric Co. v. Gaertner*, 666 S.W.2d 764 (Mo. banc 1984). In *General Electric*, this Court quashed a preliminary writ *on the merits* and permitted trial to proceed on a claim the relator alleged was barred by the statute of limitations. *Id*. at 768. In other words, rather than determine whether prohibition was an appropriate remedy or not, this Court instead went straight to analysis of the Relator's allegation that the statute of limitations barred the underlying claim. After analyzing the issue, this Court determined that the statute of limitations did not in fact bar the plaintiff's claim.[4] *Id*. at 767-768.

As Judge Satz noted in his concurring opinion in *O'Blennis*, "It was in this context that Judge Rendlen made the statement quoted by the majority here, in which he implied the writ should be used to prevent a trial court from '[f]orcing upon a [party] the expense and burdens of trial when the claim is *clearly* barred….' (Emphasis His)." *O'Blennis*, 691 S.W.2d at 505.

The approach taken in *General Electric* was also apparently used in *State ex rel. BP Products North American, Inc. v. Ross*, 163 S.W.3d 922 (Mo. banc 2005). In *BP Products*,

[4] This approach can possibly be explained by the fact that the issue presented there was one of first impression: "This Court has not resolved the issue of whether a third party plaintiff seeking contribution under the doctrine of *Whitehead & Kales* may implead a third party defendant under Rule 52.11(a) after the statute of limitations has expired on the claim asserted by the original plaintiff." *General Electric*, 666 S.W.2d at 765.

this Court quashed in part and made absolute in part, a preliminary writ on the merits and permitted trial to proceed on a claim the Relator alleged was barred by the statute of limitations. Similarly to *General Electric*, the issue appeared to be one of first impression, that being which statute of limitations applies to the tort of "injurious falsehood." *BP Products*, 163 S.W.3d at 925-926. *See also*, *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 865 (Mo. banc 1986) (Prohibition deemed appropriate to resolve issue of whether complainant in Missouri Commission on Human Rights action is to be treated as a "party" for purposes of securing deposition); *In the Interest of N.D.C.*, 229 S.W.3d 602, 604 (Mo. banc 2007) (Prohibition deemed appropriate to resolve constitutional issue of first impression -exclusion of victim hearsay testimony- that would evade appellate review if not raised prior to final judgment); *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 413 (Mo. banc 2007) (criminal case, Supreme Court found prohibition appropriate given irreparable harm that could result where trial court wrongly applied statute conferring right to trial continuance); *State ex rel. Bloomquist v. Schneider*, 2008 WL133924 (Mo.) (Prohibition deemed appropriate to resolve whether section 516.200 can be constitutionally applied to out-of-state defendant).

C. Relator Has Failed to Establish *Any* of the Conditions Precedent Necessary to Justify an Absolute Order of Prohibition.

Relator's Petition should be denied due to the fact that under the circumstances, prohibition is not an appropriate remedy. Relator has failed to establish that any of the recognized standards for application of prohibition as delineated above apply to this matter:

1. ***Morasch* is Substantially Similar and Directly on Point**.

As discussed above, the facts in *Morasch* are substantially similar to those presented here in that the defendant filed a motion to dismiss (here a motion for summary judgment) solely on the basis that the plaintiff's claim was barred by the statute of limitations. Under these same set of facts, this Court quashed the preliminary order in prohibition on the basis that the Relator had failed to demonstrate that prohibition was appropriate. *Morasch*, 654 S.W.2d at 892.

Although disagreeing with the breadth of the majority opinion, Judge Blackmar in a concurring opinion nevertheless agreed with the result that under such circumstances as presented there and here, ***"[t]his is a clear misuse of the writ of prohibition."*** *Id*. at 892-893. (emphasis added). Given the unavoidable similarities between *Morasch* and this case, plaintiff Visnaw would respectfully suggest that this case is controlling and that Relator's Petition therefore should be denied. *Id*.

2. **Respondent Does Not Lack Jurisdiction**.

A lack of jurisdiction of the trial court is generally necessary and must be established before issuance of a writ. *Less*, 814 S.W.2d at 3. In this case, Relator does not even allege that Respondent lacked jurisdiction to enter an order denying summary judgment on statute of limitations grounds, nor is there any evidence to indicate such a lack of jurisdiction. Thus, this general prerequisite has not been established by Relator. *Id.*

3. **Relator Does Not Lack an Adequate Remedy by Appeal**.

A lack of an adequate remedy by appeal is also generally necessary and must be established before issuance of a writ. *Less*, 814 S.W.2d at 3. In this case, Relator has failed to show that it does not have a right to appeal Respondent's alleged error of law, and in fact it is evident that such a right to appeal does exist when this matter has been properly adjudicated and a final judgment rendered. Thus, this general prerequisite has not been established by Relator. *Id.*

4. **Respondent Did Not Act In Excess of His Jurisdiction**.

Prohibition will not be granted unless it is "clearly evident" that an act is in excess of jurisdiction and the presumption of correct action in favor of the trial judge is overcome by the relator. *Less*, 814 S.W.2d at 3. Relator has not shown that it is "clearly evident" that Respondent acted in excess of his jurisdiction and Relator has failed to rebut the ***presumption*** that Respondent's denial of summary judgment was the correct action in this matter. *Id.*; *Proctor*, 671 S.W.2d at 275.

5. **This Is Not a "Peculiarly Limited Situation" Where Irreparable Harm May Result**.

This Court has warned that departure from the two prong test (lack of jurisdiction and lack of an adequate remedy by appeal) requires a "…peculiarly limited situation where irreparable harm may come to a litigant if some type of justifiable relief is not made available to respond to a trial court's order." *Less,* 814 S.W.2d at 4, *citing*, *Dally*, 811 S.W.2d at 373. Examples of such a situation are *Noranda* and *N.D.C.*, where there is an issue that might otherwise escape the appellate courts' attention for some period of time and

in the meantime it is being decided wrongly by the trial courts and may result in establishing an improper precedent. *Noranda*, 706 S.W.2d at 865; *N.D.C.* 229 S.W.3d at 604.

This case does not present such a "peculiarly limited situation." The issue, when damages are capable of ascertainment, is not one that might otherwise escape the appellate courts' attention for some time or is one of first impression, given that this very issue received full attention recently by this Court in *Powel v. Chaminade*, 197 S.W.3d 576 (Mo. banc 2006). Moreover, Relator has failed to establish any "considerable hardship and expense" other than to generally claim that a trial would cause Relator "to suffer the burden of unnecessary and burdensome litigation." *See*, Relator's Brief, p.27. Thus, Relator has not established a sound basis for departing from the two-part analysis necessary to find that prohibition is an appropriate remedy in this matter. *Dally*, 811 S.W.2d at 373.

6. **The Material Facts in this Matter *Are* In Dispute**.

Departure from the general two-part analysis toward determination of the availability of prohibition may be justified in a situation where the issue before the trial court is "solely a matter of law" and where "[t]here is no dispute regarding the facts which present that issue." *O'Blennis*, 691 S.W.2d at 500. Unlike *O'Blennis* (where it was undisputed that the civil plaintiff had knowingly pled guilty to the very criminal charge that formed the sole basis of his legal malpractice claim), the material facts in this case are in dispute. As discussed below, in response to the underlying summary judgment motion, plaintiff provided a substantial amount of evidence and testimony supporting his version of the facts that credibly contradict Relator's mere allegations. *See*, RA1, 297-342.

7. **<u>This Is Not an "Anomalous", "Phenomenal and Exigent Instance" Where Absolute Harm May Result</u>**.

In *Richardson*, this Court was presented with a criminal law matter where once the trial judge's order went into effect (compelling the defendant to disclose the name and address of an expert consulted with but not retained to testify), the proverbial bell could not be un-rung, and the relator/defendant would be left without any adequate remedy by trial or appeal. *Richardson*, 660 S.W.2d at 701. Presented with such a factual scenario, this Court deemed it to be an "anomalous" and "phenomenal and exigent instance" where absolute irreparable harm would result and that prohibition was an adequate and appropriate remedy. *Id*.

In *Wolfrum*, this Court was presented with a situation where the trial court wrongly denied a continuance of the trial date to a criminal defendant, thus forcing his legal counsel to proceed to trial unprepared. Given the disastrous consequences that were certain to result, this Court deemed an absolute writ of prohibition appropriate. *Wolfrum*, 225 S.W.3d at 412-413.

<u>No such dire scenarios are presented here</u>. When Respondent denied summary judgment as to statute of limitations grounds, no bell was rung that can't be taken back, nor was Relator improperly forced to proceed to trial unprepared. Relator has completely litigated this matter and continues to have adequate remedies through both trial and appeal. In short, this matter nowhere near resembles the anomalous, phenomenal and exigent instances presented in *Richardson* and *Wolfrum*.

8. **<u>The Underlying Claim is *Not Clearly Barred*</u>**.

The entire basis of Relator's Petition and Brief is premised upon the argument that plaintiff's underlying claim is "clearly barred" by the statute of limitations because he admits having always remembered the seemingly legitimate and non-sexual details of the "experiments" with Brother Mueller. *See*, Relator's Brief, pp.11-27. However, in support Relator can only make bare allegations and provides no ***evidence*** to prove there are absolutely no genuine disputes of material fact as to this issue and that the trial court erred so grossly that this Court must now step in immediately and correct this egregious mistake. *Id.*

Relator's Brief is simply nothing more than an attempt to obtain an interlocutory appeal of an alleged trial court error of law, which is an abusive tactic that has been previously rejected by this Court. *Proctor*, 671 S.W.2d at 275; *Morasch*, 654 S.W.2d at 892-893; *Richardson*, 660 S.W.2d at 701. Relator's arguments at best establish that there are different or contradictory conclusions that can be reasonably drawn from the evidence as to the running of the statute of limitations, thus making it a question of fact for a jury and justifying denial of summary judgment. *Powel*, 197 S.W.3d at 586.

As discussed above, this matter bares no resemblance to the facts presented in *O'Blennis*, where it was determined that plaintiff's claims were "clearly barred" given that the civil plaintiff's entire basis for his legal malpractice lawsuit against his criminal defense attorney was eviscerated by pleading guilty to the underlying criminal charge. *O'Blennis*, 691 S.W.2d at 500. This matter also bares no resemblance to the facts presented in *Bloomquist*, where the trial court committed "clear error" by applying a tolling provision to deny summary judgment on statute of limitations grounds that was previously deemed

unconstitutional by controlling United States Supreme Court precedent. *Bloomquist*, 2008 WL133924 at *1.

As can be seen from a review of the plaintiff's Petition for Damages, Relator's Motion for Summary Judgment, and plaintiff's Suggestions in Opposition, it is simply not established that plaintiff's claims are "clearly barred" by the statute of limitations.

In his Petition for Damages and in his deposition testimony, plaintiff Visnaw has consistently maintained that he did not ascertain any potential injury or harm arising from his seemingly legitimate and non-sexual interaction with Brother Mueller until 2005, when he recovered memory of the sexual abuse for the very first time. *See*, RA1, at 26-27; 297-311. Conversely, nowhere in Relator's Motion for Summary Judgment or Petition for Writ does Relator provide any testimony or other evidence establishing that plaintiff ascertained, or reasonably should have ascertained a potential harm or injury prior to 2005 merely by remembering strange yet seemingly legitimate and non-sexual conduct, or because he was intelligent, or because he has subsequently obtained military interrogation training. Therefore, it cannot be credibly argued that plaintiff's claims are "clearly barred" in this matter, and as a result, prohibition is not an appropriate remedy. *Id.*

9. **A Determination *On The Merits* Warrants a Finding that Plaintiff's Claims Are Not Barred by the Statute of Limitations**.

Relator is clearly seeking an interlocutory appeal of the trial court's denial of summary judgment. As is noted above, use of the writ of prohibition in this manner is simply not appropriate and in fact constitutes an abuse that should be condemned. Relator's Brief is ultimately grossly premature in that it simply seeks review of alleged trial court

error that is appropriate for review on appeal following trial and final judgment in this matter.

Furthermore, a matter of first impression is not presented here, as were the situations in *General Electric*, *BP Products North America, Inc.*, *Noranda*, and *In the Interest of N.D.C.* However, if this Court is inclined to consider the underlying statute of limitations issue *on the merits*, plaintiff would respectfully suggest that the appropriate finding would be that plaintiff's claims were timely filed, or at a minimum, a genuine dispute of material fact exists, in that the credible evidence demonstrates that different or contradictory conclusions can be reasonably drawn from the evidence as to the running of the statute of limitations, thus making it a question of fact for a jury to decide and making summary judgment inappropriate. *Powel*, 576 S.W.3d at 586.

a. Standard of Review for Summary Judgment.

"The standard of review of a summary judgment is *de novo*. A summary judgment is proper if there is an ***absence*** of disputed issues of material fact and the movant has demonstrated that it is entitled to judgment as a matter of law. The movant has the burden to show a right to judgment that flows from facts which there is no genuine dispute. The trial court when it considers a motion for summary judgment ***tests simply for the existence, not the extent***, of genuine disputes. Genuine disputes exist where the record contains competent material that evidences two plausible, but contradictory accounts of the facts." *Hart v. Kupper Parker Comm., Inc.*, 114 S.W.3d 342, 345 (Mo. App. E.D. 2003) (internal citations omitted) (emphasis added).

"Missouri courts regard summary judgment as an extreme and drastic remedy that must be applied with the exercise of great care." *Robinson v. Ahmad Cardiology, Inc.*, 33 S.W.3d 194, 198 (Mo. App. E.D. 2000). In fact, summary judgment is considered so drastic that it "…borders on a denial of due process and effectively denies the party against whom it is entered a day in court." *Hart*, 114 S.W.3d at 345.

As the movant, Relator had the burden of proof of establishing that summary judgment was proper in this matter and "[a] summary judgment is not proper if the trial court must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment." *Id.* Moreover, when reviewing Relator's Motion for Summary Judgment, the court shall review the record in the light most favorable to the plaintiff, and shall accord plaintiff the benefit of all reasonable inferences from the record. *Powel*, 197 S.W.3d at 580.

Relator's Motion for Summary Judgment was predicated entirely upon statute of limitations grounds. "The statute of limitations is an affirmative defense, Rule 55.08, and respondents who move for summary judgment on that basis bear the burden of showing that it bars plaintiff's claims." *Id*. Moreover, ***"when contradictory or different conclusions can be drawn from the evidence as to whether the statute of limitations has run, it becomes a question for the jury, and thus summary judgment is inappropriate."*** *Id*. at 586. (emphasis added).

b. The Capable of Ascertainment Standard.

In 2006, this Court examined the "capable of ascertainment" standard in the *Powel* case. In *Powel*, the plaintiff alleged to have been sexually abused by the defendants between the ages of 15 and 17. However, he claimed that he had repressed memory of the sexual abuse until the age of 41, after which he filed suit. The trial court granted summary judgment in favor of the defendants on the grounds that plaintiff's damages became "capable of ascertainment", and thus the statute of limitations began to run, when the sexual abuse had occurred some twenty-plus years earlier. This Court reversed the trial court's granting of summary judgment. In examining the issue, this Court summed up the argument put forth by the defendants, an argument that was made by Relator in this case:

> Respondents [Chaminade/Marianist Order] argue that the proper interpretation of "capable of ascertainment" is that the statute of limitations begins to run when the sexual abuse allegedly occurred-here from 1973 to 1975-because that is when the injury objectively could have been discovered or made known if the victim had not repressed memory of it. They argue that if the alleged events occurred, they must have been traumatic and so must have caused immediate damage so that plaintiff could have maintained suit immediately….***Chaminade's argument also misses the mark***.

Id. at 581-582. (emphasis added).

This Court rejected the defendants' argument for the simple reason that in some cases, the date the injury occurs may be ***later*** in time than the underlying battery. *Id*. at 582; *citing*, *K.G. v. R.T.R.*, 918 S.W.2d 795, 798 (Mo. banc 1996), and, *Sheehan v. Sheehan*, 901 S.W.2d 57, 59-60 (Mo. banc 1995).

Having rejected the very same argument that Relator makes in this case, this Court framed the ultimate issue as follows: "what is the test for when damages are capable of ascertainment?" *Id*. This Court answered that question by stating: "*the statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." Id.* (emphasis in original). This Court then cited with approval to several prior examples where the technical breach or wrong occurred many years (sometimes decades) before ascertainment of the resultant damage, thus necessitating denial of summary judgment on statute of limitations grounds. For example:

In *Dixon v. Shafton*, 649 S.W.2d 435 (Mo. banc 1983), four partners signed a contract without being informed by their fifth partner, an attorney, about a clause in the contract that ultimately caused them damage. Although the wrong had existed and had been at least theoretically ascertainable since the inception of the contract, the statute of limitations did not begin to run until the lawyer-partner advised the remaining partners that they should get independent counsel because he had made a mistake. *Id*. at 438; *Powel*, 197 S.W.3d at 583.

In *Martin v. Crowley, Wade & Milstead, Inc.*, 702 S.W.2d 57 (Mo. banc 1985), in 1983 the plaintiffs sued defendants for negligence relating to a survey done of plaintiffs' residential lot in 1973 which had caused them to build their house in the wrong place and resulted in diminished market value. This Court reversed summary judgment in favor of defendants as to the statute of limitations issue stating that "[n]othing indicated that plaintiffs knew or should have known of any reason, until May 1981, to ***question***

defendant's work. It was only when they learned in 1981 that the house had been built too close to the property line that the statute began to run, for the mere occurrence of an injury itself does not necessarily coincide with the accrual of a cause of action." *Id*. at 58. *Powel*, 197 S.W.3d at 583. (emphasis added).

In *B.M.A. v. Graham*, 984 S.W.2d 501 (Mo. banc 1999), marble panels were installed on the outside of an office building when it was built in the 1960's. The defect existed from the start, so at least theoretically some damage had been sustained at that time, which the owners could have ascertained if they had looked behind the marble slabs covering the building. This Court rejected defendant's claim that the statute of limitations began to run as soon as the building was built, or even when other problems with the panels became known over the ensuing decade. *Id.* at 507.

Rather, "[this Court] took a more ***practical*** approach and held that the damages were sustained and capable of ascertainment only when the damage sued for was ***substantially complete***, which is when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury. This occurred in 1985 [over 20 years after the construction of the building] when the first panels began to fall." *Id*. at 507; *Powel*, 197 S.W.3d at 583-84. (emphasis added). The *Powel* Court opined that "[i]n other words, *BMA* took the approach that it is not the existence of a nominal claim for damage, but the occurrence and capability of ascertaining actual and substantial damage, that begins the running of the statute." *Id*.

Finally, the *Powel* Court cited to *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997), noting that "*Klemme* also reaffirms that the mere existence of the wrong and some nominal damage is not enough. Plaintiff must also have notice of these facts or of something that puts plaintiff on notice to inquire further." *Id*. *See also*, *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 129-130 (Mo. App. E.D. 2006) (citing *Powel*, finding that statute of limitations did not begin to run until seven years after the technical breach occurred when meaning of certain terms in a release were placed into issue). After this survey of decisions where summary judgment was properly denied as to statute of limitations grounds, the *Powel* Court ultimately applied the test specifically to the case at hand.

In that regard, this Court held that questions of fact existed whether a reasonable person ***in the plaintiff's situation*** would have been capable of ascertaining the substantial nature of the damages he had suffered at the time the conduct occurred, thus summary judgment was reversed and the matter was remanded back to the trial court for further adjudication. *Id.* at 586.

In articulating this test, this Court cautioned lower courts that in considering a motion for summary judgment as to the statute of limitations, ***"when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide."*** *Id*. at 585. (emphasis added). In applying the articulated test to the facts in *Powel*, this Court again noted that the approach advocated by the defendants, an approach repeated by Relator in this matter, "effectively

makes the date of the wrongful conduct the date when the statute of limitations begins to run. For all the reasons discussed earlier, this approach is incorrect." *Id*.

c. <u>Contradictory or Different Conclusions May Be Reasonably Drawn From the Evidence as to Whether the Statute of Limitations Has Run</u>.

Thus, the ultimate standard to be applied in this case is that: "*the statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.*" *Powel*, 197 S.W.3d at 582.

Moreover, "when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide," and thus summary judgment is inappropriate. *Id*. at 585.

Consequently, the issue Judge Ross was presented with is: would a reasonably prudent person, under the same or similar circumstances as plaintiff Visnaw be put on notice of a potentially actionable injury by the seemingly legitimate and non-sexual interaction with Brother Mueller when it occurred?[5] In support of its Motion for Summary Judgment and Petition for Writ, Relator merely ***alleges*** that the non-sexual although unusual interaction plaintiff had with Mueller that he has always remembered would undoubtedly put any reasonably prudent young man on notice of a potentially actionable injury when it

[5] It deserves repeating that at no time has Relator credibly disputed plaintiff's position in this matter that he did not obtain conscious recollection of the ***sexual*** abuse until 2005. Relator's Brief is predicated ***entirely*** upon plaintiff always remembering the ***non-sexual*** conduct by Mueller. *See*, Relator's Brief, p. 10.

occurred. However, beyond the mere allegation itself, Relator does not provide any ***evidence*** to carry ***its burden of proof*** as to this affirmative defense. In other words, Relator:

- Does not provide any evidence or testimony that the seemingly legitimate and non-sexual interaction with Brother Mueller would put any reasonably prudent young man in the same circumstances on notice of a potentially actionable injury at the time of the occurrence;
- Does not provide any testimony from other individuals who were subjected to the same seemingly legitimate and non-sexual conduct by Brother Mueller that such conduct put them on notice of a potentially actionable injury at the time of the occurrence;
- Does not provide any evidence or testimony that because plaintiff Visnaw was a "smart, successful high school senior" or "was a professional military interrogator with federal law enforcement training in the area of criminal law," that this made him more inclined to be put on notice of an actionable injury by the seemingly legitimate and non-sexual interaction with Brother Mueller.

In short, Relator, who has the burden of proof relative to establishing this affirmative defense that the statute of limitations bars plaintiff's claims, did not provide Respondent, the lower appellate court, or this Court, with any ***factual evidence*** to support its allegations and carry its burden of proof.

On the other hand, plaintiff provided evidence that establishes, given the circumstances (i.e. non-sexual conduct, occurring in the context of an underage student assisting a trusted religious leader and teacher in an allegedly legitimate scholastic

endeavor), that a reasonably prudent young man would not have been placed on notice of a potentially actionable injury at the time the interaction occurred, but rather would not be capable of ascertaining the harm until such time he recollected the sexual abuse, which in this case occurred in 2005.

Specifically, plaintiff provided the testimony of other "test subjects" who underwent the same "experimentation" as plaintiff and reacted in the same way, that being acceptance of Mueller's representations as genuine and not viewing the conduct as harmful at the time of its occurrence. *See*, Supplemental Statement of Facts, pp. 26-34. Plaintiff provided the testimony of his licensed psychologist who testified that a majority of young men in plaintiff's situation would have trusted and accepted the representations of Brother Mueller as legitimate and would not have not been placed on notice of harm at the time such conduct occurred. *Id*. at 20-24. Plaintiff provided the testimony of a clergy abuse expert who testified that young men in plaintiff's situation would have trusted and accepted Brother Mueller's overtures. *Id*. at 25. Plaintiff even provided the testimony of two of ***Relator's own representatives*** (one of whom is the former head of the Order) who both testified that it would not have been unreasonable or unusual for young men in plaintiff's situation to have accepted Brother Mueller's non-sexual conduct towards them as legitimate at the time it occurred. *Id.* at 34-40.

The issue presented here is whether a reasonably prudent person ***in plaintiff's situation*** (i.e. non-sexual conduct, occurring in the context of an underage student assisting a trusted religious leader and teacher in an allegedly legitimate psychological experiment),

would have been placed on notice of a potentially actionable injury at the time the conduct occurred in the early to mid 1980's. *Powel*, 197 S.W.3d at 586.

This Court is presented with the unsubstantiated allegation provided by Relator (that any reasonably prudent young man would have been placed on notice of harm) versus the evidence provided by plaintiff, which includes the testimony of other young men subjected to the same conduct, the testimony of a psychologist, the testimony of a clergy abuse expert, and the testimony of two members of Relator's own Order, all of whom support plaintiff's position on this issue that a reasonably prudent person in the same situation would not be placed on notice of harm by the seemingly legitimate and non-sexual conduct until recollection of the sexual abuse occurred, which in plaintiff's case indisputably occurred in 2005.

Plaintiff's situation is analogous to that in the *Martin* case, where this Court ruled that the statute of limitations did not bar the plaintiffs' claim because "[n]othing indicated that plaintiffs knew or should have known of any reason, until May 1981, ***to question*** defendant's work. It was only when they learned in 1981 that the house had been built too close to the property line that the statute began to run, for the mere occurrence of an injury itself does not necessarily coincide with the accrual of a cause of action." *Martin*, 702 S.W.2d at 58. (emphasis added).

In this matter, given the context of the interaction with Brother Mueller, allegedly undertaken as part of a legitimate scholastic endeavor, nothing indicates that plaintiff knew or should have known of any reason, until 2005, ***to question*** Brother's Mueller's conduct

towards him. Rather, it was only when he recovered conscious recollection of the sexual abuse that the statute began to run. *Id.*

Plaintiffs' situation is also analogous to that in the *B.M.A.* case, in that the damage sued for was not "substantially complete" until long after the underlying tortious conduct occurred. *B.M.A.* 984 S.W.2d at 507. As noted above, plaintiff's damages were not substantially complete until 2005, when he recovered conscious recollection of the sexual abuse that was inflicted upon him by Brother Mueller.

The evidence is simply not "so clear" that there is no genuine factual dispute as to the accrual date of plaintiff's claims, therefore summary judgment was properly denied. *See*, *Tilley v. Franklin Life Ins. Co.*, 957 S.W.2d 349, 351 (Mo. App. E.D. 1997) ("Where the issue of the statute of limitations involves determination of when a claim accrues, summary judgment cannot be granted unless the evidence is ***so clear*** that there is no genuine factual issue and the determination can be made as a matter of law."). (emphasis added). At best, Relator's allegations only create different conclusions that can be reasonably drawn from the evidence as to whether the statute of limitations has run, thus making the issue a question of fact for the jury, and supporting Respondent's denial of summary judgment in this matter. *Powel*, 197 S.W.3d at 586.

When this seemingly legitimate and non-sexual interaction is not viewed in a vacuum as Relator advocates, but rather is considered in its proper context, that being the deception employed by a religious mentor greatly admired and trusted by his underage victims, who justified his seemingly non-sexual conduct to them under the guise of a legitimate experiment, it is apparent that a reasonably prudent person under such circumstances would

simply not be put on notice of a potentially actionable injury when such conduct occurred. In this case, it is only when memory of the sexual abuse was recovered (i.e. when the non-sexual conduct could no longer be plausibly justified), would a reasonably prudent person be put on notice of an actionable injury. *Powel*, 197 S.W.3d at 586.

Relator's reliance is also misplaced on the recently issued Eastern District Court of Appeals opinion in *Graham v. McGrath*, 2007 WL4301191 (Mo. App. E.D.). In *Graham*, the plaintiff alleged to have been sexually abused by a priest between 1983 and 1986 (between the ages of eleven and fourteen). *Id*. at *1. Specifically, the plaintiff alleged that he was subjected to the following sexual abuse by the priest:

-fondling of his leg and genitals;

-kissing;

-groping; and,

-caressing.

Id.

Of critical importance to this case is the distinguishing fact that the plaintiff in *Graham* admitted that he ***always remembered*** this obviously ***overt sexual conduct*** perpetrated upon him by the priest, although he claimed that he was not capable of ascertaining the potential harm from the abuse until long after it occurred. *Id*.

The *Graham* Court affirmed summary judgment on statute of limitations grounds (the plaintiff had filed suit in 2003 at age 31) because it was apparent that:

-the plaintiff ***always had memory*** of the acts constituting ***sexual*** abuse; and

-the plaintiff ***long ago had understood*** that he was a victim of ***sexual*** abuse, as evidenced by his reports of sexual abuse made to loved ones.[6]

Id. at *3.

In this case, unlike the situation in *Graham*, plaintiff Visnaw has ***not*** always remembered the overt genital sexual abuse he suffered, and plaintiff has ***not*** always understood that he was a victim of sexual abuse. Rather, the undisputed evidence establishes that it was not until 2005 that plaintiff regained conscious recollection of the sexual abuse and thus began to understand for the first time that he had been a victim of sexual abuse. *See*, Supplemental Statement of Facts, pp.10-17. Applying the analysis provided in *Graham*, plaintiff's statute of limitations did not begin to run until 2005, when:

-he first recovered conscious recollection of the ***sexual*** abuse; and

-he objectively understood for the first time that he was a victim of ***sexual*** abuse.

d. <u>Plaintiff's Lawsuit Was Timely Filed and Is Not Barred by the Statute of Limitations</u>.

Plaintiff's evidence credibly establishes that the seemingly legitimate and non-sexual interaction with Brother Mueller under the circumstances described by plaintiff and others (and substantiated by the experts' testimony) would not put a reasonably prudent young man

[6] Conversely, in this case despite its best efforts, Relator has been completely unable to locate a relative or friend to testify that plaintiff had prior to 2005 reported or complained that he had been harmed or abused by Brother Mueller. *See*, RA2 at 405-407; 427; 449-450; 458-463; 472-473; 476.

in such circumstances on notice of a potentially actionable injury when the conduct occurred. Only in 2005, when plaintiff recovered memory of the sexual abuse was he placed on notice of a potentially actionable injury. Relator provides ***no contrary factual evidence*** in support of its allegations, and the offering of a trial court order granting summary judgment in a different case that is itself subject to an appeal is not controlling precedent.[7]

"The relevant statute of limitations here is five years after the cause of action accrued. Sections 516.120 (4) and 516.100." *Powel*, 197 S.W.3d at 587. As has been demonstrated, plaintiff's cause of action did not accrue until 2005, when he recovered memory for the first time of the sexual abuse inflicted upon him by Brother Mueller.

Plaintiff's lawsuit was initiated on ***January 3, 2006***, well-within the time period afforded under the statute of limitations. *Id*. Plaintiff's cause of action is also timely under the three year "discovery" Childhood Sexual Abuse statute of limitations, §537.046, which the *Powel* Court indicated would be applicable to such claims. *Powel,* 197 S.W.3d at fn.4. Under this statute, as long as the action was commenced after August 28, 2004, plaintiff has three years from the "date the plaintiff discovers, or reasonably should have discovered, that

[7] Judge Dierker's Order granting summary judgment in *Kluempers/Giegling* is no more controlling over this issue than the order denying summary judgment in *Bacon v. Brother William Mueller, et al.*, 05-5015 (a case with far more factual similarities to *Visna*w) entered by Judge Wallace, Circuit Court of St. Louis County, Missouri, on June 21, 2007.

the injury or illness was caused by childhood sexual abuse, whichever later occurs." §537.046 (2) and (3).

Since Brother Mueller's sexual exploitation of young men was kept secret until 2005, and since plaintiff's memory of the sexual abuse inflicted upon him as a minor was not recovered until 2005, plaintiff did not discover, nor could have reasonably discovered that his damage was caused by the sexual abuse until 2005. *Id*. Thus, under this statute of limitations, plaintiff's cause of action was timely filed.

CONCLUSION

Ultimately, the *raison d'etre* of Relator's Petition was first to obtain a continuance of the trial date, and second to obtain an interlocutory appeal of Respondent's denial of summary judgment. Relator has failed to establish *any* legitimate basis for entering an absolute order of prohibition in this matter. Relator has absolutely failed to establish that plaintiff's claims are "clearly barred" by the statute of limitations by merely looking at the pleadings or even by a full review of the evidence. The evidence fully supports the trial court's finding that a genuine dispute of material fact exists as to whether the statute of limitations bars plaintiff's claims due to the fact that different or contradictory conclusions

can be reasonably drawn from the evidence as to this issue. Respondent's denial of summary judgment is a proper subject for review on ***appeal*** following proper adjudication and final judgment. If this Court considers the issue on the merits, then the evidence establishes that plaintiff's claims were timely filed and are not barred by the affirmative defense of the statute of limitations.

Based upon the argument and authority above, plaintiff respectfully requests that this Court deny Relator's request for an absolute order of prohibition and remand this matter back to Respondent for trial and final adjudication. Plaintiff further requests that this Court levy an appropriate sanction against Relator for its gross misuse and abuse of the writ procedure in order to deter Relator and other litigants in the future from like conduct.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I the undersigned, certify that this Brief complies with Rule 55.03; that it complies with Rule 84.06(b), was prepared in Microsoft Word, the font is Times New Roman 13 point type, and contains approximately 17,513 words; one copy of the brief in printed form and one copy of the brief on floppy disk in Microsoft Word format was served via U.S. Mail, this _____ day of _____, 2008, to:

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IN THE
MISSOURI SUPREME COURT

STATE ex rel. MARIANIST PROVINCE OF THE UNITED STATES,	)	
	)	No. SC88779
Relator-Defendant,	)	
	)	St. Louis County, Missouri
	)	Judge John A. Ross
vs.	)	Circuit Court No. 06CC-000008
HONORABLE JOHN A ROSS, JUDGE, CIRCUIT COURT, COUNTY OF ST. LOUIS, DIVISION 15	)	
Respondent.	)	

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