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 REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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I. RESPONDENT'S REPRESENTATIONS REGARDING THE "FACTS" ASSOCIATED WITH POWEL'S TESTIMONY REGARDING THE ABUSE HE SUFFERED AT CHAMINADE AS WELL AS THE TESTIMONY OF DR. GREENBERG ARE INACCURATE, ESPECIALLY IN LIGHT OF THE CLEARLY RECOGNIZED STANDARD THAT THE FACTS AND ALL THE INFERENCES THEREFROM MUST BE REVIEWED IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY.

In numerous locations throughout the Respondents' Substitute Brief Respondents argue that Michael Powel always knew that he had been molested and remembered it from the beginning or for sometime thereafter. (Respondents' Substitute Brief, pgs. 16, 19, 34, 35, 56-60, 75, 76). This is an inaccurate reading of Dr. Greenberg's statements regarding what Powel told him and further is an inaccurate reading of Powel's testimony in his deposition and his Affidavit and is an effort to seek to have this Court re-examine what was clearly established as a genuine issue of fact decided by the trial court in favor of Powel. The Circuit Court in its March 17, 2004 Order stated:

> For the reasons set forth in this Memorandum and Order, the Court would find, it were free to do so, that:
>
> 1. The summary judgment record here supports that there is a genuine issue of material fact as to whether Plaintiff involuntarily repressed his memory of the alleged abuse from age 17 until February, 2000 at age 41; and

2. That the summary judgment record creates a jury triable question as to whether the damage resulting from such abuse was "capable of ascertainment" (as required by §516.100 R.S.Mo.) before Plaintiff recovered his memory of the abuse in February, 2000.

(L.F. 261).

Therefore, the Circuit Court, in examining the facts and the reasonable inferences therefrom in the light most favorable to the non-moving party, as one must do in determining whether a motion for summary judgment should be granted, determined that Powel had presented a genuine issue of fact regarding whether or not his damages were "capable of ascertainment" before he recovered his memory of the sexual abuse in February, 2000. The trial court only granted summary judgment because it felt compelled to follow the case of H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. Ct. App. E.D. 2000). However, the Eastern District's Opinion in this case determined that H.R.B. v. Rigali, Harris v. Hollingsworth, 150 S.W.3d 85 (Mo. Ct. App. W.D. 2004), and Vandenheuvel v. Sowell, 866 S.W.2d 100 (Mo. Ct. App. W.D. 1994), failed to follow this Court's opinion in Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. banc. 1995), which held that repressed memory may prevent the ascertainment of injury and therefore delay the running of the statute of limitations. (App. at A9). For this reason the Eastern District stated that it will "no longer follow the rationale in H.R.B. and its progeny as they contravene Missouri statutes and case law precedent." (App. at A9). Therefore, there can be no doubt that the trial court determined that there was a genuine issue of fact

which precluded summary judgment on the issue of whether or not Powel's damages were capable of ascertainment before he regained his memory in February of 2000.

Powel was evaluated by Michael S. Greenberg, Ph.D., a licensed psychologist, on April 16, 2002. (L.F. 205). Dr. Greenberg prepared a detailed report regarding the particulars of his psychological evaluation of Powel. (L.F. 209-216). Dr. Greenberg testified that he is always concerned with the issue of "false memory syndrome" when there has been a victim of sexual abuse who has repressed his memory of the traumatic events. (L.F. 206). False memories of child abuse under this syndrome may be implanted or suggested by a therapist or another person who has influence over a potential victim. (L.F. 206). Dr. Greenberg testified by way of Affidavit that Powel informed him that he repressed his memory of being molested at approximately age seventeen. Powel's memory returned after having a brain tumor. (L.F. 205-206, 211). Dr. Greenberg further noted in his Affidavit that "at no time did Michael Powel indicate to me that he in fact did not repress the memory of the sexual abuse performed upon him until age seventeen, but rather gave a specific history which was corroborated by Ms. Black of having repressed these memories until February 2000." (L.F. 206). Betty Black is a counselor who had been counseling Powel approximately once per week regarding the effects of the abuse he suffered while a minor. (L.F. 206). Dr. Greenberg further specifically testified:

> At no time did I intend in my report to indicate or imply that Michael Powel did not repress the memory of the sexual abuse he reported having performed upon him until age seventeen (17), but rather I was

> intending to report his report to me that the memory came back to him spontaneously without suggestion from a therapist or other person who had influence over him and that once it returned he could remember all the way back to his early childhood and recalled the sexual abuse performed upon him.

(L.F. 206-207).

Powel testified during his deposition that he told Dr. Greenberg that he had repressed the memory of his sexual abuse. (L.F. 133). Subsequent to his deposition Powel also provided sworn testimony in an Affidavit which was attached in response to Defendants' Motion for Summary Judgment. (L.F. 196). In his Affidavit Powel explains that he recalled for the first time as an adult several instances of sexual abuse which occurred while he was a student at Chaminade High School and that between the age of seventeen and the time of his recollection in February 2000 he had no memory of any acts of sexual abuse occurring to him. (L.F. 196). February of 2000 was the first time that he recalled the prior acts of sexual abuse while he was a child, including the acts of abuse which occurred while he was a student at Chaminade. (L.F. 196). Powel further testified that between the age of seventeen and forty-one he had no recollection or knowledge of any abuse having occurred to him before his eighteenth birthday. (L.F. 196).

Powel's deposition in this case was taken on September 24, 2003. (L.F. 93). At that time he was asked many questions regarding his memory of events which took place in the 1970's. At the time of his deposition he was asked questions regarding his

memory in 2003, once it had returned, of events in the 1970's and how he felt about those events. At that time Powel was obviously testifying about what he could recall in hindsight. Respondents, in their Substitute Brief, argue that Powel, while testifying in his deposition about how he felt about events in hindsight, ascertained the damages that he was suffering as a result of the abuse at Chaminade. Respondents argue that because Powel indicated in his deposition that he felt that the abuse was "wrong" and that he felt "sick to stomach" that this somehow demonstrates that Powel was aware of the damages that he was suffering as a result of the abuse and therefore his damages were "capable of ascertainment" at the time the abuse occurred. (L.F. 108, 113). Further, Respondents somehow argue that because Powel testified in his deposition that Brother Woulfe and Father Christensen threatened him with reprisal if he told anyone about the assaults and abuse that this demonstrates that he was aware of the damages at that time. (Respondent's Substitute Brief at 16, L.F. at 108, 116).

When Powel's deposition and the Affidavits of Plaintiff and Dr. Greenberg are reviewed and the facts and reasonable inferences therefrom are taken in the light most favorable to Powel, as one must do in reviewing a motion for summary judgment, it is clear that Respondents cannot demonstrate that Powel was aware of the sexual abuse at the time it occurred or that the damages were therefore "capable of ascertainment" at the exact time that the abuse occurred. The statements in Powel's deposition were made based upon his memory in 2003 of events which occurred in the 1970's. The statements in his deposition do not demonstrate that at the time the events occurred he was aware of the events or that the damages were "capable of ascertainment" at that time. Powel

specifically testified in his deposition on numerous occasions that his testimony was based upon hindsight. When Powel was asked how many times he was assaulted by Brother Woulfe he responded, "as we sit here, three times." (L.F. 107). When asked if there were any other incidents regarding sexual abuse by Brother Woulfe he indicated, "as I am sitting here, I am telling you all the instances I can recall." (L.F. 108). When asked about other abuse that he had suffered he testified that in "hindsight" he felt that he was damaged physically or emotionally as a result of that abuse. (L.F. 117).

In their Substitute Brief Respondents state that Powel discussed acts of abuse with another student after the abuse occurred. The exact testimony is as follows:

> Q: Ok. Did you ever discuss this with Parker on any occasion after that?
>
> A: Yes.
>
> Q: And when?
>
> A: I cannot recall.
>
> Q: Was it back when you were in school?
>
> A: Yes.
>
> Q: Back at Chaminade I mean.
>
> A: Yes.
>
> Q: Ok. And can you recall the nature of the discussion that you had with Parker about this incident?
>
> A: No.

Q: Was it something in the nature of, “I can’t believe he did that,” or something along that line?

A: I cannot recall.

Q: Were there any other incidents following the movie—or strike that. Did Christensen touch you or Parker while you were at the movies that night?

A: I cannot recall.

Q: And how long were you in the movie house that night with Christensen?

A: I cannot recall.

Q: Were there any discussions on the drive down there as to where you were going or why you were going there?

A: Yes.

Q: What were the discussions?

A: Discussions were—well, I would be guessing.

Mr. Bauer: Well, don’t guess.

Q: (By Mr. Noce) No, no, don’t guess.

Mr. Bauer: If you remember, tell him. If you don’t remember tell him, but don’t guess.

A: I cannot recall.

(L.F. 115).

As is clearly demonstrated by the deposition testimony, Powel's memory of this event is muddled at best. He doesn't remember if there was any touching, doesn't remember what, if anything, was discussed with his friend and doesn't recall if there were any discussions with his friend on the way to the movie theatre that evening. This testimony is insufficient to demonstrate that Powel's damages as a result of the sexual abuse that he suffered was capable of ascertainment at the time the abuse occurred. The party asserting the affirmative defense of a violation of the statute of limitations bears the burden of proving that defense. Business Men's Assurance Company of America v. Graham, 984 S.W.2d 501 (Mo. banc. 1999). At best, these statements demonstrate his memory today of events that occurred many years ago and these statements fail to demonstrate that, at the time of the incidents, Powel's damages were capable of ascertainment as required by §516.100 R.S.Mo.

II. POWEL'S DAMAGES WERE NOT CAPABLE OF ASCERTAINMENT UNITL FEBRUARY OF 2000 BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED DURING THE TIME THAT HE WAS A MINOR AND BY THE TIME HE REACHED THE AGE OF TWENTY-ONE HIS MEMORIES HAD BEEN REPRESSED.

In their Substitute Brief Respondents argue that Powel's damages were immediately capable of ascertainment at the time that the sexual abuse occurred and therefore his statute of limitations began running at that time and once the statute of limitations began running it could not be tolled absent specific statutory authorization. Under R.S.Mo. §516.100, Powel's claims for intentional failure to supervise clergy "shall

not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs but when the damage resulting therefrom is sustained and capable of ascertainment…". However, if the alleged abuse occurred when Powel was a minor, R.S.Mo. §516.170 tolls the applicable statute of limitations until the Plaintiff turns twenty-one. H.R.B. v. J.L.G., 913 S.W.2d 92, 95 (Mo. Ct. App. E.D. 1995); J.D. v. M.F., 758 S.W.2d 177, 178 (Mo. Ct. App. E.D. 1988). §516.170 states as follows:

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

R.S.Mo. 516.170.

By the express terms of §516.170, a minor's statute of limitations would not even begin to run until he reaches the age of twenty-one. At the time Powel reached the age of twenty-one he had no memory of the sexual abuse. Powel's damages were not capable of ascertainment upon reaching the age of majority. As an adult he would not have been able to file a claim for the sexual abuse that he suffered until his memory returned and his damages were capable of ascertainment. This was not until February of 2000. Because Powel was a minor at the time of the abuse and his statute of limitations was tolled pursuant to §516.170 and, upon attaining the age of majority, his memory was repressed, the statute of limitations began running in February of 2000 when his memory returned.

This is therefore not a situation where Powel was already an adult and his damages began and then stopped by an intervening loss of memory which would then toll the running of the statute of limitations. Here, the statute of limitations would never begin running until Powel recovered his memory because when the abuse occurred he was a minor and upon reaching the age of majority his memory was repressed and had been for several years. Under H.R.B. v. J.L.G., 913 S.W.2d at 95, and §516.170, Powel's damages only became capable of ascertainment in February of 2000.

III. RESPONDENTS' EFFORTS TO DISTINGUISH THIS COURT'S PRECEDENTS IN SHEEHAN v. SHEEHAN AND K.G. v. R.T.R. AS WELL AS THE EASTERN DISTRICT OPINIONS IN H.R.B. v. J.L.G. AND L.M.S. v. N.M. ARE UNAVAILING.

Respondents' Substitute Brief seeks to distinguish this Court's precedents in Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. 1995), and K.G. v. R.T.R., 918 S.W.2d 795 (Mo. banc. 1996), as well as the Eastern District Court of Appeals' opinions in L.M.S. v. N.M., 911 S.W.2d 703 (Mo. Ct. App. E.D. 1995), and H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. E.D. 1995). They seek to distinguish Sheehan, L.M.S. v. N.M. and H.R.B. v. J.L.G. by arguing that these cases were based upon motions on the pleadings and are therefore distinguishable. The trial court dealt with this argument quite eloquently stating:

> However, while the distinction between a motion to dismiss and motion for summary judgment may sometimes be of significance, on this issue, the significance is not talismanic. That is simply too thin a

reed upon which to gloss over what really amounts to a fundamental inconsistency between two competing lines of cases.

(L.F. 259).

This Court recognized in Sheehan that repressed memory may serve to delay the running of the statute of limitations because the damages may not be ascertainable until a later date. Plaintiff's Petition in Sheehan alleged that she "involuntarily repressed conscious memory" of the sexual abuse she suffered until a later date. This Court then held that the plaintiff's damages "may not have been ascertainable until August 1990 or thereafter." Sheehan, 901 S.W.2d at 59. The holding of Sheehan clearly establishes that in cases of repressed memory the damages from the sexual abuse may not be ascertainable until some date after the actual events occurred.

In L.M.S. v. N.M.and V.P., 911 S.W.2d 703 (Mo. Ct. App. E.D. 1995), the Eastern District was called upon to consider whether the statute of limitations for the intentional tort of battery was tolled until the memory of those acts was refreshed and capable of ascertainment. In reversing the trial court and remanding for further proceedings, the Eastern District held that despite the fact that Plaintiff alleged that she had involuntarily repressed her memory of the abuse from approximately fourteen years of age until age twenty-seven, under the holding of Sheehan, the plaintiff's damage "may not have been capable of ascertainment until her memories began to emerge in 1992". Id. at 704.

In H.R.B. v. J.L.G., 913 S.W.2d 92, 94 (Mo. Ct. App. E.D. 1995), plaintiff claimed that his cause of action was timely pursuant to R.S.Mo. §537.046 and §516.100

in that he could not discover and could not reasonably ascertain the damages he suffered as a result of the sexual abuse until October 1992 because the psychological coping mechanisms that he utilized repressed memory of his abuse until 1992. Id. at 94-95. The trial court dismissed H.R.B.'s claims in reliance upon Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. banc. 1993), and Vandenheuvel v. Sowell, 886 S.W.2d 100 (Mo. Ct. App. W.D. 1994), stating "repressed memory does not serve to extend the statute of limitations for plaintiff's claims to the time plaintiff's memory revived." Id. at 95. In accordance with the holding in Sheehan, the Eastern District reversed and remanded.

This Court once again considered these issues in K.G. v. R.T.R., 918 S.W.2d 795 (Mo. banc. 1996), the most recent precedent of this Court regarding the issue of whether or not repressed memory can prevent the running of the statute of limitations. In K.G. v. R.T.R. this Court recognized in even stronger language than in Sheehan that in cases where there has been repressed memory the cause of action does not accrue until the memory is regained. This Court recognized that under a §516.100 analysis, in cases where memory of the abusive conduct has been repressed and then subsequently recovered, the date the injury occurs may be later in time than the occurrence of the abuse. Id. at 798. In K.G. this Court explicitly stated:

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

Id. at 798; Sheehan, 901 S.W.2d at 58-59, citing §516.100 and §516.140.

In K.G. the plaintiff alleged that she was subject to sexual abuse by the defendant between the ages of three and seven years old and that she involuntarily repressed conscious memory of these events until January 1989 and had no conscious memory of the identity of the perpetrator until December 1990. Id. at 797. Interpreting Sheehan, this Court recognized that it is the memory of consequential injury and damages, not the memory of the perpetrator that "triggers the running" of the statute of limitations. Id. at 798. Therefore, in Powel's case, his statute of limitations would begin running when he recovered his memory of the abuse in February, 2000.

Respondents' Substitute Brief argues that this Court should ignore the holdings in Sheehan, L.M.S. and H.R.B v. J.L.G. because they were opinions based upon motions to dismiss on the pleadings whereas this is a case involving a dismissal following a motion for summary judgment. They further seek to distinguish K.G. by essentially arguing that K.G. does not mean what it says. Quite simply, if a plaintiff pleads that his memory was repressed and did not return until many years later, if repressed memory could never serve to toll the running of the statute of limitations until the memory returns then the decisions in Sheehan, K.G., L.M.S. and H.R.B. v. J.L.G. would have resulted in dismissals of the plaintiff's claims. If repressed memories simply could not prevent the running of the statute of limitations then, whether the plaintiff pleaded repressed memory in his pleadings or not, if the statute of limitations had elapsed absent such repressed memory all of those cases would have been dismissed based upon the statements made within the petition. If repressed memory could not have prevented the damages from

being capable of ascertainment and the plaintiff pleaded in those cases that his memory had been repressed until some date which was after the plaintiff's twenty-sixth birthday then these courts would have dismissed their petitions because on the face of the petitions the claims would have been filed outside of the statute of limitations. *See* §516.100 and §516.170.

IV. THE EASTERN DISTRICT, IN ITS OPINION IN THE INSTANT CASE, PROPERLY INTERPRETED THE "CAPABLE OF ASCERTAINMENT" STANDARD SET FORTH IN §516.100 R.S.Mo. AND DID NOT CHANGE THE "CAPABLE OF ASCERTAINMENT" STANDARD TO A DISCOVERY RULE BASED STANDARD.

Respondents' Substitute Brief makes numerous arguments that the Eastern District opinion in this case creates a new discovery-based standard in determining when the statute of limitations begins to run under §516.100. This is inaccurate. In fact, the Eastern District Court of Appeals in its Opinion noted that the opinion in the case of H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. Ct. App. E.D. 2000), and the standard urged by Respondents suggest the adoption of a "sustainment of injury" test rather than the "capable of ascertainment" test which is set forth in the Missouri statutes. (App. at A8). As the Eastern District noted in its Opinion, this ignores nearly a century of precedent. Id. As the Eastern District pointed out, H.R.B. holds that "any plaintiff that suffers a traumatic event immediately knows the damage that it will cause him or her. Accordingly, the traumatic event triggers the running of the statute of limitations

regardless of whether or not the plaintiff remembers the event." (App. at A8-9). The Eastern District continued in its Opinion, stating:

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

(App. at A9). The Eastern District noted that the trial court believed that Powel overcame the summary judgment motion by demonstrating genuine issues of material fact. The Eastern District stated:

> We agree with the trial court in that Powel has overcome Chaminade's summary judgment motion by demonstrating genuine issues of material fact…Accordingly, the issue of when Powel's damages from his childhood sexual abuse were capable of ascertainment is a decision to be made by the jury.

(App. at A9-10).

A review of the Eastern District's opinion in this case and the evidence set forth before the trial court demonstrates that the Eastern District's opinion was based upon its interpretation of the "capable of ascertainment" language in §516.100 and the court did not establish a new discovery-based standard for determining when the statute of limitations would begin to run. Rather, the Eastern District recognized that in certain cases, as here, damages from sexual abuse may not be "capable of ascertainment" when the plaintiff has no memory of those events.

The Amicus Brief of the Archdiocese of St. Louis argues that H.R.B. v. Rigali "did not universally hold that when an overt sexual assault occurs, the injury and damage are ascertainable at the time of the abuse." (Amicus Brief of the Archdiocese of St. Louis at 34). To the contrary, this is **exactly** what the H.R.B. v. Rigali court found. The H.R.B. v. Rigali court stated "where an overt sexual assault occurs, the injury and damage resulting therefrom are capable of ascertainment at the time of the abuse." H.R.B. v. Rigali, 18 S.W.3d at 443. As the trial court noted, H.R.B. v. Rigali "very clearly and unequivocally holds that repressed memory **can never** serve to toll the statute of limitations under the 516.100 "capable of ascertainment" test. (L.F. 259) (*Emphasis in the original*). As the Eastern District recognized in the instant case, this is not Missouri law and ignores nearly a century of precedent. (App. at A8-9). As the Eastern District recognized, the standard in H.R.B. v. Rigali and its progeny as urged by the Respondents renders the capable of ascertainment standard meaningless. Under this standard the damages would always be determined to be capable of ascertainment at the time of the act rather than at some other point when the victim remembers the abuse. This amounts

to changing the statutory test from a "capable of ascertainment" test to a "sustainment of the injury" test.

Respondents make numerous arguments that if the Eastern District's opinion is followed that all statutes of limitations will somehow be rendered meaningless. Respondents' "the sky is falling" argument is fallacious. At most, the opinion of the Eastern District and the "capable of ascertainment" standard urged here, as the trial court noted, would not "eliminate" the statute of limitations in these cases but would merely convert the issue into a question for the jury to determine, as is the case in occupational disease cumulative trauma cases. (L.F. 254, n. 8). Even under current case law, if reasonable persons can draw some contradictory or different conclusion from the evidence then a statute of limitations question should be submitted to a jury to decide. Powel v. Chaminade College Preparatory, Inc., E.D. 84366, 2005 W.L. 1266801 (Mo. Ct. App. E.D. May 31, 2005); Lomax v. Sewell, 1 S.W.3d 548, 552-553 (Mo. Ct. App. W.D. 1999); Straub v. Tull, 128 S.W.3d 157, 159 (Mo. Ct. App. S.D. 2004). In this case reasonable minds could differ as to when Powel's damages were capable of ascertainment and therefore this should be a jury question. The trial court specifically stated that "the summary judgment record creates a jury triable question as to whether the damages resulting from such abuse was "capable of ascertainment" (as required by §516.100 R.S.Mo.) before Plaintiff recovered his memory of the abuse in February of 2000." (L.F. 261).

Respondents also argue that Powel's claims cannot be tolled based upon his repressed memory of the sexual abuse absent specific disabilities or exceptions enacted

by the legislature. First, as noted in detail above, Powel's statute of limitations was tolled by his infancy and disability because he sustained these damages while he was a minor and therefore, pursuant to §516.170 R.S.Mo. his claims do not begin to run until he reaches the age of majority. Upon reaching the age of majority, Plaintiff had no memory of the abuse that he suffered at the hands of Brother Woulfe and Father Christensen and therefore the damages were not capable of ascertainment until his memory returned in February of 2000. Therefore, the statute of limitations may be suspended or tolled based upon the specific language of §516.170.

Respondents' dispute regarding Appellant's references to "tolling" of the statute of limitations may simply be a matter of wording. Whether the statute of limitations is "tolled" as that term is commonly used is not as significant as whether or not the statute of limitations can run when a victim's memory is repressed as an adult and therefore the damages are not "capable of ascertainment" during that time. As Appellant has clearly established throughout Appellant's Substitute Brief and this Substitute Reply Brief and as was further demonstrated by the trial court's Order and the Eastern District's Opinion, Powel's damages were not capable of ascertainment until February of 2000 when his memory returned. For this reason, both the trial court and the Eastern District determined that Powel had demonstrated a genuine issue of fact regarding whether Powel's damages were capable of ascertainment prior to the return of his memory in February of 2000 and therefore Defendant's Motion for Summary Judgment should have been denied.

Appellant set forth two hypothetical scenarios in his Substitute Brief to demonstrate the unfair nature of the position being advocated by Respondents and the

Eastern District in the H.R.B. v. Rigali opinion. Under the position advocated by the H.R.B. v. Rigali court and Respondent, if a young child is sexually abused then his damages from that abuse would be immediately ascertainable at the time the act of abuse occurred. However, if the abuser then repeatedly slammed the plaintiff's head into the ground mere minutes after the abuse or psychologically tormented the young victim and the plaintiff then could not recall the abusive events until he reached his late twenties or later, despite the deliberate intentional actions of the perpetrator, plaintiff's statute of limitations would not be tolled under the position suggested by Respondents. Respondents do not address the specific hypothetical scenario included within Appellant's Substitute Brief. Instead, Respondents alter the hypothetical situation to one whereby "the sexual abuse and assault immediately cause the plaintiff to lose consciousness for an extended period of time." (Respondents' Substitute Brief at 36-37). In such a case, Respondents argue that the limitations period would be tolled under §516.170 R.S.Mo. under the statutory exception for those plaintiffs suffering from mental incapacity. First, although plaintiff would certainly argue that such a fact pattern should suffice to toll the statute of limitations for a plaintiff suffering from mental incapacity, the case law is unclear on this issue. However, the more relevant point is that the hypothetical scenario advanced by Respondent is significantly different than the hypothetical scenario advanced by Appellant. Appellant's scenario involves one whereby a victim is sexually assaulted and then loses her memory several minutes later when she is assaulted by the perpetrator after the sexual abuse has been completed. Under the scenario advanced by the H.R.B. v. Rigali court and Respondents, the minor's

statute of limitations would begin to run at the time of the abuse because the damages were capable of ascertainment immediately, despite the fact that mere minutes after the abuse, the perpetrator physically assaulted the victim and the victim had no memory of the events. Under H.R.B. v. Rigali and the Respondents' position, the victim's statute of limitations would not be tolled if the damages were ascertained at the time of the abuse, despite the fact that the perpetrator later physically assaulted the victim and the victim never regained the memory until decades had elapsed. Surely this is not a scenario intended by the legislature.

Respondents also suggest that if a defendant sought to "psychologically torment" a plaintiff after the alleged abuse for the purpose of causing the victim to be unable to recall the abuse that he suffered then the limitations period for the claim would be tolled under the statutory exception for intentional or fraudulent concealment of a cause of action under R.S.Mo. §516.280. Appellant agrees that a plaintiff's statute of limitations should be tolled under this scenario. The evidence in this case show that Brother Woulfe and Father Christensen instructed Powel "not to tell anyone about the sexual assaults and abuse." (L.F. 116). In his deposition Powel testified that Christensen and Woulfe repeatedly instructed him not to tell anybody about the assaults and abuse and he feared reprisal based upon what they had said. (L.F. 108, 116). Based upon the Respondents' concession that such actions by the abusers in this case would allow for the statute of limitations to be tolled by R.S.Mo. §516.280, it is clear that the fraudulent concealment of the cause of action by agents of Chaminade, along with Powel's repressed memory, prevented his damages from being "capable of ascertainment" until February of 2000.

V. THE "CAPABLE OF ASCERTAINMENT" STANDARD SET FORTH BY THE EASTERN DISTRICT IN ITS OPINION IS BASED UPON NEARLY A CENTURY OF PRECEDENT AND DOES NOT "JUDICIALLY REVIVE" AN EXPIRED CLAIM BECAUSE POWEL'S DAMAG ES WERE NOT CAPABLE OF ASCERTAINMENT UNTIL FEBRUARY OF 2000.

Respondent argues that the interpretation of the "capable of ascertainment" standard set forth by the Eastern District in its Opinion amounts to a "judicial revival" of a cause of action that had expired under previous judicial interpretations. Respondent relies upon Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. banc. 1993), for their argument that an appellate court cannot "judicially revive" claims that had been considered to be expired under prior judicial interpretations of laws regarding the statute of limitations. Respondent's arguments are without merit. Doe based its opinion upon Article I, Section 13 of the Missouri Constitution which prohibits the enactment of any law that is "retrospective in its operation." Id. at 340. Retrospective laws are laws which "take away or impair rights acquired under existing laws, or create a new obligation and pose a new duty, or attach a new disability in respect to transactions or considerations already passed." Id. The opinion in Doe is based solely upon Missouri constitutional law against "retrospective **legislation**".

Respondent further cites Harris v. Hollingsworth, 150 S.W.3d 85 (Mo. Ct. App. W.D. 2004), as further support for its position that a court cannot "judicially revive" a claim that has already been barred by the statute of limitations. As an initial matter, it should be noted that Appellant disagrees that Appellant's claims had ever been time

barred. Further, Harris itself notes Doe's opinion was based solely upon retrospective legislative changes, stating, "Doe v. Roman Catholic Diocese holds that legislative changes since an action was barred under old law cannot resuscitate a previously barred cause of action." Id. at 91. Inexplicably, however, the Western District then stated that appellant failed to show that prior to Sheehan Missouri considered repressed memory as deferring the accrual of a cause of action for childhood sexual abuse until the memory was recovered. Id. The Western District then appeared to base its opinion upon the fact that as of 1994 the Vandenheuvel court had held that repressed memory did not delay the accrual of a cause of action under §516.100. Id. To the extent that Harris based its opinion upon Doe's holding that legislative changes since an action was barred under old law cannot resuscitate a previously barred cause of action, Harris misreads Doe. As the Eastern District noted in its Opinion, the Missouri legislature adopted its current standard under §516.100 in 1919. (App. at A9). Further, it is the cases of H.R.B. v. Rigali, Harris v. Hollingsworth and Vandenheuvel which involve new interpretations of Missouri law regarding statutes of limitations and ignore "nearly a century of precedent." (App. at A8).

The standard urged by the Appellant in this appeal and set forth by the Eastern District in its Opinion is not a new judicial interpretation of the "capable of ascertainment" standard and it is not a new discovery-based standard but, in fact, merely clarifies nearly a century of precedent regarding the "capable of ascertainment" standard set forth in §516.100 R.S.Mo. For this reason, Respondent did not acquire a vested right to be free from suit under the rationale of Doe. Appellant presented a genuine issue of

fact to the trial court regarding whether or not his damages were "capable of ascertainment" prior to his memory being recovered in February of 2000 and therefore Defendant's Motion for Summary Judgment should have been denied.

VI. R.S.Mo. §537.046 APPLIES TO APPELLANT'S CLAIMS AGAINST THE MARIANIST PROVINCE AND CHAMINADE.

In Appellant's Substitute Brief, Appellant argued that the Circuit Court erred in holding that §537.046 did not apply to Powel's claims against the Defendants for intentional failure to supervise clergy because §537.046 allows for recovery of damages against the defendants suffered as a result of childhood sexual abuse and there is no question that Plaintiff's damages are a result of childhood sexual abuse. Powel therefore argued that §537.046 applies to claims upon the actual perpetrators of the abuse as well as nonperpetrators. Contrary to Respondents' arguments, Powel has not waived the argument that Respondents can be held liable under an "accomplice" liability theory since Appellant argued both before the Circuit Court and the Eastern District that §537.046 can apply to entities such as the Marianist Province and Chaminade as well as the actual perpetrators of the sexual abuse. The "accomplice" liability argument is an argument within an argument, is not a new argument and therefore is not waived.

Missouri corporations, including not-for-profit corporations such as the Archdiocese, can be criminally prosecuted under any Missouri criminal statute "where the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation."

§562.056(1)(3) R.S.Mo. 2004. §562.056 merely provides the vehicle for asserting liability. Corporations are prosecuted under the statute defining the criminal conduct. *See* State v. Boone Retirement Center, Inc., 26 S.W.3d 265 (Mo. Ct. App. W.D. 2000) (upholding conviction of non-profit nursing home corporation for a Class D felony violation of neglect of a nursing home patient, Section 198.070.11, as extended to corporate entities by Section 562.056(1)(3)). In Boone Retirement Center, Inc., the not-for-profit entity was not convicted of a violation of 562.056, but of a violation of the criminal statute of neglect.

Advocates against extension of 537.046 to entities other than the perpetrator rely on a Rhode Island decision, Kelly v. Marcantonio, 678 A.2d 873 (1996), where that state's Supreme Court restricted Rhode Island's childhood sex abuse discovery test to the perpetrator. The court based its decision on the statute's definition of childhood sexual abuse as "any act committed by the defendant against a complainant who was less than eighteen (18) years of age at the time of the act and which act would have been a criminal violation of chapter 37 of title 11." Under Rhode Island law, the court reasoned, the only individual capable of violating the referenced chapter of the Rhode Island Criminal code was the individual violator. Id. at 877.

Given Missouri's statutory basis for imposing liability against corporate entities, the logic of the Rhode Island decision does not apply to 537.046. Section 537.046 similarly defines "childhood sexual abuse" with reference to criminal statutes. But unlike the Rhode Island statute, a violator of these criminal statutes can be a corporate entity. Chaminade can be convicted of the crimes specified by 537.046 as those defining

"childhood sexual abuse" See 537.046; 562.056. Therefore, the reference in 537.046 to criminal statutes does not narrow application of §537.046 to individual perpetrators. The legislature is presumed aware that 562.056, in effect since 1979, extended liability to entities such as Chaminade for criminal acts it defined as "childhood sexual abuse." In short, the Archdiocese, as much as the individual priest, is a "perpetrator" under Missouri law.

The same analysis applies to accomplice liability in Missouri. Two forms of accomplice liability exist in Missouri – common law criminal aiding and abetting, as well as civil aiding and abetting. Each establishes that the Archdiocese may be charged with the actions found in the criminal statutes referenced in §537.046. Missouri law is clear that anyone who in any way aids, abets, or encourages another in the commission of a crime by a form of affirmative participation with a common intent and purpose is guilty to the same extent as the principal offender, even though the accomplice did not personally commit every element of the principal offense. State v. Kobel, 927 S.W.2d 455, 459 (Mo. App. W.D. 1996). Proof of any participation by the defendant in the crime is sufficient to support a conviction. State v. Forister, 823 S.W.2d 504, 508 (Mo. App. E.D. 1992).

As §537.046 incorporates whole cloth the criminal law with regard to rape, sodomy, incest, sexual abuse and contact, that incorporation includes the liability of one who aids or abets. "That is to say, a rape may be the result of a concert of action aided and abetted between perpetrators." State v. Davis, 557 S.W.2d 41, 43[1-3] (Mo. App. 1977). Thus, where persons act with common purpose for a criminal enterprise, the

prosecution need not prove that the defendant personally committed all of the acts essential to the offense. State v. May, 587 S.W.2d 331, 334[2-5] (Mo. App. 1979). The participation in crime may be shown by such circumstances as presence, companionship and conduct attendant to the offense. State v. Cullen, 591 S.W.2d 49, 51[4, 5] (Mo. App. 1979). For a discussion of common law criminal aiding and abetting, see State v. White, 622 S.W.2d 939 (Mo. banc. 1981). Although criminal accomplice liability was most recently codified in 1979 in Section 562.041, that form of liability—criminal aiding and abetting—remains doctrinal in nature. The courts continue to discuss and rely upon it as a "broad concept" encompassing many acts. State v. Richardson, 923 S.W.2d 301, 317 (Mo. banc. 1996). Any individual, or entity, could be liable for the criminal conduct listed in §537.046, even if not an actual perpetrator, as a criminal abettor. The Missouri legislature therefore must have contemplated the application of §537.046 to entities other than an individual perpetrator, such as Respondents.

Aside from the criminal context, aiding and abetting is also recognized in the civil arena, where there has been no codification of the principal of aiding and abetting. The nature of civil aiding and abetting is that "one is subject to liability if he…knows that the other's conduct constitutes a breach of duty and gives substantial assistance of or encourages to the other so to conduct himself." Restatement (Second) of Torts §876(b) (1965). Missouri recognized civil aiding and abetting in Raybourn v. Gicinto, 370 S.W.2d 29 (Mo. App. 1957), and Knight v. Western Auto Supply Company, 239 Mo. App. 643 (1946) (recognizing aiding and abetting as a theory of liability in an assault and battery case). Under this theory, Respondents could be held liable for a violation of

537.046 as a civil abettor, even if the terms of §537.046 applied only to individual perpetrators. Therefore, the discovery test of §537.046 could be extended to Respondents. The legislature's inclusion of the phrases "any action" and "any civil action" in 537.046 reinforces this conclusion.

CONCLUSION

For all of the foregoing reasons and the reasons stated in Appellant's Substitute Brief, Plaintiff respectfully requests that this Court reverse the Circuit Court's granting of Defendants' Motion for Summary Judgment and remand this case to the Circuit Court for further proceedings consistent with this Court's holding.

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CERTIFICATION PURSUANT TO RULE 84.06(C)

Appellant hereby certifies that Appellant's Substitute Reply Brief complies with the limitations contained within Rule 84.06(b). Appellant's Substitute Reply Brief contains 7,702 words.

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CERTIFICATE OF SERVICE

COME NOW the undersigned and hereby certifies that two true and accurate copies of Appellant's Substitute Reply Brief were hand delivered, this 15th day of August, 2005 to Mr. Gerard T. Noce, 1010 Market Street, Suite 500, St. Louis, Missouri 63101.

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