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

AMICUS BRIEF OF THE ARCHDIOCESE OF ST. LOUIS

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JURISDICTIONAL STATEMENT

This case involves whether the Circuit Court of the City of St. Louis erred in granting summary judgment to the Marianist Province of the United States and Chaminade College Preparatory, Inc. based on § 516.120 of the Missouri statute of limitations. The trial court certified its decision as a final judgment in accordance with Missouri Supreme Court Rule 74.01(b). After briefing and oral argument, on May 31, 2005, the Missouri Court of Appeals for the Eastern District reversed the trial court's granting of summary judgment, and pursuant to Rule 83.02, certified this case for transfer to this Court "because of its general interest and to clarify the differing case law in the appellate districts." Powel v. Chaminade College Prep., Inc., No. ED 84366, 2005 WL 1266801, at *4 (Mo. Ct. App. E.D. May 31, 2005).

All parties have consented to the filing of this amicus curiae brief by the Archdiocese of St. Louis pursuant to Rule 84.04(f)(2).

INTRODUCTION

The Archdiocese of St. Louis ("Archdiocese"), a Missouri nonprofit unincorporated association, files this amicus curiae brief pursuant to Rule 84.05(f)(2) and with the consent of all parties.

The Archdiocese has a particular interest in the outcome of this litigation. First, the Archdiocese once was a named defendant in this case, but was dismissed by Powel without prejudice on July 17, 2003. (L.F. at 18-40, 236.) Second, the Archdiocese was the prevailing party in H.R.B. v. Rigali, 18 S.W.3d 440, 443 (Mo. Ct. App. E.D. 2000), a case in which the trial court was compelled to follow and which the Court of Appeals in Powel stated was wrongly decided. (L.F. at 253, 256-61); Powel, 2005 WL 1266801, at *4. The Archdiocese firmly believes that the Missouri Court of Appeals for the Eastern District in H.R.B. v. Rigali properly applied Missouri law to the evidence in that case with respect to the statute of limitations. The Archdiocese also has an interest in assuring that Missouri's statute of limitations jurisprudence, particularly the "capable of ascertainment" test in Mo. Rev. Stat. § 516.100, is properly followed and consistently applied by Missouri courts. The Archdiocese provides this Court with arguments which expand upon those set forth in Respondents' brief.

STATEMENT OF FACTS

Michael Powel ("Powel") was born on June 10, 1958 and turned twenty-one (21) years old on June 10, 1979. (L.F. at 114, 227.) Powel filed this action in the Circuit Court of the City of St. Louis ("trial court") on June 7, 2002, three days shy of his forty-fourth (44th) birthday. (L.F. at 240.)

Powel's Fourth Amended Petition is an action for damages based upon allegations that he was sexually abused while a minor and boarding student at Chaminade College Preparatory, Inc., d/b/a Chaminade College Preparatory School ("Chaminade") in St. Louis County, Missouri, from late 1973 to 1975. (L.F. at 22-23, 117.) Powel was fifteen (15) to seventeen (17) years old while attending Chaminade. During this time, members of the Marianist Province of the United States ("Marianist Province") were employed as educators at Chaminade. (L.F. at 19, 43.) Plaintiff alleges that he was sexually abused by two of his instructors, Brother John J. Woulfe ("Woulfe") and Father William Christensen ("Christensen"). (L.F. at 20-23.) Powel alleges that Woulfe and Christensen regularly and repeatedly engaged in unpermitted, harmful, and offensive sexual contact with him while he was a minor. (L.F. at 25, 29, 88.)

Powel testified that he was sexually assaulted and/or molested by Woulfe on three occasions at Chaminade between 1974 and 1975. (L.F. at 89, 94, 106, 107.) Powel testified that he felt physically ill and associated physical and emotional pain after each of these incidents of sexual abuse. (L.F. at 108, 123.)

Powel testified that Christensen committed five acts of sexual abuse upon him while he attended Chaminade. (L.F. at 111.) These acts include, inter alia, fondling,

watching an X-rated movie with Christensen and another student, and engaging in oral sex and anal sex with Christensen. (L.F. at 25, 112-16, 122-23.) Powel testified he felt physically ill and emotionally sick after incident of sexual fondling and oral sex with Christensen. (L.F. at 113, 116.) Powel stated that Christensen took Powel and another student, Marcus Parker, to an X-rated movie in St. Louis. (L.F. at 113.) Powel testified that during the X-rated movie, Christensen unzipped his pants, removed his penis, and may have played with it. (L.F. at 114.) Powel testified that he discussed this incident with Marcus Parker afterwards when they returned to Chaminade. (L.F. at 115.) Plaintiff further testified that each incident of anal sodomy was painful, and that he associated physical and emotional pain with each abusive incident involving Christensen. (L.F. at 25, 122-23.)

Powel testified that he avoided Woulfe and Christensen, making it a point of never going into their rooms again. (L.F. at 116, 137.)

Powel never informed any official at Chaminade about this alleged abuse while Powel was attending Chaminade. (L.F. at 23, 108, 116, 137.)

Powel stated that he remembered being molested until approximately age seventeen (17), but then he repressed his memories at that time. (L.F. at 185.) Powel's expert, Dr. Michael S. Greenberg, also confirmed that Powel remembered the alleged abuse when Powel was between the ages of fifteen (15) to seventeen (17) years old. (L.F. at 205, 211.) By the time Powel was eighteen (18) years old, he repressed his memories until February 2000, when he was forty-one (41). (L.F. at 173, 191, 196.)

In addition to the tort claims against Woulfe and Christensen, Powel pleaded claims against the Marianist Province and Chaminade for intentional failure to supervise clergy. (L.F. at 33-36.)

On October 16, 2003, the Marianist Province and Chaminade moved for summary judgment based on the five-year statute of limitation found in Mo. Rev. Stat. § 516.120(4). (L.F. at 77-93.) After the motion was fully briefed, on March 17, 2004, the trial court issued an Order and Partial Judgment, granting Marianist Province and Chaminade's motion for summary judgment based on § 516.120(4). (L.F. at 238-62.) The trial court found that Powel was consciously aware of the abuse when it occurred. (L.F. at 260.) The trial court further determined that Powel did remember his abuse until the age of seventeen (17) and then repressed his memory from the age of seventeen (17). (L.F. at 244, 261.) The trial court also found that Mo. Rev. Stat. § 537.046 was not applicable to the Marianist Province and Chaminade. (L.F. at 246-51.) The trial court certified its decision as a final judgment in accordance with Missouri Supreme Court Rule 74.01(b). (L.F. at 262.)

Powel timely filed a Notice to Appeal of the grant of partial summary judgment based upon the statute of limitations, i.e., Mo. Rev. Stat. § 516.120(4). (L.F. at 263-64.) After briefing and oral argument, the Missouri Court of Appeals for the Eastern District on May 31, 2005 reversed the trial court's granting of summary judgment, predicating its decision on § 516.120(4) and declining to address the applicability of § 537.046 to the Marianist Province and Chaminade. Pursuant to Rule 83.02, the Court of Appeals certified this case for transfer to this Court.

STANDARD OF REVIEW

The propriety of summary judgment purely is an issue of law, which an appellate court reviews de novo. Nusbaum v. City of Kansas City, 100 S.W.3d 101, 105 (Mo. 2001) (en banc).

Summary judgment will be upheld on appeal if: (1) the pleadings, affidavits, admissions, and exhibits demonstrate there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. Mo. Sup. Ct. R. 74.04; Nusbaum, 100 S.W.3d at 105; ITT Commercial Fin. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc). Facts in support of a party's motion for summary judgment are taken as true unless contradicted by the nonmoving party's response. Nusbaum, 100 S.W.3d at 105. A moving party need not controvert each element of a nonmoving party's claim to establish a right to summary judgment. Jos. A. Bank Clothiers, Inc. v. Brodsky, 950 S.W.2d 297, 300 (Mo. Ct. App. E.D. 1997). The moving party may establish a right to summary judgment simply by showing: (1) facts that negate any one of the claimant's element facts; or (2) that the nonmoving party does not have sufficient evidence to support a finding of the existence of any one of the claimant's elements. Id. at 300; see also State ex rel. Missouri Highway & Transp. Comm'n v. Dierker, 961 S.W.2d 58, 60 (Mo. 1998) (en banc).

Summary judgment is "appropriate in statute of limitations cases because underlying facts are relatively easy to develop." Hasemeier v. Metro Sales, Inc., 699 S.W.2d 439, 441 (Mo. Ct. App. E.D. 1985) (citing Dixon v. Shafton, 649 S.W.2d 435, 440 (Mo. 1983) (en banc)).

POINTS RELIED ON

I. The trial court properly granted summary judgment to the Marianist Province and Chaminade under the applicable statute of limitations, Mo. Rev. Stat. § 516.120(4), because the undisputed facts show that Powel's alleged damages were sustained and capable of ascertainment during the period of time when Powel was fifteen (15) to seventeen (17) years old, which was prior to any alleged claim of repression, suppression, or loss of Powel's memory.

Cases

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

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

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

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

II. Under Mo. Rev. Stat. § 516.100, once the fact of damage first becomes ascertainable and the right to sue arises, a claimant cannot toll or prevent the running of the applicable statute of limitations because of some alleged intervening disability, such as absence of memory, occurring after the alleged tortious act.

Cases

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

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

Shelter Mut. Ins. Co. v. Director of Revenue, 107 S.W.3d 919 (Mo. 2003)

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

III. The trial court correctly ruled that Mo. Rev. Stat. § 537.046 does not apply to Powel's claims against the Marianist Province and Chaminade for intentional failure to supervise clergy because the plain and ordinary language of § 537.046 limits the statute's application to the perpetrator of the specific acts of childhood sexual abuse.

Cases

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo. 1988)

State ex rel. Nixon v. Quicktrip Corp., 133 S.W.3d 33 (Mo. 2004)

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

Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood, 107 S.W.3d 235 (Mo. 2003)

ARGUMENT

I. The trial court properly granted summary judgment to the Marianist Province and Chaminade under the applicable statute of limitations, Mo. Rev. Stat. § 516.120(4), because the undisputed facts show that Powel's alleged damages were sustained and capable of ascertainment during the period of time when Powel was fifteen (15) to seventeen (17) years old, which was prior to any alleged claim of repression, suppression, or loss of Powel's memory.

The trial court properly granted summary judgment to the Marianist Province and Chaminade under the applicable statute of limitations, Mo. Rev. Stat. § 516.120(4), because Powel knew of the alleged sexual abuse when it happened, and for a period of years after it allegedly happened, before purportedly repressing his memory of it. The alleged sexual abuse occurred between the ages of fifteen (15) and seventeen (17), and Powel did not repress, suppress, or lose his memory of the alleged abuse until at least age seventeen (17).[1] (L.F. at 185, 205, 211.) The trial court held that the five-year statute of limitations found in § 516.120(4) applies to Powel's alleged claims against the Marianist Province and Chaminade for intentional failure to supervise clergy. (L.F. 251.) Mo. Rev. Stat. § 516.100 sets forth the method of accrual of Missouri state law claims for purposes

[1] Missouri courts seem to use the terms "repress" and "suppress" interchangeably, although these terms have differences. The Archdiocese will use the term "repress" throughout this brief.

of statutes of limitations, including the five-year limitations period in § 516.120(4). Section 516.100 states that:

> the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is capable of ascertainment, and if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Id. Under this statute, the applicable limitations period begins to run when the injury or damage has been sustained and is capable of ascertainment.[2]

Under controlling Missouri law, the capable of ascertainment test is an "objective" standard determined as a matter of law by the trial judge. Sheehan v. Sheehan, 901 S.W.2d 57, 59 (Mo. 1995) (en banc). Therefore, "[a] cause of action occurs, and limitations thereon begin to run, when the right to sue arises." Chemical Workers Basic Union Local No. 1744 v. Arnold Savings Bank, 411 S.W.2d 159, 165 (Mo. 1966) (en banc). The limitations period commences when, on an objective basis, the fact of damage was first capable of ascertainment. Harris-Laboy v. Blessing Hosp., Inc., 972 S.W.2d 522, 525 (Mo. Ct. App. E.D. 1998); see also Business Men's Assurance Co. of America v. Graham, 984 S.W.2d 501, 506-507 (Mo. 1999) (en banc). Indeed, if "the ***fact***

[2] If a claimant's damages are "capable of ascertainment" before the claimant is twenty-one (21) years old, Missouri will toll the commencement of the limitations period until the claimant turns twenty-one (21). See Mo. Rev. Stat. § 516.170.

of damage is ascertainable, then the statute of limitations begins to run even if the precise amount of damage is not ascertainable or if some additional damages may occur in the future." Jordan v. Willens, 937 S.W.2d 291, 294 (Mo. Ct. App. W.D. 1996) (emphasis in original) (citing Dixon, 649 S.W.2d at 438).

Missouri has rejected a subjective "discovery" rule to determine when a cause of action accrues. See, e.g., Doe v. O'Connell, 146 S.W.3d 1, 3 (Mo. Ct. App. E.D. 2004); see also Business Men's Assurance, 984 S.W.2d at 507. "Damage is sustained and capable of ascertainment when it can be discovered or made known, not when the plaintiff actually discovers the injury or wrongful conduct." Sheehan, 901 S.W.2d at 58-59 (internal quotations omitted). The "statute of limitation begins to run when the fact of the damage is ***capable of ascertainment***, although not actually discovered or ascertained." Carr v. Anding, 793 S.W.2d 148, 150 (Mo. Ct. App. E.D. 1990) (emphasis in original) (other citations omitted). "Mere ignorance of the plaintiff of his cause of action will not prevent the running of the statute of limitations." Id. (internal quotations omitted); see also Vandenheuvel v. Sowell, 886 S.W.2d 100, 102 (Mo. Ct. App. W.D. 1994). Stated simply, a claimant does not have to know and appreciate every element of every cause of action before the statute of limitations begins to run. If this were true, statutes of limitations would be meaningless.

In cases involving alleged sexual abuse, Missouri courts have held that "[g]enerally, the sexual abuse itself is 'capable of ascertainment' immediately, and the damage therefrom is 'capable of ascertainment' as soon as the emotional turmoil

appears." Harris v. Hollingsworth, 150 S.W.3d 85, 88 (Mo. Ct. App. W.D. 2004) (citing H.R.B. v. Rigali, 18 S.W.3d at 443).

In this case, the trial court identified and discussed two Missouri appellate decisions that "were not meaningfully distinguishable": H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. Ct. App. E.D. 2000), and Vandenheuvel v. Sowell, 886 S.W.2d 100 (Mo. Ct. App. W.D. 1994). (L.F. at 253-54, 257-58.)

In H.R.B. v. Rigali, a case criticized by the Court of Appeals in Powel, plaintiff sued the Archdiocese of St. Louis for sexual abuse that he allegedly sustained in 1963 and 1964 due to the misconduct of a Catholic parish priest. 18 S.W.3d at 442. Subsequent to a prior appeal in H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. E.D. 1995), the trial court allowed plaintiff's intentional failure to supervise claim to be submitted to the jury, over the Archdiocese's objection that such claim was barred by Mo. Rev. Stat. § 516.120(4). Id. The Missouri Court of Appeals for the Eastern District reversed the jury verdict, holding that plaintiff's claim indeed was time barred and the trial court erred in allowing it go to the jury. Id. at 443. The Court of Appeals reached its decision by applying an objective standard as it was required to do under Missouri law, but also found that under a subjective standard plaintiff's claims also were barred. The Eastern District stated:

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

> demonstrated in no unequivocal terms that the sexual abuse was overt, traumatic, painful and violent. ***Moreover, his testimony shows that he was very much aware of each sexual assault***. He specifically testified he felt pain and confusion and questioned why the abuse was happening to him . . .
>
> Plaintiff argues that he repressed any memory of these events until October 1992 and his repression of memory should toll the statute of limitations until that date. Plaintiff testified that after the attacks, he went to an area park and cried. He stated that while at the park he placed himself into a trance and suppressed the 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***.

Id. at 443-44 (emphasis added). The undisputed evidence in H.R.B. v. Rigali, including plaintiff's own testimony and that of his expert, conclusively demonstrated that plaintiff was aware of his alleged injuries ***during*** and ***after*** the alleged abuse – but later suppressed his memories of the alleged abuse. Id. at 444. Because plaintiff knew the fact of his alleged damage no later than 1964, but waited until 1994 to file suit, the Eastern District found that plaintiff's claim was time barred under §§ 516.100 and 516.120(4). This decision clearly was predicated on the undisputed evidence that plaintiff had knowledge of his alleged abuse at the time of each occurrence and for a period of time thereafter. This decision was not based on some implicit adoption of the "sustainment of

injury test," as the Court of Appeals in Powel would have this Court believe. Powel, 2005 WL 1266801, at *4.

The Court of Appeals in Powel also stated that H.R.B. v. Rigali failed to follow this 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 of H.R.B. and its progeny as they contravene Missouri statutes and case law precedent." Powel, 2005 WL 1266801, at *4. The Court of Appeals is mistaken. Sheehan stands for the proposition that when specific timeframes are not pleaded on the face of the petition, a claimant who alleges repressed memory is entitled to develop factual allegations and avoid dismissal of such claims under Rule 55.27(a)(6) based on the statute of limitations. In H.R.B. v. Rigali, on the other hand, the undisputed evidence presented to the trial court showed that plaintiff knew that he was damaged at the time of the abuse, but consciously suppressed this memory afterwards. 18 S.W.2d at 443-44. When the Eastern District in H.R.B. v. Rigali wrote the sentence "[w]here an overt sexual assault occurs, the injury and damage resulting from the act are capable of ascertainment at the time of the abuse," id. at 443, it did so in light of the evidence presented, including the admissions of plaintiff and his expert, that plaintiff was aware of his injury and damage at the time of the sexual assault. The Court of Appeals in Powel improperly takes the above-referenced sentence out of context and improperly isolates it from the uncontroverted evidence presented to the trial court in that case.

In Vandenheuvel v. Sowell, another case criticized by the Court of Appeals in Powel, plaintiff sued her deceased father's estate for sexual battery and abuse, which allegedly occurred before she turned eighteen (18) years old. 886 S.W.2d at 101. Plaintiff, who was forty-eight (48) years old when she filed her petition in 1993, claimed that she psychologically repressed her memory of the alleged abuse. Id. The trial court granted summary judgment in favor of the estate, finding that plaintiff's cause of action was barred by the two-year battery statute of limitations, Mo. Rev. Stat. § 516.140. The Missouri Court of Appeals for the Western District affirmed this decision, holding that under "the objective test, the trial court could reasonably have found that the damage from the alleged abuse was sustained and capable of ascertainment at the time of the alleged abuse." Id. at 104. The Western District also rejected plaintiff's repressed memory argument, concluding that "the accrual of a cause of action for battery is not extended under § 516.100 due to repression of memory." Id. The Western District explained that "[w]hether the limitations period should be extended for such abuse claims is a matter subject to legislative determination," and that no express tolling provision for repressed memory has been enacted. Id. at 103.

The holdings in these two cases are entirely consistent with Missouri's long-standing interpretation of the "capable of ascertainment" language of Mo. Rev. Stat. § 516.100 and Missouri's objective test. Missouri does not utilize a "subjective" test or a "discovery" test under § 516.100, which is what the Court of Appeals in Powel employs in its analysis, but does not so state.

As in H.R.B. v. Rigali and Vandenheuvel,[3] the undisputed summary judgment evidence presented to the trial court in this case shows that Powel knew of his alleged sexual abuse by Woulfe and Christensen when it occurred and that Powel remembered this alleged abuse from the ages of fifteen (15) to seventeen (17) years old.[4] Powel even discussed some of the abuse with another student, Marcus Parker, but kept it secret from the Marianist Province and Chaminade. Thus, the accrual of Powel's claims is not

[3] Unlike Sheehan, H.R.B. v. Rigali and Vandenheuvel were not motion to dismiss cases. H.R.B. v. Rigali was tried to a jury and reversed on appeal. 18 S.W.2d at 442-43. Vandenheuvel was based on a motion for summary judgment, where the record was fully developed by the parties. 886 S.W.2d at 101.

[4] The Court of Appeals in Powel stated: "In this case, there was ***no*** evidence presented in the motion for summary judgment indicating Powel had ***any memory or knew he was being abused at the time it occurred***." 2005 WL 1266801, at *5 (emphasis added). ***This is an incorrect statement of the facts by the Court of Appeals and ignores the manifest evidence presented to and found by the trial court***. In the trial court's order, Judge Riley found that although there was a genuine factual issue as to whether Powel "repressed his memory of the alleged incidents of sexual abuse at Chaminade from the age of 17 until February of 2000," (L.F. at 244, 261), there was ***no*** claim by Powel that he repressed his memory of the alleged sexual abuse from age fifteen (15) to seventeen (17). Judge Riley specifically found that "***Plaintiff was consciously aware of the abuse when it occurred***." (L.F. at 260) (emphasis added).

extended under Mo. Rev. Stat. § 516.100 due to his alleged repressed memory. Below are the salient facts:

- Powel testified that he was sexually assaulted and/or molested by Woulfe on three occasions at Chaminade between 1974 and 1975. (L.F. at 89, 94, 106, 107.) Powel testified that he felt disgusted and "sick to [his] stomach" and associated physical and emotional pain after each of these incidents. (L.F. at 108, 123.) Powel stated: "I felt it was wrong." (L.F. at 108.)
- Powel testified that Christensen committed five acts of sexual abuse upon him while he attended Chaminade. (L.F. at 111.) These acts include, inter alia, fondling, an X-rated movie, oral sex and anal sex. (L.F. at 25, 112-16, 122-23.) Powel testified he felt physically ill and emotionally sick after incident of sexual fondling and oral sex with Christensen. (L.F. at 113, 116.)
- Powel stated that Christensen took Powel and another student, Marcus Parker, to an X-rated movie in St. Louis. (L.F. at 113.) Powel testified that during the X-rated movie, Christensen unzipped his pants, removed his penis, and masturbated. (L.F. at 114.) Powel testified that he discussed this incident with Marcus Parker after their return to Chaminade. (L.F. at 115.)
- Plaintiff further stated that each incident of anal sodomy was painful, and that he associated physical and emotional pain with each abusive incident involving Christensen. (L.F. at 122-23.)
- Powel reported that he felt "dirty, confused, ashamed, and had to hold these experiences a secret from others." (L.F. at 210.) Powel testified that he avoided

Woulfe and Christensen, making it a point of never going into their rooms again.[5] (L.F. at 116, 137.)

- Powel stated that he remembered being molested until approximately age seventeen (17), but then he repressed his memories at that time. (L.F. at 185, 205, 211.) By the time he was eighteen (18) years old, he repressed his memories until February 2000, when he was forty-one (41) years old. (L.F. at 173, 191, 196.)
- Powel's retained expert, Dr. Michael S. Greenberg, also confirmed that Powel remembered the alleged abuse when Powel was between the ages of fifteen (15) to seventeen (17) years old. (L.F. at 205, 211.)
- Powel stated, "I recalled for the first time ***as an adult*** several instances of sexual abuse which occurred to me, some of which occurred while I was a student at Chaminade High School." (L.F. at 196) (emphasis added).

In light of these wholly undisputed facts and admissions by Powel and his expert, the trial court correctly found that "there is no doubt here that Plaintiff was consciously aware of the abuse when it occurred," (L.F. at 260), and for a period thereafter and that "there is no question here that the abuse was emotionally traumatic and sometimes, physically painful when it occurred." (L.F. at 260.) The Court of Appeals in Powel evidently overlooked or neglected to recognize this evidence. Hence, the Court of Appeal's statement that there was ***no*** evidence presented in the motion for summary judgment indicating Powel had

[5] This testimony alone shows that Powel was fully cognizant of the alleged sexual abuse, hence his avoidance of going into the rooms of Woulfe and Christensen.

any memory or knew he was being abused at the time it occurred" was plainly wrong. Powel, 2005 WL 1266801, at *5.

Applying Missouri's "capable of ascertainment" test and the objective standard, it is clear that the fact of Powel's alleged damage was ascertainable no later than 1977. There is no evidence in the record to suggest that Powel was mentally incompetent[6] at the time of the alleged sexual assaults by Woulfe and Christensen. The only tolling exception that applies in this case under Mo. Rev. Stat. § 516.170 is the "minority" exception, which tolled Powel's claims until he was twenty-one (21) years old. However, even applying this exception, Powel was required to file his claims by the time he was twenty-six (26) years old (June 10, 1984), not eighteen (18) years after that date. In light of the undisputed material facts and admissions by Powel and his own expert, Dr. Greenberg, the trial court properly granted summary judgment to the Marianist Province

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[6] In order to toll a limitations period due to mental incapacity, one "must set forth facts which show that plaintiff was deprived of an ability to reason or was unable to understand and act with discretion in the ordinary affairs of life, which disability prevented plaintiff from bringing suit." Kellog v. Kellog, 989 S.W.2d 681, 685 (Mo. Ct. App. E.D. 1999); see also Kraft v. St. John Lutheran Church of Seward, Neb., No. 04-3154, 2005 WL 1661405, at *4 (8th Cir. July 18, 2005) (noting that as a matter of law, plaintiff's disorders "were not the type of mental disorders that are contemplated by the [Nebraska] statute, because they do not render him incapable of understanding his legal rights or instituting legal action."). Powel made no such showing.

and Chaminade based on the expiration of § 516.120(4), the applicable statute of limitations. This Court should affirm the trial court's decision.

II. Under Mo. Rev. Stat. § 516.100, once the fact of damage first becomes ascertainable and the right to sue arises, a claimant cannot toll or prevent the running of the applicable statute of limitations because of some alleged intervening disability, such as absence of memory, occurring after the alleged tortious act.

Powel argues that the statute of limitations did not begin to run because he allegedly repressed his memory of the alleged acts of sexual abuse between the ages of seventeen (17) and forty-one (41). (L.F. at 196-97.) However, it is undisputed that this repression of memory did not occur until a substantial period of time after the alleged abuse had lapsed. ***Importantly, Powel admitted that he remembered the abuse for years before purportedly repressing his memory***. (L.F. at 185, 205, 211.) Powel failed to offer any facts to show that his memory repression occurred contemporaneously with the abuse. The trial court also did not find any repression of memory contemporaneously with the abuse. (L.F. at 260.) Rather, the trial court found that "there is no doubt . . . that Plaintiff was consciously aware of the abuse when it occurred." (L.F. at 260.) Hence, it is undisputed by Powel and his expert that Powel had full knowledge during, and for a period of time after, of the acts of sexual abuse and knew these acts were wrongful. During this time period of awareness, Powel's damage was sustained and capable of ascertainment, and the statute of limitations was triggered.

Powel's argument that the five-year limitations period somehow is tolled because of his allegation of repressed memory is not supported by Missouri law.

Statutes of limitations are ***favored*** in the law and cannot be avoided unless the party seeking to do so brings himself within an exception each by the legislature. Hill v. John Chezik Imports, 797 S.W.2d 528, 530 (Mo. Ct. App. E.D. 1990); Hammond v. Municipal Correction Institute, 117 S.W.3d 130, 138 (Mo. Ct. App. W.D. 2003). As this Court has recognized, 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, 923 (Mo. 2003) (en banc) (quoting Cooper v. Minor, 16 S.W.3d 130, 138 (Mo. 2002) (en banc)) (emphasis added). Exceptions to statutes of limitation are strictly construed. Chambers v. Nelson, 737 S.W.2d 225, 227 (Mo. Ct. App. E.D. 1998). Courts cannot extend statutes of limitation or extend the exceptions enacted by the legislature, even in cases of hardship. Id.; Hill, 797 S.W.2d at 530. Statutes of limitation rest on sound principles of public policy in that they tend to promote peace and welfare by compelling the presentation of claims within a reasonable period of time after their origin and while the evidence is fresh and witnesses are available. Business Men's Assurance, 984 S.W.2d at 507.

The legislature has not enacted a disability or exception under Mo. Rev. Stat. §§ 516.100 and 516.170 on account of a claimant's alleged repressed memory.

Indeed, it is well settled that "[t]raditionally, 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." Hollingsworth, 150 S.W.3d at 90.[7]

[7] Other jurisdictions also have recognized this legal principle. See, e.g., Kluckhuhn v. Ivy Hill Ass'n, Inc., 461 A.2d 16, 20 (Md. Ct. Spec. App. 1983) ("Generally, a disability that occurs after the statute has started to run will not toll the statute."); Nelson v. Nelson, 669 P.2d 990, 992 (Ariz. Ct. App. 1983) ("Arizona is thus in line with the general rule that personal disabilities commencing after the time the cause of action accrues do not toll the statute of limitations."); Roman v. A.H. Robins Co., Inc., 518 F.2d 970, 972 (5th Cir. 1975) ("Once the limitations period begins to run, it continues to do so even should one of the disabilities that would toll it arise in the meantime.") (applying Texas law); Berman v. Palatine Ins. Co., 379 F.2d 371, (7th Cir. 1967) ("Once the period of limitations begins to run on a legal claim, it continues without interruption, notwithstanding the fact that a subsequent disability befalls the party entitled to enforce the claim.") (quoting Schiller v. Kucaba, 203 N.E.2d 710, 715 (Ill. App. Ct. 1964)); Nichols v. Salisbury Hardware & Furniture Co., 103 S.E.2d 837, 844 (N.C. 1958) ("It is well recognized law in this jurisdiction from the earliest times that when the Statute of Limitation has begun to run, no subsequent disability will interfere with it."); Bock v. Collier, 151 P.2d 732, 735 (Or. 1944) ("[U]nder our law, in order to be available to plaintiff, the disability must have existed when the right of action accrued, and a disability arising subsequently cannot be considered."); Whitehurst v. Duffy, 26 S.E.2d

Even after Powel admittedly knew the fact of his damage at the time of the abuse and for a period of time after the acts or events giving rise to the injury and damage, Powel invites this Court to recognize a tolling provision for repressed memory, asserting that the statute of limitations may be suspended due to memory loss. There are significant dangers inherent in such an invitation. For example, tolling the limitations period based on a claimant's subjective claim of repressed memory would wholly negate the objective standard of § 516.100, which was placed into law by the Missouri legislature. Missouri courts would be unable to determine, on an objective basis, when a claimant represses, suppresses, or loses and then regains his memory. The Western District in Vandenheuvel addressed the many concerns with repressed memory generally,

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101, 103 (Va. 1943) ("It is, of course, well settled that where a cause of action has accrued, and the statute of limitations has commenced to run thereon, the statute is not suspended . . ."); Dalton v. Mayor & Council of the City of Hoboken, 171 A. 141, 142 (N.J. 1934) ("It is a settled rule under the British statute of limitations as well as like statutes in our state that once begun to run its course will not be impeded or its operation suspended by any subsequent disability."); Givens v. Jones, 12 P.2d 892, 894-95 (Okla. 1932) ("As a general rule, the disability which arrests the running of the statute must exist at the time the right of action accrues, and the statute having once attached, the period will continue to run, and will not be suspended by any subsequent disability, unless the statute so provides.")

although not in the context of memories repressed at a time subsequent to the act giving rise to the injury and damage, stating that:

> Courts and commentators which have discussed this issue recognize that allowing a plaintiff to bring an action based solely on the recollection of very old incidents that were allegedly repressed from consciousness, ***with no means of independently verifying the memory repression, would effectively eliminate the statute of limitations***. This would give a plaintiff unlimited time to bring an action, while the facts tend to become increasingly difficult to determine as the age of the alleged incident increases. The potential for spurious claims increases and the capability of the court to determine the truth would be significantly reduced, particularly when the alleged perpetrator is deceased. Whether the limitations period should be extended for such abuse claims is a matter subject to legislative determination.

Id. at 103 (emphasis added).

Moreover, the legislature in 1990 enacted Mo. Rev. Stat. § 537.046 (as amended in 2004), which extends the statute of limitations against perpetrators of childhood sexual abuse and which does have a subjective element – a so-called delayed discovery of injury test with respect to the actual perpetration of the alleged abuse.

The Court of Appeals in Powel stated that "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." 2005 WL 1266801, at *4. The Court of Appeals in Powel makes an incorrect interpretation of Sheehan. H.R.B., Hollingsworth, and Vandenheuvel are all consistent with Missouri's "capable of ascertainment" test and objective standard. It is the Court of Appeal's decision in Powel that is out of step with this Court's statute of limitations jurisprudence.

In Sheehan v. Sheehan, plaintiff alleged that her father sexually abused her as a child. 901 S.W.2d at 57-58. Plaintiff alleged that she involuntarily repressed conscious memory of these events throughout her childhood and young adulthood until 1990. The trial court granted defendant's motion to dismiss based on statute of limitations. This Court reversed, noting that a petition may not be dismissed unless it clearly establishes "on its face and without exception" that is barred. Id. at 59. This Court held:

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

Id. at 59 (emphasis added). The holding in Sheehan is narrow, relating only to the case where the Court found that plaintiff had made sufficient allegations in a petition, construing them broadly and favorably toward plaintiff, to survive a motion to dismiss. This Court ***never*** explicitly held that the repression of memory would absolutely toll the

statute of limitations under Mo. Rev. Stat. §§ 516.100 and 516.120. This issue was ***never*** reached in Sheehan.

Moreover, it is axiomatic that if Vandenheuvel properly failed to apply Missouri law, this Court would have overruled it in Sheehan or even in K.G. v. R.T.R., 918 S.W.2d 795 (Mo. 1996) (en banc), another motion to dismiss case decided after Vandenheuvel was handed down. Instead, this Court in Sheehan simply distinguished Vandenheuvel, noting that it was a case decided by summary judgment, where matters outside the pleadings and a record fully developed indicated when the damage became ascertainable. Sheehan, 901 S.W.2d at 59.

The same was true in H.R.B. v. J.L.G., 913 S.W.2d at 92, and L.M.S. v. N.M & V.P., 911 S.W.2d 703 (Mo. Ct. App. E.D. 1995). In both of these cases, following Sheehan, the Eastern District was required to remove all skepticism and doubt regarding plaintiff's allegations of repression of knowledge of the alleged abuse and allowed the claims to proceed where the statute of limitations bar did not clearly appear on the face of the petition. In H.R.B. v. J.L.G., for example, the Eastern District stated that:

> [W]e are required to allow the pleading is broadest intendment and to construe the petition's allegations favorably to the plaintiff . . . the petition is ambiguous enough as to when plaintiff could have ***objectively*** discovered or made know the fact of injury from defendant's alleged conduct, to withstand a motion to dismiss on limitations grounds. We must take all the allegations in the petition as true, suspending any skepticism as to the merits of plaintiff's allegations.

913 S.W.2d at 96 (emphasis added); see also L.M.S., 911 S.W.2d at 704 (holding that because all allegations are construed "broadly and favorably" to plaintiff, the petition "may be timely.")

H.R.B. v. Rigali, 185 S.W.3d at 440, is not inconsistent with H.R.B. v. J.L.G. or Sheehan. The Eastern District in H.R.B. v. Rigali so explained:

> Moreover, we do not consider our holding today to be inconsistent with our opinion in the prior appeal in this case, H.R.B., 913 S.W.2d at 92. This first appeal occurred after the trial court dismissed Plaintiff's petition as barred by the statutes of limitations in sections 516.120(4) and 537.046. We reversed, following Sheehan, concluding that the petition's allegations were sufficient to survive a bare motion to dismiss, giving Plaintiff's petition its broadest intendment and construing it favorably to Plaintiff.

18 S.W.3d at 445 (internal citations omitted).

The Court of Appeals in Powel writes that "H.R.B. holds that any plaintiff who suffered a traumatic event immediately knows the damage it will cause him or her. Accordingly, the traumatic event triggers the running of the statute of limitations, regardless of whether or not the plaintiff remembers the event." Powel, 2005 WL 1266801, at *4. The Court of Appeals in Powel is mistaken with respect to its interpretation of the holding in H.R.B. v. Rigali.

H.R.B. v. Rigali did not universally hold that where an overt sexual assault occurs, the injury and damage are ascertainable at the time of the abuse. H.R.B. v. Rigali further did not hold that there could never be a situation where repressed memory tolls the statute

of limitations. Rather, H.R.B. v. Rigali found that "***where full evidence in Plaintiff's allegations has been adduced . . . the evidence will not support a finding that Plaintiff's repression of his memory will toll the statute of limitations in section 516.120 and 516.100***." 18 S.W.2d at 445 (emphasis added). H.R.B. v. Rigali reached this holding based on plaintiff's testimony and that of his expert which showed "that, at the time the acts were perpetrated, he had full knowledge of the events and knew they were wrongful." Id. at 444. The Eastern District in H.R.B. v. Rigali carefully reviewed the evidence, including plaintiff's own testimony and that of his expert, and decided that "***the evidence will not support a finding that Plaintiff's repression of his memory will toll the statute of limitations***." Id. at 445 (emphasis added).

In this case, the summary judgment evidence was developed fully by the parties. Powel repeatedly admitted that he had knowledge of being molested from the time of the acts until approximately age seventeen (17). (L.F. at 185, 205, 211.) Even Powel's own expert, Dr. Greenberg, affirmed that Powel knew of the alleged abuse when Powel was between the ages of fifteen (15) and seventeen (17). (L.F. at 205, 211.) Because Powel knew the fact of his damages during that period of time, the limitations period for his claims began to run without interruption – tolled only for his minority under § 516.170. No other tolling exception, as enacted by the legislature, applies to Powel's claims. Powel cannot prevent the running of § 516.120(4), the applicable statute of limitations, because of his alleged memory loss, which occurred ***after*** his damages were capable of the ascertainment. Such a result would be contrary to the manifest intent of the legislature and controlling Missouri case law.

III. The trial court correctly ruled that Mo. Rev. Stat. § 537.046 does not apply to Powel's claims against the Marianist Province and Chaminade for intentional failure to supervise clergy because the plain and ordinary language of § 537.046 limits the statute's application to the perpetrator of the specific acts of childhood sexual abuse.

The trial court properly held that Mo. Rev. Stat. § 537.046 does not apply to Powel's claims against the Marianist Province and Chaminade for intentional failure to supervise clergy because the plain and ordinary language of Mo. Rev. Stat. § 537.046 limits the statute's application to only the alleged perpetrator of the specific acts of childhood sexual abuse. Mo. Rev. Stat. § 537.046 provides in part that:

> In any civil action for a recovery of damages suffered as a result of childhood sex abuse, the time for commencement of the action shall be within five years of the date the plaintiff attains the age of eighteen or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by childhood sex abuse, whichever later occurs.

Id. § 537.046.2. (1990). Section 537.046.1(1), in turn, specifically defines the term "childhood sexual abuse" as:

> 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.

Id. § 537.046.1.(1) (emphasis added). All of the acts prohibited by the specific criminal statutes cited above involve physical assaults by one person (the defendant) upon another person (the plaintiff). See, e.g., § 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); and § 568.020 (incest). Therefore, Mo. Rev. Stat. § 537.046.1.(1) is limited to only those actions to recover damages from illness or injury caused by physical sexual assault or contact "committed by the defendant against the plaintiff."

This statutory language makes clear that Mo. Rev. Stat. § 537.046 only applies to the perpetrator committing a specific act defined in §§ 566, et seq., and hence the arguments advanced by Powel and Amici Curiae are wholly in applicable. Powel and Amici Curiae argue that § 537.046 extends to non-perpetrators because Powel's causes of action are based on damage sustained as a result of childhood sexual assault. This argument is contrary to the basic rules of statutory construction and impermissibly extends the scope of the Missouri statute.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider

the words used in their plain and ordinary meaning." State ex rel. Nixon v. Quicktrip Corp., 133 S.W.3d 33, 37 (Mo. 2004) (en banc) (quoting Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. 1988) (en banc)). If the intent of the legislature is clear and unambiguous, giving the language of the statute its plain and ordinary meaning, then courts are bound by that intent and cannot resort to any statutory construction in interpreting that statute. Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood, 107 S.W.3d 235, 239 (2003) (en banc); see also Cline v. Teasdale, 142 S.W.3d 215, 222 (Mo. Ct. App. W.D. 2004). In the absence of a statutory definition, the terms of a statute will be given their plain or ordinary meaning as derived from the dictionary. State ex rel. Hope House, Inc. v. Merrigan, 133 S.W.3d 44, 49 (Mo. 2004) (en banc); Nixon, 133 S.W.3d at 37.

The trial court determined that "when properly construed according to its express terms and plain language, [Mo. Rev. Stat. § 537.046] may only be invoked against the perpetrator of one or more of the above-enumerated criminal offences." (L.F. at 250.) The trial court noted that "although Plaintiff's cause of action against Marianist and Chaminade for intentional failure to supervise clergy is obviously ***related to*** his claims against other defendants who (allegedly) actually committed one or more such criminal offenses, still, the former is not the same as the latter." (L.F. at 250) (emphasis in original). The trial court held that Plaintiff's intentional failure to supervise claims were not encompassed within the penal code provision listed in § 537.046.1(1) and that nothing in the statute either says or implies that the statute can apply to tortious claims other than "childhood sexual abuse." (L.F. at 250-51.)

The Western District in Hollingsworth also recognized that § 537.046 was limited only to "childhood sexual abuse." The Western District stated:

> The petition also contains a reference to "other physical and emotional abuse" inflicted upon [plaintiff]. Because this is an attempt to plead "other personal injury," any such claims of abuse, to the extent that they were sufficiently pleaded, were subject to the five-year limitations period of section 516.120. ***Because these were not claims of "childhood sexual abuse" within the meaning of section 537.046, the limitations period could not be extended by section 537.046***. Therefore, these claims are also currently barred.

Id. at 89 (emphasis added).

The Amici Curiae brief filed on behalf of Powel argues that the trial court circumvented the intent of the legislature by limiting Mo. Rev. Stat. § 537.046 to the perpetrator of the alleged abuse, citing a number of cases from other jurisdictions.[8] These cases are irrelevant when it comes to the intent of the Missouri's legislature in enacting § 537.046 and the statutory construction of this statute. Indeed, none of the other states' statutes is identical to the language of § 537.046, which limits its application

[8] Amici Curiae sometimes incorrectly refer to the Archdiocese as the Respondent in this case. (See Amici Curiae at 32-34.) The Marianist Province and Chaminade are the onlyRespondents. The Archdiocese was dismissed by Powel on July 17, 2003. (L.F. at 236.)

to those specific sexual acts set forth in the penal codes enumerated in the statute and perpetrated by the defendant upon the plaintiff. See Mo. Rev. Stat. § 537.046.1(1) (defining "childhood sexual abuse" as "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 . . . .).

Should this Court look to other jurisdictions for guidance in determining the plain and ordinary language of § 537.046, two cases, one from Rhode Island and the other from California, particularly are instructive. See Kelly v. Marcantonia, 678 A.2d 873, 875-76 (R.I. 1996) (holding that statute of limitations, which defined "childhood sexual abuse" as any act by "the defendant against the complainant," and which act would have been a violation of the applicable criminal code, necessarily limited the statute's applicability to causes of action against "the" defendant who had himself engaged in the criminal conduct); Debbie Reynolds Prof'l Rehearsal Studios v. Superior Court, 25 Cal. App. 4th 222, 231 (1994) (holding that statute of limitations, which defined "childhood sexual abuse" as any act "proscribed" under the applicable penal code, necessarily limited the statute's applicability to causes of action against defendants who had themselves perpetrated "certain intentional criminal acts prohibited by law.")

Because the plain and ordinary language of § 537.046 inextricably links "childhood sexual abuse" with the certain sections of the penal code, the Missouri statute clearly is limited only to the alleged perpetrator.

Irrespective, however, of whether Mo. Rev. Stat. § 537.046 applies to non-perpetrators, Powel's claims still are barred by the statute of limitations. In Doe v.

Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. 1993) (en banc), this Court held that § 537.046 could not operate retrospectively to revive a cause of action which previously had been barred by the expiration of the applicable statute of limitations. This Court held that the right to be free from suit, already having vested upon the expiration of the limitations period, was a substantive right under the Missouri Constitution. Id. at 342; see also Mo. Constit. Art. 1, § 13. Consistent with this holding, Powel cannot avoid summary judgment unless his causes of action potentially remained viable at the time this statute was adopted on August 28, 1990, and unless his injuries had not been discovered, and could not have been reasonably discovered, by June 7, 1997 (five (5) years before Powel filed his original Petition).

As discussed above, the fact of Powel's alleged damages were capable of ascertainment from 1973 to 1975. During this period of time, Powel does not claim that his memory was repressed. Since Powel was a minor at the time of the alleged abuse, the statutory clock was tolled until he turned twenty-one (21) in 1979. Under the five-year statute of limitations in § 516.120(4), Powel's Petition therefore had to be filed no later than 1984. Powel filed this action on June 7, 2002. (L.F. at 240.) Powel's claims have expired, and the Marianist Province and Chaminade have acquired a vested, constitutional right to be free from suit.

CONCLUSION

The Court of Appeals in Powel erred in having overlooked the substantial evidence presented in the summary judgment motion of the Marianist Province and Chaminade and the finding of the trial court that Powel consciously was aware of the sexual abuse when it occurred. Powel remembered his abuse until he was seventeen (17) years old. Likewise, in H.R.B. v. Rigali, the evidence also showed that plaintiff was aware of his abuse at the time it occurred and for a period of time thereafter. These two cases are not factually distinguishable in that regard.

This Court should hold that a claim of repressed memory does not toll Mo. Rev. Stat. § 516.120, where the evidence shows that the claimant remembered the act of sexual abuse and did not repress memory of the abuse contemporaneously with the act of sexual abuse.

Respectfully submitted,

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MICHAEL POWEL,	)	
	)	
Appellant/Plaintiff,	)	
	)	
vs.	)	No. SC 86875
	)	
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	)	
Respondents/Defendants.	)	

CERTIFICATION PURSUANT TO RULE 84.06(C)

Amicus party Archdiocese of St. Louis hereby certifies that its Amicus Brief complies with the limitations contained within Rule 84.06(b). The Amicus Brief contains 8,117 words.

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CERTIFICATE OF SERVICE

COME NOW the undersigned and hereby certifies that an accurate copies of Amicus Brief of the Archdiocese of St. Louis was served via regular mail this ___ day of July, 2005 to the following counsel of record:

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