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JURISDICTIONAL STATEMENT

This action is one involving the question of whether Missouri Statute Section 537.046, the Missouri statute of limitations governing civil actions for damages from childhood sexual abuse, applies to causes of action against entities or individuals who intentionally or negligently allowed the abuse to occur. The action also involves a related question, whether Appellant's cause of action is barred by the statute of limitations because his injuries were reasonably capable of ascertainment before he repressed his memory of the abuse. This appeal therefore involves the construction of a statute of limitations of this state.

INTRODUCTION

Amici Curiae conditionally file this brief pursuant to Supreme Court Rule 84.05 of the Missouri Rules of Court. The interests of each "friend of the court" are set forth in the annexed motion and are incorporated herein by reference. The Amici Curiae include the following organizations:

National Center for Victims of Crime

Victim Advocacy and Research Group

The Link Up, Inc.

Marilyn Van Debur Institute, Inc.

Mothers Against Sexual Abuse

The Awareness Center

The Human Lactation Center, Ltd.

S.M.A.R.T. (Stop Mind Control and Ritual Abuse Today)

Justice for Children

Survivors' Network of those Abused by Priests ("SNAP")

Leadership Council

Survivors First

Survivor Connections, Inc.

The Amici Curiae have provided this Honorable Court with arguments which expand upon that which it is anticipated will be set forth in the Appellant's Brief. The

friends of the Court believe that these arguments are all relevant to the issues raised by the Plaintiff.

STATEMENT OF THE FACTS

This is an action for damages based upon the sexual abuse Plaintiff endured while a minor enrolled at Chaminade College Preparatory school, ("Chaminade") from 1973 through 1975. This sexual abuse was committed by Defendants Fr. William Christensen and Br. John J. Woulfe, a catholic priest and a religious brother with Defendant Marianist Province of the United States, ("Marianist"). Plaintiff involuntarily repressed any conscious memory of these incidents until February of 2000. Plaintiff initiated tort claims directly against Christianson and Woulfe and claims against Chaminade and Marianist. At issue in this case is Counts IX and X, which are claims against Defendants Chaminade and Marianist for intentional failure to supervise their clergy. Defendants Marianist and Chaminade filed a joint motion for summary judgment with respect to Counts IX and X asserting that the claims against them for intentional failure to supervise clergy are governed and barred by Missouri Statute Section 516.120(4). Plaintiff countered this argument by stating that all claims are governed by Missouri Statute Section 537.046 and are well within the statute of limitations.

The Honorable John J. Riley dismissed Plaintiff's claims, ruling that Missouri Statute section 537.046 may only be invoked against the perpetrator of sexual abuse for claims of "childhood sexual abuse" as that term is defined under the Missouri penal code.

In addition, the trial court dismissed Appellant's claims on the further grounds that Missouri Statute section 516.100, as interpreted by the Court of Appeals in H.R.B.v Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000), does not toll the running of the statute of limitations for child sexual abuse cases involving a plaintiff's claim of repressed memory, under the "capable of ascertainment" test set forth in that statute. The issue of Missouri Statute section 537.046 applicability to claims against parties other than the perpetrator of the sexual abuse has not yet been reviewed by this the Missouri appellate courts. The Eastern District of the Appellate Court indicated H.R.B. v. Rigali was error, reserved judgment on the applicability of 537.046 to the Archdiocese, and certified for transfer this case to the Missouri Supreme Court. Amici curiae wish to provide this Court with analysis, information and guidance regarding this issue to allow the Court to make a fully informed ruling on the applicability of this statute.

Amici Curiae also wish to present arguments which reconcile the line of seemingly inconsistent cases in the Missouri appellate courts' decisions in the area of tolling the statute of limitations where repression of memory is alleged.

POINTS RELIED ON

I. The Trial Court Erred in Determining That Missouri Statute Section 537.046 Applies Only to Perpetrators of Child Hood Sexual Abuse Because the Intent of the Legislature in Enacting Section 537.046 Was to Extend the Statute of Limitations for All Causes of Action Seeking the Recovery of Damages Based on Childhood Sexual Abuse.

Statutes

Mo. Stat. § 537.046

Cases

Sabia v. State, 164 Vt. 293, 669 A.2d 1187 (1995)

Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Co. Ct. App. 2000)

Butled v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc. 1995)

C. J. C. v. Corporation of Catholic Bishop of Yakima, 138 Wash. 2d 699 (Wa. 1999)

Articles

Ann M. Hagen, Tolling the Statute of Limitations for Adult Survivors of Child Sexual Abuse, 76 Iowa L. Rev. 355 (1991)

II. The Trial Court Erred in Determining That Missouri Statute Section 537.046 Did Not Apply to Institutions and Individuals That Intentionally and Negligently Allowed the Abuse to Occur Because the Statute as Expressly

Written Does Not Exclude Any Causes of Actions That Are Related to the Recovery for Damages as a Result of Childhood Sexual Abuse.

Statutes

Mo. Stat. § 537.046

Cases

Swartz v. Swartz, 887 S.W.2d 644 (Mo. Ct. App. W.D. 1995)

Riordan v. Clark, 8 S.W.3d 182 (Mo. Ct. App. 1993)

Almonte, P.P.A. v. New York Medical College, 851 F. Supp. 34 (D. Ct. 1994)

Treatises

W. Page Keeton, et. al, Prosser and Keeton on the Law of Torts, §1 (5th ed. 1984)

Articles

Rosemarie Ferrante, The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress, 61 Brook. L. Rev. 199 (1995)

III. The Trial Court Erred in Interpreting the Legislative Intent of Section 537.046 to Bar a Plaintiff from Pursuing Claims Against Those Who Allowed the Abuse to Occur in That the Missouri's Delayed Discovery Statute Was Enacted in Recognition of the Unique, Complex and Delayed Nature of the Injuries of the Victims of Childhood Sexual Abuse Suffer, Thus That the

Clear Purpose of the Statute Is to Give Such Victims More Time to Seek Redress Against All Those Responsible for Causing the Injuries.

Articles

Margaret O. Hyde and Elizabeth H. Forsyth, M.D. The Sexual Abuse of Children and Adolescents, 10 (1997)

Maxine Hancock & Karen Burton Mains, Child Sexual Abuse, Hope for Healing, 33 (1987)

Carolyn B. Handler, Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle, 15 Fordham Urb. L.J. 709 (1986-87)

Blake-White & Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, 1985 Soc. Casework: J. Contemp. Social Work 394 (Sept. 1985)

Books

Dale Robert Reinert, Sexual Abuse and Incest (1997)

Mic Hunter, Abused Boys(1991)

Wayne Kritsberg, The Invisible Wound: A New Approach to Healing Childhood Sexual Trauma, (1993)

IV. The Capable of Ascertainment Accrual Test, Section 516.100, Which Alternatively Governs the Plaintiff-appellant Claims, Requires That Damages

Be Substantially Sustained and Be Capable of Ascertainment Before Any Cause of Action Accrues, and Appellate Case Law to the Contrary Is in Error.

Cases

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

Articles

Blake-White & Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, 1985 Soc. Casework: J. Contemp. Social Work 394, 394-402 (Sept. 1985)

E. Where the Facts Are Incomplete or Present the Possibility of Contradictory Conclusions on the Issue of Ascertainment, it Can Not Be Said as a Matter of Law That the Victim Ascertained His Damages – the Jury Is the Proper Arbiter of That Decision.

Statutes

Mo. St. § 516.100

Cases

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

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

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

H.R.B. v. J. L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995)

ARGUMENT

I. The Intent of the Legislature in Enacting Section 537.046 Was to Extend the Statute of Limitations for All Causes of Action Seeking the Recovery of Damages Based on Childhood Sexual Abuse.

A. In Response to the Relatively Recent Attention Given to the Prevalence of Childhood Sexual Abuse and its Severe Consequences to Victims, the State of Missouri Has Joined Most Other States in Enacting a Delayed Discovery Statute to Make it Easier for Victims of Childhood Sexual Abuse to Sue.

In response to the relatively recent discovery of the prevalence of sexual abuse, and of the difficulty survivors have in connecting the injuries they have sustained with the sexual abuse that occurred years before, many states have enacted some type of delayed discovery statute for claims specifically based upon childhood sexual abuse.

On August 28, 1990, Missouri enacted its own delayed discovery rule specifically for victims of childhood sexual abuse, section 537.046.[1] Section 537.046 is really separated into two parts. The first gives plaintiffs five years from the age of 18 in which to file suit. The second part is the delayed discovery

[1] For a detailed interpretation of Missouri's limitations periods for child sexual abuse, see Sharon Lowenstein, Missouri Limitation Period for Child Sexual Abuse, 53 J. Mo. B. 288. (1997).

statute, which gives plaintiffs three years from the date the plaintiff discovers or reasonably should have discovered the causal connection between the injury and the abusive acts.

Unlike traditional statute of limitations which bar most adult sexual abuse survivors from bringing civil claims, Missouri's discovery rule gives survivors additional time to bring claims by triggering the running of the statute of limitations with the victim's discovery of the cause and fact of the injury. Ann M. Hagen, Note, Tolling the Statute of Limitations for Adult Survivors of Child Sexual Abuse, 76 Iowa L. Rev. 355, 365 (1991). It is clear that in enacting section 537.046, the Legislature understood the formidable challenges adult survivors experienced with the legal system and intended to dispose of the additional hurdles an adult survivor had to overcome in order to bring a viable claim.

Missouri Statute section 537.046(1) specifically states:

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

(Emphasis added).

In addition, Section 537.046 (3) states:

> "This section shall apply to **any action .....**"

(Emphasis added).

B. The Circuit Court in the Case at Bar Misconstrued Missouri's Delayed Discovery Statute by Holding That the Statute Only Applies to Claims Against the Perpetrator of the Abuse.

In the case at bar, the circuit court misconstrued Missouri Statute section 537.046 in Appellant Powel's case and determined that the statute only applies to claims of intentional sexual abuse against the individual perpetrator. Thus, under the trial court's interpretation, legitimate claims against entities and individuals for intentionally or negligently allowing the abuse to occur would still be considered time barred under the existing statute of limitations.

In its decision, the court stated that under the plain language of the statute, subsection one did not have any application to the type of claim brought by Plaintiff against the Defendants, Marianist and Chaminade for intentional failure to properly supervise clergy. The court stated that although Plaintiff's claims against these entities are obviously related to his claims against the perpetrator, the claims are not "encompassed within the penal code provisions listed under section 537.046.1(1)" and therefore the statute does not apply to such claims. (See March 17, 2004 Order, at pp. 13-14). The circuit court reasoned that the statute specifically defines "childhood sexual abuse" as any act constituting a violation of various provisions of the Missouri penal code; as a result, "the statute may only be invoked against the perpetrator of one or more of the above-enumerated criminal offenses." (March 17, 2004 Order, at p. 13.)

C. The Express and Unambiguous Language of the Statute Does Not Exclude Causes of Action Against Parties Other than the Perpetrator of the Abuse If the Causes of

Action Are Based upon Damages Sustained as the Result of Childhood Sexual Abuse.

By limiting the application of the statute of limitations under section 537.046 to claims against the perpetrator of the abuse, the district court completely circumvented the intent of the legislature. In enacting section 537.046, the legislature intended to benefit victims of childhood sexual abuse, not to punish the perpetrators of the abuse. Thus, it is a remedial statute which must be construed liberally. See Sabia v. State, 164 Vt. 293, 309, 669 A.2d 1187,1198 (1995)(declining to exclude claims against parties who failed to protect the victim from the abuse by reading the term "against the perpetrator" into a remedial statute of limitations whose purpose is to benefit victims of childhood sexual abuse, not to punish the perpetrators of the abuse); Cavanaugh v. Abbott Lab., 145 Vt. 516, 529-30, 496 A.2d 154, 162 (1985)(declining to read unexpressed limitation into statute of repose); Cf. Clymer v. Webster, 156 Vt. 614, 623, 596 A.2d 905, 910 (1991)(wrongful death statute intended to alter the harsh common-law rule denying liability due to death of victim is remedial in nature and must be construed liberally).

"When construing a statute, courts must ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning." Butled v. Mitchell-Hugeback, Inc. 895 S.W.2d 15, 19 (Mo. banc. 1995). "To determine whether a statute is clear and unambiguous, this court must look to whether the language is plain and clear to a person of ordinary intelligence." Russell v. Mo. State Employees' Ret. Sys., 4 S.W.3d 554, 556 (Mo. App. 1999). The Court will look past the plain and ordinary meaning of a statute only if the language is

ambiguous or if its plain meaning would lead to an illogical result . Lonergan v. May, 53 S.W.3d 122, 126 (Mo. App. 2001)

The language of section 537.046 is plain and clear to a person of ordinary intelligence. Black's Law Dictionary defines "civil action" as an "**action[] brought to enforce, redress or protect private rights. In general, all types of actions, other than criminal proceedings.**" Black's Law Dictionary 245 (6th ed. 1990) (emphasis added.)

The definition of the word "any" also is illuminating. According to Webster's II New College Dictionary (1999), the definition of "any" is "[o]ne or some, **regardless of sort,** quantity or number ... One or another without restriction or exception"(emphasis supplied). Thus, "any" civil action, according to its plain and ordinary meaning, would include all "sorts" of civil actions, as long as the action is seeking recovery of damages sustained as a result of childhood sexual abuse. Also, "any civil action" means "one or another [civil action] **without restriction or exception**".

D. Courts in Other Jurisdictions Have Interpreted Very Similar Delayed Discovery Statutes as Applying to Claims of Negligence Against Parties Other than the Perpetrator of the Abuse.

This interpretation of the statutory language is in accord with judicial interpretations of very similar, if not identical, statutes of limitations in at least three other states. For example, the Vermont Supreme Court was called upon to interpret a statute of limitations for childhood sexual abuse which reads as follows:

> (a) A civil action brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced

> within six years of the act alleged to have caused the injury or condition, or six years of the time the victim discovered that the injury or condition was caused by that act, whichever period expires later. The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury.
>
> .....
>
> (c) As used in this section, "childhood sexual abuse" means any act committed by the defendant against a complainant who was less than 18 years of age at the time of the act and which act would have constituted a violation of a statute prohibiting lewd and lascivious conduct, lewd or lascivious conduct with a child, sexual assault or aggravated sexual assault in effect at the time the act was committed.

12 Vt. Stat. § 522(1989).

In Sabia v. State, 164 Vt. 293, 669 A.2d 1187 (1995), three sisters brought suit against the State for failing to protect them from their stepfather's sexual abuse, despite repeated, substantiated reports of the abuse to the State's Department of Social and Rehabilitative Services. Id. at 297, 669 A.2d at 1190. The State argued that the general statute of limitations for personal injury, which limits the time to sue to three years from the date the cause of action accrued, applied to the case. The State argued that the childhood sexual abuse statute applied only to suits against the perpetrators of the abuse, not other persons whose negligence may have contributed to the abuse. Id. at 309, 669 A.2d at 1197.

In support of its argument, the State noted that the childhood sexual abuse statute, 12 Vermont Statutes section 522(1989), states that the action must be commenced within six years of the "act" committed "by the defendant", and the statute defines "childhood sexual abuse" as any "act" committed "by the defendant". Id. In addition, the State argued that if the legislature had intended to allow nonperpetrators to be defendants, it would have required plaintiffs to establish which incident of sexual abuse caused the injury. Id.

The Vermont Supreme Court squarely rejected these arguments, stating that it

> found nothing in the statutory language suggesting that the Legislature intended to exclude nonperpetrators from the reach of the statute. Use of the word "act" in different contexts in different sentences of the statute does not compel the conclusion that the "act" complained of must always be the "act" of sexual abuse itself. The statute applies to civil actions "brought by any person *for recovery of damages for injury suffered as a result of childhood sexual abuse.* ... Plaintiff Patterson's suit plainly falls within the scope of the statute. We decline to read the term "against the perpetrator" into a remedial statute whose purpose is to benefit victims of childhood sexual abuse, not to punish the perpetrators of the abuse.

Id.

The Missouri statute of limitations for actions for childhood sexual abuse is virtually identical, in relevant parts, to the Vermont statute discussed above. Like the Vermont statute, Missouri Statute section

537.046 applies to any civil action brought for the recovery of damages suffered as a result of childhood sexual abuse. Like the Vermont statute, section 537.046 defines "childhood sexual abuse" as an act by "the defendant" which constitutes a violation of the Missouri penal code involving sexual offenses. By defining "childhood sexual abuse" as acts in violation of the penal code, the legislature did not intend to limit the type of **defendant** against whom an action could be brought, but intended to limit the type of **conduct** which would qualify as "childhood sexual abuse". See C.J.C. v. Corporation of the Catholic Bishop of Yakima, 985 P.2d 262 (1999), where the Supreme Court of Washington interpreted a similar statute of limitations which defined childhood sexual abuse as certain enumerated violations of the Washington criminal code. C.J.C., 985 P.2d at 266, 268-69. The C.J.C. Court explained:

> [W]e read the statutory definition of "childhood sexual abuse" as limiting only the specific predicate sexual *conduct* upon which all claims or causes of action must be based. Thus, the alleged sexual abuse must amount to a violation of the criminal code. If it does not, no claim of any type, against any person, lies. We find this interpretation best preserves express language contained within the act, harmonizes related provisions, and leaves intact the primary meaning of the definition of "childhood sexual abuse" – that claims must be based on serious sexual misconduct of criminal proportions.

Id. (Emphasis in original).

The C.J.C. court found this definition of "childhood sexual abuse" did not exclude claims against parties based on negligence. Rather, the definition describes the predicate conduct on which all claims are based, including negligence claims. Id. At 267. "The alleged sexual abuse is essentially an element of the plaintiff's negligence claims. Absent the abuse, plaintiffs would not have suffered any injury and their negligence claims could not stand. Thus, the "gravamen" of plaintiffs' claims is that defendants are liable for injuries resulting from acts of intentional sexual abuse.. .. [T]he injury resulting from the abuse "forms the grounds" for the claims. Id. at 267-68.

Like the statute involved in C.J.C., Missouri Statute section 537.046 describes the "predicate conduct on which all claims are based, including negligence claims. The underlying basis for the claim is the intentional sexual abuse which the negligent party allowed to occur, and that sexual abuse is an essential element to the negligence claim. This interpretation applies the plain meaning of the statutory language without distorting it and without reading into it language which is not there.

The State of Montana has a similar statute of limitations for childhood sexual abuse claims, although the Montana Legislature used slightly different words:

> (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than: ... (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

Mont. Stat. § 27-2-216(1)(b)

The Montana Supreme Court interpreted this language in Werre v. David, 913 P.2d 625, 631-32(1996). The Court looked at the dictionary definition of "Base", which is "'that on which something rests or stands: FOUNDATION ... the point or line from which a start is made in an action or undertaking ... '". Id. p. 631(citations omitted). Using this definition of "base", the Court concluded that under the plain meaning of this statutory language, an action is "'based on intentional conduct' if intentional sexual abuse is the starting point or foundation for the claim." Id. p. 632.

Although Missouri Statute section 537.046 does not contain the words "based on", the Montana Supreme Court's analysis of the meaning of its statute supports the interpretations of similar statutory language in both C.J.C. and Sabia: that the definition of "childhood sexual abuse" as a violation of the penal code by the defendant merely means that the cause of action must have as its foundation injury suffered as a result of childhood sexual abuse, i.e., the sexual abuse as defined in the statute is an essential element of the claim.

Recently, the federal district court of South Dakota, in interpreting a South Dakota childhood sexual abuse statute worded much like Missouri's, also determined that use of the words "based on" and "any civil action" included causes of actions against organizational third parties. Delonga v. Diocese of Sioux Falls, 329 F.Supp.2d 1092, 1100-1102 (D.S.D. 2004). The South Dakota statute, S.D.C.L § 26-10-25, defines applicability of the discovery test to "[a]ny action based on intentional conduct brought by any person for damages for injury suffered as a result of childhood sexual abuse" and then defines "childhood sexual abuse" as "acts committed by the defendant against he complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 22-22 or prior laws of

similar effect at the time the act was committed which act would have constituted a felony" S.D.C.L § 26-10-29. The Delonga court concluded: "The focus of the statute at hand, as gleaned from its language, is on actions flowing from a particular type of harm, not on the nature of the party or parties causing the harm." Delonga, 329 F.Supp.2d 1092 at 1103-1104.

State courts in Illinois and federal court decisions in Connecticut additionally have held childhood sexual abuse statutes similar to Missouri's to apply to third parties. See Hobert v. Covenant Children's Home, 723 N.E.2d 384, 386-387 (2000); Nutt v. Norwich Roman Catholic Diocese, 921 F.Supp.66, 72 (D. Conn. 1995); Almonte v. New York Medical College, 851 F.Supp.34, 37 (D.Conn. 1994).

In conclusion, using the ordinarily accepted meanings of the words "any," "civil action," and "childhood sexual abuse" in section 537.046, together with the remedial purpose of the statute, leads to the inescapable conclusion that the Missouri Legislature intended the statute to apply to causes of action against parties who are secondarily liable for allowing the abuse to occur. If the Legislature wanted to preclude extending the application beyond the perpetrator, it would have said so explicitly. See e.g. Sandoval v. Archdiocese of Denver, 8 P.3d 598, 602-603 (Co. Ct. App. 2000).[2]

[2] In Sandoval, the Colorado Court of Appeals interpreted Co. St. § 13-80-103.4(1), which expressly denies the application of its six-year limitation period to derivative claims involving vicarious liability. The court stated that without the limiting language a claim of sexual abuse could have been brought against the perpetrator under the extended limitations period. In addition, the Sandoval court acknowledged that the literal meaning of the Colorado statute's phrase "any civil action based on a sexual offense" would include

causes of action against third parties. But the presence of legislative history indicating a contrary intent in the Colorado legislature lead the court to reject this conclusion. Sandoval, 8 P.3d 598 at 604. Note that the only other negative authority, not since abrogated through legislative amendment, is Kelly v. Marcantonio, 678 A.2d 873 (1996).

Furthermore, the language of this statute is unambiguous and its application is logical. In fact, should this court interpret section 537.046 as the circuit court would suggest, the results would then be illogical. It is illogical to suppose that a statute designed to benefit victims of childhood sexual abuse would be so narrowly drawn as to allow the benefit only as against the perpetrator of the abuse. If that was the Legislature's intent, it would have said so explicitly. Since it did not so limit the scope of the statute, the only way to achieve such a result would be to read into the statute language that is not there. Such an interpretation would leave a plaintiff unable to obtain full redress for all injuries suffered and would not provide any motivation to entities or individuals to change policies concerning the prevention of sexual abuse.

It is clear from the unambiguous language of the statute that the statutory focus is on **actions** flowing from a particular type of harm and not who may be **parties** to a lawsuit.[3] Therefore, in defining the scope of the statute, courts should look at whether the underlying harm was allegedly caused by sexual abuse rather than whether the named defendants are potentially primarily or only secondarily liable for the alleged harm.

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[3] See Almonte, 851 F. Supp. at 37, (The United States District Court interpreted Conn. Gen. Stat. § 52-577d, "[n]o action to recover damages for personal injury to a minor..." applied to both perpetrators of the sexual assault and other individuals. In making its determination, the court stated that the unambiguous language of the statute indicated that the statutory focus was on actions flowing from a particular type of harm and not parties.)

E. Missouri Unincorporated Associations and Not-for-profit Corporations Can Be Held Liable under Criminal Statutes for the Actions of the Third Parties; Therefore Section 537.046, by Reference to Missouri Criminal Law, Contemplates Liability for Entities as Perpetrators.

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) RSMo 2004. Section 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.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. The Archdiocese 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 the Archdiocese 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 can be made with reference 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 any 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 form of 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. See State v. Richardson, 923 S.W.2d 301, 317 (Mo.banc1996). 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 the Archdiocese.

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, 307 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, the Archdiocese 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 the Archdiocese. The legislature's inclusion of the phrases "any action" and "any civil action" in 537.046 reinforces this conclusion.

II. The Delayed Discovery Statute Was Enacted in the Social Context of a Growing Awareness of the Part Played by Institutions in Allowing Sexual Abuse to Occur; Thus the Missouri Legislature Clearly Intended to Provide Relief to Victims Against All Persons Responsible for the Injury.

Missouri courts have not yet decided the question whether Missouri Statute section 537.046 extends to claims other than claims against the perpetrator of the abuse. See Swartz v. Swartz, 887 S.W.2d 644, 650 (Mo. Ct. App. W.D. 1995)(stating that the court "need not decide ... whether [section 537.046] extends beyond actions for damages caused by the commission of sexual abuse to claims for damages related to sexual abuse, such as [plaintiff's] claims for breach of a parental duty of care.")

Victims of childhood sexual abuse face formidable barriers against the achievement of justice in either the criminal or the civil justice system. Rosemarie Ferrante, The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress, 61 Brook. L. Rev. 199, 200 (1995). Many, if not most of these victims only become capable of bringing court action many years after the abuse

occurred, only to find that both criminal prosecution of the abuser and civil redress against any party are barred by statutes of limitation.

In many cases of sexual abuse, in addition to the perpetrator who actually committed the abuse, there are other individuals or entities who knew or should have known about the sexual abuse and did nothing to stop it. If an entity or individual was negligent for allowing the sexual abuse to occur and/or continue, or in failing to protect the victim from harm, the plaintiff should be afforded the same opportunity for redress against that entity or individual as is given to him for redress against the perpetrator.

Potential causes of action against secondary wrongdoers who negligently or intentionally allow the abuse to occur commonly include actions for battery, negligence (including negligent failure to warn and failure to protect), negligent retention and supervision, intentional failure to supervise, breach of fiduciary duty and vicarious liability. See Brett v. Watts, 601 N.W.2d 199 (Minn. Ct. App. 1999); Angie M. v. Superior Court, 37 Cal.App. 4th 1217, Cap. Rptr. 2d 197 (4th Dist. 1995)(battery); See L.P. v. Oubre, 547 So, 2d 1320 (La. Ct. App. 5th Cir 1989) writ denied 550 So. 2d 634 (La. 1989); Hutchinson ex. rel. Hutchinson v. Luddy, 560 Pa. 51, 742 A.2d 1052 (1999); C.J.C. v. Corporation of Catholic Bishop of Yakima, 138 Wash. 2d 699, 985 P.2d. 262 (1999), as amended, (Sept. 8, 1999); Grozdanich v. Leisure Hills Health Center, Inc. 25 F. Supp. 2d 953 (D. Minn. 1998)(negligent failure to warn); See generally Beul v. ASSE Intern, Inc. 233 F.3d 441, 149 Ed. Law Rep. 122 (7th Cir. 2000); Walthers v. Gossett, 148 Or. App. 548, 941 P.2d 575 (1997)(negligent failure to protect); See Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 38 A.L.R. 4th 225 (Minn. 1983); Evan F. v. Hughson United Methodist Church, 8 Cal. App. 4th 828, 10 Cal. Rptr. 2d 748. 7 I.E.R. Cas. (BNA) 1185 (3d Dist. 1992); Broderick

v. King's Way Assembly of God Church, 808 P.2d 1211 (Alaska 1991); J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391, 4 I.E.R. Cas. (BNA) 576 (1988)(negligent retention and supervision); See F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997); Doe v. Evans, 814 So 2d 370 (Fla. 2002); Martinelli v. Bridgeport Roman Catholic Diocesan Corp. 196 F.3d 409 (2d Cir. 1999)(breach of fiduciary duty); See Fearing v. Bucher, 327 Or. 367, 977 P.2d 1163 (1999)(vicarious liability); Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997)(intentional failure to supervise).

In Missouri, the courts are left with very little guidance in determining the intent of the Legislature. However, by looking at the surrounding circumstances and the objectives to be accomplished through the statute, the intent of the legislature can be determined. Cf. Riordan v. Clark, 8 S.W.3d 182, 184 (Mo. App. 1993) (citing State of Missouri ex rel. County of St. Charles v. Mehan, 854 S.W2d. 531, 535 (Mo. App. 1993)).

In the late 1980's and early 1990's, a movement to raise awareness about the prevalence of sexual abuse swept through the nation and brought the discussion of the applicability of the "delayed discovery rule" to cases of sexual abuse. It was at that time that, nationwide, media were reporting allegations of sexual abuse occurring inside the Catholic Church, at day care centers and homes, at pre-schools, elementary schools, high schools, nursing homes and even within the family. The Missouri Supreme Court noted in 1984 that "the number of reports of child abuse cases appearing in a multitude of publications indicate the problem has reached epidemic proportions and apparently the legislature has determined the deterrent value of tort judgments as well as other available sanctions are necessary to stem the rising tide." State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 452 (Mo. Banc 1984). *cited by* Bradley v. Ray, 904

S.W.2d 302, 310 (Mo.App.W.D. 1995)(recognizing tort action against third party for failure to warn of impending child abuse.)

This is the historical context in which section 537.046 was enacted.

By enacting section 537.046, one of the objectives of the Missouri legislature was to provide victims of sexual abuse additional time to file a civil action. The legislature recognized that it could take a victim several years to come to terms with the sexual abuse and, thus, it would a take victim at least that long to identify those responsible for the abuse, including those that could have protected him and prevented the abuse. See Almonte, P.P.A. v. New York Medical College, 851 F. Supp. 34, 37 (D. Ct. 1994).

It is inconceivable that the Legislature would intentionally leave a victim without any recourse against those who negligently and intentionally failed to prevent the abuse. A basic tenet of tort law is that the cost of injury should be borne **by all parties at fault.** W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 1 at 2 (5th ed. 1984) (emphasis added.) Yet, under the circuit court's construction, the cost of injury is not being born by all parties. In fact, if section 537.046 was limited to only actions against perpetrators, most other "related" defendants would be immune from suit. Such a result is contrary to public policy and would be inconsistent with the surrounding circumstances and objectives of the Missouri legislature in enacting a statute that extends the statute of limitations for victims of sexual abuse.

III. Missouri's Delayed Discovery Statute Was Enacted in Recognition of the Unique, Complex and Delayed Nature of the Injuries Victims of Childhood Sexual Abuse Suffer, and Thus the Clear Purpose of the Statute Is to Give Such Victims More Time to Seek Redress Against All Those Responsible for Causing the Injuries.

Approximately twenty percent of Americans have been sexually abused as children, meaning that almost sixty million living Americans are child molestation victims.[4] However, many of these cases are under-reported. See Margaret O. Hyde and Elizabeth H. Forsyth, M.D. The Sexual Abuse of Children and Adolescents, 10 (1997). There are many reasons why these cases remain under-reported. In most cases, the abuser manipulates the victim into remaining silent about the sexual acts. This is done by threatening the victim with violence to himself, members of his families and/or friends. Maxine Hancock & Karen Burton Mains, Child Sexual Abuse, Hope for Healing, 33 (1987). The abuser may also manipulate the victim into thinking that the abuser and the victim are involved in a relationship, and that they must keep the relationship a secret. Dale Robert Reinert, Sexual Abuse and Incest, 34-35 (1997). In addition, almost all childhood sexual abuse instills confusion, guilt and shame in victims, which makes them feel that they are somehow at fault for the abuse or that it was not abuse at all. See Mic Hunter, Abused Boys, 80-82 (1991). Finally, many young children lack the verbal ability to convey to someone else what had occurred. Hyde & Forsythe, supra, at 10.

The impact of sexual abuse varies from case to case, depending on the child's age, the frequency of the abuse and the aggressive or sadistic nature of the abuse. Carolyn B. Handler, Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle, 15 Fordham Urb. L.J.

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[4] See Michael Finnegan, The Judicial Misapplication of the Minnesota Delayed Discovery Statute, 29 Wm. Mitchell L. Rev. 1445 (2003).

709, 716 (1986-87). The most consistently reported effects are depression, guilt and shame, self-mutilation, suicidal behavior, eating disorders, sleep disturbances, drug or alcohol abuse, inability to form relationships, tendencies toward promiscuity or prostitution and a vulnerability toward re-victimization. Ferrante, supra.

In addition, survivors of sexual abuse often develop defenses such as denial, disassociation and memory repression to deal with the ongoing or past abuse. Wayne Kritsberg, The Invisible Wound: A New Approach to Healing Childhood Sexual Trauma, 56-57 (1993). These defenses operate mostly on an unconscious level, causing survivors of sexual abuse to be unaware that they exist, thus making it impossible to treat the unidentified injuries. Id. at 48. Furthermore, these defenses mask the injuries and therefore prevent survivors and their physicians, therapists or counselors from diagnosing or understanding the reason for the injury. In other words, a survivor will be depressed, suffering from suicidal behavior, engaging in self-mutilation and abusing drugs and alcohol, but will not be able to recognize what caused these behaviors to occur. Clearly the survivor is injured, but is unable to understand how.

Finally, in the case of memory repression, it may take a survivor many months or years after the first memory is revived to recover enough facts to support a cause of action. Blake-White & Kline, Treating the Dissociative Process in Adult Victims of Childhood Incest, 1985 Soc. Casework: J. Contemp. Social Work 394, 394-402 (Sept. 1985). Therefore, many meritorious claims would be time-barred without a mechanism which either tolls the statute of limitations or provides for delayed accrual. Many states have responded to this problem by enacting special statutes of limitation which extend the time within which a victim of childhood sexual abuse may bring a civil action for recovery of damages for injuries suffered as a result of the abuse. The State of Missouri is one of them.

IV. The Capable of Ascertainment Accrual Test, Section 516.100, Which Alternatively Governs the Plaintiff-appellant Claims, Requires That Damages Be Substantially Sustained and Be Capable of Ascertainment Before Any Cause of Action Accrues, and Appellate Case Law to the Contrary Is in Error.

The Missouri appellate courts have addressed whether a statute of limitations can be tolled when a victim of childhood sexual abuse has repressed the memory of the abuse until many years later, and then recovers the memory. The result is two apparently conflicting lines of cases, with the most recent case, H.R.B. v. Rigali, 18 S.W.3d 440 (Mo. App. E.D. 2000) holding that repression of memory can never toll the statute of limitations. (See March 17, 2004 Order at p. 23.)

In the case at bar, the circuit court followed H.R.B. v. Rigali and did not find that the statute of limitations is tolled due to Appellant's repression of memory. The circuit court did so even though it expressed its clear and strong disagreement with the holding in H.R.B. v. Rigali, because it was bound to follow binding precedent.

V. There Is a Genuine Issue of Material Fact as to When Appellant Was Reasonably Capable of Ascertaining That He Had Been Injured as a Result of Sexual Abuse, and at this Early Stage of the Litigation, it Cannot Be Said That as a Matter of Law, Appellant Could Have Ascertained He Was Injured Before He Repressed His Memory of the Abuse; as a Result, the Circuit Court Erred in Granting Summary Judgment on this Ground.

The discovery test provided in Section 537.046 should apply to all causes of actions asserted by the plaintiff-appellant against all of the defendants. However, should Section 537.046 not apply to some or all of his claims, the cause of actions will accrue when the damage has been sustained and is capable of ascertainment, pursuant to the accrual test for general tort actions provided in 516.100. That statute provides 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 sustained and 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.

The "capable of ascertainment" test is not discovery test, but it is also not a "sustainment of the injury" test. Jepson v. Stubbs, 555 S.W.2d 307 (Mo.banc 1977). It is a middle course plotted out by the legislature and generally followed by Missouri courts, though the application of that test in some sex abuse cases such as H.R.B. v. Rigali have cast some doubt on the true nature of the test. "Capable of Ascertainment" is rightly articulated as a two-part test, as the clear language of the statute expresses. See §516.100. First, the injury must be "sustained." In addition to being substantially sustained, the injury must also be "capable of ascertainment." But this second condition prescribed by 516.100 has been largely collapsed into the first condition. Sitting en banc, the Missouri Supreme Court, in Business Men's Assurance Company v. Graham, 984 S.W.2d 501, 507 (Mo.banc 1999), noted that the "capable of

ascertainment" has come to be construed as meaning "substantially sustained." (quoting Lockett v. Owens-Corning Fiberglas, 808 S.W.2d 902, 907 (Mo. App. 1991)).

At issue in this appeal is the case law on "capable of ascertainment" following H.R.B. v. Rigali, where the court appeared to create an irrebuttable presumption that all damages resulting from sexual abuse are objectively capable of ascertainment at the moment of the abuse. This decision has been followed most recently by Harris v. Hollingsworth,150 S.W.3d 85, 88 (Mo.App. W.D. 2004). However, this interpretation of "capable of ascertainment" is inaccurate, and erases the distinction between "capable of ascertainment" and "sustainment of injury" as triggers for accrual.

H.R.B. v. Rigali and Harris' reading of "capable of ascertainment", as noted by the Appellate Court in the case at bar, is "not Missouri law." In two decisions, Sheehan v Sheehan, 901 S.W.2d, 57, 59 (Mo. 1995) and K.G. v. R.T.R., 918 S. W.2d 795 (Mo. banc. 1996), the Missouri Supreme Court clearly recognized that repressed memory can postpone accrual of a cause of action by preventing damage from being "capable of ascertainment." Such a holding recognizes the long history in Missouri of applying the "capable of ascertainment" test to recognize a distinction between the wrongful act / sustainment of the injury and when that injury becomes capable of ascertainment. See Jepson v. Stubbs, 555 S.W.2d 307, 314 n. 6 (Mo. 1977)(*quoting* Frederick Davis, *Tort Liability and the Statutes of Limitation*, 33 Mo.L.Rev. 171, 187-88 (1968)); Powel v. Chaminade College Prepatory, Inc., No 84366 (Mo.App.E.D., May 31, 2005) (listing cases recognizing this distinction.) By statute and through case law, Missouri has made the choice to start accrual at the point where damages are mostly sustained and capable of ascertainment, not at an earlier point. To the extent H.R.B. v. Rigali and its progeny in effect create a

"wrongful act" or "sustainment of injury test" for sex abuse victims, they have diverged from clear precedent.

H.R.B. v. Rigali in addition runs afoul of the language of 516.100. Section 516.100 states that "the cause of action shall not be deemed to accrue when the wrong is done." See § 516.100. To the extent H.R.B. v. Rigali, and cases following it, require causes of action stemming from sexual abuse to accrue at the moment of attack, it directly conflicts with the express language of § 516.100.

Beyond departing from precedent, and deviating from the plain language of 516.100, the H.R.B. v. Rigali test also creates an anomaly in Missouri law, whereby a discrete class of victims is denied the benefits of the "capable of ascertainment test." For all other victims, say of falling marble tiles, or cracked foundations, Section 516.100 by its express language rejects such a "sustainment of the injury" test for accrual – "sustainment of the injury" simply isn't the test specified in 516.100. See Business Men's Assurance Company, 984 S.W.3d 440 at 443; Allen v. Kuehnle, 92 S.W.3d 135, 139 (Mo.App.E.D. 2002) (Damage from cracked foundation not immediately ascertainable). For all other Missourians, injury can be separate from damage. Such unequal application of Missouri law has no rational basis, considering what the science and the medical community have to say about the nature of the injury sustained from sex abuse – it is principally psychological, not physical and not immediately ascertainable. H.R.B. v. Rigali's test also flies in the face of public policy of Missouri, a policy which has, since the 1980s, sought to expand the period of limitations available to sex abuse victims, not narrow it. See § 537.046, including subsequent amendments.

Nonetheless, the circuit court in the case at bar cited H.R.B. v. Rigali, 18 S.W.3d at 443 as the precedent which it was bound to follow, and granted Respondents' motions for summary judgment based on its interpretation of H.R.B. v. Rigali as holding that repression of memory can never toll the statute of limitations, and that the damages were capable of ascertainment at the time of the abuse. (See March 17, 2004 Order at pp. 23-24.)

H.R.B.v. Rigali was wrongly decided. It is also distinguishable from the instant case, because there the H.R.B. v. Rigali court made the determination that the damages were capable of ascertainment at the time of the abuse from "fully developed facts after trial; facts which unequivocally show[ed] Plaintiff's injury and damages were readily capable of ascertainment when they occurred." Rigali, 18 S.W.2d at 444. Those facts included the Plaintiff's testimony. That testimony has been construed to indicate that HRB knew that he sexual abuse that occurred was "overt, traumatic, painful and violent", and that Plaintiff was "very much aware of his injury and damages at the time of each sexual assault." Id. The Court of Appeals in Rigali distinguished Sheehan, 901 S.W.2d 57 (Mo. 1995), by noting that that case had been before the Supreme Court on appeal from an order granting the defendant's motion to dismiss. H.R.B. v. Rigali, 18 S.W.2d at 444. The H.R.B. v. Rigali court noted that the holding in Sheehan was narrow, and was based on the fact that the Plaintiff's allegations were ambiguous as to when she had sustained her injuries and damages. In construing the petition broadly and in Plaintiff's favor, the court found that her damages may not have been ascertainable until a date within the limitations period. Id.

Similarly, the H.R.B. v. Rigali court distinguished its earlier opinion in the same case, H.R.B. v. J. L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995) for the same reasons it found Sheehan distinguishable: "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. . . . In so doing, we stated: 'In other words, the petition is ambiguous enough as to when plaintiff could have objectively discovered or made known 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'". H.R.B. v. Rigali, 18 S.W.3d at 445 (quoting H.R. B. v. J.L.G., 913 S.W.2d at 96).

The case at bar was also presented to the Court of Appeals on appeal from the trial court's order granting Respondents' motions for summary judgment. Although a summary judgment motion typically involves more evidence than on a motion to dismiss, it still is a motion brought in the early stages of litigation and cannot be compared to the full-blown trial in H.R.B. v. Rigali. The evidence as to the date the Appellant's injuries and damages became capable of ascertainment is a disputed fact and therefore should be decided by the jury. Viewing the factual record and all reasonable inferences to be drawn therefrom in the light most favorable to the Appellant, as the court must on a motion for summary judgment, it is clear that in the instant case the trial court erred in dismissing the Appellant's claims on statute of limitations grounds, in light of Sheehan and H.R.B. v. J.L.G., supra. It was error for the circuit court to conclude that H.R.B. v. Rigali compelled dismissal, because even the Court of Appeals in H.R.B. v. Rigali was careful to distinguish its holding, stating that it was based upon a review of the evidence adduced after a trial on the merits, from the holdings in Sheehan and its earlier decision in H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. App. E.D. 1995), which were decided on a much more limited factual record. H.R.B. v. Rigali, 18 S.W.3d at

444. The factual record in this matter establishes only that a question of fact concerning the statute of limitations remains outstanding and it should therefore be decided by the jury.

Because the factual record in the case at bar does not unequivocally establish that Appellant was capable of ascertaining his injuries before he repressed his memory of the abuse, it was error for the circuit court to grant Respondents' motions for summary judgment. While normally, the running of the statute of limitations is a question of law for the court, Lomax v. Sewell, 1 S.W.3d 548, 552 (Mo.App.W.D. 1999), when contradictory or differing conclusions can be drawn from the evidence as to whether the statute has run, it is a question of fact for the jury to decide. Allen v. Kuehnle, 92 S.W.3d 135, 139 (Mo.App.E.D. 2002) (citing Lomax, 1 S.W.3d 548 at 552-53). Through application of an ad hoc "sustainment of the injury" accrual test H.R.B. v. Rigali, where in effect, the court took judicial notice that the sex abuse damages were immediately "capable of ascertainment," the H.R.B. v. Rigali court denied that plaintiff a jury determination. The plaintiff-appellant in the case at bar has presented comparable evidence that places in dispute the moment the damages became capable of ascertainment; in this situation, under Missouri law, such a determination should be made by a jury.

CONCLUSION

The Missouri legislature recognized the long-term effects of childhood sexual abuse when it enacted the discovery rule found in section 537.046. It seems illogical for the legislature to only afford victims of sexual abuse partial recovery. If an entity or individual were responsible or negligent for allowing the sexual abuse to continue, or for failing to protect the plaintiff from harm, the plaintiff should be afforded the same

opportunity for redress against those persons as is given to him for redress against the perpetrator. Furthermore, under the plain meaning of the statute, "any civil action for recovery of damages suffered as a result of childhood sexual abuse" includes actions against the perpetrator and any other party who was found to have harmed Plaintiff as result of the perpetrator's sexual abuse. Further, section 516.100, which alternatively governs the plaintiff-appellant's claims, describes the "capable of ascertainment" accrual rule, requires damages to be mostly sustained and objectively capable of ascertainment. Such an accrual test is an explicit rejection of a "sustainment of the injury" or "wrongful act" accrual test. Errant Missouri case law ignoring this legislative determination and creating an ad hoc exception for sex abuse victims should be overruled. Therefore, amici curiae respectfully request that this Court reverse the circuit court's order and remand the case for trial.

Respectfully Submitted,

Dated: _____

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