IN THE SUPREME COURT OF MISSOURI

No. SC86875

MICHAEL POWEL,

Appellant/Plaintiff,

v.

MARIANIST PROVINCE OF THE UNITED STATES, CHAMINADE COLLEGE PREPARATORY, INC. d/b/a CHAMINADE COLLEGE PREPARATORY SCHOOL, FATHER WILLIAM CHRISTENSEN and BROTHER JOHN J. WOULFE,

Respondents/Defendants.

Appeal from the Circuit Court for the City of St. Louis, State of Missouri

Honorable Judge John J. Riley

SUBSTITUTE BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Circuit Court of the City of St. Louis erred in granting the Marianist Province of the United States and Chaminade College Preparatory, Inc.'s Motion for Summary Judgment and therefore dismissing Appellant's cause of action against Respondents Marianist Province of the United States and Chaminade College Preparatory, Inc. Following briefing and argument before the Missouri Court of Appeals Eastern District, on May 31, 2005, the Eastern District reversed the trial court's granting of summary judgment and, pursuant to Rule 83.02, certified this case for transfer to this Court because of its general interest and to clarify the differing case law in the appellate districts.

STATEMENT OF FACTS

On June 17, 2002 Plaintiff Michael Powel filed his Petition seeking damages against Marianist Province of the United States, Chaminade College Preparatory, Inc. d/b/a Chaminade College Preparatory School, Father William Christensen and Brother John J. Woulfe. On February 28, 2003, Plaintiff, Michael Powel, served Defendants with his Fourth Amended Petition. (L.F. 18-41). Counts IX and X of the Fourth Amended Petition assert claims against Defendants Chaminade College Preparatory, Inc. and Marianist Province of the United States. (L.F. 33-36). The Fourth Amended Petition alleges that Plaintiff is entitled to damages arising out of childhood sexual abuse, which he sustained while enrolled as a student at Chaminade High School during the years of 1973, 1974 and 1975. (L.F. 22-23). Count IX of the Fourth Amended Petition alleges claims against Defendant Marianist Province of the United States for intentional failure to supervise clergy. (L.F. 33-34). Count X of the Fourth Amended Petition alleges claims against Defendant Chaminade College Preparatory, Inc. for intentional failure to supervise clergy.

Plaintiff's Fourth Amended Petition alleges that Defendant William Christensen was an ordained Roman Catholic priest and a member of the Defendant Marianist Province assigned to provide religious, spiritual, social, educational and emotional guidance, counseling, training, direction and supervision at the school facilities of Defendant Chaminade. (L.F. 20). Plaintiff Michael Powel further alleges that Defendant Brother John J. Woulfe was a religious brother and member of the Defendant Marianist Province assigned to provide religious, spiritual, social, educational and emotional

guidance, counseling, training, direction and supervision at the school facilities of Defendant Chaminade. (L.F. 20). Plaintiff further alleges that Defendants Christensen and Woulfe were employed by Defendants, including the Marianist Province and Chaminade, to carry out the duties of a Catholic priest and religious brother respectively, and were under the Defendants' direct supervision and control by supervisors of the Defendants. (L.F. 20-21). Defendants Christensen and Woulfe were assigned by the various Defendants, including the Marianist Province and Chaminade, to carry out their priestly and religious duties at Defendant Chaminade's school. (L.F. 21). Plaintiff further alleges that in furtherance of their own interests, the various Defendants, including the Marianist Province and Chaminade, hired and retained Defendants Christensen and Woulfe as a priest and religious brother respectively, and permitted them to have unsupervised access to young students attending Defendant Chaminade's school, including, but not limited to, Plaintiff. (L.F. 21). Plaintiff's Fourth Amended Petition further alleges that instruction and supervision of young children, including boys attending and boarding at Defendant Chaminade's school facility, was within the scope of Defendant Christensen's employment as a priest and Defendant Woulfe's employment as a religious brother. (L.F. 21).

Plaintiff further alleges that Defendants Christensen and Woulfe were acting upon the premises of Defendant Chaminade's school facility, upon which said Defendants Christensen and Woulfe were privileged to enter only as the agents, servants or employees of, among others, the Marianist Province and Chaminade. (L.F. 22). Plaintiff further alleges that he succumbed to sexual contact by Defendants Christensen and

Woulfe only because of their misuse of their job created authority as a priest and religious brother, respectively. (L.F. 22). Plaintiff also pleaded that Defendants Christensen and Woulfe had the apparent authority to engage in this conduct because of their status as a Roman Catholic priest and religious brother, respectively. (L.F. 22). At all relevant times Defendants Christensen and Woulfe were employed as a priest and religious brother, respectively, by, among others, the Marianist Province and Chaminade, and were under these Defendants' direct supervision and control when they committed the acts and omissions described within Plaintiff's Fourth Amended Petition. (L.F. 21-22).

Plaintiff's Fourth Amended Petition alleges that Plaintiff was raised in a devotedly Roman Catholic family and was baptized, confirmed and regularly celebrated weekly mass and received the sacraments through the Roman Catholic church and therefore he developed great admiration, trust, reverence and respect for Roman Catholic priests and religious brothers. (L.F. 22). Plaintiff further pleads that beginning in late 1973 or early 1974 he began receiving religious, spiritual, social, educational and emotional guidance, counseling, training, direction and supervision at Defendant Chaminade's school from Defendants Christensen and Woulfe, who then and there entered into a fiduciary relationship with Plaintiff. (L.F. 22). Plaintiff was a student attending high school and living and boarding at Defendant Chaminade's school facility at all relevant times. (L.F. 22). Plaintiff knew and accepted Defendant Christensen as his priest, counselor and authority figure and knew and accepted Defendant Woulfe as a religious brother, counselor and authority figure. (L.F. 22-23).

Plaintiff's Fourth Amended Petition further alleges that while engaged in a fiduciary relationship with Plaintiff and purporting to provide to him religious, spiritual, social, educational and emotional guidance, counseling, training, direction and supervision, Defendants Christensen and Woulfe engaged in sexual contact with Plaintiff from late 1973 or early 1974 through approximately November 1975. (L.F. 23). Because of the Plaintiff's vulnerability and placement of trust in Defendants Christensen and Woulfe and their fiduciary positions as priest, religious brother, counselors and authority figures, Plaintiff was caused to suffer anxiety and fear which contributed to him being subjected to Defendants Christensen and Woulfe's control. (L.F. 23). Plaintiff further alleged that Defendants Christensen and Woulfe repeatedly instructed Plaintiff not to tell anyone about the sexual assaults and abuse and threatened and otherwise deliberately induced in Plaintiff a fear of reprisal which caused Plaintiff to remain silent concerning Defendants Christensen and Woulfe's repeated sexually abusive conduct. (L.F. 23). Defendants Christensen and Woulfe took advantage of their fiduciary relationship to intimidate Plaintiff into silence. (L.F. 23).

Plaintiff alleged that the totality of the circumstances surrounding the abuse to which Plaintiff was exposed by Defendants Christensen and Woulfe caused Plaintiff to develop various psychological coping mechanisms. (L.F. 23). Because of the psychological coping mechanisms, Plaintiff was unable to perceive or know that he was a victim of sexual abuse and was unable to perceive or know the existence or nature of the psychological injuries and/or their connection to the sexual abuse perpetrated upon him. (L.F. 23). Plaintiff's Fourth Amended Petition alleges that these circumstances include,

but are not limited to, the extreme nature of sexual abuse, exploitation, and intimidation and Defendants Christensen and Woulfe's status as fiduciaries and trusted religious and educational authority figures and counselors. (L.F. 23-24).

Plaintiff alleged that he involuntarily repressed memory of the sexual abuse until February 2000, when Plaintiff had his first recollection of this sexual abuse. (L.F. 24). Plaintiff repressed his memory of these events between the ages of seventeen (17) and forty-one (41). (L.F. 196-197). Plaintiff regained his memory of the events of childhood sexual abuse in February 2000 and in the first half of 2001 Plaintiff began a course of psychological therapy and treatment with Betty Black, a licensed psychologist in the state of Florida. (L.F. 26). During the course of therapy received by Betty Black, Plaintiff was first diagnosed as having suffered post traumatic stress disorder. (L.F. 24). Prior to this course of therapy, which began in the first half of 2001, Plaintiff had no indication that the events involving sexual abuse had caused injury and ascertainable damage. (L.F. 24).

Plaintiff was also evaluated by Michael S. Greenberg, Ph.D., a licensed psychologist, on April 16, 2002. (L.F. 205). Dr. Greenberg prepared a detailed report regarding the particulars of his psychological evaluation of Plaintiff. (L.F. 209-216). Dr. Greenberg noted that Mr. Powel informed him that "he remembered being molested until approximately age seventeen (17), but he repressed his memories at that time. His memories came back to him after having a brain tumor." (L.F. 205-206, 211). Dr. Greenberg noted that at no time did Michael Powel indicate to him that he did not repress the memory of his sexual abuse until age seventeen (17) but rather gave a specific history

which was corroborated by Betty Black of having repressed these memories until February 2000. (L.F. 206). Dr. Greenberg noted that Mr. Powel's memory came back to him spontaneously without suggestion from a therapist or other person who had influence over him and that at the point that his memory finally returned he could remember all the way back to his early childhood and recalled the sexual abuse performed upon him by Defendants Christensen and Woulfe. (L.F. 207).

Plaintiff's Fourth Amended Petition pleads that the sexual abuses by Defendants Christensen and Woulfe were and are consistent with the trauma of other persons suffering such abuse and that the delayed recognition and onset of injuries and ascertainable damage due to events involving sexual abuse is a well established and recognized symptom and byproduct of several mental disorders within the Diagnostic and Statistic Manual of Mental Disorders, Fourth Edition (published by the American Psychiatric Association). (L.F. 24). One of these disorders is post traumatic stress disorder and Plaintiff has been diagnosed as suffering from post traumatic stress disorder. (L.F. 24).

Plaintiff further pleads that Defendants Christensen and Woulfe had propensities for sexually abusive behavior and posed a certain or substantially certain risk of harm to young students, including Plaintiff, and that all Defendants knew, by and through their supervisors, that Defendants Christensen and Woulfe had propensities for sexually abusive behavior and further knew that harm was certain or substantially certain to result to boarders at Defendant Chaminade's school, including Plaintiff, and all Defendants herein disregarded this known risk of harm. (L.F. 25). Plaintiff's Fourth Amended

Petition further pleads that this action is brought in a timely fashion pursuant to R.S.Mo. §537.046 and R.S.Mo. §516.100 because Plaintiff did not discover his injuries and ascertainable damages due to sexual abuse until the first half of 2000. (L.F. 25).

Counts IX and X of Plaintiff's Fourth Amended Petition allege intentional failure to supervise clergy on the part of Defendant Marianist Province and Chaminade respectively. (L.F. 33-36). The Fourth Amended Petition alleges that Defendants Marianist Province and Chaminade, by and through their servants, agents, employees and members, appointed or provided supervisors over Defendants Christensen and Woulfe who knew that harm was certain or substantially certain to result to the minor boys, including Plaintiff, who where students at Defendant Chaminade. (L.F. 33-35). Plaintiff further alleges that Defendants Marianist Province and Chaminade, by and through such supervisors, disregarded the known risk of harm to the minor boys, including Plaintiff, who were students at Defendant Chaminade. Plaintiff also alleges that Defendants Christensen and Woulfe were upon the premises owned and/or in the possession of, among others, Defendants Marianist Province and Chaminade, and upon which Defendants Christensen and Woulfe were privileged to enter as the servants of, among others, Defendants Marianist Province and Chaminade or were using automobiles or other vehicles of, among others, Defendants Marianist Province and Chaminade at the time of the perpetration of acts of sexual abuse as otherwise stated within the Fourth Amended Petition. (L.F. 34-35). The Fourth Amended Petition alleges that Defendants' acts or conduct were done or omitted willfully, wantonly and with reckless disregard for the safety of others, including Plaintiff, and as a direct result of the inactions of the

supervisors of Defendants Marianist Province and Chaminade, Plaintiff has suffered and will continue to suffer severe and medically diagnosed emotional distress, embarrassment, loss of self esteem, disgrace, humiliation, psychological injury, loss of enjoyment of life, wage loss and deprivation of earning capacity and has incurred and will continue to incur expenses for psychological treatment, therapy and counseling in an attempt to be cured of these conditions. (L.F. 34-36). Plaintiff's Fourth Amended Petition seeks compensatory and punitive damages against Defendants Marianist Province and Chaminade. (L.F. 34-36).

Plaintiff's cause of action against the Defendants, including Defendants Marianist Province and Chaminade, was filed on June 7, 2002. (L.F. 17, 169). Plaintiff's cause of action against Defendants Marianist Province and Chaminade was therefore filed within three (3) years of the first memory Plaintiff had of the acts of childhood sexual abuse since reaching adulthood. (L.F. 196-198, 205-208, 209-216). On October 16, 2003 Defendants Chaminade College Preparatory, Inc. and the Marianist Province of the United States filed their Motion for Summary Judgment on Counts IX and X of Plaintiff's Fourth Amended Petition. (L.F. 77). On December 5, 2003 Plaintiff filed his Response to Defendants' Motion for Summary Judgment, Legal Memorandum in Support of His Response, Response to Statement of Uncontroverted Material Facts and Affidavits of Plaintiff and Dr. Michael Greenberg. (L.F. 168-188, 189-201, 202-216). On December 19, 2003 Defendants Chaminade and the Marianist Province filed their Reply Memorandum and their Response to Plaintiff Powel's Supplemental Statement of Facts. (L.F. 218-231, 232-235). On March 17, 2004 the Circuit Court granted

Defendants' Motion for Summary Judgment on Counts IX and X of Plaintiff's Fourth Amended Petition. (L.F. 238-262).

In its Order the Circuit Court held that "because Counts IX and X constitute all of the claims against those particular Defendants, Marianist and Chaminade, this Order therefore qualifies as a single, distinct, final and appealable "judicial unit" within Rule 74.01(b)." (L.F. 261-262). The court, therefore, pursuant to Rule 74.01(b), expressly determined and certified that its judgment as to the claims decided by the March 17, 2004 Order were final and that there was no just reason for delay of appeal. (L.F. 262). The Circuit Court, in its March 17, 2004 Order further stated:

> For the reasons set forth in this Memorandum and Order, the Court would find, if it were free to do so, that: (1) The summary judgment record here supports that there is a genuine issue of material fact as to whether Plaintiff involuntarily repressed his memory of the alleged abuse from age seventeen until February 2000 at age forty-one; and (2) that the summary judgment record creates a jury triable question as to whether the damage resulting from such abuse was "capable of ascertainment" (as required by §516.100 R.S.Mo.) before Plaintiff recovered his memory of the abuse in February 2000. However, for the reasons also stated herein, the Court believes it cannot so rule and still be faithful to its obligation to follow the precedent of H.R.B. v. Rigali ("HRB II"), 18 S.W.3d 440 (Mo. App. E.D. 2000).

(L.F. 261).

Plaintiff timely filed his Notice of Appeal on March 26, 2004. (L.F. 263-265).

On May 31, 2005, the Eastern District of the Missouri Court of Appeals handed down its opinion in this case and reversed the trial court's granting of summary judgment in favor of Marianist Province and Chaminade. (App. at A1). In its opinion, the Eastern District Court of Appeals determined that, because of the traumatic abuse that Powel suffered, his memory was repressed at the time of the abuse and he had no recollection until his treatment for brain cancer. (App. at A9-10). The Eastern District determined that Plaintiff demonstrated genuine issues of material fact regarding when Plaintiff's damages from his childhood sexual abuse were capable of ascertainment and therefore this issue should be a decision made by the jury. (App. at A10). The Eastern District further determined that the Court in H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000), erred in failing to apply the appropriate standards for determining when an injury is capable of ascertainment as set forth by the Missouri Legislature. (App. at A9). The court further determined that H.R.B. v. Rigali, Harris v. Hollingsworth, 150 S.W.3d 85, 88 (Mo. App. W.D. 2004), and Vandenheuvel v. Sowell, 866 S.W.2d 100 (Mo. App. W.D. 1994), failed to follow this Court's opinion in Sheehan which held that repressed memory may prevent the ascertainment of injury and therefore forestall the running of the statute of limitations. (App. at A9). For this reason the court stated that it will "no longer follow the rationale in H.R.B. and its progeny as they contravene Missouri statutes and case law precedent." (App. at A9).

Pursuant to Missouri Rule 83.02 the Eastern District Court of Appeals transferred this case to this Court because of its general interest and to clarify the differing case law in the appellate districts. (App. at A10).

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THAT PLAINTIFF'S MEMORY OF THE CHILDHOOD SEXUAL ABUSE THAT HE SUSTAINED WAS REPRESSED UNTIL FEBRUARY 2000 AND THEREFORE PLAINTIFF'S CLAIMS WERE TIMELY FILED UNDER SECTIONS 516.120(4) AND 516.100.

Cases

***Sheehan v. Sheehan*,** 901 S.W.2d 57 (Mo. banc 1995)

***K.G. v. R.T.R.*,** 918 S.W.2d 795 (Mo. banc 1996)

Powel v. Chaminade College Preparatory, Inc., _____ S.W.3d _____, 2005 W.L. 1266801 (Mo. App. E.D. 2005)

L.M.S. v. N.M and V.P., 911 S.W.2d 703 (Mo. App. E.D. 1995)

Statutes

516.100 R.S.Mo.

516.120 R.S.Mo.

516.170 R.S.Mo.

537.046 R.S.Mo.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT SECTION 537.046 DOES NOT APPLY TO PLAINTIFF'S CLAIMS AGAINST DEFENDANTS FOR INTENTIONAL FAILURE TO SUPERVISE CLERGY BECAUSE SECTION 537.046 ALLOWS FOR RECOVERY OF DAMAGES AGAINST DEFENDANTS MARIANIST PROVINCE AND CHAMINADE SUFFERED AS

A RESULT OF CHILDHOOD SEXUAL ABUSE AND THERE IS NO QUESTION THAT PLAINTIFF'S DAMAGES ARE A RESULT OF CHILDHOOD SEXUAL ABUSE.

Cases

Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. banc 1995)

H.R.B. v. J.L.G., 9113 S.W.2d 92 (Mo. App. E.D. 1995)

L.M.S. v. N.M and V.P., 911 S.W.2d 703 (Mo. App. E.D. 1995)

Gibson v. Brewer, 952 S.W.2d 239 (Mo. banc. 1997)

Statutes

537.046 R.S.Mo.

516.100 R.S.Mo.

516.120 R.S.Mo.

ARGUMENT

SCOPE OF REVIEW FOR ALL POINTS RELIED ON

The standard of review of a summary judgment is essentially *de novo*. I.T.T. Commercial Finance v. Mid-America Marine Corp, 854 S.W.2d 371, 376 (Mo. banc. 1993); Skay v. St. Louis Parking Company, 130 S.W.3d 22, 25 (Mo. App. E.D. 2004). The record should be reviewed in the light most favorable to the party against whom judgment was entered and that party should be accorded the benefit of all inferences which may reasonably be drawn from the record. I.T.T. Commercial Finance, 854 S.W.2d at 376; Skay, 130 S.W.3d at 25.

Under Missouri Court Rule 74.04, summary judgment is appropriate if the record demonstrates that there is a set of material facts as to which there is no genuine dispute, and that based on those undisputed facts the moving party is entitled to judgment as a matter of law. I.T.T. Commercial Finance, 854 S.W.2d at 380. The movant bears the burden of establishing both a legal right to judgment, and the absence of any genuine issue of material fact required to support the right to judgment. Id. at 377. A movant may thus establish a right to summary judgment by, among other ways, showing that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. Id. at 381.

In reviewing a motion for summary judgment, the trial court must view the factual record, and all reasonable inferences, which may be drawn therefrom, in the light most favorable to the non-movant. Id. at 376. The trial court, when it considers a motion for summary judgment, tests simply for the existence, not the extent of genuine disputes. Id.

at 378. Genuine disputes exist where the record contains competent material that evidences two plausible, but contradictory, accounts of the facts. Id. at 382. Summary judgment is not proper if the trial court must overlook material in the record that raised a genuine dispute as to the facts underlying the movant's right to judgment. Id. at 378. Summary judgment is a drastic remedy, which borders on a denial of due process and effectively denies the party against whom it is entered his day in court. Bellon Wrecking and Salvage Company v. Rohlfing, 81 S.W.3d 703, 705 (Mo. App. E.D. 2002).

Under §516.100 the question of whether or not damages are capable of ascertainment at a given time is deemed to be governed by an "objective" standard for determination of whether or not the statute of limitations has elapsed, and thus normally is a matter of law to be decided by the trial court. Sheehan v. Sheehan, 901 S.W.2d 57, 58-59 (Mo. banc. 1995). If reasonable persons can draw some contradictory or different conclusion from the evidence then a statute of limitations question should be submitted to a jury to decide. Powel v. Chaminade College Preparatory, Inc., _____ S.W.3d _____, 2005 W.L. 1266801 at 3 (Mo. App. E.D. 2005); Lomax v. Sewell, 1 S.W.3d 548, 552-553 (Mo. App. W.D. 1999); Straub v. Tull, 128 S.W.3d 157, 159 (Mo. App. S.D. 2004).

I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THAT PLAINTIFF'S MEMORY OF THE CHILDHOOD SEXUAL ABUSE THAT HE SUSTAINED WAS REPRESSED UNTIL FEBRUARY 2000 AND THEREFORE PLAINTIFF'S CLAIMS WERE TIMELY FILED UNDER SECTIONS 516.120(4) AND 516.100.

Plaintiff's Fourth Amended Petition alleges that he was a victim of childhood sexual abuse by Father William Christensen and Brother John Woulfe while he was a student at Defendant Chaminade College Preparatory School during the years 1973, 1974 and 1975. (L.F. 18-41). Plaintiff filed claims against Defendants Chaminade and the Marianist Province in Counts IX and X of the Fourth Amended Petition for intentional failure to supervise clergy. (L.F. 33-36). Plaintiff's cause of action against the Marianist Province and Chaminade was filed on June 7, 2002. (L.F. 17). On October 16, 2003, Defendants Marianist Province and Chaminade (hereinafter "Defendants") filed their Motion for Summary Judgment on Counts IX and X of Plaintiff's Fourth Amended Petition claiming that Plaintiff's claims were barred by the applicable statutes of limitations. (L.F. 77-79). Plaintiff filed his Response to the Defendants' Motion for Summary Judgment as well as his Legal Memorandum and Response to the Statement of Uncontroverted Material Facts on December 4, 2003. (L.F. 164-167, 168-188, 189-201). Plaintiff subsequently filed a Motion to File Original Affidavit in Support of Plaintiff's

Response to Motion for Summary Judgment attaching Affidavits of the Plaintiff and of Dr. Michael Greenberg, a clinical psychologist. (L.F. 202-216).

The Circuit Court, in its Order and Partial Judgment dated March 17, 2004, held that Plaintiff provided a summary judgment record which demonstrates a genuine issue of material fact as to whether Plaintiff involuntarily repressed his memory of the childhood sexual abuse from age seventeen (17) until February 2000 at age forty-one (41) and therefore there was a jury triable question as to whether the damage resulting from the abuse was "capable of ascertainment" under Missouri Revised Statute §516.100 before Plaintiff recovered his memory of the abuse in February 2000. However, the court granted Defendants' Motion for Summary Judgment on the grounds that the case of H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000), held that a victim's repressed memory cannot serve to toll the statute of limitations and therefore Plaintiff's claims were not timely filed. (L.F. 238-262). The Eastern District Court of Appeals, in its opinion in the instant case, reversed the trial court's Order dismissing this case, held that the rationale set forth in H.R.B. v. Rigali should no longer be followed and transferred this case to this Court pursuant to Rule 83.02. (App. at A9-10).

Missouri Revised Statute §516.120(4) states as follows:

> 516.120 What Actions Within Five Years
>
> Within Five Years:
>
> (4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or

> rights of another, not arising on contract and not herein otherwise enumerated;

Plaintiff's claims for intentional failure to supervise clergy may be considered to be an action which is not encompassed within any other more specific statute, and therefore the action may be considered to be governed by the five (5) year limitations period allowed under 516.120(4) R.S.Mo.[1]

The time when Plaintiff's cause of action began to run is set forth in §516.100. §516.100 states as follows:

> 516.100. Period of Limitation Prescribed
>
> Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided that for the purposes of §516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, **but when the damage resulting therefrom is sustained and capable of ascertainment,** and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

[1] As will be stated in greater detail later in this Brief, Plaintiff also believes his cause of action may fall under Section 537.046, the statute that specifically deals with childhood sexual abuse. Those arguments will be addressed in detail *infra*.

R.S.Mo. §516.100 (*Emphasis Added*).

Plaintiff's action arises out of childhood sexual abuse while he was a minor enrolled as a student at Chaminade during the years of 1973, 1974 and 1975. (L.F. 23). Among the evidence provided to the court in response to Defendants' Motion for Summary Judgment was an Affidavit of Michael Powel, which stated that he repressed his memory of the acts of sexual abuse between the ages of seventeen (17) and forty-one (41). (L.F. 196-197). Plaintiff regained his memory of the events of childhood sexual abuse in February 2000 and he was subsequently treated by Betty Black, a licensed psychologist in the state of Florida. (L.F. 26, 206). Plaintiff was also evaluated by Michael S. Greenberg, Ph.D., a licensed psychologist, on April 16, 2002. (L.F. 205). Dr. Greenberg prepared a detailed report regarding the particulars of his psychological evaluation of Plaintiff. (L.F. 209-216). Dr. Greenberg noted in both his detailed report and his Affidavit, which was attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, that Mr. Powel informed him that "he remembered being molested until approximately age seventeen (17) but he repressed his memories at that time. His memories came back to him after having a brain tumor." (L.F. 205-206, 211). Despite allegations to the contrary in Defendants' Motion for Summary Judgment, Dr. Greenberg noted in his Affidavit that at no time did Michael Powel indicate to him that he did not repress the memory of his sexual abuse from age seventeen (17) but rather gave a specific history which was corroborated by Betty Black of having repressed these memories until February 2000. (L.F. 206). Dr. Greenberg noted that Mr. Powel's memory came back to

him spontaneously without suggestion from a therapist or other person who had influence over him and that at the point that his memory finally returned he could remember all the way back to his early childhood and recalled the sexual abuse that he experienced at the hands of Defendants Christensen and Woulfe. (L.F. 207).

Since Plaintiff was a minor at the time he was abused, pursuant to §516.170 R.S.Mo. he would not be required to bring his action until after he reached the age of majority. §516.170 states:

> 516.170 May delay filing of action, when
>
> Except as provided in section 516.105, if any person entitled to bring an action in sections 516.100 to 516.370 specified, at the time of the cause of action accrued be either within the age of twenty-one years or mentally incapacitated, such person shall be at liberty to bring such actions within the respective times in sections 516.100 to 516.370 limited after such disability is removed.

Under §516.100, Plaintiff's cause of action "shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs but when damage therefrom is sustained and is capable of ascertainment…" The Circuit Court, pursuant to H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000), held that even though it felt that Plaintiff had come forth with evidence that established a genuine issue of fact as to whether or not his memory of the childhood sexual abuse that he suffered had been repressed from the age of seventeen (17) until February 2000, the holding of H.R.B. v. Rigali was binding precedent and, in effect, held that a plaintiff's repressed memory

cannot toll the statute of limitations pursuant to §516.100. As the trial court noted, "Missouri's "capable of ascertainment" test is often the subject of legal argument and the test "has not been precisely defined by Missouri Courts"." (L.F. 252). *See also* Vandenheuvel v. Sowell, 886 S.W.2d 100, 102 (Mo. App. W.D. 1994). Whether or not a plaintiff's damages were capable of ascertainment at a given time is ordinarily deemed to be governed by an "objective" standard and normally is a matter of law to be decided by the trial court. Sheehan v. Sheehan, 901 S.W.2d 57, 58-59 (Mo. banc. 1995). However, where reasonable persons could draw some contradictory or different conclusions from the evidence a statute of limitations question may be submitted to a jury to decide. Lomax v. Sewell, 1 S.W.3d 548, 552-53 (Mo. App. W.D. 1999).

The trial court, although disagreeing with the holdings in Vandenheuvel and H.R.B. v. Rigali, ruled that those cases were not meaningfully distinguishable from the instant case and that H.R.B. v. Rigali was binding precedent in this action. In H.R.B. v. Rigali, a former student at a church run school brought an action for intentional failure to supervise clergy against the archbishop arising out of sexual abuse that he suffered while a student more than thirty (30) years prior. The plaintiff in that action contended that he had repressed his memory of the abuse until many years later as an adult. H.R.B., 18 S.W.3d at 442, 444. The defendant's statute of limitations arguments were rejected and the claim against the archbishop went to trial and resulted in a verdict in favor of the plaintiff. The Court of Appeals reversed, stating:

> There was no question of fact for the jury to decide because no contradictory or different conclusion could be drawn from the

> evidence. Applying an objective standard, it is clear that plaintiff's damages were sustained and capable of ascertainment in 1964 when they occurred. Where an overt sexual assault occurs, the injury and damage resulting therefrom are capable of ascertainment at the time of the abuse.

Id. at 443.

The Court stated that plaintiff's testimony demonstrated that at the time the acts were perpetrated he had full knowledge of the events and knew that they were wrongful and therefore it was at that moment that plaintiff's damage was sustained and capable of ascertainment. Id.

The facts of H.R.B. are distinguishable from the present case. In H.R.B., the plaintiff's expert testified that the plaintiff "knows that he is injured and damaged in some way, but he doesn't know why." Id. at 444. In this case Plaintiff's psychologist has specifically stated that Plaintiff repressed his memory and did not regain it until February 2000. (L.F. 205-207, 211). In H.R.B., the psychological testimony was that the plaintiff was aware he had been injured and damaged in some way, but did not know why. Here, there is testimony that there was a complete repression of the acts and feelings associated with them which plaintiff suffered while a student at Chaminade.

Plaintiff would also submit that H.R.B. v. Rigali, was wrongly decided. Taken to its logical extreme, a plaintiff could have been sexually abused as a young child and his damages from that abuse would be, according to the Rigali case, immediately ascertainable at the time the act of abuse occurred. However, if the abuser then

repeatedly slammed the plaintiff's head into the ground mere minutes after the abuse or psychologically tormented the young victims and the plaintiff then could not recall the abusive events until he reached his late twenties or later, despite the deliberate intentional actions of the perpetrator, plaintiff's statute of limitations would not be tolled. His damages would, under the H.R.B. analysis, be immediately capable of ascertainment despite the intervening loss of memory that he would suffer. Such a result is patently absurd and encourages the most extreme actions of the abusers towards their victims. The abusers would therefore have an incentive to do anything that they could to cause the victims to be unable to recall the abuse that they suffered. Since such abusers are frequently individuals in a position of trust over the victims, such as family members, counselors and clergy, this would encourage the abusers to engage in physical, and more frequently mental, torment of their victims. Sound public policy should discourage, rather than encourage such conduct.

The holding in H.R.B. would serve to shorten, not lengthen the statute of limitations for victims of childhood sexual abuse to file their claims. Victims of childhood sexual abuse would be forced to file their claims against the abusers and other defendants within five (5) years of the date that they turned twenty-one (21) years of age. In effect, the holding in H.R.B. would render the "capable of ascertainment" standard in §516.100 meaningless and all claims for childhood sexual abuse where there has been a repressed memory would always accrue when the wrong was done rather than when the damages were capable of ascertainment. The "capable of ascertainment" standard is, in effect, rendered meaningless by H.R.B. The Eastern District, in its opinion in the instant

case, recognized the flawed reasoning of H.R.B. and held that H.R.B. incorrectly interpreted Missouri law and, along with Harris v. Hollingsworth, 150 S.W.3d 85, 88, and Vandenheuvel v. Sowell, 866 S.W.2d 100 (Mo. App. W.D. 1994), should no longer be followed.

Further, the way that the objective test for determining when the damages are capable of ascertainment used in H.R.B. is inconsistent with the realities demonstrated in this case. Plaintiff has specifically testified that he did not recall any of the events of the sexual abuse inflicted upon him by Brother Woulfe and Father Christensen from the time he was seventeen (17) until February 2000. (L.F. 196). In February 2000 Michael Powel recalled for the first time as an adult several instances of sexual abuse, which occurred to him while he was a student at Chaminade High School. (L.F. 196). Between the age of seventeen (17) and the time of the recollection of the events in February 2000 he had no memory of any acts of sexual abuse occurring to him and that was the first time that he had any recollection of the acts done to him by Father Christensen and Brother Woulfe while he was a student at Chaminade between the age of seventeen (17) and forty-one (41). (L.F. 196). Plaintiff testified that once he recalled the events of sexual abuse which were perpetrated upon him up to the age of seventeen (17), including those acts perpetrated upon him while a student at Chaminade High School, he recalled such actions on his own without any suggestion by a counselor, psychologist or any other person. (L.F. 197). The Affidavit of Dr. Greenberg and his report associated with his psychological evaluation of Michael Powel also demonstrate that Mr. Powel indicated that he repressed his memories of childhood sexual abuse from the age of seventeen (17)

until February 2000. Dr. Greenberg indicated that Mr. Powel reported to him "that the memory came back to him spontaneously without suggestion from a therapist or other person who had influence over him, and that once it returned he could remember all the way back to his early childhood and recalled the sexual abuse performed upon him." (L.F. 207).

When the facts are viewed in the light most favorable to the Plaintiff, as must be done in reviewing the granting of a motion for summary judgment, under §516.100 the damage from the sexual abuse inflicted upon Plaintiff by Brother Woulfe and Father Christensen was not capable of ascertainment at the time that it was sustained and was unable to be ascertained until his memory returned in February 2000. It is important to note that §516.100 requires that the plaintiff ascertain the damages that he has suffered as a result of the tort which has occurred. Merely being aware of generalized amorphous actions which are not recalled do not rise to the level of ascertainment of damages associated with the actual tortious sexual abuse by Father Christensen and Brother Woulfe. It is not enough for the plaintiff to recognize that he has been damaged but he must recognize that he has been damaged by the actions of the individuals in causing the tort. The statute of limitations under §516.100 will not begin to run until the damage is sustained and the damage therefrom (the sexual abuse by Brother Woulfe and Father Christensen) is capable of ascertainment. As Mr. Powel did not recall the actions of Father Christensen and Brother Woulfe until February 2000 he clearly could not connect the problems that he had sustained over the years to their actions. Therefore, it should be

determined that, under §516.100, Plaintiff's cause of action did not accrue until February of 2000 when his memory of the events at Chaminade returned.

A. THIS COURT'S OPINION IN SHEEHAN v. SHEEHAN IMPLICITLY OVERRULED VANDENHEUVEL v. SOWELL AND THEREFORE SUBSEQUENT DECISIONS OF THIS COURT AND APPELLATE COURT DECISIONS DEMONSTRATE THAT H.R.B v. RIGALI WAS WRONGLY DECIDED AND THEREFORE THE EASTERN DISTRICT'S OPINION IN THIS CASE CORRECTLY HELD THAT THE DECISION IN H.R.B. v. RIGALI FAILED TO FOLLOW MISSOURI LAW AND SHOULD NO LONGER BE FOLLOWED.

As the trial court recognized, H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000), heavily relied on the case of Vandenheuvel v. Sowell, 886 S.W.2d 100 (Mo. App. W.D. 1994), to hold that damages sustained from sexual abuse are capable of ascertainment at the time they occur and therefore a victim's repressed memory will not toll the statute of limitations until the memory is regained. After Vandenheuvel was handed down, the Missouri Supreme Court in the cases of Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. banc. 1995), and K.G. v. R.T.R., 918 S.W.2d 795 (Mo. banc. 1996), as well as Court of Appeals opinions from the Eastern District in the cases of L.M.S. v. N.M. and V.P., 911 S.W.2d 703 (Mo. App. E.D. 1995) and H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. App. E.D. 1995), recognized that damages from sexual abuse may be capable of ascertainment at a date later than the date that the abuse occurred and that the repressed memory of the victim may serve to toll the statute of limitations until such point as the

memory is regained. For these reasons, the Eastern District determined that H.R.B. v. Rigali was wrongfully decided and will no longer be followed in the Eastern District and is not controlling precedent regarding this issue as this Court has held that repressed memory may, in some cases, serve to toll the statute of limitations. (App. at A9-10). Therefore, Plaintiff respectfully urges this Court to follow the precedents set forth in Sheehan, K.G. and the Eastern District's opinion in the instant case.

In Vandenheuvel the plaintiff alleged that her deceased father sexually abused her at various times before she reached the age of eighteen (18) and that she psychologically repressed her memory of the abusive acts because her father threatened to harm her if she disclosed his conduct to anyone else. Vandenheuvel, 886 S.W.2d at 101. The plaintiff's father died in March 1993 and she filed her petition on October 4, 1993 when she was forty-eight (48) years old. Id. She alleged that she was unable to know or ascertain the existence of the acts of abuse or the nature of the injuries until after her father's death and the opening of the probate of his estate. Id. The trial court entered summary judgment in favor of the defendant and held that a battery action accrues when the damages resulting from the battery are capable of ascertainment and that her alleged injuries were capable of ascertainment at the time of the battery and therefore her claims were barred by the two (2) year statute of limitations found in §516.140, R.S.Mo. Id. In affirming the trial court's granting of summary judgment, the Western District held that Missouri has adopted a "middle of the road" test in determining when damage has been sustained and is capable of ascertainment. Id. at 102. The Vandenheuvel court stated that this test is an objective test decided as a matter of law by the trial judge. Id., citing Anderson v.

Griffin, Dysart, Taylor, Penner and Lay, P.C., 684 S.W.2d 858, 861 (Mo. App. 1984). Although Plaintiff claimed that her memory of the alleged abuse had been repressed until her father had passed away, the Vandenheuvel court held that applying the objective test, "the trial court could reasonably have found that the damage from the alleged abuse was sustained and capable of ascertainment at the time of the abuse." Id. at 104.

The Vandenheuvel court was critical of the idea of allowing a statute of limitations to be tolled based upon repressed memory. The court stated:

> Courts and commentators which have discussed this issue recognized that allowing a plaintiff to bring an action based solely on the recollection of very old incidents that were allegedly repressed from consciousness, with no means of independently verifying the memory repression, would effectively eliminate the statute of limitations.

Id. at 103.

The court then recognized that the Missouri legislature had created a new statute of limitations for filing sexual abuse claims. At that time §537.046 R.S.Mo. stated as follows:

> (2) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within five (5) years of the date the plaintiff attains the age of eighteen (18) or within three (3) years of the date the plaintiff discovers or reasonably should have discovered that the

injury or illness was caused by child sexual abuse, whichever later occurs.

(3) This Section shall apply to any action commenced on or after August 28, 1990, including any action which would have been barred by the application of the statute of limitations applicable prior to that date.

§537.046 R.S.Mo.

Despite the fact that the case of Doe v. Roman Catholic Diocese, 862 S.W.2d 338 (Mo. banc. 1993), held that subparagraph three (3) of §537.046 was unconstitutional to the extent that it would operate retrospectively to revive a cause of action which had already been extinguished, the intent of the legislature is quite clear from the language in §537.046. The language of §537.046 clearly demonstrates that the Missouri legislature sought to extend the statute of limitations for the filing of claims associated with child sexual abuse. Further, §537.046(2) clearly demonstrates that the legislature desired to utilize a discovery rule for the period when causes of action for child sexual abuse would accrue. Section 537.046(2) indicates that "the time for commencement of the action shall be within five (5) years of the date the plaintiff attains the age of eighteen (18) or within three (3) years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs." §537.046(2).

The legislature's desire to extend the statute of limitations for the victims of child sexual abuse in order to help those who cannot help themselves is made even more clear by the fact that the Missouri legislature in 2004 once again amended the language of §537.046. The amended language of §537.046(2), which was approved by the legislature on June 14, 2004 and became effective on August 28, 2004, states:

> (2) In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the action shall be commenced within ten (10) years of the date the plaintiff attains the age of twenty-one (21) or within three (3) years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs.

R.S.Mo. 537.046 (2004).

Clearly the Missouri Legislature in 2004 once again intended to extend the statute of limitations for the victims of child sexual abuse. As opposed to the earlier version of the statute when a victim's claim would commence within five (5) years of the date the plaintiff attained the age of eighteen (18), the newer version of the legislation mandates that the commencement shall be within ten (10) years of the date the plaintiff attains the age of twenty-one (21). Admittedly, the 2004 legislation is not the relevant law in determining whether or not plaintiff's claim was timely filed in this action. However, the 2004 legislation demonstrates once again that the Missouri legislature desires to protect individuals who cannot protect themselves by providing for extended periods of statutes of limitations for victims of child sexual abuse. The first step in the process of extending

statutes of limitations for the victims of child sexual abuse was the 1990 legislation which initially made §537.046 law and allowed for a discovery rule which allows for claims after a victim's repressed memory has been regained. The 2004 version of §537.046 extended these time frames even further.

Despite the fact that the Vandenheuvel court recognized that the Missouri legislature had passed §537.046, the court cited lengthy passages from law reviews and learned treatises stating that extending the statutes of limitations for child sexual abuse and allowing for a discovery rule for those types of claims to determine when damages can be ascertained and a claim will accrue are disfavored. The Western District, in deciding Vandenheuvel, ignores the clear intent of the Missouri legislature in enacting 537.046 by stating that "if repressed memory would have extended the statute of limitations under the law prior to §537.046 the legislature would not have believed there was any need to enact §537.046." The Western District cites no legislative history in its opinion to support this statement. The statement is also clearly dicta. The Circuit Court in the instant case recognized the numerous problems and great leaps made by the Western District in its opinion in Vandenheuvel, stating in footnote eight (8):

> Contrary to what the Vandenheuvel court stated, allowing alleged repressed memory to toll the running of the statute of limitations in abuse cases would not "eliminate" the statute of limitations in those cases, but instead would merely convert it into a question for the jury to determine, as is often true in occupational disease cumulative trauma cases. Likewise the Vandenheuvel court was off the mark as

> well in saying that the legislature necessarily construes §516.100 in a one size fits all manner by enacting §537.046. Vandenheuvel was also mistaken—despite its footnote one—in saying that the Missouri Supreme Court would not have decided Doe "unless the claim of plaintiff Doe had been barred under [Section 516.100]." To the contrary, the court in Doe made it unequivocally clear that plaintiff Doe had not claimed his action was allowed under §516.100 and that the court therefore **was not addressing that issue**. Doe, 862 S.W.2d at 339-340 n.3.

(*Emphasis in the original*). (L.F. 254). However, the Circuit Court, although critical of Vandenheuvel, felt that the facts of the case were similar to the instant case and, in combination with the holding in H.R.B. v. Rigali, felt compelled to grant Defendants' Motion for Summary Judgment.

The posture of this case is significantly different from the posture of the Vandenheuvel case. The trial court in Vandenheuvel granted summary judgment and held that the Plaintiff's injuries were capable of ascertainment at the time the battery occurred. In the instant case the trial court specifically found that there was a genuine issue of material fact as to whether Plaintiff involuntarily repressed his memory until February of 2000 and that "the summary judgment record creates a jury triable question as to whether the damage resulting from such abuse was "capable of ascertainment" (as required by §516.100) before Plaintiff recovered his memory of the abuse in February of 2000." (L.F. 261). However, the trial court felt compelled to grant Defendants' Motion

for Summary Judgment because it felt bound to follow the precedent of H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000). While this case was before the Eastern District Court of Appeals that Court held that H.R.B. v. Rigali, Vandenheuvel, and Harris v. Hollingsworth, 150 S.W.3d 85, fail to follow Missouri law regarding the "capable of ascertainment" standard that has existed for nearly a century. (App. at A8-9). The Eastern District stated:

> By the legislature's adoption of our current standard in 1919, an action does not occur "when the wrong is done or the technical breach occurs." Section 516.100. The court in H.R.B. erred in failing to apply the standards set forth by our legislature. Moreover, H.R.B., Hollingsworth, and Vandenheuvel all fail to follow our Missouri's Supreme Court's opinion in Sheehan, holding that repressed memory can prevent the ascertainment of injury and therefore forestall the running of the statute of limitations. Hence, we choose to no longer follow the rationale in H.R.B. and its progeny as they contravene Missouri statutes and case law precedent.

(App. at A9).

After Vandenheuvel had been decided, this Court in the case of Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. banc. 1995), considered a case in which a woman alleged that her father had committed numerous acts of sexual abuse upon her while she was a child and that she had involuntarily repressed the memory of those events until August of 1990 or thereafter. Id. at 58. The trial court granted the dismissal on statute of

limitations grounds finding "the fact of damage was ascertainable before the plaintiff turned twenty-one (21)." Id. at 59. On appeal, this Court, in reversing the trial court's holding, recognized that the date when injury occurs or is reasonably ascertainable may be later in time than the abuse in cases of repressed memory. Id. As the Circuit Court recognized in the instant case, "damage in such cases is objectively ascertainable, not necessarily when the wrongful conduct occurs or even when the plaintiff actually discovers such wrongful conduct but when the facts of damage can be discovered or made known." Id. (L.F. 258). In tacitly recognizing that repressed memory can result in damages not being objectively ascertainable until some date well after the actual abuse, this Court stated:

> The petition does not state the date Margaret "sustained and suffered" these injuries and damages; it is ambiguous as to when she objectively could have discovered or made known the fact of damage. The only date alleged is that she "involuntarily repressed conscious memory" of the abuse "until August 1990 or thereafter". Construing the allegations of the petition broadly and favorably to Margaret, **her damage may not have been ascertainable until August 1990 or thereafter**.

Id. (*Emphasis Added*).

It is clear that this Court has recognized that in cases of repressed memory the damages from the sexual abuse may not be ascertainable until some date after the actual events occurred. Although not explicitly stated in the opinion, the language in Sheehan

clearly and implicitly overrules Vandenheuvel in allowing cases to proceed where there has been repressed memory of child sexual abuse and therefore the cause of action is considered to begin accruing upon the memory being regained.

In K.G. v. R.T.R., 918 S.W.2d 795 (Mo. banc. 1996), this Court recognized in even stronger language that in cases where there has been repressed memory the cause of action does not accrue until the memory is regained. The Supreme Court recognized that under a §516.100 analysis, in cases where memory of the abusive conduct has been repressed and then is subsequently recovered, the date the injury occurs may be later in time than the occurrence of the abuse. K.G. v. R.T.R., 918 S.W.2d at 798. In K.G. the Supreme Court explicitly stated:

> In Sheehan, *supra*, this court held that a cause of action for battery is deemed to accrue "when the damage is done and is capable of ascertainment," and further in cases of involuntary repressed memory, the date the injury occurs may be later in time than the battery.

K.G. v. R.T.R., 918 S.W.2d at 798; Sheehan, 901 S.W.2d at 58-59, citing Sections 516.100 and 516.140.

The significance of this Court's opinion in Sheehan was underscored by their comments in footnote two (2) to the opinion in which they stated:

> It is remarkable that plaintiff failed to assert any objection to the correctness of the trial court's conclusion that the battery statute of limitation expired two years after plaintiff's twenty first birthday. Equally remarkable is that neither Sheehan nor §516.100 is cited in

her brief. Sheehan was decided more than five months prior to the filing of plaintiff's brief in this court.

K.G. v. R.T.R., 918 S.W.2d at 798, n.2.

K.G. involved claims where the plaintiff alleged that she was subject to sexual abuse by the defendant between the ages of three (3) and seven (7) years old and that she involuntarily repressed conscious memory of these events until January of 1989 and had no conscious memory of the identity of the perpetrator until December of 1990. Id. at 797. Interpreting Sheehan, this Court recognized that, depending on the facts, it is the memory of consequential injury and damages, not the memory of the perpetrator that "triggers the running" of the statute of limitations. Id. at 798.

After Sheehan and K.G. were handed down, the Eastern District of the Missouri Court of Appeals reversed and remanded two cases in which the trial court had dismissed petitions on grounds that repressed memory of childhood sexual abuse could not toll the statute of limitations under §516.100. In the case of L.M.S. v. N.M. and V.P., 911 S.W.2d 703 (Mo. App. E.D. 1995), the Eastern District considered whether, in a case where a child's memory of the sexual abuse had been repressed, the statute of limitations for the intentional tort of battery was tolled until the memory of those acts was refreshed and capable of ascertainment. In L.M.S. the plaintiff argued that defendant did not have a vested right to be free from suit created by the expiration of the statute of limitations for the tort of battery under §516.140 and therefore §537.046 would not operate retroactively in reinstituting her claim for battery but, instead, would be acting prospectively. Based upon the provisions of §516.140 and §516.100 the plaintiff contended that her damage

resulting from the defendant's actions was not capable of ascertainment until her memories began to emerge in November of 1992. Plaintiff therefore argued that her statute of limitations did not begin to run against her until her memories began to emerge in November of 1992 and therefore her action was not barred before August 28, 1990, the effective date of §537.046. Id.

In reversing the trial court's dismissal of the action and remanding the case to the trial court for further proceedings, the Eastern District held that despite the fact that plaintiff alleged that she had involuntarily repressed her memory of the abuse from approximately fourteen (14) years of age until age twenty-seven (27), under the holding of Sheehan, the plaintiff's damage "may not have been capable of ascertainment until her memories began to emerge in 1992". Id. at 704. For that reason, the court determined that her petition filed in June of 1993 may have been timely. The court further reversed the dismissal by the trial court finding that defendant had no vested right to presume that her claims were barred by the statute of limitations for battery, and therefore the provisions of §537.046 may have been applicable to her claims. For these reasons, the defendant did not have a vested right to be from suit under Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. banc. 1993), as the statute of limitations for battery had not elapsed prior to the enactment of §537.046.

The Eastern District Court of Appeals also remanded for further consideration the case of H.R.B. v. J.L.G. In H.R.B. v. J.L.G. the plaintiff alleged that he was a thirteen (13) year old student at a school under the supervision and control of the archbishop and that during the years of 1963 and 1964 he suffered various instances of sexual abuse by

defendant J.L.G., a Roman Catholic priest employed by the church. H.R.B. v. J.L.G., 913 S.W. 2d at 94. Plaintiff further claimed that the action was brought in a timely fashion pursuant to R.S.Mo. §537.046 and §516.100 in that he did not discover and could not reasonably ascertain the damages he suffered as a result of the sexual abuse until October of 1992 because the psychological coping mechanisms that he utilized repressed any memory of his abuse until 1992. Id. at 94-95. The trial court dismissed H.R.B.'s claims in reliance upon Doe and Vandenheuvel stating "repressed memory does not serve to extend the statute of limitations for plaintiff's claims to the time plaintiff's memory revived." Id. at 95. In accordance with the holding in K.G., the Eastern District reversed the dismissal of plaintiff's claims and remanded them to the trial court for further action.

Plaintiff respectfully urges this Court to follow the holdings in Sheehan, K.G., L.M.S. and H.R.B. v. J.L.G. and the Eastern District Court of Appeal's opinion in this case and reverse the decision of the Eastern District Court of Appeals in H.R.B. v. Rigali and the decisions of the Western District Court of Appeals in Hollingsworth and Vandenheuvel and find that plaintiff presents a fact question for a jury that he repressed the memory of the childhood sexual abuse he suffered at the hands of Brother Woulfe and Father Christensen until February 2000, and therefore the damages that he suffered were not capable of ascertainment until February 2000. Plaintiff has therefore created a genuine issue of fact, which should have prevented the trial court from granting summary judgment on statute of limitations grounds. The facts of this case are even more clear than the facts stated in many of the above cited cases and there is a well developed record regarding Plaintiff's repressed memory. Although Plaintiff suffered acts of sexual abuse

while he was a child, the memory of that abuse was repressed from the time he was seventeen (17) until the time he was forty-one (41) years old. (L.F. 196-198, 205-208, 209-216). Plaintiff had no recollection or knowledge of any sexual abuse occurring to him before his eighteenth birthday until February 2000. (L.F. 196-198, 205-208, 209-216). Further, Plaintiff's psychologist, Dr. Michael S. Greenberg, noted that Mr. Powel stated that, "he remembered being molested until approximately age seventeen (17), but he repressed his memories at that time. His memories came back to him after having a brain tumor" in February 2000. (L.F. 205-208).

In looking at the facts and reasonable inferences therefrom in the light most favorable to the Plaintiff, clearly Plaintiff's damage associated with the sexual abuse was not "capable of ascertainment" from the time he was seventeen (17) years old until February 2000 because he had no memory of this damage. Plaintiff could not have brought an action for damages during the intervening years because he had no knowledge that such an action existed, as he did not remember any of the actions which took place. Therefore, pursuant to the terms of §516.100, §516.120 and §516.170, Plaintiff's five (5) year statute of limitations would not have begun to run until February 2000, which was the time that Plaintiff's damages were "capable of ascertainment". The statute of limitations for Plaintiff's claims under §516.120 were tolled by the provisions of §516.100 and his five (5) year statute of limitations would have begun to run in February of 2000. Thus, Plaintiff's Petition, which was filed in June of 2002, is well within the five (5) year statute of limitations established by §516.120. Therefore, Plaintiff's claims are not time barred.

As the trial court notes frequently throughout its extensive, well reasoned Order, it found that Plaintiff repressed his memory until February 2000 and, absent the holding in H.R.B. v. Rigali, it would have denied Defendant's Motion for Summary Judgment based upon the statute of limitations. The trial court noted that in its view, the holding in H.R.B. v. Rigali was inconsistent with the Supreme Court's holdings in Sheehan, *supra*, and K.G. v. R.T.R., *supra*, as well as the Eastern District's own holdings in L.M.S. and H.R.B. v. J.L.G..

The trial court agreed with the statements of the Eastern District in H.R.B. v. Rigali that the Supreme Court did not explicitly overrule the holding in Vandenheuvel but attempted to distinguish it on the grounds that Vandenheuvel was a case determined at the summary judgment stage, whereas Sheehan involved a motion to dismiss. However, as the trial court noted, "while the distinction between a motion to dismiss and a motion for summary judgment may sometimes be of significance, on this issue, the significance is not talismanic. That is simply too thin a reed upon which to gloss over what really amounts to a fundamental inconsistency between two competing lines of cases." (L.F. 259). The trial court further noted that the two competing lines of cases are completely at odds. The trial court stated "it is clear to this court that in both Sheehan as well as K.G. v. R.T.R., the Supreme Court plainly said—by necessary implication—that such tolling due to repressed memory **is** sometimes possible." (*Emphasis in the Original*). (L.F. 259-260).

In the instant case, the Eastern District Court of Appeals in its panel opinion determined that the H.R.B. v. Rigali court appears to adopt the "sustainment of injury

test" rather than the "capable of ascertainment" test which is set forth in the Missouri statutes. Powel v. Chaminade College Preparatory, Inc., _____ S.W.3d _____, 2005 W.L. 1266801 (Mo. App. E.D. 2005); H. R. B. v. Rigali, 18 S.W.3d at 443. (App. at A8). As the Eastern District noted in its panel opinion, this ignores nearly a century of precedent. Powel, _____ S.W.3d _____, 2005 W.L. 1266801 (Mo. App. E.D. 2005). (App. at A8). As the Eastern District pointed out, H.R.B. holds that "any plaintiff that suffers a traumatic event immediately knows the damage it will cause him or her. Accordingly, the traumatic event triggers the running of the statute of limitations, regardless of whether or not the plaintiff remembers the event." (App. at A8-9). As the Eastern District correctly pointed out, the Western District has also held that an injury immediately accrues. *See* Hollingsworth, 150 S.W.3d at 88; Vandeheuvel, 866 S.W.2d 100 (Mo. App. W.D. 1994). The Eastern District continued stating:

> This is not Missouri law. By the legislature's adoption of our current standard in 1919, an action does not accrue "when the wrong is done or the technical breach… occurs." Section 516.100. The court in H.R.B. erred in failing to apply the standards set forth by our legislature. Moreover, H.R.B., Hollingworth and Vandenheuvel all fail to follow our Missouri Supreme Court's opinion in Sheehan, holding that repressed memory can prevent the ascertainment of injury and therefore forestall the running of the statute of limitations. Hence, we choose to no longer follow the rationale in H.R.B. and its progeny as they contravene Missouri statutes and case law precedent.

(App. at A9).

The Eastern District also stated:

> [T]here was evidence that because of the traumatic abuse Powel suffered, his memory was repressed at the time of the abuse, and he had no recollection until his treatment for brain cancer. The trial court in Powel's case believed that Powel overcame the summary judgment motion by demonstrating genuine issues of material fact which would be a jury issue.
>
> We agree with the trial court in that Powel has overcome Chaminade's summary judgment motion by demonstrating genuine issues of material fact…Accordingly, the issue of when Powel's damages from his childhood sexual abuse were capable of ascertainment is a decision to be made by the jury. *See* Straub, 128 S.W.3d at 159. Point granted.

Powel, _____ S.W.3d _____ 2005 W.L. 1266801 (Mo. App. E.D. 2005) (App. at A9-10).

As the trial court noted, Sheehan, K.G., L.M.S. and H.R.B. v. J.L.G. all recognize that the statute of limitations can be tolled by repressed memory in some cases. The Eastern District, in the instant case, has also recognized that the statute of limitations can be tolled by repressed memory. The other line of cases, represented by Vandenheuvel and H.R.B. v. Rigali, held that such tolling is not possible. (L.F. 260). The trial court further stated that "this uncertainty in the law, created by the two inconsistent lines of cases, will undoubtedly continue until the Missouri Supreme Court revisits this area and

makes explicitly clear whether H.R.B.II (H.R.B. v. Rigali) is, or is not, good law that should be followed." (L.F. 260). Finally, the trial court held that it had no choice but to follow H.R.B. v. Rigali, but further noted that it strongly disagreed with the reasoning of H.R.B. v. Rigali and even believes that it is quite possible that the Missouri Supreme Court might also disagree with the reasoning in H.R.B. v. Rigali if it were to examine this area of the law. (L.F. 260-261). Obviously the Eastern District Court of Appeals in the instant case, agreed with the trial court that H.R.B. v. Rigali incorrectly interpreted Missouri law in stating that H.R.B. v. Rigali and its progeny should no longer be followed. Powel, _____ S.W.3d _____, 2005 W.L. 1266801 (Mo. App. E.D. 2005) (App. at A9).

The trial court concluded by indicating that if it were free to do so it would deny Defendant's Motion for Summary Judgment and hold that Plaintiff presented a genuine issue of fact as to whether or not his damages were "capable of ascertainment" before he recovered his memory of the abuse in February 2000. (L.F. 261). However, despite its significant misgivings, the trial court held that it had to dismiss Plaintiff's cause of action based upon the precedent of H.R.B. v. Rigali. The Eastern District, in its panel opinion in the instant case, agreed with the trial court's rationale that this Court's holding in Sheehan v. Sheehan allowed for repressed memory, in certain circumstances, to toll the running of the statute of limitations. (App. at A9). For this reason it determined that H.R.B. v. Rigali had incorrectly interpreted Missouri statutes of limitations and held that H.R.B. v. Rigali and its progeny should no longer be followed. (App. at A9).

For all of the foregoing reasons, Plaintiff respectfully submits that H.R.B. v. Rigali, Harris v. Hollingworth and Vandenheuvel should be explicitly overruled based upon this Court's precedents set forth in Sheehan and K.G. The clear testimony of Plaintiff and his psychologist, Dr. Greenberg, demonstrates that Plaintiff repressed his memory from the age of seventeen (17) until February 2000. For this reason, under virtually any standard, it is clear that Plaintiff's damages were not "capable of ascertainment" to Plaintiff until February 2000, when his memory came back to him. Since his Petition against Defendants Chaminade and the Marianist Province was filed in June of 2002, his claims were filed well within the five (5) year statute of limitations under §516.120 and §516.100, and therefore were timely filed. For these reasons, Plaintiff would respectfully urge this Court to hold that the trial court erred in granting Defendant's Motion for Summary Judgment and further urges this Court to uphold the Eastern District's reversal of the granting of the Motion for Summary Judgment and remand this case to the Circuit Court for the City of St. Louis for further proceedings.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT SECTION 537.046 DOES NOT APPLY TO PLAINTIFF'S CLAIMS AGAINST DEFENDANTS FOR INTENTIONAL FAILURE TO SUPERVISE CLERGY BECAUSE SECTION 537.046 ALLOWS FOR RECOVERY OF DAMAGES AGAINST DEFENDANTS MARIANIST PROVINCE AND CHAMINADE SUFFERED AS A RESULT OF CHILDHOOD SEXUAL ABUSE AND THERE IS NO QUESTION THAT PLAINTIFF'S DAMAGES ARE A RESULT OF CHILDHOOD SEXUAL ABUSE.

Section 537.046 R.S.Mo. (1990) states as follows in relevant part:

> 1. As used in this section, the following terms mean:
>
> (1) "childhood sexual abuse", any act committed by the Defendant against the Plaintiff which act occurred when the plaintiff was under the age of eighteen years and which act would have been a violation of Section 566.030, 566.040, 566.050, 566.060, 566.070, 566.080, 566.090, 566.100, 566.110 or 566.120, R.S.Mo., or Section 568.020, R.S.Mo.;
>
> 2. In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within five years of the date the plaintiff attains the age of eighteen or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs.
>
> 3. This section shall apply to any action commenced on or after August 28, 1990, including any action which would have barred by the application of the statute of limitation applicable prior to that date.

The Circuit Court, in its Order and Partial Judgment, found that §537.046 does not apply to Plaintiff's claims against Defendants for intentional failure to supervise clergy because §537.046 may only be invoked against the perpetrator of one or more of the enumerated criminal offenses contained within §537.046.1(1). The Eastern District

Court of Appeals in its opinion in the instant case did not reach this issue as it determined that Plaintiff's claims were timely filed under the general statute of limitations. The Eastern District indicated that it would reserve its discussion as to whether §537.046 applied to a claim for intentional failure to supervise clergy to "another more germane set of circumstances." (App. at A10). Plaintiff would respectfully urge this Court to find that the Circuit Court's holding regarding the applicability of §537.046 is in error and remand this case to the Circuit Court for the City of St. Louis for further proceedings.

In the case of H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. App. E.D. 1996), the Circuit Court dismissed plaintiff's civil actions for damages against the defendant perpetrator, the archbishop and the church on the grounds that plaintiff's claims had elapsed under the applicable statutes of limitations. The first three counts of plaintiff's and plaintiff's wife's petition were brought by plaintiff against defendant J.L.G., the Roman Catholic priest employed by the church, for breach of fiduciary duty (Count I), intentional infliction of emotional distress (Count II), and childhood sexual abuse (Count III). Id. at 94. The next five counts were brought by the plaintiff against the archbishop and the church: respondeat superior (Count IV), negligence (Count V), negligent infliction of emotional distress (Count VI), intentional infliction of emotional distress (Count VII), and breach of fiduciary duty (Count VIII). The final two counts were loss of consortium claims against all the respondents, brought by plaintiff (Count IX) and wife (Count X). The trial court, in considering the defendants' statute of limitations arguments, dismissed all counts against the individual defendant and also dismissed Counts IV through X against the archbishop and the church. The trial court found that under R.S.Mo.

§516.120 and §516.100 and in reliance on Doe and Vandenheuvel that the repressed memory of plaintiff would not extend the statute of limitations until such time as plaintiff's memory revived. Id. at 95. The trial court further found that R.S.Mo. §537.046 did not extend the time for filing the petition, as the original statutes of limitations, R.S.Mo. §516.120 and §516.100 had already expired and the respondents had a vested right to be free from suit under Doe.

The Eastern District, in relying upon this Court's opinion in Sheehan, held that the petition did not clearly indicate on its face and without exception that Counts I through VIII, and Count X were barred by the statute of limitations under §537.046. Id. at 96-97. In reversing and remanding the trial court's decision to dismiss plaintiff's claims under the statutes of limitations set forth in §516.100, §516.120 and §537.046, the Eastern District implicitly recognized that §537.046 applies to claims against nonperpetrators as well as perpetrators. The plaintiff had argued that §537.046 applied to plaintiff's claims against the archbishop and the church. In reversing and remanding the case to the Circuit Court, the Eastern District allowed the claims of the plaintiff under §537.046 to go forward against the archbishop and the church even though, by the Circuit Court's analysis in the instant case, the archbishop and the church would not have been the actual perpetrators of the sexual abuse. For these reasons it is clear the trial court erred in granting Defendant's Motion for Summary Judgment regarding the applicability of §537.046 to this action and that summary judgment should not have been granted.

§537.046(2) states that it is applicable "in any civil action for recovery of damages suffered as **a result of childhood sexual abuse**…" (*Emphasis Added*). §537.046(2).

There can be no doubt that Plaintiff filed an action for damages suffered as a result of childhood sexual abuse. The damages that he has suffered are allegedly caused by the abuse that he suffered at the hands of Brother Woulfe and Father Christensen while he was a student at Defendant Chaminade. Plaintiff's Petition alleges that Defendants Marianist Province and Chaminade had a supervisory or agency relationship with Brother Woulfe and Father Christensen. Counts IX and X of Plaintiff's Fourth Amended Petition seek damages from Defendants Marianist Province and Chaminade for their intentional failure to supervise these two members of the clergy. The damages that Plaintiff has suffered for childhood sexual abuse are a result of the actions of Defendants Marianist Province and Chaminade in failing to supervise Brother Woulfe and Father Christensen.

As the Circuit Court noted, "there is little doubt that the legislature intended this statute to provide, in some ways, a substantively more liberal rule with regard to the time within which an aggrieved plaintiff may bring a cause of action for sexual abuse, and specifically with regard to whether repressed memories of abuse can serve to toll the running of the statute of limitations in such cases, than what the legislature assumed might always be available under the more traditional statutes of limitations." *See* e.g. Straub v. Tull, 128 S.W.3d 157 (Mo. App. S.D. 2004). (L.F. 247). The trial court continued by indicating that it believed that §537.046 is a more liberal standard which governs if both it and §516.120 and §516.100 apply in a given case. (L.F. 247). The court further indicated that it had no doubt that Plaintiff's claims against Defendant Chaminade and Defendant Marianist Province would not be time barred if §537.046 applies. (L.F. 247).

In the instant case, Plaintiff suffered numerous acts of sexual abuse while a student at Chaminade High School, which was run by the Marianist Province during the years of 1973 through 1975. Plaintiff's date of birth is June 10, 1958, making him between the ages of fifteen (15) and seventeen (17) at the time the alleged acts were perpetrated upon him. By the time he was eighteen (18) years old he had involuntarily repressed his recollection of these events. (L.F. 196-198, 205-208, 209-216). Thus, from the time Plaintiff reached eighteen (18) years of age, until his memory returned in February 2000 at age forty-one (41), Plaintiff had no recollection of the acts of sexual abuse perpetrated upon him while a student at Chaminade. Pursuant to §537.046(2), Plaintiff then had a time period of three (3) years from the time he "discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse" within which to file this lawsuit. As Plaintiff filed his Petition on June 7, 2002, he clearly did so within this time period. (L.F. 17).

In their Motion for Summary Judgment the Defendants relied upon H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. 2000), to argue that §516.120(4) was the applicable statute of limitations. As stated in great detail above, Plaintiff believes that his claims were tolled by the provisions of §516.100 due to his repressed memory and therefore his claims were filed within the appropriate time frame under §516.120. The Eastern District Court of Appeals, in its opinion in the instant case, also determined that Plaintiff's claims were tolled by the provisions of §516.100 due to his repressed memory and therefore his claims were filed within the appropriate time frame under §516.120. The court then reserved discussion as to whether §537.046 applied to a claim for intentional failure to

supervise clergy to "another more germane set of circumstances". (App. at A10). However, Plaintiff also believes that §537.046, if applicable, was also complied with by Plaintiff in filing his cause of action on June 7, 2002, slightly more than two (2) years after he regained his memory of the childhood sexual abuse that he suffered.

H.R.B. v. Rigali is distinguishable as it relates to §537.046, because in that case the parties agreed that §516.120(4) was the applicable statute of limitations. Id. at 443. Plaintiff does not concede in this case that §537.046 is not applicable and therefore Defendant's reliance on H.R.B. v. Rigali as it relates to §537.046 is unavailing. Further, it should be noted that the facts in H.R.B. v. Rigali differ significantly from the facts in the instant case. In the instant case, the Plaintiff's psychologist has specifically stated that Plaintiff repressed his memory and did not regain it until February 2000. (L.F. 205-208). In the Rigali case, the psychological/psychiatric testimony was that the plaintiff was aware that he had been injured and damaged in some way, but did not know why. Here there is no such testimony, but rather a complete repression of the acts and feelings associated with them, which Plaintiff suffered while a student at Chaminade.

The remainder of H.R.B. v. Rigali deals with the Eastern District's review of the "capable of ascertainment" test under §516.100. The rationale was rejected by the Eastern District in its panel opinion. (App. at A8-10). Section 537.046, on the other hand, does not have a capable of ascertainment test but rather a "discovery" rule for the determination of damages. Thus, upon Plaintiff's discovery in February 2000 that his injury or illness was caused by childhood sexual abuse, his three (3) year time period

began to run. When his case was filed on June 7, 2002, Plaintiff complied with §537.046.

As the trial court correctly notes, this Court, in the case of Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 341-42 (Mo. banc. 1993), held that to the extent that §537.046(3) was designed to revive any actions that were already time barred on its effective date of enactment (August 28, 1990) that the statute is unconstitutional. The court in Doe held that that portion of subparagraph three (3) would be unconstitutional as a violation of the prohibition against the application of retrospective laws. Because of the prohibition against retrospective laws, this Court held that defendants who would have been protected from suit due to expiration of the prior applicable statute of limitations have a "vested right" to continue to remain "free from suit". Id. at 342. However, although §537.046 cannot operate to revive causes of action whose statute of limitations have already elapsed prior to the enactment of §537.046, it can extend the allowable time limit for bringing such actions for those cases where the statute of limitations had not already been time barred as of August 28, 1990. *See* K.G. v. R.T.R., 918 S.W.2d 795, 798 (Mo. banc. 1996); Ridder v. Hibsch, 94 S.W.3d 470, 472 (Mo. App. S.D. 2003).

In the case of L.M.S. v. N.M. and V.P., 911 S.W.2d 703, 704 (Mo. App. E.D. 1995), the Eastern District considered whether, in a case where a child's memory of the sexual abuse had been repressed, the statute of limitations for the intentional tort of battery was tolled until the memory of those acts was refreshed and capable of ascertainment. In L.M.S., the plaintiff argued that the defendant did not have a vested

right created by the expiration of the statute of limitations for the tort of battery under §516.140 and therefore §537.046 would not operate retroactively in reinstituting her claim for battery but, instead, would be acting prospectively. Based upon the provisions of §516.140 and §516.100, the plaintiff contended that her damage resulting from the defendant's actions was not capable of ascertainment until her memories began to emerge in November of 1992. Plaintiff further argued that her statute of limitations did not begin to run against her until her memories began to emerge in November of 1992 and therefore her action was not barred before August 28, 1990, the effective date of §537.046. Id. In reversing the trial court's dismissal of plaintiff's claims, the Eastern District followed the Supreme Court's opinion in Sheehan and held that plaintiff's damages may not have been ascertainable under §516.100 and §516.140 until November of 1992, the time when her memories began to emerge. For that reason, the court determined that her petition filed in June of 1993 may have been timely. The Eastern District reversed dismissal by the trial court finding that the defendant had no vested right to presume that her claims were barred by the statute of limitations for battery, and therefore the provisions of §537.046 were applicable to her claims.

The facts in this case are even more clear. Although Plaintiff suffered acts of sexual abuse while he was a child, the memory of that abuse was repressed from the time he was seventeen (17) until the time he was forty-one (41). (L.F. 196-198, 205-208, 209-216). Plaintiff had no recollection or knowledge of any sexual abuse occurring to him before his eighteenth (18^{th}) birthday until February 2000. (L.F. 195-198, 205-208-209-215). Further, Plaintiff's psychologist, Dr. Michael S. Greenberg, noted that Mr. Powell

stated that "he remembered being molested until approximately age seventeen (17), but he repressed his memories at that time. His memories came back to him after having a brain tumor" in February 2000. (L.F. 205-207). Clearly Plaintiff's damage associated with the sexual abuse was not "capable of ascertainment" from the time he was seventeen (17) years old until February 2000 because he had no memory of this damage. Plaintiff could not have made a claim during the intervening years because he had no knowledge that such claim existed, as he did not remember any of the actions which took place. Therefore, pursuant to the terms of §516.100 and §516.120, Plaintiff's five (5) year statute of limitations would not have begun to run until February 2000, which was the time that Plaintiff's damages were capable of ascertainment. For these reasons, Defendants did not have a vested right to be free from suit under the provisions of §516.100 and §516.120 pursuant to Doe because his cause of action was not barred before the legislature enacted §537.046 in 1990. As his claims were not capable of ascertainment until 2000, §537.046 would not be operating retroactively to revive a cause of action that had already been barred. *See* L.M.S., 911 S.W.2d at 704; *see also* Sheehan v. Sheehan, *supra*.

The trial court, although it believed that §537.046 could only be applied to claims for sexual abuse against the perpetrator of the acts of the abuse, indicated that it would "otherwise be inclined to agree with plaintiff's argument that his cause of action against defendants was not barred prior to the enactment of §537.046 because his claims were not capable of ascertainment before February 2000 due to his repressed memory of the abuse", and therefore, "since his claims were not barred under the old statutes prior to

August 28, 1990, §537.046 is applicable to his cause of action and would not be operating retrospectively to revive a cause of action that was already time barred." (L.F. 249). For all of the reasons stated herein, when all of the facts and reasonable inferences are looked at in the light most favorable to the Plaintiff, it is clear that the trial court erred in granting Defendants' Motion for Summary Judgment because, pursuant to the case of H.R.B. v. J.L.G., claims for damages as a result of sexual abuse can be prosecuted against Defendants other than just the abusing parties.

A. ALTERNATIVELY, PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL FAILURE TO SUPERVISE CLERGY WAS TIMELY FILED SINCE THE CAUSE OF ACTION FOR INTENTIONAL FAILURE TO SUPERVISE CLERGY WAS NOT RECOGNIZED WITHIN THE STATE OF MISSOURI UNTIL THE MISSOURI SUPREME COURT HANDED DOWN THE CASE OF GIBSON v. BREWER.

In their Motion for Summary Judgment, Defendants argue that §537.046 cannot apply because the Defendants had a vested right to be from suit as Plaintiff's cause of action for intentional failure to supervise clergy was time barred by the existing statutes of limitations at the time that §537.046 was enacted in August of 1990. Defendants' arguments are unavailing and must fail because Plaintiff could not have filed his cause of action for intentional failure to supervise clergy until 1997, when the cause of action was recognized within the state of Missouri by this Court in the case of Gibson v. Brewer, 952 S.W.2d 239 (Mo. banc. 1997).

The cause of action for intentional failure to supervise clergy had never been recognized within the state of Missouri until this Court handed down the case of Gibson v. Brewer in 1997. For this reason, Plaintiff's claims for intentional failure to supervise clergy could not have been brought prior to the enactment of Missouri Revised Statute §537.046 in 1990. Therefore, Plaintiff's filing of his claims for childhood sexual abuse under §537.046 associated with the Defendants' intentional failure to supervise clergy do not revive a claim which had already been barred by the applicable statute of limitations because no such cause of action existed within the state of Missouri prior to the court's holding in Gibson v. Brewer in 1997, seven (7) years after the Missouri Legislature enacted Missouri Revised Statute §537.046. Thus, Defendants had no vested right to be free from Plaintiff's action because no such action existed before the enactment of §537.046.

In the Doe case, this Court stated:

> The sole issue is the constitutionality of the childhood sexual abuse statute, Section 537.046, R.S.Mo. Supp. 1992, to the extent that it authorizes causes of action that are barred under statutes of limitation applicable prior to August 28, 1990, the effective date of the statute.

Doe, 862 S.W.2d at 339.

Doe claimed damages against the defendants under causes of action for battery, clergy malpractice and breach of fiduciary duty. The court noted that although battery was clearly an actionable claim, Missouri courts had not addressed the propriety of causes of action for clergy malpractice or the tort of breach of fiduciary duty as it related

to childhood sexual assaults. Id. The trial court granted defendant's motion to dismiss on the grounds that the cause is "barred by the statute of limitations". Id. This Court noted that the Order was not specific and did not indicate which statute of limitations the trial court referenced in its Order. This Court noted that there were two relevant statutes. The two relevant statutes were the two (2) year statute for battery under §516.140 and the five (5) year statute of limitations for the other tort actions "assuming they are recognized under the law" under §516.120(4). Id. In Doe, this court noted that plaintiff's counsel did not appeal the trial court's ruling that the statute of limitations had expired by the time the petition was filed, and therefore they did not address the propriety of that ground for dismissal. Id. at 339-40.

Unlike the arguments of the plaintiff in Doe, Plaintiff would note that the statute of limitations for claims of intentional failure to supervise clergy had not expired by the time Plaintiff's cause of action was filed on June 7, 2002. The case of Gibson v. Brewer was handed down on August 19, 1997, seven (7) years after §537.046 was enacted. After a lengthy discussion regarding whether or not the court would recognize a cause of action for negligent failure to supervise clergy, the court in Gibson first adopted a cause of action for intentional failure to supervise clergy stating, "recognizing the tort of intentional failure to supervise clergy, in contrast does not offend the first amendment." Gibson, 952 S.W.2d at 248. In Doe, this Court rejected plaintiff's efforts to recognize a cause of action for negligent failure to supervise clergy. Therefore, in the instant case, plaintiff could never have filed a claim for intentional failure to supervise clergy prior to 1997 because the state of Missouri did not recognize such actions.

The Doe court held that once the original statute of limitations expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature, and therefore Article I, Section 13 of the Missouri Constitution prohibits the legislative revival of the cause of action. Doe, 862 S.W.2d at 341. In the instant action, however, Defendants never possessed a vested right to be free from suit based upon their intentional failure to supervise clergy because the cause of action for intentional failure to supervise clergy did not exist at the time that Missouri Revised Statute §537.046 was adopted by the Missouri Legislature. Section 537.046 is therefore not being applied retroactively to affect a vested right of defendants, but is being applied prospectively since the statute predates this Court's recognition of a common law action for intentional failure to supervise clergy. Plaintiff Michael Powel's memory of the sexual abuse that he suffered was repressed from the time he was seventeen (17) until February 2000. Under §537.046(2), Plaintiff is entitled to file a cause of action relating to childhood sexual abuse within three (3) years from the date that he discovers the sexual abuse. Plaintiff's claims against Defendants for their intentional failure to supervise their clergy, a cause of action that was first recognized in 1997, were filed on June 7, 2002, within the three (3) year time period of the discovery of his damages in compliance with §537.046.

For the foregoing reasons, it is clear that Defendants did not possess a vested right to be free from suit for their intentional failure to supervise clergy because the cause of action for intentional failure to supervise clergy was not recognized until 1997, seven (7) years after the Missouri Legislature enacted §537.046. Defendants cannot have a vested

right to be free from a cause of action that has not been recognized by the courts or the legislature. No such cause of action would have been viable for any plaintiffs within the state of Missouri prior to 1997. There can be no statute of limitations for a nonexistent cause of action and therefore Defendants have no vested right to be free from suit for a nonexistent cause of action.

For all of the foregoing reasons, it is clear that Plaintiff's claims for intentional failure to supervise clergy are appropriately brought pursuant to §537.046 and such claims against Defendants the Marianist Province and Defendant Chaminade are viable causes of action. Further, under the express provisions of §537.046, Plaintiff's cause of action does not accrue until the damages from the sexual abuse are discovered. As Plaintiff did not discover the damages that he sustained as a result of the sexual abuse until his repressed memory was regained in February 2000, Plaintiff's cause of action was filed within the appropriate time frame set forth under §537.046 when the Petition was filed in June, 2002. In addition, Plaintiff's cause of action was also timely filed under §537.046 because the cause of action for intentional failure to supervise clergy was not recognized within the state of Missouri until 1997 in the case of Gibson v. Brewer. Plaintiff could not file a cause of action for a claim that did not exist prior to Gibson v. Brewer. Once the cause of action for intentional failure to supervise clergy was adopted in 1997, Plaintiff therefore was entitled to file his claim within three (3) years from the date that he regained his repressed memory under §537.046. Since Plaintiff regained his repressed memory in February 2000 and the cause of action was filed in June of 2002, Plaintiff's cause of action for intentional failure to supervise clergy was timely filed.

Therefore, Plaintiff respectfully urges this Court to reverse the trial court's granting of summary judgment in this matter and remand this cause of action to the Circuit Court for further proceedings.

CONCLUSION

Plaintiff presented sufficient evidence to the trial court to create a genuine issue of material fact regarding whether or not Plaintiff's damages were "capable of ascertainment" under the provisions of §516.100 and §516.120(4) during the time that Plaintiff's memory was repressed from his teenage years until February 2000. The Affidavits of Michael Powel and Dr. Michael Greenberg clearly establish that Plaintiff's memory was repressed from the time he was seventeen (17) until February 2000. Plaintiff then filed his cause of action against Defendants the Marianist Province and Chaminade on June 7, 2002, well within the five (5) year statute of limitations set forth in §516.120(4). When the facts are viewed in the light most favorable to Plaintiff, it is clear that Plaintiff's damages were not capable of ascertainment during the time period when his memory was repressed.

Plaintiff also timely filed his cause of action against the Defendants for intentional failure to supervise clergy pursuant to §537.046. Section 537.046 provides that a plaintiff shall file his cause of action within three (3) years from the time he discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse. As the Affidavits of Dr. Greenberg and Plaintiff attest, Plaintiff did not recall the acts of sexual abuse until February 2000. Since Plaintiff's cause of action was filed in June of 2002, it was filed well within the three (3) year statute of limitations set forth in §537.046 from the date he discovered the abuse. Further, the case of H.R.B. v. J.L.G. implicitly recognizes that §537.046 can apply to entities other than the actual perpetrators of the sexual abuse.

Finally, it is clear that Plaintiff's cause of action was timely filed under §537.046 because the cause of action for intentional failure to supervise clergy was not recognized within the state of Missouri until this Court handed down the case of Gibson v. Brewer in 1997. Since the case of Gibson v. Brewer was not handed down until 1997, Defendant did not have a vested right to be free from suit under §537.046 because the statute of limitations had not elapsed prior to the enactment of §537.046. Since the cause of action for intentional failure to supervise clergy was not recognized until 1997 and §537.046 was enacted in 1990, Plaintiff timely filed his cause of action against the Defendants in June of 2002 when he filed his cause of action within three (3) years from the date that he discovered the acts of sexual abuse perpetrated upon him.

For all of the foregoing reasons, Plaintiff respectfully urges this Court to uphold the Eastern District's decision reversing the trial court's Order granting Defendants' Motion for Summary Judgment. Plaintiff therefore respectfully requests that this Court reverse the Circuit Court's granting of Defendants' Motion for Summary Judgment and remand this case to the Circuit Court for further proceedings consistent with this Court's holding.

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IN THE SUPREME COURT OF MISSOURI

MICHAEL POWEL, Appellant/Plaintiff, v. MARIANIST PROVINCE OF THE UNITED STATES, CHAMINADE COLLEGE PREPARATORY, INC. d/b/a CHAMINADE COLLEGE PREPARATORY SCHOOL, FATHER WILLIAM CHRISTENSEN AND BROTHER JOHN J. WOULFE, Respondents/Defendants.	)	No. SC86875

CERTIFICATION PURSUANT TO RULE 84.06(C)

Appellant hereby certifies that Appellant's Substitute Brief complies with the limitations contained within Rule 84.06(b). The Substitute Brief contains 16,963 words.

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MICHAEL POWEL, Appellant/Plaintiff, v. MARIANIST PROVINCE OF THE UNITED STATES, CHAMINADE COLLEGE PREPARATORY, INC. d/b/a CHAMINADE COLLEGE PREPARATORY SCHOOL, FATHER WILLIAM CHRISTENSEN AND BROTHER JOHN J. WOULFE, Respondents/Defendants.	)	No. SC86875

CERTIFICATE OF SERVICE

COME NOW the undersigned and hereby certifies that two true and accurate copies of Appellant's Substitute Brief were hand delivered, this 17th day of June, 2005 to Mr. Gerard T. Noce, 1010 Market Street, Suite 500, St. Louis, Missouri 63101.

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IN THE SUPREME COURT OF MISSOURI

No. SC86575

MICHAEL POWEL,

Appellant/Plaintiff,

v.

MARIANIST PROVINCE OF THE UNITED STATES, CHAMINADE COLLEGE PREPARATORY, INC. d/b/a CHAMINADE COLLEGE PREPARATORY SCHOOL, FATHER WILLIAM CHRISTENSEN and BROTHER JOHN J. WOULFE,

Respondents/Defendants.

Appeal from the Circuit Court for the City of St. Louis, State of Missouri

Honorable Judge John J. Riley

APPELLANT'S SUBSTITUTE APPENDIX

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APPENDIX TABLE OF CONTENTS

IN THE SUPREME COURT OF MISSOURI

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CERTIFICATE OF SERVICE

COME NOW the undersigned and hereby certifies that two true and accurate copies of Appellant's Substitute Appendix were hand delivered, this _____ day of _____, 2005 to Mr. Gerard T. Noce, 1010 Market Street, Suite 500, St. Louis, Missouri 63101.

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_____

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