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 RESPONDENTS MARIANIST PROVINCE OF THE UNITED STATES AND CHAMINADE COLLEGE PREPARATORY INC., d/b/a CHAMINADE COLLEGE PREPARATORY SCHOOL

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ORAL ARGUMENT REQUESTED

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A. Under Missouri's long-standing, objective-based standard for the statute of limitations, Powel's alleged damages were "capable of ascertainment" when he was allegedly sexually abused in 1973 through 1975, not when he allegedly regained his memory of the alleged abuse, and thus his claims are time-barred for his failure to file them within five years of the time of the alleged abuse. 30

B. Missouri law does not permit tolling of the statute of limitations simply because a plaintiff forgets or represses memory of his alleged damages and injuries *after* he sustained them. 35

C. Missouri case law has not changed the objective-based interpretation of the "capable of ascertainment" test to provide, in the repressed memory context, that a plaintiff's damages are only "capable of ascertainment" when he recalls his memory of the abuse. 38

II. Even if Missouri now construes the "capable of ascertainment" test as a discovery-based standard, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because a plaintiff's damages under the supposed new standard would be ascertainable at the time of discovery, in that Powel knew about and remembered the alleged sexual abuse and damages at the time that they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 1 in Powel's substitute brief). 47

A. Even if a discovery-based standard applies, Missouri courts (and even proponents of the repressed memory phenomena) acknowledge a crucial distinction between claimants who demonstrate that they had no knowledge or memory of the sexual abuse from the time it occurred until years later and those who knew about the abuse as it occurred and remembered it for some time thereafter, but eventually allegedly repressed or suppressed memory of it. 48

B. Even under a discovery-based standard, the time limitation period begins once a plaintiff knows of the alleged sexual abuse and cannot be suspended or tolled because he allegedly represses or suppresses his memory of the abuse some time thereafter. 53

C. Powell knew of the alleged sexual abuse at the time it allegedly occurred, and thus his claims are barred for his failure to file them within five years of that time. 56

III. Even if Powel's alleged damages were not "capable of ascertainment" in 1973 and 1975 under Missouri's supposed new discovery-based standard, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because courts may not "judicially revive" claims that were previously barred by prior interpretations of the statute of limitations, in that Powel's claims were barred by the prior objective-based construction of the "capable of ascertainment" test (response to Point Relied On # 1 in Powel's substitute brief). 60

A. Even if Missouri has adopted a discovery-based standard, the prohibition on "judicial revival" of expired claims prevents application of such a standard in this case. 62

B. The Marianist Province and Chaminade had a "vested right" to be free from suit for all claims for "other injury," including claims for intentional failure to supervise clergy. 63

IV. The circuit court properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because the new statute of limitations in section 537.046 of the Revised Statutes of Missouri for "childhood sexual abuse" claims may not be retroactively applied to save claims already barred by the previous statute of limitations and does not apply to claims for intentional failure to supervise clergy, in that Powel's claims against the Marianist Province and Chaminade were already barred by the statute of limitations in section 516.120(4) and are intentional-failure-to-supervise claims for which section 537.046 does not apply (response to Point Relied On # 2 in Powel's substitute brief). 65

A. The new statute of limitations for "childhood sexual abuse" claims set forth in section 537.046 does not apply in this case because the Marianist Province and Chaminade had a "vested right to be free from" Powel's "suit" as his claims were already time-barred under section 516.120 at the time this new statute which enacted. 67

B. The new statute of limitations set forth in section 537.046 does not apply in this case because Powel has not brought a claim against the Marianist Province and Chaminade for "childhood sexual abuse" as defined by that statute. 68

(1) There has not been and cannot be any evidence that the Marianist Province or Chaminade committed any of the violent, sexual acts prohibited by the statutes set forth in section 537.046. 70

(2) Missouri case law does not hold that section 537.046 applies to nonperpetrators like the Marianist Province or Chaminade. 70

(3) Section 537.046 does not apply to the Marianist Province and Chaminade even under an "accomplice" liability theory. 72

V. Even if the new statute of limitations in section 537.046 applies to the claims in this case, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment because such claims must be brought within "three years of the date the plaintiff discovers, or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse," in that Powel discovered the alleged sexual abuse and damages at the time they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 2 in Powel's substitute brief). 75

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Jurisdictional Statement

The defendants/respondents Marianist Province of the United States and Chaminade College Preparatory Inc. d/b/a Chaminade Preparatory School agree with the jurisdictional statement set forth in the plaintiff/appellant Michael Powel's substitute brief. The Marianist Province and Chaminade only seek to add that when the Circuit Court of the City of St. Louis granted their summary judgment motions, the trial court also certified its decision as a final judgment in accordance with Missouri Supreme Court Rule 74.01(b) on the express determination that there was no just reason for delay. (A36.)

Statement of Facts

Thirty years ago, the plaintiff Michael Powel attended high school from the age of 15 to 17 at Chaminade College Preparatory College in St. Louis County, Missouri, from late 1973 to 1975. (L.F. 22-23, 117.) During this time, members of the Marianist Province of the United States were employed at Chaminade as educators. (L.F. 19, 43.) Born on June 10, 1958, Powel was a boarding student at Chaminade and lived in the school's residence halls during the academic year. (L.F. 104, 114.) He also stayed at Chaminade during the summer months and did odd jobs for the school. (L.F. 104.) According to Powel's testimony, after he left Chaminade in 1975, Powel felt "like a piece of dirt" and "very betrayed by Chaminade." (L.F. 142.) The reason for these alleged feelings of betrayal: Powel claims that two faculty members at Chaminade, Brother John J. Woulfe and Father William Christensen, sexually abused him while he attended the school.[1] (L.F. 20-23.) After these alleged assaults, Powel testified that he felt like he was not "good at anything except for having my body sexually abused." (L.F. 117.)

[1] The Marianist Province and Chaminade adamantly deny Powel's allegations that Brother Woulfe and Father Christensen sexually abused him and that these entities intentionally failed to supervise these individuals. Nevertheless, since Powel's allegations are relevant for the purpose of discussing the statute of limitations issues in this case, the Marianist Province and Chaminade briefly summarize these allegations in this Statement of Facts.

Alleged Sexual Abuse by Brother Woulfe

Brother John J. Woulfe served as a religious brother at Chaminade during Michael Powel's stay at the school. (L.F. 20-21.) Powel testified that at various times he lived in the same residence hall as Brother Woulfe, Canning Hall. (L.F. 104, 105, 106.) Powel testified that Brother Woulfe "was always in the locker room and he was in the dorm" and would "put his hands" on "kids" "[w]henever he could get a chance." (L.F. 106.) According to Powel, in the late fall or winter of 1973 Brother Woulfe offered Powel a massage in Woulfe's room. (L.F. 106.) Powel allegedly then walked into Brother Woulfe's room and Woulfe closed the door. (L.F. 107.) Powel testified that he "laid down" on his stomach on Woulfe's bed and, from his alleged past experiences with sexual abuse, "sort of knew what was going to go on." (L.F. 106-07.) Powel claims to have also been sexually abused by three siblings and two other men before ever attending Chaminade. (L.F. 118-21.) In any event, as Brother Woulfe allegedly "started massaging" Powel, Woulfe allegedly "went down to [Powel's] buttocks area and started fondling" Powel's genitalia. (L.F. 107.) This conduct allegedly continued for "about five, ten minutes" until Powel ejaculated. (L.F. 107.) According to Powel, Brother Woulfe massaged and fondled Powel in this fashion at least three times during Powel's stay at Chaminade. (L.F. 107.)

Alleged Sexual Abuse by Father Christensen

Father William Christensen was an ordained Roman Catholic Priest assigned to serve at Chaminade during Powel's stay at the school. (L.F. 20-21.) Powel recalls

that Father Christensen taught him theology at Chaminade and, like Brother Woulfe, also resided in Canning Hall. (L.F. 48, 112.) According to Powel, Father Christensen sexually abused him on five occasions. (L.F. 111.) The first incident allegedly occurred during one of the summers that Powel worked for the school. (L.F. 111.) Powel claims that Father Christensen "sexually fondled" him in Christensen's room as the two were "standing up." (L.F. 112.) Powel testified that Christensen sexually abused him in his room at other times, as well. (L.F. 116.) Father Christensen, according to Powel, even "suggest[ed] that I do fellatio on him." (L.F. 116.) Powel testified that one occasion he did so and had Christensen's "penis in [his] mouth for about a minute, minute and a half." (L.F. 116.) Powel also claims Christensen performed fellatio on him, as well. (L.F. 116.)

In addition to this alleged abuse, Powel also claims that Father Christensen introduced him to pornography. (L.F. 136.) According to Powel, during one of the summers Powel stayed at Chaminade, Father Christensen drove Powel and his fellow classmate Marc Parker to see an "XXX movie" showing in a theater in the City of St. Louis. (L.F. 133.) As Powel, Christensen and Parker were allegedly watching the pornographic movie, Powel claims that he looked at Christensen and saw him with "his zipper undone…his penis out, and…a Bible right there." (L.F. 114.) Powel further testified: "All I know is I looked at Parker, Parker looked over at me and, man, what is going on here." (L.F. 114.) Powel stated that this was the only time he allegedly went to see a pornographic movie with Father Christensen. (L.F. 115.)

Powel's Reactions to this Alleged Sexual Abuse

Powel knew about the alleged sexual abuse as it allegedly occurred and remembered it for some time thereafter. (L.F. 23, 90, 108, 113, 115-16, 133, 137, 190, 191, 210.) When asked how he felt after each alleged incident of sexual abuse, Powel testified: "I felt it was wrong." (L.F. 108.) Powel allegedly felt physically ill and emotionally sick after these alleged incidents. (L.F. 90, 190, 191.) "Not that I would throw up," Powel explained, but after each alleged incident, Powel stated that he felt disgusted and "sick to [his] stomach." (L.F. 108, 113.) He later told his psychologist Michael S. Greenberg that he felt "dirty, confused" and "ashamed." (L.F. 210.) Nevertheless, Powel never told any officials at Chaminade about this alleged abuse while he attended the school. (L.F. 23, 108, 116, 137.) According to Powel, Brother Woulfe and Father Christensen "instructed" him "not to tell anyone about the sexual assaults and abuse." (L.F. 23.) They also allegedly "threatened and otherwise deliberately induced in [him] a fear of reprisal which caused [him] to remain silent concerning…Christensen and Woulfe's repeated sexually abusive conduct." (L.F. 23.) From Powel's perspective, Woulfe and Christensen were allegedly able to take "advantage of their…position to intimidate" him "into silence." (L.F. 23.) As a result, Powel allegedly "had to hold these experiences a secret from others." (L.F. 210.)

Except for perhaps one incident. (L.F. 115.) When Father Christensen allegedly took Powel to the "XXX movie" theater, Powel's classmate Marc Parker was allegedly there, as well. (L.F. 133.) Powel testified that he and Parker discussed

this trip together sometime after they arrived "[b]ack at Chaminade." (L.F. 115.) Powel did not tell any Chaminade officials about the trip, however, because Powel allegedly believed he would have gotten into trouble. (L.F. 115-16.)

As he described in his deposition, Powel faults Chaminade for his failure to inform school officials about this alleged sexual abuse:

> "[T]hese are people who are responsible for me, they're boarding me, they're supposed to be emotionally supportive of me, spiritually supportive of me, physically supportive of me, I should have been able to go to any one of these people and say, 'Hey, this is happening.' They did not lay that foundation."

(L.F. 137.) With allegedly nowhere to turn, Powel commented: "I guess what I was supposed to do was stand in the corner and go, 'Oh, this is okay.'" (L.F. 137.) He says that he made a point of never going in Woulfe's and Christensen's rooms again, but "[a]t some point being at that age," Powel explained, "you had to do something." (L.F. 116, 137.) "I guess I should have gotten a gun and shot him or something," Powel testified. (L.F. 137.) He didn't. Instead, Powel believes that he did what "anyone who had gone through what I was going through" would have done: "act out." (L.F. 137.) For Powel, this "acting out" took the form on one occasion of having and selling alcohol to other students at the school. (L.F. 116, 137.) For this and, according to Powel, "other reasons," the then seventeen-year-old Powel was expelled from Chaminade in 1975. (L.F. 116, 137.)

Powel's Experiences After Leaving Chaminade

Once he was expelled from Chaminade, Powel moved to Marc Parker's family's residence in Springfield, Illinois. (L.F. 117.) While in the Parker home, Powel alleges that he was sexually abused by Marc's mother, Gail Parker. (L.F. 117.) Powel testified that this abuse included sexual fondling, sexual intercourse and fellatio. (L.F. 117.) When "Mr. Parker found out that his wife was sexually molesting" him in 1976, Powel was required to leave their home. (L.F. 144.)

After these alleged incidents of sexual abuse, Powel testified that he felt that he was not "good at anything except for having my body sexually abused." (L.F. 117.) As a response, Powel "started to hitchhike and have older men pick [him] up and things of that nature." (L.F. 117.) Powel estimates that he was sexually abused by these men one-hundred times. (L.F. 117.) "I cannot give you [their] names. I do not know the names," Powel explained. (L.F. 117.) Though he allegedly "never asked for pay," Powel stated that he was paid by these men fifty-percent of the time. (L.F. 118.) This conduct continued, according to Powel, for the next four or five years. (L.F. 118.)

However, despite the sexual abuse that he allegedly sustained by Marc Parker's mother and one-hundred other men, Powel claims that sometime after he left Chaminade, he had no memory of Brother Woulfe and Father Christensen allegedly sexually abusing him. (L.F. 196-97; Sub. Brief. App. at p. 56.) According to Powel's appellate brief, "[b]y the time he was eighteen (18) years old, he had involuntarily repressed his recollection" of the alleged acts of sexual abuse that

were allegedly "perpetrated upon him" by Woulfe and Christensen "between the ages of fifteen (15) and seventeen (17)."[2] (Sub. Brief App. at p. 56.) According to Powel, to "repress, repress, repress and run away as hard as I could" was his "way of dealing" with "all the sexual pedophilia, humiliation," and "soul murdering substance" that he had allegedly incurred at Chaminade. (L.F. 136.) He allegedly did not begin to recall these incidents of sexual abuse again until February 2000. (L.F. 24.) Thus, "from the time [Powel] reached eighteen (18) years of age, until his memory returned in February 2000 at age forty-one (41)," Powel allegedly "had no recollection of the acts of sexual abuse perpetuated upon him while a student at Chaminade." (Sub. Brief at p. 56.)

[2] At other points in his appellate brief, Powel suggests that he repressed memory of the alleged abuse at approximately the age of 17. (*See e.g.* Sub. Brief App. at p. 26.) Nevertheless, the evidence unquestionably demonstrates that any memory loss allegedly happened some time *after* the sexual abuse had allegedly occurred. (L.F. 23, 90, 108, 113, 115-16, 133, 137, 190, 191, 210.)

Points Relied On

I. The circuit court properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under R.S. Mo. section 516.120(4) because injury and damage resulting from sexual abuse is "capable of ascertainment" at the time of the sexual abuse (not when the alleged repressed memory of that abuse is regained) in that Powel was allegedly abused in 1973 to 1975, and thus his alleged damages were ascertainable at that time, but he did not file suit until June 2002 (response to Point Relied On # 1 in Powel's substitute brief).

Cases

Business Men's Assur. Co. of America v. Graham, 984 S.W.2d 501 (Mo. 1999)

Vandenheuvel v. Sowell, 886 S.W.2d 100 (Mo. App. Ct. 1994)

H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. Ct. 2000)

Harris v. Hollingsworth, 150 S.W.3d 85 (Mo. App. Ct. 2004)

Statutes

Mo. Rev. Stat. § 516.100

Mo. Rev. Stat. § 516.120

Mo. Rev. Stat. § 516.140

Mo. Rev. Stat. § 516.170

Mo. Rev. Stat. § 516.280

Mo. Rev. Stat. § 537.046

II. Even if Missouri now construes the "capable of ascertainment" test as a discovery-based standard, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because a plaintiff's damages under the supposed new standard would be ascertainable at the time of discovery, in that Powel knew about and remembered the alleged sexual abuse and damages at the time that they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 1 in Powel's substitute brief).

Cases

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

H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. Ct. 2000)

Harris v. Hollingsworth, 150 S.W.3d 85 (Mo. App. Ct. 2004)

Statutes

Mo. Rev. Stat. § 516.100

Mo. Rev. Stat. § 516.120

Mo. Rev. Stat. § 516.270

III. Even if Powel's alleged damages were not "capable of ascertainment" in 1973 and 1975 under Missouri's supposed new discovery-based standard, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because courts may not "judicially revive" claims that were previously barred by prior interpretations of the statute of limitations, in that Powel's claims were barred by the prior objective-based construction of the "capable of ascertainment" test (response to Point Relied On # 1 in Powel's substitute brief).

Cases

Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. 1993)

Harris v. Hollingsworth, 150 S.W.3d 85 (Mo. App. Ct. 2004)

State ex rel. Brandon v. Dolan, 46 S.W.3d 94 (Mo. App. Ct. 2001)

Vandenheuvel v. Sowell, 886 S.W.2d 100 (Mo. App. Ct. 1994)

Constitutional Authority

Art. I, § 13, Mo. Const.

Statutes

Mo. Rev. Stat. § 516.100

Mo. Rev. Stat. § 516.120

IV. The circuit court properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because the new statute of limitations in section 537.046 of the Revised Statutes of Missouri for "childhood sexual abuse" claims may not be retroactively applied to save claims already barred by the previous statute of limitations and does not apply to claims for intentional failure to supervise clergy, in that Powel's claims against the Marianist Province and Chaminade were already barred by the statute of limitations in section 516.120(4) and are intentional-failure-to-supervise claims for which section 537.046 does not apply (response to Point Relied On # 2 in Powel's substitute brief).

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

H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. Ct. 2000)

State v. Brown, 924 S.W.2d 3 (Mo. App. Ct. 1996)

Constitutional Authority

Art. I, § 13, Mo. Const.

Statutes

Mo. Rev. Stat. § 516.100

Mo. Rev. Stat. § 516.120

Mo. Rev. Stat. § 537.046

Mo. Rev. Stat. § 566.030

Mo. Rev. Stat. § 566.040

Mo. Rev. Stat. § 566.050

Mo. Rev. Stat. § 566.060

Mo. Rev. Stat. § 566.070

Mo. Rev. Stat. § 566.080

Mo. Rev. Stat. § 566.090

Mo. Rev. Stat. § 566.100

Mo. Rev. Stat. § 566.110

Mo. Rev. Stat. § 566.120

Mo. Rev. Stat. § 568.020

V. Even if the new statute of limitations in section 537.046 applies to the claims in this case, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment because such claims must be brought within "three years of the date the plaintiff discovers, or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse," in that Powel discovered the alleged sexual abuse and damages at the time they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 2 in Powel's substitute brief).

Statutes

Mo. Rev. Stat. § 537.046

Argument

Standard of Review

This action comes before this Court upon review of the circuit court's entry of summary judgment in favor of the Marianist Province and Chaminade. Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law. *Id.* For this reason, the Missouri Supreme Court has commented that summary judgments "play an essential role in our [judicial] system." *Id.*

When considering appeals from summary judgments, facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id.* The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. *Id.* As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. *Id.* Therefore, the propriety of summary judgment is purely an issue of law, and the appellate court's review of the summary judgment entry is *de novo*. *Id.*

Moreover, this action was transferred to this Court upon order of the Missouri Court of Appeals for the Eastern District in accordance with Missouri Supreme Court Rule 83.02. When a case is transferred to the Missouri Supreme Court after an opinion by the Court of Appeals, Missouri Supreme Court Rule 83.08(a) provides that the parties shall retain the same position as appellant and respondent as in the Court of Appeals. The Marianist Province and Chaminade were respondents before the Court of Appeals and thus are respondents before this Court. A respondent may raise on appeal any arguments or basis that it has in support, or feels would support, the judgment in its favor whether or not relied on by the trial court. *See Nooney Krombach Co. v. Blue Cross and Blue Shield of Missouri*, 929 S.W.2d 888, 895 (Mo. App. Ct. 1996); *Siemer v. Schuermann Bldg. & Realty Co.*, 381 S.W.2d 821, 828 (Mo. 1964). In contrast, an appellant may only raise those arguments on appeal that were properly preserved at the trial court level. *See Lundstrom v. Flavan*, 965 S.W.2d 861, 864 (Mo. App. Ct. 1998). Moreover, just as an appellate court need not defer to the trial court's order granting summary judgment, the Missouri Supreme Court hearing an appeal transferred to it under Rule 83.02 need not defer to the earlier decision of the Court of Appeals. *See* 17 Missouri Practice § 83.08-2 n.2.

Introduction

Michael Powel's claims against the Marianist Province and Chaminade for intentional failure to supervise clergy are barred by the statute of limitations. Under the Missouri courts' long-standing, objective-based interpretation of the five-year statute of limitations under R.S. Mo. 516.120 for "other injury" claims, Powel's claims were "capable of ascertainment" at the time he was allegedly sexually abused. Even under a discovery-based interpretation of that statute, his claims were also "capable of ascertainment" at the time he was allegedly abused because he knew about the alleged abuse as it allegedly occurred and remembered it for some time thereafter. Either way, once his claims were "capable of ascertainment," the time limitation period on these claims began and his alleged subsequent memory repression could not toll or suspend the running of this period. Since Powel failed to file his claims within five years after the alleged abuse (even allowing for the additional filing-time provided to minors), Powel's claims are thus barred by section 516.120.

Moreover, Missouri's newer statute of limitations in R.S. Mo. 536.047 for "childhood sexual abuse" suits does not save Powel's claims, either. It does not do so because that statute's limitation period may not be retroactively applied in this case, does not apply to nonperpetrators like the Marianist Province and Chaminade, and also expired before Powel eventually filed his claims. Thus, this Court should affirm the circuit court's judgment sustaining the Marianist Province's and Chaminade's motion for summary judgment on grounds of the statute of limitations.

Discussion of the Points Relied On

I. The circuit court properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under R.S. Mo. section 516.120(4) because injury and damage resulting from sexual abuse is "capable of ascertainment" at the time of the sexual abuse (not when the alleged repressed memory of that abuse is regained) in that Powel was allegedly abused in 1973 to 1975, and thus his alleged damages were ascertainable at that time, but he did not file suit until June 2002 (response to Point Relied On # 1 in Powel's substitute brief).

Prior to August 28, 1990, two statutes of limitations controlled claims for childhood sexual abuse in Missouri: a two-year period of limitation for assault or battery and a five-year limitation applicable to "any other injury to the person." *See Sheehan v. Sheehan*, 901 S.W.2d 57, 58 (Mo. 1995); Mo. Rev. Stat. § 516.140 (two years); Mo. Rev. Stat. § 516.120(4) (five years). Of these two statutes, the parties agree that the five-year limitation applies to Powel's alleged claims against the Marianist Province and Chaminade for intentional failure to supervise clergy. (Sub. Brief App. at pp. 24-25.) For all the reasons set forth below, these claims are barred by this five-year statute of limitation.

A. Under Missouri's long-standing, objective-based standard for the statute of limitations, Powel's alleged damages were "capable of ascertainment" when he was allegedly sexually abused in 1973 through 1975, not when he allegedly regained his memory of the alleged abuse, and thus his claims are time-barred for his failure to file them within five years of the time of the alleged abuse.

Under section 516.100 of the Revised Statutes of Missouri, the triggering event for the applicable statute of limitations is when damage is sustained and becomes "capable of ascertainment."[3] Mo. Rev. Stat. § 516.100. This standard has been described as a "middle-of-the-road" test in that the limitation period does not necessarily begin as early as when the "wrong is done" or the "technical breach" of "duty occurs," nor does it wait until the plaintiff "actually discovers injury or wrongful conduct." *See Carr v. Anding*, 793 S.W.2d 148, 150 (Mo. App. Ct. 1990); *Sheehan*, 901 S.W.2d at 58-59; § 516.100. Instead, the damage is "capable of ascertainment," and thus the time limitation period begins, when the fact of damage "*can* be discovered or made known." *Sheehan*, 901 S.W.2d at 58-59 (emphasis added). This is an "objective determination" for the trial court to make. *See id.*;

[3] If a plaintiff's damages are "capable of ascertainment" before that plaintiff is 21 years old, Missouri law will delay the commencement of the limitations period until the plaintiff turns 21. *See* Mo. Rev. Stat. § 516.170.

Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858, 861 (Mo. App. Ct. 1984).

Under the "capable of ascertainment" standard, Missouri courts have consistently held that the statute of limitations is triggered not by discovery of damage, but by the commencement of the right to sue. *See Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 507 (Mo. 1999); *Chemical Workers Basic Union, Local No. 1744 v. Arnold Sav. Bank*, 411 S.W.2d 159, 165 (Mo. 1966). The word "ascertain" has always been read as referring to the fact of damage, rather than to the precise amount or extent of damage. *Dixon v. Shafton*, 649 S.W.2d 435, 438 (Mo. 1983). In turn, the "fact of damage" refers to the "injurious consequences or resulting damages which bring about accrual of the cause of action," not "mere aggravating circumstances enhancing a legal injury already inflicted or the mere development of the injury." *Chemical Workers*, 411 S.W.2d at 163-64. Thus, when the injury is "complete as a legal injury at the time of the act, the period of limitation will at once commence." *Id.*, 411 S.W.2d at 164. Indeed, even the Eastern District acknowledged below that damages are capable of ascertainment "the moment that plaintiff's damages are substantially complete." (A7.) Although the limitation period does not necessarily begin when the "wrong is done" or the "breach of duty occurs," it may begin at these points if the injury has occurred at the same time. *See Chemical Workers*, 411 S.W.2d at 64.

Moreover, Missouri courts have made it abundantly clear that the "capable of ascertainment" test is not a discovery test. As stated earlier, damage is ascertainable

when the fact of damage "can be discovered or made known," not when a plaintiff actually discovers injury or wrongful conduct. *Sheehan*, 901 S.W.2d at 58-59. The failure to discover the wrongful act does not prevent the accrual of the cause of action after the damage is sustained and is capable of ascertainment. *Chemical Workers*, 411 S.W.2d at 164. "Mere ignorance" of the plaintiff of his cause of action will not prevent the running of the statute. *Chemical Workers*, 411 S.W.2d at 165. Similarly, a general charge of ignorance at one time and of subsequent knowledge at another is insufficient to toll the statute. *Chemical Workers*, 411 S.W.2d at 164-65.

Indeed, the Court has rejected arguments to construe the "capable of ascertainment" language to provide for a discovery test. *See Jepson v. Stubbs*, 555 S.W.2d 307, 313 (Mo. 1977). More specifically, it has been argued that "the phrase 'capable of ascertainment' [should] be construed to mean 'capable of ascertainment in the normal course of events by this particular plaintiff in the exercise of reasonable diligence'." *Id.* However, to do so, the Court noted, "would be to rewrite the statute so as to establish a 'discovery' rather than a 'capable of ascertainment' test in all instances to which the statutes of limitation are applicable." *Id.* The Court has emphatically declined such an invitation to amend the statute in this manner: "This is not what the legislature did and it is not for us to rewrite the statute to so provide. If that is to be done, it must be by legislative action." *Id.*

As a result, the running of the statute of limitations begins upon the commencement of the right to sue, not the discovery of damage. Missouri courts

have consistently applied this principle in determining when the statute of limitations is triggered for claims of sexual abuse. *Vandenheuvel v. Sowell, H.R.B. v. Rigali*,[4] and *Harris v. Hollingsworth* all involved claims of childhood sexual abuse. *See Vandenheuvel*, 886 S.W.2d 100, 101 (Mo. App. Ct. 1994.); *H.R.B. II,* 18 S.W.3d 440, 442 (Mo. App. Ct. 2000); *Harris*, 150 S.W.3d 85, 86-87 (Mo. App. Ct. 2004). In each of these cases, the Missouri appellate courts held that the "damage from the alleged abuse was sustained and capable of ascertainment at the time of the abuse." *Vandenheuvel*, 886 S.W.2d at 104; *see also H.R.B.*, 18 S.W.3d at 444; *Harris*, 150 S.W.3d at 88. As the appellate court in *H.R.B. II* explained, where "an

[4] The *H.R.B. v. Rigali* case came before the Missouri Court of Appeals upon review of the trial court's denial of a motion for directed verdict in favor of the defendants Archbishop Justin Rigali and the Immaculate Conception School and its denial of their motions for judgment notwithstanding the verdict. *See* 18 S.W.3d at 443. The case had been before the Court of Appeals previously for review of the trial court's granting of various motions to dismiss. *See* 18 S.W.3d at 442. The appellate court's opinion disposing of the first appeal was styled *H.R.B. v. J.L.G.*, 913 S.W.2d 92 (Mo. App. Ct. 1992.) For the sake of clarity, this brief will refer to the first appeal which addressed the motions to dismiss as "*H.R.B. I*" and will refer to the second appeal which addressed the motions for directed verdict and judgment notwithstanding the verdict as "*H.R.B. II*."

overt sexual assault occurs, the injury and damage resulting from the act are capable of ascertainment at the time of the abuse." 18 S.W.3d at 444.

The holdings in these cases are entirely consistent with Missouri's long-standing interpretation of the "capable of ascertainment" language. As the evidence in *H.R.B. II* showed (and as the alleged evidence in most sexual abuse cases presumably show), the sexual abuse in these three cases was "overt, traumatic, painful and violent." *See* 18 S.W.3d at 444. Under these circumstances, it is without question that injury and damage allegedly had been inflicted upon these plaintiffs at the time of abuse. As a result, these plaintiffs had the right to sue these various defendants at the time of the alleged abuse, as well. Since the right to sue was the triggering event for the running of the statute of limitations under the "capable of ascertainment" test, holding that the limitations period began at the time of the abuse was consistent, indeed mandated, by the Missouri courts' decades-old interpretation of this statutory test.

Likewise in this case, the statutory five-year limitation period for the plaintiff Michael Powel's intentional-failure-to-supervise-clergy claims began at the time Powel was allegedly sexually abused by Brother Woulfe and Father Christensen. (L.F. 106-07, 112-16, 133-36.) Powel claims that this sexual abuse included genital fondling, oral sex and viewing pornographic movies. (L.F. 106-07, 112-16, 133-36.) After each of these alleged instances of abuse, Powel testified that he felt disgusted, "sick to [his] stomach," "dirty, confused" and "ashamed." (L.F. 108, 113, 210.) Without a doubt, if Powel's allegations of sexual abuse are true (which the

Marianist Province and Chaminade deny), then Powel sustained his alleged emotional and physical injuries and damages at the time of the alleged abuse. It is at this time that Powel's alleged right to sue arose and thus that his alleged damages were "capable of ascertainment." Therefore, the five-year limitation period commenced for Powel's alleged claims against the Marianist Province and Chaminade at the time of alleged abuse in approximately 1973 to 1975. (L.F. 22-23, 117.) Since he did not file suit until June 2002, his claims are barred by the five-year statute of limitations for "other injury" claims (even with the requisite tolling for his being a minor at the time the cause of action accrued). (L.F. 114.)

B. Missouri law does not permit tolling of the statute of limitations simply because a plaintiff forgets or represses memory of his alleged damages and injuries *after* he sustained them.

As discussed above, the plaintiff Michael Powel claims that some time after he left Chaminade, he repressed his memories of the alleged sexual abuse he allegedly sustained at the school. (L.F. 196-97; Sub. Brief App. at p. 56.) In his brief, Powel repeatedly argues that the running of the statute of limitations period can and should be "tolled" until the date his memory was allegedly regained. (Sub. Brief App. at pp. 30, 33, 34, 35, 46, 47, and 49.) However, this is unsupported by Missouri law.

As this Court has recently held, the "'statute of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature and the courts are not empowered to extend those exceptions." *Shelter Mut. Ins. Co. v.*

Director of Revenue, 107 S.W.3d 919, 924 (Mo. 2003) (quoting *Cooper v. Minor*, 16 S.W.3d 578, 582 (Mo. 2000).) Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself within an exception enacted by the legislature. *Hammond v. Municipal Correction Institute*, 117 S.W.3d 130, 138 (Mo. App. Ct. 2003.) The Missouri legislature has not enacted a disability or exception applicable to the five-year statute of limitations for "other injury" claims on account of a plaintiff's alleged repression of memory. As the Western District in the aforementioned *Harris* case held, the "absence of memory alone, occurring after the tortious act, does not defer either the accrual of the cause of action or the running of the statute." 150 S.W.3d at 90.

Nevertheless, Powel argues that not tolling the statute of limitations in the repressed memory context would "encourage…the most extreme actions of abusers towards their victims." (Sub. Brief App. p. 30) Powel hypothesizes that abusers could "repeatedly slam…the plaintiff's head into the ground mere minutes after the abuse" or "psychologically torment…the young victims" so that the plaintiff could not recall the abusive events until after the running of the statute of limitations. (Sub. Brief App. at pp. 29-30.) The abusers would then, according to Powel, have an "incentive to do anything that they could to cause the victims to be unable to recall the abuse that they suffered." (Sub. Brief App. at p. 30.)

However, Powel's hypothetical situations have already been addressed by specific exceptions to the statute of limitations enacted by the Missouri legislature. If the sexual abuse and assault immediately caused the plaintiff to lose

consciousness for an extended period of time (*e.g.* "repeatedly slammed the plaintiff's head into the ground mere minutes after the abuse"), then the limitations period would be tolled under the statutory exception for those plaintiffs suffering from mental incapacity.[5] *See* Mo. Rev. Stat. § 516.170. If a defendant sought to "psychologically torment" a plaintiff after the alleged abuse for the purpose of "caus[ing] the victims to be unable to recall the abuse that they suffered," then the limitations period for this claim would be tolled under the statutory exception for intentional or fraudulent concealment of a cause of action. *See Greeson v. Ace Pipe Cleaning, Inc.*, 830 S.W.2d 444, 447 (Mo. App. Ct. 1992); Mo. Rev. Stat. § 516.280. In short, the Missouri legislature already has provided disabilities or exceptions to the statute of limitations to deal with the situations raised in Powel's hypotheticals.

What the legislature has not done, however, is enact a disability or exception for the situation that Powel himself claims to be in: a plaintiff that allegedly loses his recollection of damage and injury *after* the damage and injury has been sustained. Since the Missouri legislature has not provided an exception for this alleged memory loss situation, the statute of limitations cannot be tolled for Powel on account of his alleged lack of recollection. *See Shelter Mut. Ins.*, 107 S.W.3d at

[5] Powell was not, and has never even alleged, that he was mentally incapacitated at the time of the alleged abuse.

924; *Harris*, 150 S.W.3d at 90. Therefore, Powel's claims are barred by the five-year statute of limitations for "other injury" claims.

C. Missouri case law has not changed the objective-based interpretation of the "capable of ascertainment" test to provide, in the repressed memory context, that a plaintiff's damages are only "capable of ascertainment" when he recalls his memory of the abuse.

In addition to his "tolling" argument, Powel also contends that a number of Missouri opinions stand for the proposition that damage is not "capable of ascertainment" in the memory repression context until the plaintiff recalls his memory of the abuse. (Sub. Brief App. at pp. 40-45.) In particular, Powel cites the Missouri Supreme Court's opinions in *Sheehan v. Sheehan*, 901 S.W.2d 57 (Mo. 1995), and *K.G. v. R.T.R.*, 918 S.W.2d 795 (Mo. 1996), as well as the Eastern District of Missouri's opinions in *L.M.S. v. N.M.*, 911 S.W.2d 703 (Mo. App. Ct. 1995), and *H.R.B. I*, 913 S.W.2d 92 (Mo. App. Ct. 1995). However, as explained below, none of these cases should be read as changing the Missouri Supreme Court's long-standing interpretation of the statutory "capable of ascertainment" language as applied in *Vandenheuvel*, *H.R.B. II*, and *Harris*.

In *Sheehan*, the plaintiff alleged that her father sexually abused her as a child. 901 S.W.2d at 57-58. As a result, she alleged that the abuse caused her "consequential injuries and damages." *See id.*, 901 S.W.2d at 59. She further alleged that she involuntarily repressed conscious memory of these events throughout her childhood and young adulthood until August 1990. *See id.*, 901

S.W.2d at 58. The trial court, however, granted the defendant father's motion to dismiss on the grounds of the statute of limitations. *See id*. Even given the tolling statute for minors, the trial court held that the plaintiff needed to file her suit by June 7, 1989. *See id*. She did not do so. *See id*.

In reversing the trial court's dismissal, this Court noted in *Sheehan* that when an affirmative defense, such as a statute of limitations, is asserted, the petition may not be dismissed unless it clearly establishes "on its face and without exception" that it is barred. *Id*., 901 S.W.2d at 59. Since the petition "does not state the date" the plaintiff "'sustained and suffered' these injuries and damages," this Court concluded that "it is ambiguous as to when she objectively could have discovered or made known the fact of damage." *Id*. Noting that the "only date alleged" in the petition was August 1990 (the date until which the plaintiff allegedly "'involuntarily repressed conscious memory' of the abuse"), the Court commented that "[c]onstruing the allegations of the petition broadly and favorably to the plaintiff," the damage "*may* not have been ascertainable 'until August 1990 or thereafter.'" *Id.* (emphasis added).

Reviewing the actual holding of *Sheehan*, the Court did not hold, as Powel suggests, that if a plaintiff represses memory of his damages and injuries then his damages and injuries are only "capable of ascertainment" when he regains his memory. Instead, the Court held that the *Sheehan* plaintiff's petition did "not state the date" that she allegedly "'sustained and suffered' these injuries and damages" and thus was "ambiguous as to when she objectively could have discovered or made

known the fact of damage." As a result, given the high threshold for succeeding on a motion to dismiss based on the statute of limitations (where the petition may only be dismissed where it "clearly establishes 'on its face and without exception'" that the claims are barred), the Court held that "[c]onstruing the allegations of the petition broadly and favorably to the plaintiff" it could not say that the plaintiff's claims were clearly barred. Essentially, a plaintiff has to plead herself out of a claim in order to justify dismissing her petition at the pleading stage on the grounds of the statute of limitations. This Court held that the plaintiff in *Sheehan* had not done so.

After the Court issued its opinion in *Sheehan*, the Eastern District issued opinions in *L.M.S.* and *H.R.B. I* in December 1995. Like in *Sheehan*, the cases in *L.M.S.* and *H.R.B. I* came before the appellate court upon review of the trial courts' granting of the defendants' motions to dismiss on the grounds of the statute of limitations. *See L.M.S.*, 911 S.W.2d at 703; *H.R.B. I*, 913 S.W.2d at 94-95. The plaintiffs in these two cases both alleged that they had been sexually abused as children. *See L.M.S.*, 911 S.W.2d at 703; *H.R.B. I*, 913 S.W.2d at 94. Their petitions also alleged, or were construed to allege, that they had repressed memory of this abuse and did not regain memory of it until years later. *See L.M.S.*, 911 S.W.2d at 703; *H.R.B. I*, 913 S.W.2d at 94. Relying on *Sheehan's* liberal construction rules regarding the review of a plaintiff's petition subject to a motion to dismiss, the Eastern District compared the allegations in *L.M.S.* and *H.R.B. I* to those in *Sheehan* and held that the plaintiffs' allegations were "ambiguous enough" to survive, or left "open the possibility" of surviving, the statute of limitations at this early motion-to-

dismiss-on-the-pleadings stage. *See L.M.S.*, 911 S.W.2d at 704; *H.R.B. I*, 913 S.W.2d at 96. For this reason alone the Eastern District reversed the trial courts' dismissals of these actions. *See L.M.S.*, 911 S.W.2d at 704; *H.R.B. I*, 913 S.W.2d at 96. Neither *L.M.S.* or *H.R.B. I* held that alleged memory repression would defer the accrual of a cause of action under the "capable of ascertainment" standard. *See L.M.S.*, 911 S.W.2d at 704; *H.R.B. I*, 913 S.W.2d at 96.

This Court's opinion in *K.G. v. R.T.R.*, however, is a bit more complicated. In *K.G.*, the plaintiff filed suit against her father alleging that he sexually abused her as a child. *See* 918 S.W.2d at 797. She alleged that she had involuntarily repressed conscious memory of these events until January 1989 and had no conscious memory of the identity of the perpetrator until December 1990. *See id.* The trial court concluded that the two-year statute of limitations for the plaintiff's battery claim expired on January 17, 1988 (two years after her 21st birthday). *See* 918 S.W.2d at 798. Since the plaintiff did not file her petition until September 10, 1993, the trial court granted the defendant's motion to dismiss on the grounds of the statute of limitations. *See id.*

On appeal, the plaintiff never contended that the trial court erred in concluding that her claims would be time-barred by the two-year statute of limitations for battery claims. *See id.*, 918 S.W.2d at 798 n.2. Instead, the plaintiff apparently only asserted that a different set of statutes of limitation should apply to

her alleged recollection.[6] *See id.*, 918 S.W.2d at 797-800. Nevertheless, the Court decided to comment on whether the trial court was correct in holding that the battery statute of limitations expired two years after the plaintiff's 21st birthday. *See id.*, 918 S.W.2d at 798. Addressing the plaintiff's allegations of repressed memory, the Court proposed that the *Sheehan* opinion *could* be read as holding that the "date the injury occurs *may* be later in time than the battery." *Id.* (emphasis added). The Court surmised that under this construction, "it is *arguable* that under *Sheehan*, plaintiff's damages did not accrue until January 1989," the date she allegedly regained memory of the abuse. *See id.*, 918 S.W.2d at 799 (emphasis added). The Court completely rejected the notion that the limitation period may "arguably" extend as far as the date the plaintiff allegedly regained memory of the identity of the perpetrator (December 1990). *Id.*, 918 S.W.2d at 798. The Court noted that even if *Sheehan* could be "[s]o construed" to hold that the injury "may" occur later in time than the battery, it would be the "memory of the consequential injury and damages, not the memory of the identity of the perpetrator" that would trigger the statute of limitations. *See id.* Even if the two-year battery statute of limitations could be construed to begin at time of her alleged recollection in January 1989, the

[6] The plaintiff argued instead that the five-year statute of limitation for "other injury" claims and the new statute of limitation for "childhood sexual abuse" claims in Mo. Rev. Stat. § 537.046 should apply.

Court concluded that the plaintiff's claims would still be time-barred as she filed suit on a date (September 1993) more than two years after January 1989. *See id.*

As explained by the Eastern District in *H.R.B. II*, the Missouri Supreme Court "never explicitly made…a ruling" in *K.G.* that a plaintiff's damages only accrue when she regains her memory. *See* 18 S.W.3d at 445. Moreover, though *K.G.* discussed the Western District's opinion in *Vandenheuvel* (which held that such damages are capable of ascertainment at the time of the abuse), *K.G.* never overruled *Vandenheuvel*. *See H.R.B. II*, 18 S.W.3d at 445.

Indeed, upon further review, the Missouri Supreme Court was presumably ambiguous in *K.G.* as to this "capable of ascertainment" issue in the repressed memory context because the Court did not need to make an explicit determination on this issue in that case. When considering whether to adopt a new legal theory or construction, Missouri courts will first determine if the proponent of that theory will actually prevail if that new theory is in fact adopted. *Cf. Baugher v. Gates Rubber Co., Inc.*, 863 S.W.2d 905, 914 (Mo. App. Ct. 1993) ("Since there is no injury, this case does not present a basis for determining whether a cause of action for negligent spoliation would be recognized in Missouri.") If the proponent of that theory will not prevail even upon its adoption, Missouri courts will not make any decision concerning whether to adopt that theory. *Cf. id.* Any statements by the courts to the contrary are dicta. *See Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003) ("Statements are obiter dicta if they are not essential to the court's decision of the issue before it….[and are] not precedent that is binding upon us.") Since the

plaintiff's battery claims in *K.G.* would be barred by the two-year battery statute of limitations even if her damages were not "capable of ascertainment" until she regained memory of the sexual abuse, the Court did not need to issue a definitive statement on whether to adopt this new "capable of ascertainment" standard. As such, this Court's opinion in *K.G.* should not be interpreted as having done so.

In this case, the trial court and the appellate court both concluded that there are two "fundamentally inconsistent lines of cases" on the "capable of ascertainment" issue in the repressed memory context. (A8-9, A34.) Nevertheless, this Court should attempt to harmonize the opinions so as not to construe *Sheehan*, *L.M.S.*, *H.R.B. I*, and *K.G.* as standing for the proposition that a plaintiff's damages from sexual abuse are only "capable of ascertainment" after the plaintiff recovers her memory of the abuse. To do otherwise would contradict Missouri's decades-long interpretation of what the "capable of ascertainment" standard means. As discussed earlier, Missouri courts have consistently held that when the limitations period begins under this standard is an "objective determination" that depends not on when the damages are actually discovered, but instead when the right to sue arises (*i.e.* when the injury is "complete as a legal injury"). *See Business Men's*, 984 S.W.2d at 507; *Chemical Workers*, 411 S.W.2d at 165; *Anderson*, 684 S.W.2d at 861. As Judge Holstein—who authored the opinion in *K.G.*—wrote in his dissent in *Sheehan*, "[a]pplying this objective standard, it does not matter that this particular plaintiff may have subjectively suffered from dissociative amnesia concerning the event in question." 901 S.W.2d at 60 (Holstein, dissenting). To try to get inside a

plaintiff's mind and determine whether he did or did not remember a sexual assault and the resulting damages is the epitome of what a subjective, discovery-based standard would require. To adopt such a standard in this case would be akin to throwing the Missouri legislature's objective "capable of ascertainment" standard out-the-window and replacing it with a brand-new discovery standard. This is not what the legislature has enacted, and thus cannot be the ultimate holdings of *Sheehan, L.M.S., H.R.B. I, and K.G.*

Moreover, if the statute of limitations' "capable of ascertainment" language truly provided for a discovery-based statute of limitations, then it is curious as to why the legislature enacted a discovery-based statute of limitations for "childhood sexual abuse claims" in section 537.046 of the Revised Statutes of Missouri in 1990. *See* Mo. Rev. Stat. § 537.046. Under Missouri rules of statutory construction, a law passed by the legislature is presumed to have been enacted for a "reasonable" "legislature purpose," not for no purpose at all. *See State ex rel. Missouri Power & Light Co. v. Riley*, 546 S.W.2d 792, 796 (Mo. App. Ct. 1977). Moreover, the statute is also presumed to have been enacted to "make some change in the existing law." *See id*. As will be discussed in greater detail in section IV of the Argument of this brief, section 537.046 allows a plaintiff to file a claim for "childhood sexual abuse" within "five years of the plaintiff attaining the age of twenty-one" or within "three years of the date the plaintiff *discovers, or reasonably should have discovered*, that the injury or illness was caused by childhood sexual abuse." Mo. Rev. Stat. § 537.046.2. The Legislature would not have enacted section 537.046 if the "capable

of ascertainment" standard governing section 516.120 already meant "discovery of the abuse."

Indeed, the actual language of section 537.046 demonstrates a legislative intent to change the law in this area. The statute originally provided that it applied "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 limitation applicable prior to that date."[7] § 537.046.3. There can be no doubt that the legislature intended to resurrect claims that were previously barred. If Missouri law had always provided for a discovery-based standard, the enactment of section 537.046 would have been unnecessary.

Thus, this Court should dispel any notion that *Sheehan*, *L.M.S.*, *H.R.B. I, and K.G.* hold that "capable of ascertainment" is a discovery-based standard. Since Michael Powel's alleged damages and injuries were "capable of ascertainment" at the time of the alleged sexual abuse in 1973 to 1975, and since he filed this action against the Marianist Province and Chaminade more than five years after this time period, his alleged claims against them are barred by the statute of limitations (even with the requisite tolling for Powel's being a minor). (L.F. 114.)

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[7] The statutory language in this provision declaring that this new limitations period shall be applied retroactively was later held unconstitutional by the Missouri Supreme Court in *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 304 (Mo. 1993).

II. Even if Missouri now construes the "capable of ascertainment" test as a discovery-based standard, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because a plaintiff's damages under the supposed new standard would be ascertainable at the time of discovery, in that Powel knew about and remembered the alleged sexual abuse and damages at the time that they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 1 in Powel's substitute brief).

Even if Missouri has now adopted a discovery-based standard, Powel's claims against the Marianist Province and Chaminade would still be barred: by his own admission, Powel knew about the alleged abuse when it allegedly happened, and for years after it allegedly happened, before eventually allegedly forgetting about it. (L.F. 23, 90, 108, 113, 115-16, 133, 137, 190, 191, 210.)

A. Even if a discovery-based standard applies, Missouri courts (and even proponents of the repressed memory phenomena) acknowledge a crucial distinction between claimants who demonstrate that they had no knowledge or memory of the sexual abuse from the time it occurred until years later and those who knew about the abuse as it occurred and remembered it for some time thereafter, but eventually allegedly repressed or suppressed memory of it.

To further explain, in the cases cited by Powel as endorsing a discovery-based standard for the statute of limitations, the plaintiffs all alleged that they had no recollection of the sexual abuse *at all* until years after the incidents of abuse:

- ***Sheehan:*** "On Apr 28, 1993, Margaret filed her petition, asserting that Leroy abused her as a child…The petition stated: Plaintiff involuntarily repressed conscious memory of the aforedescribed events…throughout her childhood and young adulthood until August 1990 or thereafter." 901 S.W.2d at 57-58;
- ***L.M.S.:*** "In her petition, she alleges that when she was between 4 and 8 years old, father 'sodomized, sexually assaulted, sexually abused, or otherwise committed sexually deviant acts upon [her].'….During therapy [years later], daughter alleges she 'first recalled that she had been sexually abused during her childhood.' Until that time, daughter claims she repressed any memory of these events." 911 S.W.2d at 703;

- ***K.G.:*** "Plaintiff alleges that between the approximate ages of three and seven years she was 'intentionally, negligently and unlawfully subjected to sexual contact ... by defendant.'….Plaintiff alleges 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." 918 S.W.2d at 797.

Thus, in each of these three cases, the plaintiffs alleged that they had no memory or knowledge of the abuse from the time it allegedly occurred until years later.

In the fourth case cited by Powel, *H.R.B. I,* the plaintiff's petition was ambiguous on the topic. The plaintiff alleged that the defendant priest had sexually abused him at various times in 1963 and 1964. *See H.R.B. I,* 913 S.W.2d at 94. According to the plaintiff's petition, the power imbalance between the plaintiff and the defendant "increased plaintiff's vulnerability to defendant…and had the effect of silencing plaintiff." *Id.* The plaintiff further alleged that the nature of the relationship and the sexual exploitation "caused him to develop certain psychological coping mechanisms." *Id.* The plaintiff finally alleged that he was unable to ascertain his injuries and their connection to the sexual abuse until years later. *See id*. The defendant argued that unlike the petition in *Sheehan*, the petition in *H.R.B. I* did not allege repression of memory. *See id.*, 913 S.W.2d at 96. The defendant also argued that the language that petition used ("increased the plaintiff's vulnerability," "had the effect of silencing plaintiff," "coping") implied that the plaintiff was aware of the harm or legal wrong done to him at the time of the

alleged abuse. *See id.* As mentioned earlier, however, *H.R.B. I* came before the Eastern District for review of the trial court's granting of a motion to dismiss on the pleadings. For a motion to dismiss, the court is "required to allow the pleading its broadest intendment and to construe the petition's allegations favorably to the plaintiff." *Id.* Given this liberal construction, the court held that the "petition's term 'psychological coping mechanisms' may encompass…involuntary repression of memory." *Id.* As a result, the appellate court concluded that the petition was "ambiguous enough" as to when the plaintiff could have ascertained his alleged damages and injuries. *See id.* Since the petition could have been read to allege that the plaintiff had no memory or knowledge from the time of the abuse until years later, the appellate court held it improper to dismiss the plaintiff's action at this early pleading stage. *See id.*

The *H.R.B.* plaintiff's case came back before the Eastern District in *H.R.B. II.* This time, the appellate court reviewed the trial court's denial of the defendants' motions for directed verdict and motions for judgment notwithstanding the verdict and found the plaintiff's evidence was much different than the ambiguous allegations pleaded in his petition:

> "Plaintiff testified that after the attacks, he went to an area park and cried. He stated that while at the park he placed himself in a trance and suppressed his memory of the pain and abuse. However, his testimony shows that, at the time the acts were perpetrated, he had full knowledge of the events and knew they were wrongful. It was at that

> moment that Plaintiff's damage was sustained and capable of ascertainment."

18 S.W.3d at 444. Unlike his petition which was ambiguous as to when the plaintiff knew of the alleged abuse, the *H.R.B.* plaintiff's evidence demonstrated that he certainly was aware of the abuse at the time it occurred. As a result, the appellate court in *H.R.B. II* held that the plaintiff's claims were "capable of ascertainment" at the time of abuse.

The factual situation described in *H.R.B. II* is apparently not an unusual one. Even among proponents of the alleged repressed memory phenomena, victims of sexual abuse can, according to these proponents, know of the abuse at the time it is occurring and remember for some time thereafter only to at some later point lose, or "suppress," all memory of the abuse. For example, the Eastern District in this case cited approvingly in its opinion to a study titled "Recall Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse," that was written by researcher Linda Williams. (A7; A1167.) In this study, all reported female victims of sexual abuse in a major northeastern city in the 1970s were brought to the city hospital emergency room for treatment and collection of forensic evidence. (A1169.) From April 1, 1973, to June 30, 1975, a number of these girls from ages 10 months to 12 years were examined as part of a larger study of the consequences of sexual assault. (A1169.) Details of the sexual assault were recorded contemporaneously with the report of the abuse and were documented in both hospital medical records and research interviews "with the child, the caregiver or

both." (A1169.) In 1990 and 1991, over one-hundred of these girls, now adults, were located and personally interviewed. (A1169.) According to the Williams' study, over one-third (38%) did not report the sexual abuse that they experienced in childhood during these 1990 and 1991 interviews. (A1170.) Williams believes that the majority of these women did not remember the abuse. (A1171.) However, for the purposes of this case, the fundamental point is that a large number of girls knew about the alleged sexual abuse when it occurred and remembered it long enough to report it to hospital officials and other researchers. (A1169, 1173.) As Williams noted, "All of the women in this sample had experienced child sexual abuse that was reported to the authorities" in the 1970s by "the child, the caregiver or both." (A1169, 1173.) A number of these women, according to Williams, eventually lost memory of the sexual abuse. (A1171.) Nevertheless, the study demonstrates that even proponents of the alleged repressed memory phenomena acknowledge that it is possible—in fact, by virtue of this study, highly likely—that victims of sexual abuse who allegedly repress or suppress memory of the trauma only do so some time after it has occurred. During the infliction of the sexual abuse and for a period of time thereafter, these victims know about and remember the abuse and injuries.

In *Sheehan*, *L.M.S.*, *K.G.* and *H.R.B. I*, the plaintiffs' petitions alleged, or were construed to allege, that they had no knowledge or memory of the alleged abuse until years after the abuse had allegedly occurred. Under a discovery-based standard for the statute of limitations, the limitations period would begin at this time of recollection. In *H.R.B. II*, however, the evidence demonstrated that the plaintiff,

like the victims described in the Williams study, knew of the alleged abuse *at the time* it had allegedly occurred. If Missouri has adopted a discovery-based standard, then in these cases it is at the time that the plaintiff first knows of the alleged abuse and damages (as in *H.R.B. II*) that the limitations period should begin.

B. Even under a discovery-based standard, the time limitation period begins once a plaintiff knows of the alleged sexual abuse and cannot be suspended or tolled because he allegedly represses or suppresses his memory of the abuse some time thereafter.

Once a plaintiff knows of the abuse and damages, his after-the-fact loss of memory should be, for the purposes of the statute of limitations, irrelevant. As the Western District in *Harris* held, the "absence of memory alone, occurring after the tortious act, does not defer either the accrual of the cause of action or the running of the statute." 150 S.W.3d at 90. Once the statute of limitations clock starts, nothing can stop it save a disability or exception enacted by the legislature. Indeed, even for the specific disabilities enacted by the legislature which do toll the statute of limitations, such as for mental incapacity, tolling will only occur if the specific disability existed "at the time" the "right of action or of entry accrued." *See* Mo. Rev. Stat. § 516.270. A statutory disability that appears after the accrual of the cause of action has no effect on the limitations period. *See id.*

The reasons for such a rule are found in the purposes for the statute of limitations themselves. The statutes of limitations rest upon "reasons of sound public policy in that they tend to promote the peace and welfare of society and are

favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception." *State ex rel. Sisters of St. Mary v. Campbell,* 511 S.W.2d 141, 148 (Mo. App. Ct. 1974). Moreover, the statutes of limitation are shields "primarily designed to assure fairness to defendants by prohibiting stale claims, those where evidence may no longer be in existence and witnesses are harder to find, all of which tends to undermine the truth-finding process." *Mikesic v. Trinity Lutheran Hospital,* 980 S.W.2d 68, 73 (Mo. App. Ct. 1998). To allow the statutory limitations period to stop once it has already begun would encourage years and years of delay, frustrating the very reasons for having a statute of limitations in the first place.

Allowing the statute of limitations to be tolled by the plaintiff's memory lapse would essentially repeal all such statutes and centuries of public policy upon which those statutes are based. The legislatures of every state have passed such statutes recognizing the injustice of allowing the prosecution of stale claims such as this. The legislatures and the courts have acknowledged that witnesses often cannot be located or in some instances die. Memories fade, documents and other evidence is lost or destroyed. In such instances a plaintiff can testify from "memory" without any opportunity on the part of the defendant to effectively cross-examine or defend. To allow the plaintiff here to proceed because he has conveniently forgotten or suppressed a bad memory/incident would impact not only alleged sexual abuse claims, but all tort claims, thereby opening the floodgates. For example, if a plaintiff observed a shooting in a grocery, sustaining a post-traumatic stress disorder

and then forgot about the incident, or even if a plaintiff was humiliated by a teacher's or employer's comment years ago, those cases will be revived and not subject to the statute of limitations if the plaintiff can say he suppressed the memory and "moved on" only to "recognize" years later that it impacted him more than he thought.

Consider also whether bystander accident cases could be revived, or domestic violence and divorce proceedings could result in civil actions. These are actual issues that plaintiffs will seize on in many types of cases. The memory lapse extension, sought by plaintiff herein, to the well-established statutes of limitations must not be allowed.

Such a rule would in effect repeal the statute of limitations. A plaintiff could always claim that he or she had forgotten about a claim and therefore would be entitled to a tolling of the statute of limitations. Moreover, by allowing plaintiffs more time to file suit, this rule would actually encourage, or at least permit, plaintiffs to forget about claims after their accrual at the expense of the defendant. Defendants may have claims brought against them only during the limitations periods prescribed by the Missouri legislature. Once those periods conclude, defendants are entitled—indeed, as will be discussed later, have a "vested right"—to be free from suit. *See Doe*, 862 S.W.2d at 311. However, a rule which permits the limitations period to stop after it has started on account of a plaintiff's memory loss would extend the limitations period for an indefinite and unknown period of time and would seriously infringe upon the defendant's "vested right" to be free from

suit. As mentioned earlier, the statutes of limitation are "primarily designed to assure fairness to defendants by prohibiting stale claims." Allowing plaintiffs to file suit years after the passing of the limitations period simply does not prohibit stale claims, but openly encourages them.

Furthermore, a rule which would allow the statutory clock to stop once it has already started would be completely unworkable. As shown by the deposition testimony, affidavits and appellate briefs filed by Powel in this case, neither Powel nor his experts have been able to demonstrate with any kind of certainty the date or time on which he allegedly began to repress his memory of the alleged sexual abuse (other than it happened after he left Chaminade). It is impractical to allow the statutory clock to stop at some imprecise point in time and then start again with indefinite time remaining. If Missouri allows a delay in the accrual of a cause of action in the repressed memory context (which the Marianist Province and Chaminade believe that it should not), then it should only allow such a delay if the plaintiff demonstrates that he repressed all knowledge and memory of the abuse from the time it occurred. Then, at least determining when the statute of limitations begins would be workable. To allow the statutory clock to start, stop and start again, however, is completely unfeasible.

C. Powell knew of the alleged sexual abuse at the time it allegedly occurred, and thus his claims are barred for his failure to file them within five years of that time.

In this case, if the Court does adopt a discovery-based standard where the limitations period begins when the plaintiff first knows of the alleged abuse and injuries, the plaintiff Michael Powel's claims against the Marianist Province and Chaminade would still be barred. Powel's own testimony and admissions demonstrate that his alleged claims are of the *H.R.B. II* and Williams study variety (knowledge of the abuse at the time of and after the abuse), rather than that of *Sheehan*, *L.M.S.*, *K.G.* and *H.R.B. I* (no knowledge of the abuse until years after it occurred). It is without question that Powel knew about the alleged abuse as it allegedly occurred, as well as the alleged physical and emotional injury which immediately followed. (L.F. 23, 90, 108, 113, 115-16, 133, 137, 190, 191, 210.) Powel explained that after each alleged incident of sexual abuse, he felt disgusted, "sick to [his] stomach," "dirty, confused" and "ashamed." (L.F. 108, 113, 210.) He testified in his deposition: "I felt it was wrong." (L.F. 108.)

Additionally, Powel alleged that Brother Woulfe and Father Christensen allegedly "threatened and otherwise deliberately induced in [him] a fear of reprisal which caused [him] to remain silent" about the alleged abuse. (L.F. 23.) Powel also testified that he allegedly believed he would have gotten into trouble. (L.F. 115-16.) According to Powel, "I should have been able to go to any one of these people and say, 'Hey, this is happening.' They did not lay that foundation." (L.F. 137.) As a result, Powel said that he "had to hold these experiences a secret from others." (L.F. 210.) If Powel had forgotten about this alleged abuse while he was at Chaminade, he would not have had to keep these incidents a "secret."

Furthermore, when Father Christensen allegedly took Powel to the "XXX movie" theater, his fellow classmate Marc Parker was allegedly there, as well. (L.F. 133.) Powel testified that he and Parker discussed this alleged trip together sometime after they arrived *"[b]ack at Chaminade."* (L.F. 115) (emphasis added.) If Powel had forgotten about this alleged trip to the pornographic movie theater, it would be quite an undertaking to imagine how Powel and Marc Parker could have talked about it later at the school.

Indeed, according to Powel's own appellate brief before this Court, "[b]y the time he was eighteen (18) years old," Powel claims to have "involuntarily repressed his recollection" of the alleged acts of sexual abuse that were allegedly "perpetrated upon him" by Woulfe and Christensen "between the ages of fifteen (15) and seventeen (17)." (Sub. Brief App. at p. 56.) According to Powel, to "repress, repress, repress and run away as hard as I could" was his "way of dealing" with "all the sexual pedophilia, humiliation," and "soul murdering substance" that he had allegedly incurred at Chaminade.[8] (L.F. 136.) He allegedly did not begin to recall

[8] After being expelled from Chaminade and later leaving the Parker home, Powel testified that he felt that he was not "good at anything except for having my body sexually abused." (L.F. 117.) As a result, he then went on to "hitchhike and have older men pick [him] up and things of that nature." (L.F. 117.) Such testimony only further demonstrates that Powel knew and remembered the alleged sexual abuse and

these incidents of sexual abuse again until February 2000. (L.F. 24.) Thus, "from the time [Powel] reached eighteen (18) years of age, until his memory returned in February 2000 at age forty-one (41)," Powel allegedly "had no recollection of the acts of sexual abuse perpetuated upon him while a student at Chaminade." (Sub. Brief at p. 56.) Again, by his own admission, the alleged memory repression did not occur at the time of the alleged abuse ("between the ages of fifteen…and seventeen"), but by the time Powel "reached eighteen…years of age."

The evidence before this Court may be unclear as to the precise date that Powel claims to have repressed or suppressed his memory of the alleged sexual abuse. However, the evidence is very clear that whenever that repression allegedly occurred, it happened sometime *after* the alleged incidents of abuse. If it had not, Powel would not have felt disgusted, "sick to [his] stomach," "dirty, confused" and "ashamed"; would not have been "intimidated into silence"; would not have had to "hold these experiences a secret from others"; and would not have talked about it afterwards with Marc Parker. Powel's testimony and admissions demonstrate that he did not repress all knowledge and memory of the alleged abuse from the time of the abuse until years later as the plaintiffs alleged in *Sheehan, L.M.S., K.G.* and *H.R.B. I.* Instead, like in *H.R.B. II* and the Williams study, the evidence in this case shows that Powel knew about the alleged abuse when it allegedly occurred and

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injuries he allegedly sustained at Chaminade for some time after the abuse allegedly occurred.

remembered it for some period of time afterwards. Powel claims to have repressed or suppressed his memory of this alleged abuse (as did the plaintiff in *H.R.B. II*), but as the Western District explained in *Harris*, the "absence of memory alone, occurring after the tortious act, does not defer either the accrual of the cause of action or the running of the statute." 150 S.W.3d at 90. Thus, even if Missouri has adopted a discovery-based standard for the statute of limitations in the child sexual abuse context, Powel discovered the alleged abuse and injuries when he allegedly sustained them in 1973 to 1975. His statutory limitations period began at that time (or rather when he turned 21 since he was a minor in 1973 to 1975) and his alleged subsequent memory repression did nothing to stop it. (L.F. 114.) *See Harris*, 150 S.W.3d at 90. Therefore, even under a discovery-based standard, Powel's claims are barred by the five-year statute of limitations for "other injury" claims.

III. Even if Powel's alleged damages were not "capable of ascertainment" in 1973 and 1975 under Missouri's supposed new discovery-based standard, the circuit court still properly granted the Marianist

Province's and Chaminade's motion for summary judgment on the grounds of the passage of the five-year statute of limitations under section 516.120(4) because courts may not "judicially revive" claims that were previously barred by prior interpretations of the statute of limitations, in that Powel's claims were barred by the prior objective-based construction of the "capable of ascertainment" test (response to Point Relied On # 1 in Powel's substitute brief).

Article I, section 13 of the Missouri Constitution prohibits the enactment of any law that is "retrospective in its operation." *Doe*, 862 S.W.2d at 304. "Retrospective" laws are generally defined as those law which, among other things, "take away or impair rights acquired under existing laws." *Id.*, 862 S.W.2d at 340 (quoting *Lucas v. Murphy*, 348 Mo. 1078, 156 S.W.2d 686, 690 (1941)). The Missouri Supreme Court held in *Doe v. Roman Catholic Diocese of Jefferson City* that once the statute of limitations expires and bars a plaintiff's action, the defendant has acquired a vested right to be free from suit. *See* 862 S.W.2d 338, 341 (Mo. 1993). Therefore, article I, section 13 would prohibit any legislative revival of a cause of action which had already expired. *See id.* Though *Doe* specifically addressed the prohibition on "legislative revival" of an expired cause of action, at least two Missouri appellate courts have concluded that the "reasoning of *Doe*" also applies to prohibit the "judicial revival" of a cause of action. *See State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 99 (Mo. App. Ct. 2001); *Harris*, 150 S.W.3d at 91. Just as the legislature may not enact a new statute of limitations to revive an

expired cause of action, the courts may not "re-interpret" the meaning of the language of a statute of limitations to revive a cause of action that had expired under the courts' prior interpretation of that statute. *See Harris*, 150 S.W.3d at 91; *Dolan*, 46 S.W.3d at 99.

A. Even if Missouri has adopted a discovery-based standard, the prohibition on "judicial revival" of expired claims prevents application of such a standard in this case.

Even under a discovery-based standard, the "reasoning of *Doe*" would prohibit such a standard's application in this case. As discussed in *Harris*, if Missouri now considers repressed memory as deferring the accrual of a cause of action for childhood sexual abuse until the memory is recovered, then such a change appeared no sooner than in the Missouri Supreme Court's opinions in *Sheehan* and *K.G.* in 1995 and 1996. *See* 150 S.W.3d at 91. Before these decisions, *Vandenheuval* indicated that repressed memory did not delay the accrual of a cause of action. *See id*. Causes of action barred by the statute of limitations before the 1995 and 1996 opinions in *Sheehan* and *K.G.* may not be "judicially revived" by any change in the law set forth in those two opinions.

As discussed above in section I of the Argument in this brief, the limitations period for Powel's claims against the Marianist Province and Chaminade began—under Missouri's long-standing interpretation of the statutory "capable of ascertainment" language—at the time of the alleged abuse in 1973 to 1975 (with the statutory clock tolled until he turned 21 in 1979). (L.F. 114.) Under the five-year

statute of limitations, his suit against the Marianist Province and Chaminade had to be filed in 1984. Powel did not do so. Under the "reasoning of *Doe*," Powel's claims against them expired in 1984, and the Marianist Province and Chaminade acquired a vested right to be free from suit at that time. Therefore, the Court may not now apply a new discovery-based construction of the statutory "capable of ascertainment" language—a construction which supposedly appeared over twenty years later in *Sheehan* and *K.G.*—to "judicially revive" Powel's expired claims in this case.

B. The Marianist Province and Chaminade had a "vested right" to be free from suit for all claims for "other injury," including claims for intentional failure to supervise clergy.

It is anticipated that Powel will argue that the Marianist Province and Chaminade did not have a vested right to be free from suit because the legal theory upon which Powel bases his claims, intentional failure to supervise clergy, did not exist at the time the Court issued its opinions in *Sheehan* and *K.G.* (Sub. Brief App. at pp. 65-66.) Powel asserts that the Missouri Supreme Court first recognized this theory of liability in 1997. *See Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997). As a result, Powel will assuredly argue that the Marianist Province and Chaminade do not have a vested right to be free from suit because "[t]here can be no statute of limitations for a nonexistent cause of action." (Sub. Brief App. at p. 65.)

This same argument was rejected by the Southern District in *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 99 (Mo. App. Ct. 2001). *Dolan* was a wrongful

death action against a bar brought by the family of a man killed by a drunk-driver in July 1995. *See* 46 S.W.3d at 95. The wrongful death statute required that the plaintiffs file their suit within three years of the date of death, but the family did not file until July 2000. *See id*., 46 S.W.3d at 96. The defendant bar filed a motion to dismiss on the grounds of the statute of limitations. *See id*., 46 S.W.3d at 95. The plaintiffs opposed the motion by relying on *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), where the Missouri Supreme Court struck down a statutory requirement that a "dram shop" claim was authorized only when the liquor licensee has been convicted or received a suspended imposition of sentence. *See id*., 46 S.W.3d at 95-96. Since neither of these requirements were met for the defendant, the plaintiffs argued that they had no claim against the defendant bar prior to *Kilmer*, and therefore the limitation period did not commence until *Kilmer* was decided on May 9, 2000. *See id*., 46 S.W.3d at 96.

In rejecting this argument, the Southern District emphasized the public policy reasons behind the enactment of statutes of limitation, such as the need to prohibit stale claims and to assure fairness to defendants. *Id.*, 46 S.W.3d at 97. The appellate court also pointed out that a statute of limitations cannot be avoided absent some applicable exception. *Id.*, 46 S.W.3d at 98-99. With these principles in mind, the court in *Dolan* held that to accept the plaintiffs' argument would result in a determination that the statute of limitations was tolled while the plaintiffs awaited a decision like *Kilmer*. *Id*., 46 S.W.3d at 99. "Such a determination," the court continued, "would violate the public policy of this state in that the presentation of

stale claims would occur with a resulting unfairness to the defendant." *Id.* Before the three-year limitations period ended, the plaintiffs had the "same option as the plaintiffs in *Kilmer,* i.e., file a claim under the dram shop act and attack the constitutionality of the conviction requirement." *Id.*, 46 S.W.3d at 98. Since they failed to do so, the court held that their claims were barred by the three-year statute of limitations for wrongful death claims. *See id.*, 46 S.W.3d at 99.

The reasoning employed by the Southern District in *Dolan* is sound. To hold, as the plaintiff Michael Powel suggests, that "[t]here can be no statute of limitations for a nonexistent cause of action," would completely undermine the purpose of the statute of limitations. If a plaintiff seeks to assert a brand-new theory of liability against a defendant for a personal injury claim, that plaintiff must, as explained by *Dolan*, file that claim within the five-year limitations period for personal injuries. *See* Mo. Rev. Stat. § 516.120. The plaintiff cannot hold-off on filing suit until some other plaintiff successfully asserts the new theory and then try to take advantage of it. If this were allowed, it would redefine the statute of limitations as beginning five years from the date of recognition of the tort (whenever that is), leaving it unworkably open-ended.

Since the supposed new discovery-based standard may not apply in this case, Powel's claims are barred by the objective interpretation of the five-year statute of limitations for "other injury."

IV. The circuit court properly granted the Marianist Province's and Chaminade's motion for summary judgment on the grounds of the

passage of the five-year statute of limitations under section 516.120(4) because the new statute of limitations in section 537.046 of the Revised Statutes of Missouri for "childhood sexual abuse" claims may not be retroactively applied to save claims already barred by the previous statute of limitations and does not apply to claims for intentional failure to supervise clergy, in that Powel's claims against the Marianist Province and Chaminade were already barred by the statute of limitations in section 516.120(4) and are intentional-failure-to-supervise claims for which section 537.046 does not apply (response to Point Relied On # 2 in Powel's substitute brief).

As mentioned earlier, on August 28, 1990, a new statute of limitations took effect for any action to "recover damages from injury or illness caused by childhood sexual abuse." Mo. Rev. Stat. § 537.046 (1989). This new statute of limitations, codified at section 537.046 of the Revised Statutes of Missouri, allowed a plaintiff to file his suit within the later of the following two dates:

- "within five years of the plaintiff attaining the age of twenty-one," or
- "within three years of the date the plaintiff discovers, or reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse."

§ 537.046.2 (1989). The plaintiff Michael Powel argues that his claims are governed by this new statute of limitation. This is not the case.

A. The new statute of limitations for "childhood sexual abuse" claims set forth in section 537.046 does not apply in this case because the Marianist Province and Chaminade had a "vested right to be free from" Powel's "suit" as his claims were already time-barred under section 516.120 at the time this new statute was enacted.

The new statute of limitations for childhood sexual abuse claims set forth in section 537.046 contained a provision which declared that the statute applied "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 limitation applicable prior to that date." § 537.046.3. However, as discussed above, this Court in *Doe* held that once the statute of limitations expires and bars a plaintiff's action, the defendant has acquired a vested right to be free from suit. 862 S.W.2d at 341. Article I, section 13 of the Missouri Constitution prohibits any legislative revival of a cause of action which had already expired. *See id.* For these reasons, the Court held that the provision in section 537.046 which authorized plaintiffs to file causes of action that had already been barred by the time of this new statute's enactment was unconstitutional and thus unenforceable. *Id.*, 862 S.W.2d at 342. As a result, the new statute of limitations for childhood sexual abuse claims set forth in section 537.046 does not apply to any claims that were time-barred before that statute's effective date of August 28, 1990. *See Sheehan*, 901 S.W.2d at 58.

As discussed above, Powel's claims against the Marianist Province and Chaminade expired prior to this date. Accordingly, section 537.046 does not apply to those claims.

Powel argues that the Defendants do not have a vested right to be free from suit because, again, the intentional-failure-to-supervise-clergy theory of liability was not recognized at the time the legislature enacted section 537.046. (Sub. Brief App. at pp. 64-65.) This is a nearly identical argument to the one that the Marianist Province and Chaminade anticipate that Powel will make in opposition to the Marianist Province's and Chaminade's aforementioned "judicial revival" defense. The Marianist Province and Chaminade have fully discussed this issue in section III.B of the Argument of this brief. For the sake of brevity, the Marianist Province and Chaminade adopt and incorporate that discussion herein. Therefore, since the new statute of limitations in section 537.046 cannot apply in this case due to the ban on "legislative revival" set forth in *Doe*, Powel's claims are barred by the five-year statute of limitations for "other injury" claims.

B. The new statute of limitations set forth in section 537.046 does not apply in this case because Powel has not brought a claim against the Marianist Province and Chaminade for "childhood sexual abuse" as defined by that statute.

As mentioned above, the statute of limitations set forth in section 537.046 applies to "[a]ny action to recover damages from injury or illness caused by childhood sexual abuse" filed after August 28 1990. *See* § 537.046; *Sheehan*, 901 S.W.2d at 58. The statute defines "childhood sexual abuse" to include only physical acts of sexual abuse committed by the defendant himself:

> "'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, RSMo, or section 568.020, RSMo."

§ 537.046.1(1) (emphasis added). All of the acts prohibited by the specific criminal statutes cited in this definition of "childhood sexual abuse" involve violent, physical assaults or contact upon another person. *See* § 566.030 (rape); § 566.040 (sexual assault); § 566.050 (sexual assault, since repealed); § 566.060 (forcible sodomy); § 566.070 (deviate sexual assault); § 566.080 (deviate sexual assault, since repealed); § 566.090 (sexual misconduct for deviate sexual intercourse); § 566.100 (sexual abuse for subjecting another person to sexual contact by the use of forcible compulsion); § 566.110 (sexual abuse, since repealed); § 566.120 (sexual abuse and indecent exposure); § 568.020 (incest). Thus, according to the plain language of the statute, section 537.046 only applies to those actions to recover damages from

injury or illness caused by a violent, physical sexual assault or contact "committed by the defendant."

(1) ***There has not been and cannot be any evidence that the Marianist Province or Chaminade committed any of the violent, sexual acts prohibited by the statutes set forth in section 537.046.***

In this case, there has not been and cannot be any allegation that the Marianist Province or Chaminade itself physically committed any physical sexual assault or contact upon Powel, or any conduct prohibited by the criminal statutes enumerated in section 537.046. Indeed, since they are entities and not individuals, it is impossible for them to have done so. Instead, the plaintiff has alleged that the Marianist Province and Chaminade are liable under the tort theory of intentional failure to supervise clergy. Under this intentional tort, liability is not based on wrongful physical action, but is instead predicated on the defendants' alleged "inaction" in supervising a servant under certain circumstances. *See Gibson*, 952 S.W.2d at 248. "Inaction" is not prohibited by any of the criminal statutes enumerated in section 537.046. Therefore, since Powel's claims against Marianist Province and Chaminade do not seek to recover damages from injury or illness caused by "childhood sexual abuse" as defined by section 537.046, the statute of limitation set forth in this section does not apply to Powel's claims.

(2) ***Missouri case law does not hold that section 537.046 applies to nonperpetrators like the Marianist Province or Chaminade.***

In response, Powel argues that the appellate court in *H.R.B. I* "implicitly recognized" that section 537.046 applies to claims against "nonperpetrators as well as perpetrators." (Sub. Brief App. at p. 54.) However, the court did not. The plaintiff in *H.R.B. I* alleged that his claims complied with sections 537.046 *and* 516.100. *See* 913 S.W.2d at 94. Since under *Doe* the statute of limitations in section 537.046 could not apply if the plaintiff's claims were already barred in August 1990, the appellate court then proceeded to determine if these claims were in fact barred by August 1990 and addressed only when the plaintiff's claims were "capable of ascertainment" under section 516.100. *See H.R.B. I*, 913 S.W.2d at 95-96. It did not analyze whether section 537.046 applied to the plaintiff's claims. *See id*. As mentioned earlier, the court in *H.R.B. I* concluded that the plaintiff's ambiguous allegations regarding his memory of the alleged sexual abuse required that his petition be liberally construed to allege that his damages were not capable of ascertainment until October 1992 and found his claims complied with the five-year limitation for "other injury" claims in section 516.120. *See id.*, 913 S.W.2d at 96. *See id*. The appellate court then did write that under the facts the petition was "timely filed with respect to RSMo §§ 516.120(4) and 537.046." *See id*. However, since the court devoted its entire statute-of-limitations discussion to whether the plaintiff's claims complied with section 516.100, and since it ultimately found that the plaintiff's claims did so, any language regarding section 537.046 is pure non-binding dicta. *See Swisher*, 124 S.W.3d at 482.

To underscore this point, all one needs to do is to look at what happened when the case came before the appellate court again in *H.R.B. II.* As Powel noted, the parties in *H.R.B. II* "agreed that §516.120(4) was the applicable statute of limitations." (Sub. Brief App. at p. 57.) At the time of *H.R.B. I*, the plaintiff's petition included claims against the individual priest who allegedly sexually assaulted him as well as the Immaculate Conception School and Parish and the Archbishop Justin Rigali in his representative capacity with the Archdiocese of St. Louis. *See id*., 913 S.W.2d at 94-95. With a claim pending against the perpetrator, it was only natural for the plaintiff to contend that section 537.046 applied. However, at the time of the second appeal, the plaintiff had already settled his claims with the individual priest. *See id*., 18 S.W.3d at 442. The only claims pending in *H.R.B. II* were against the Immaculate Conception School and the Archbishop (*i.e*. the "nonperpetrators"). *See id*. With claims only pending against entities that did not commit, and could not have committed, any "childhood sexual abuse" within the meaning of the statute, section 537.046 could not apply. Thus, the plaintiff never contended otherwise. Therefore, section 537.046 cannot apply to any claims against "nonperpetrators," which includes the Marianist Province and Chaminade.

(3) ***Section 537.046 does not apply to the Marianist Province and Chaminade even under an "accomplice" liability theory.***

The Amici Curiae contend that entities such as the Marianist Province and Chaminade can "commit" such physical sexual assaults and conduct by operation of Missouri's criminal statute for corporate "aiding and abetting" or accomplice

liability. (Brief Amici Curiae at pp. 31-34.) As an initial matter, the plaintiff Michael Powel never presented this argument to the trial court and thus has waived it on this appeal. *See Smith v. Shaw,* 159 S.W.3d 830, 835 (Mo. 2005) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review").

Furthermore, even under this accomplice liability argument, section 537.046 still does not apply to Powel's claims. Unlike the statutes of limitations from other jurisdictions discussed in the Amici Curiae's brief, section 537.046 only applies to those claims for damages from injury caused by an "act *committed by the defendant* against the plaintiff" which violated one of the aforementioned sexual assault statutes. However, under an accomplice theory, individuals and entities are held criminally liable not because they personally committed every element of the principal offense, but instead because they engaged in "some form of affirmative advancement of the enterprise" with the purpose of promoting the offense. *See State v. Kobel*, 927 S.W.2d 455, 459 (Mo. App. Ct. 1996); *State v. Brown*, 924 S.W.2d 3, 4 (Mo. App. Ct. 1996). Because of their assistance with the criminal enterprise, the accomplice is held liable under this theory "for the acts of *another*" (*i.e.* the person who committed the principal offense). *See Brown*, 924 S.W.2d at 4 (emphasis added). Thus, if individuals and entities are found criminally liable under an accomplice theory, it is not because *their* acts constitute a violation of the principal offense, but instead because their assistance is sufficient to hold them liable for

another's violation of the principal offense. *See Kobel*, 927 S.W.2d at 459; *Brown*, 924 S.W.2d at 4.

None of criminal sexual assault statutes included in section 537.046 are or incorporate any accomplice liability statutes. The section only includes principal offenses for violent sexual assaults, such as rape and incest. *See* § 537.046. For section 537.046 to apply, the claim has to allege that the particular defendant "committed" one of these physical acts. Without question, neither the Marianist Province or Chaminade could have. To the extent that these two entities could be held criminally liable under an accomplice liability theory (which for the reasons below the Marianist Province and Chaminade deny), they would not be held criminally liable for acts that they allegedly "committed," but instead be held liable for acts that *others* (*e.g.* Brother Woulfe and Father Christiansen) allegedly committed. If Powel based his claims against the Marianist Province and Chaminade on an accomplice liability theory, his claims would not be for "acts" allegedly "committed" by these entities. Thus, his claims would not fall within the scope of section 537.046.

Moreover, even if a claim based on an accomplice liability theory could trigger the statute of limitations under section 537.046, Powel has not presented such a claim in this case. As mentioned earlier, Powel never pleaded or presented this accomplice liability claim at the trial court level. The reason for this omission is that there is absolutely no evidence to support such a claim. The accomplice liability statute would require that Powel show that a "high managerial agent" of

Marianist Province and Chaminade "engaged in, authorized, solicited, requested, commanded or knowingly tolerated" the alleged sexual abuse for these entities' benefit. Powel has not alleged that these two entities have committed this sort of conduct. In his petition, Powel only alleges that the Marianist Province and Chaminade knew that there was *a risk* that Brother Woulfe and Father Christensen would physically harm Powel. (L.F. 21.) However, Powel never presented any evidence supporting this allegation at the trial court level. Even if he had, Powel does not allege (and certainly has not presented any evidence) that the Marianist Province and Chaminade knew of the actual alleged abuse and tolerated it. Indeed, by his own admission, Powel acknowledges that he never told any Marianist Province or Chaminade officials about the alleged abuse. (L.F. 115-16, 137, 210.) If he never told Marianist Province or Chaminade officials about this alleged abuse, they certainly could not have "known" and "tolerated" it. Powel has presented no evidence to the contrary. Quite simply, such a bare record does not support a finding of accomplice liability for these two entities. Therefore, section 537.046 cannot apply to Powel's claims in this case. As a result, Powel's claims are barred by the five-year statute of limitations for "other injury" claims.

V. Even if the new statute of limitations in section 537.046 applies to the claims in this case, the circuit court still properly granted the Marianist Province's and Chaminade's motion for summary judgment because such claims must be brought within "three years of the date the plaintiff discovers, or reasonably should have discovered that the injury or illness

was caused by childhood sexual abuse," in that Powel discovered the alleged sexual abuse and damages at the time they allegedly occurred in 1973 through 1975, but he did not file suit until June 2002 (response to Point Relied On # 2 in Powel's substitute brief).

As mentioned earlier, in order to comply with section 537.046, a plaintiff must bring his action to "recover damages from injury or illness caused by childhood sexual abuse" within "three years of the date the plaintiff discovers, or reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse." In this case, as discussed at length in section II of the Argument of this brief, the plaintiff Michael Powel's own testimony and admissions demonstrate that he knew about the alleged sexual abuse and injuries at the time that they allegedly occurred and that he remembered them for some time afterwards. For the sake of brevity, the Marianist Province and Chaminade adopt and incorporate that discussion herein. Therefore, since Powel actually discovered that his alleged injuries were allegedly caused by childhood sexual abuse in 1973 through 1975, and since he did not file his claims against the Marianist Province and Chaminade until 2002, his claims are barred by the three year statute of limitation set forth in section 537.046.[9]

[9] Powel also failed to file his claims within five years of his 18th birthday as provided in section 537.046. (L.F. 114.)

Conclusion

For any and all of the reasons set forth above, the Marianist Province and Chaminade respectfully request that this Court affirm the final judgment of the circuit court entered in this case on March 17, 2004.

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Certification Pursuant to Rule 84.06(c)

Respondents hereby certify that the Substitute Brief of Respondents Marianist Province of the United States and Chaminade College Preparatory, Inc., complies with the limitations contained within Rule 84.06(b). The Substitute Brief contains 17,813 words.

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Certificate of Service

The undersigned hereby certifies that one true accurate copy and one diskette of the Substitute Brief of Respondents Marianist Province of the United States and Chaminade College Preparatory, Inc. served upon the following counsel of record by first-class United States mail:

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