IN THE SUPREME COURT OF MISSOURI

HEART OF AMERICA COUNCIL, BOY SCOUTS OF AMERICA, and BOY SCOUTS OF AMERICA, Relators, v. THE HONORABLE CHARLES H. MCKENZIE, JUDGE, CIRCUIT COURT OF JACKSON COUNTY, MISSOURI Respondent.	)	No. SC94942

BRIEF OF RELATORS

HEART OF AMERICA COUNCIL, BOY SCOUTS OF AMERICA,

AND BOY SCOUTS OF AMERICA

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JURISDICTIONAL STATEMENT

Upon application of Relators Heart of America Council, Boy Scouts of America ("HOA") and Boy Scouts of America ("BSA"), this Court issued a Preliminary Writ of Prohibition on June 30, 2015. This Court has jurisdiction to adjudicate this matter pursuant to Article V, § 4 of the Missouri Constitution. Relators seek a Permanent Order of Prohibition to prevent the Honorable Charles H. McKenzie enforcing his Order of December 16, 2014, denying Relators' May 10, 2012 and March 17, 2014 Motions for Summary Judgment on claims that are clearly time barred by the applicable statute of limitations, Missouri statutes, and Missouri case law.

STATEMENT OF FACTS

A. Plaintiff's Background

Plaintiff John Doe ("Plaintiff") filed this action on April 14, 2011, alleging three counts against Defendant Scott Alan Bradshaw ("Bradshaw") and Relators Heart of America Council, Boy Scouts of America ("HOA") and Boy Scouts of America ("BSA"). (Appx. 1, A1-A18). In his Petition, Plaintiff alleges that when he was a boy scout, he was sexually abused from 1992 through 1997 by former Scoutmaster and adult volunteer Bradshaw. (Appx. 1, A5-A6). Plaintiff was between the ages of approximately 12 and 18 during the abuse. (Appx. 2[1], A1805, A1808).

Plaintiff has never pleaded "repressed memory"—he admits that he has always remembered and been aware of the alleged abuse. (Appx. 2, A1808; Appx. 1, A1296).

On or around October 24, 1997, Plaintiff's parents learned of the alleged sexual abuse. (Appx. 2, A1808). Shortly thereafter, Plaintiff's parents contacted the Kansas City Policy Department ("KCPD"), the Missouri Department of Social Services and a private detective. (Appx. 2, A1809-A1810). Sometime in mid-to-late 1999 and/or early 2000—when he was 19 years old—Plaintiff began actively gathering evidence to use in a civil

[1] Appendix 2 containing pages A1398 through A3368 contains documents previously filed under seal and currently is subject to Relators' pending motion to file under seal. Upon granting of such motion, Appendix 2 will be filed in this Court.

suit related to the alleged sexual abuse. (Appx. 2, A1808-A1809). In 2001, Plaintiff reported the alleged abuse to KCPD and met with an attorney about the possibility of filing a civil suit relating to the alleged abuse. (Appx. 2, A1812). Plaintiff decided not to proceed with a civil suit at that time. (Appx. 2, A1812).

Several years later, Plaintiff again contacted the attorney he first met with in 2001 regarding the possibility of filing a lawsuit. (Appx. 2, A1812). That attorney was not interested in taking Plaintiff's case because he believed that the applicable statutes of limitation had expired. (Appx. 2, A1812). A second attorney also declined to take Plaintiff's "case" and advised Plaintiff that the applicable statutes of limitations had expired. (Appx. 2, A1813).

Plaintiff filed the instant lawsuit on April 14, 2011, approximately two weeks before his thirty-first birthday. (Appx. 2, A1813). This lawsuit was filed nearly 19 years after the first act of alleged sexual abuse by Bradshaw, nearly 13 years after Plaintiff attained the age of 18, over 13 years after third parties—including Plaintiff's parents—discovered the alleged sexual abuse, nearly 10 years after Plaintiff attained the age of 21, and approximately 10 years after Plaintiff first met with an attorney about the possibility of filing a civil lawsuit. (Appx. 2, A1813).

B. Procedural History

Plaintiff filed this action on April 14, 2011 in the Circuit Court of Jackson County, alleging two counts against Defendant Scott Alan Bradshaw ("Bradshaw") and three

counts against Relators Heart of America Council, Boy Scouts of America ("HOA") and Boy Scouts of America ("BSA"). (Appx. 1, A1-A18). Plaintiff asserts the following claims against Relators:

1. Plaintiff claims that Relators are vicariously liable via respondeat superior for Bradshaw's violation of Revised Missouri Statute § 537.046, which codifies civil actions for sexual offenses against perpetrators and that they are directly liable under §537.046 for aiding and abetting Bradshaw, negligently failing to vet Bradshaw and negligently failing to supervise Bradshaw (**Count I**);
2. Plaintiff claims that Relators are vicariously liable via respondeat superior for Bradshaw's history of battery of Plaintiff (**Count II**);
3. Plaintiff claims that Relators are directly liable because they negligently breached their duty to protect Plaintiff by failing to vet and supervise Bradshaw and allowing Bradshaw to sexually abuse Plaintiff (**Count III**).

(Appx. 1, A1-A18).

On October 6, 2011, Bradshaw filed an answer to Plaintiff's petition. (Appx. 1, A19-A23). On December 9, 2011, Relators filed motions to file responsive pleadings and discovery responses out-of-time. (Appx. 1, A24-A27). On December 14, 2011, Relators filed their answers to Plaintiff's petition. (Appx. 1, A28-A49). On January 19, 2012, the

Circuit Court granted leave and allowed Relators to file answers to Plaintiff's Petition. (Appx. 1, A50-A53). On March 20, 2012, the Circuit Court ordered Relators' answers to be made more definite and certain. (Appx. 1, A54-A55). On March 30, 2012, Relators' amended answers were filed and accepted by the Circuit Court. (Appx. 1, A56-A79).

Relators filed separate summary judgment motions, seeking summary judgment on all Plaintiff's claims on the basis that they are barred by the applicable statutes of limitations. (Appx. 1, A80-A129; Appx. 2, A1398-1749). Relators subsequently filed a second summary judgment motion. (Appx. 1, A223-A287). In their second summary judgment motion, Relators argued they could not be held liable on Plaintiff's claims for vicarious liability because they lack a master-servant relationship with Bradshaw and his alleged acts were outside the scope of any purported employment relationship. [2] (Appx. 1, A223-A287). Relators further argued that they could not be held directly liable to Plaintiff because Relators and Bradshaw had no master-servant relationship or control over Bradshaw's acts, and therefore, Bradshaw's alleged abuse was not a natural incident

[2] Affidavits establishing the material facts of agency accompanied Relators' motion for summary judgment. Therefore, Plaintiff was required to submit opposing affidavits. *Mattes v. Black & Veatch*, 828 S.W.2d 903, 907 (Mo. App. 1992). Because Plaintiff failed to submit opposing affidavits, the facts specified in Relators' affidavits are deemed admitted as true by Plaintiff.

of Relators' business. (Appx. 1, A223-A287). The circuit court denied Relators' motions for summary judgment. (Appx. 1, A366-A368).

On March 16, 2015, Relators filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Western District, which was denied on April 9, 2015. (Appx. 1, A369-A1292). Relators then filed a Petition for Writ of Prohibition in the Missouri Supreme Court, and this Court granted a Preliminary Writ of Prohibition. (Appx. A1379).

POINTS RELIED ON

I. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motions for summary judgment, because these claims are time barred as a matter of law, in that Plaintiff does not claim repressed memory and filed his lawsuit nearly 19 years after the first act of alleged sexual abuse, nearly 13 years after Plaintiff attained the age of 18, over 13 years after third parties discovered the alleged sexual abuse, nearly 10 years after Plaintiff attained the age of 21 and approximately 10 years after Plaintiff first met with an attorney about the possibility of filing a civil suit relating to the alleged abuse.

MO. REV. STAT. § 537.046 (1990).

MO. REV. STAT. § 516.120.

MO. REV. STAT. § 516.140.

Doe v. Roman Catholic Diocese of Jefferson City,

862 S.W.2d 338 (Mo. banc 1993).

State ex rel. Marianist Province of the U.S. v. Ross,

258 S.W.3d 809 (Mo. banc 2008).

II. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment with respect to Count I, because Missouri law does not recognize a cause of action

under Missouri Revised Statute § 537.046 against Relator organizations, in that § 537.046 applies only to human perpetrators and therefore does not apply to Relators as a matter of law.

MO. REV. STAT. § 537.046 (1990).

H.R.B. v. Rigali,

18 S.W.3d 440 (Mo. App. 2000).

State ex rel. Marianist Province of the U.S. v. Ross,

258 S.W.3d 809 (Mo. banc 2008).

Walker v. Barrett,

650 F.3d 1198 (8th Cir. 2011).

III. **Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment on Counts I and II of Plaintiff's Petition, because Relators cannot be held liable for Bradshaw's purported conduct, in that they did not control Bradshaw's activities and therefore there was no relationship between Bradshaw and Relators that would give rise to respondeat superior liability.**

Gibson v. Brewer,

952 S.W.2d 239 (Mo. banc 1997).

Hobbs v. Boy Scouts of America,

152 S.W.3d 367 (Mo. App. 2004).

P.S. v. Psychiatric Coverage, Ltd.,

887 S.W.622 (Mo. App. 1994).

Wilson v. St. Louis Area Council, Boy Scouts of America,

845 S.W.2d 568 (Mo. App. 1992).

IV. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment on Counts I and III of Plaintiff's Petition, because Relators cannot be held directly liable on Plaintiff's claims, in that Relators and Bradshaw had no master-servant relationship, Relators did not control or direct Bradshaw's acts and Bradshaw's alleged abuse was not a natural incident of Relators' business.

Gibson v. Brewer,

952 S.W.2d 239 (Mo. banc 1997).

M.L. v. Civil Air Patrol,

806 F. Supp. 845 (E.D. Mo. 1992).

ARGUMENT

STANDARD OF REVIEW APPLICABLE TO ALL POINTS

A writ of prohibition is appropriate to prevent an abuse of judicial discretion, avoid irreparable harm or prevent the exercise of extra-jurisdictional power. *State ex rel. Marianist Province of U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo. banc 2008) (Appx. 1, A1385-A1387). Additionally, "[p]rohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. App. 2011).

This Writ comes before the Court upon review of Respondent's denial of Relators' summary judgment motions. The Court applies a *de novo* standard of review regarding summary judgment. *White v. Zubres*, 222 S.W.3d 272, 274 (Mo. banc 2007). As this Court made clear in *Marianist Province*, prohibition is an appropriate remedy for an erroneous decision to overrule a party's motion for summary judgment "to prevent needless litigation on a time-barred claim." *Marianist Province*, 258 S.W.3d at 810-11 (Appx. 1, A1385-A1387).

Once a statute of limitations expires and bars a plaintiff's cause of action, the defendant has a vested right to be free from suit. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993). Accordingly, an absolute writ of prohibition is the appropriate remedy to relieve a defendant of the expense and burden of

unwarranted litigation when a claim is time-barred. *Marianist Province*, 258 S.W.3d at 810-11 (Appx. 1, A1385-A1387).

I. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motions for summary judgment, because these claims are time barred as a matter of law, in that Plaintiff does not claim repressed memory and filed his lawsuit nearly 19 years after the first act of alleged sexual abuse, nearly 13 years after Plaintiff attained the age of 18, over 13 years after third parties discovered the alleged sexual abuse, nearly 10 years after Plaintiff attained the age of 21 and approximately 10 years after Plaintiff first met with an attorney about the possibility of filing a civil suit relating to the alleged abuse.

A. Introduction

Without explanation, Respondent has directly contradicted clear Missouri law and allowed a case to proceed even though it was filed well after the statute of limitations lapsed. Indeed, this case presents a simple issue: whether the two- and five-year statutes of limitations bar Plaintiff's alleged sexual abuse case that does not involve repressed memory when he filed his suit nearly 19 years after the first act of alleged sexual abuse, nearly 13 years after Plaintiff attained the age of 18, over 13 years after third parties—including Plaintiff's parents—discovered the alleged sexual abuse, nearly 10 years after

Plaintiff attained the age of 21 and approximately 10 years after Plaintiff first met with an attorney about the possibility of filing a civil suit relating to the alleged abuse. Under well-established principles of law, Plaintiff's claim is barred as the limitations periods expired long before he filed suit. He cannot proceed with his claim, and Relators are entitled to a permanent writ of prohibition.

B. Plaintiff's Claims Against Relators Must Be Dismissed As Time-Barred Because All Applicable Statutes Of Limitations Expired Years Ago.

On April 14, 2011, Plaintiff filed his Petition asserting claims against Relators for Childhood Sexual Abuse under § 537.046, battery and negligence. The applicable statute of limitations for each of these claims expired years before Plaintiff filed his lawsuit.[3] As such, Plaintiff's claims against Relators are barred as a matter of law and Respondent erred in refusing to grant summary judgment.

a. Plaintiff's Count II for battery is barred by the applicable two-year statute of limitations, which expired on May 1, 2003.

Missouri's statute of limitations for battery is two years, which is tolled as to a minor until the age of 21. MO. REV. STAT. §§ 516.140, 516.170 (Appx. 1, A1380-

[3] To the extent Respondent and/or Plaintiff argues that Relators waived their statutes of limitations defenses, this argument bears no merit as Relators were given leave to file and did file their Answers out of time asserting such defenses. (Appx. 1, A56-A79).

A1382). An action for battery accrues when "a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages." *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 584 (Mo. banc 2006). Because Plaintiff not only could have discovered but did, in fact, discover the alleged injury and wrongful conduct before his twenty-first birthday, Plaintiff's right to bring a battery claim expired on May 1, 2003—two years after he turned 21.[4]

i. The two-year statute of limitations began to run when Plaintiff turned 21 and expired two years later, nearly eight years before he filed suit.

Plaintiff undoubtedly could have discovered and did discover the purported injury and wrongful conduct before he turned 21, as evidenced by numerous uncontroverted facts. First, Plaintiff himself alleges that the purported abuse occurred between 1992 and 1997, when he was a minor. (Appx. 1, A5-A6). He has never pleaded "repressed memory" but instead readily admits that he has always remembered and been aware of the alleged abuse. (Appx. 1, A1296; Appx. 2, A1808). Second, Plaintiff's parents learned

[4] Missouri law does not provide a cause of action for battery against an organization such as Relators. However, assuming *arguendo* that such cause of action could be brought, it nevertheless is barred by the statute of limitations.

of the alleged sexual abuse and contacted the KCPD, the Missouri Department of Social Services and a private detective before Plaintiff turned 21. (Appx. 2, A1809-A1810). Third, when Plaintiff was approximately 19 or 20 years old (in late 1999 or early 2000), he began actively gathering evidence to use in a civil suit related to the alleged sexual abuse. (Appx. 2, A1808-A1809).

In fact, in 2001, Plaintiff met with an attorney about the possibility of filing a civil suit relating to the alleged abuse. (Appx. 2, A1812). There can be no dispute that Plaintiff was aware of his purported cause of action at that time – he consulted an attorney regarding the possibility of filing a suit. He cannot logically claim that his purported damages or injury were not discoverable or, in fact, known to him at that time – nearly ten years before he finally filed suit.

Additionally, between approximately 2008 and 2012, Plaintiff once again contacted the attorney with whom he had previously met in 2001. (Appx. 2, A1812). That attorney, however, declined to pursue Plaintiff's claim because he believed the statute of limitations had expired. (Appx. 2, A1812). A second attorney also declined to pursue Plaintiff's claim and advised Plaintiff that the applicable statutes of limitations had expired. (Appx. 2, A1812).

Clearly, any reasonable person would have been put on notice than an injury and substantial damages may have occurred when informing the authorities and consulting an attorney regarding a potential lawsuit – and in fact, Plaintiff here *was* on notice that such

purported injury had occurred at that time, long before he turned 21. As such, the two-year statute of limitations for Plaintiff's purported battery claim expired long before Plaintiff eventually filed this suit in 2011. As such, the two-year statute of limitations for Plaintiff's purported battery claim had long expired when Plaintiff eventually filed his Petition in 2011. Therefore, Respondent should have granted Relators' motion for summary judgment as to Count II for battery.

ii. The statute began to run when Plaintiff turned 21 as a matter of law because he already had contacted counsel regarding filing a lawsuit.

Under Missouri law, damages are objectively capable of ascertainment for purposes of the statute of limitations when the plaintiff contacts an attorney regarding a potential lawsuit. *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997) (holding that damages could have been discovered or made known for statute of limitations purposes once the plaintiff retained separate counsel). Any damage or injury can then be discovered or made known through inquiry by such counsel. *Id.* As such, the statute of limitations begins to run. *Id.*

Plaintiff first met with an attorney in 2001 to pursue his purported abuse claim. At the very latest, he then knew of or could have discovered his alleged damages. When Plaintiff turned 21 that same year, his damages were capable of ascertainment, and the statute thus began to run. It expired two years later, on May 1, 2003. However, Plaintiff

did not file this lawsuit until 2011 – *nearly ten years after he first contacted an attorney regarding his potential suit and nearly eight years after the limitations period had expired.*

The statute of limitations had long expired before Plaintiff filed this lawsuit against Relators. To prevent needless litigation on this time-barred claim, Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying summary judgment.

iii. The two-year statute of limitations for battery governs this Count of Plaintiff's Petition, rather than the limitations period set forth under Missouri Revised Statute § 537.046.

Plaintiff has claimed that his battery claim is subject to the ten-year statute of limitations set forth in § 537.046 (2004), which codifies civil actions for sexual offenses against perpetrators[5]. (Appx. 1, A1383-A1384). This argument fails as a matter of law. Plaintiff filed separate claims: one pursuant to § 537.046 and another for common law battery. Plaintiff's cause of action for common law battery is separate and distinct from his claim pursuant to § 537.046. *See Walker v. Barrett*, 650 F.3d 1198, 1204 n.3 (8th Cir.

[5] Missouri Revised Statute § 537.046 provides a claim against human perpetrators only, as set forth below in Point II. Accordingly, Plaintiff cannot state a claim against Relator organizations under this statute.

2011) ("Walker states that 'this is a childhood sexual abuse *case'* … implicitly suggesting that the longer statute of limitations in Missouri Revised Statutes § 537.046 should apply to all of his claims. Section 537.046 provides for a distinct cause of action … It does not apply to entire cases that involve allegations of childhood sexual abuse.") (internal citations omitted) (Appx. 1, A1388-A1397). Therefore, Plaintiff's purported claim for battery is governed by its own, separate statute of limitations, as set forth in § 516.140. (Appx. 1, A1382).

This is further evidenced by the fact that § 537.046 expressly lists the types of action to which it applies but does not include battery. (Appx. 1, A1383-A1384). Common sense dictates that by listing certain types of action to which the statute is intended to apply but declining to include a cause of action for battery the legislature did not intend to apply the longer statute of limitations set forth in § 537.046 to claims for battery. Rather, Plaintiff's purported battery claim is governed by the statute of limitations applying to common law causes of action for battery.

Moreover, even if § 537.046 somehow did apply to battery – which is contrary to Missouri law – the 1990 version of the statute in place at the time of the purported abuse would apply, as set forth above. Under this version of the statute, Plaintiff's claim would be governed by a five-year statute of limitations and still would be time barred. *See* Infra I.C.c.

Count II of Plaintiff's petition purporting to assert a claim for battery against Relators is barred by the applicable two-year statute of limitations. Accordingly, Respondent erred in denying Relators' summary judgment motion with respect to Plaintiff's claim.

b. Plaintiff's purported negligence claim set forth in Count III of his petition is barred by the applicable five-year statute of limitations, which expired on May 1, 2006.

Missouri imposes a five-year statute of limitations on claims for negligence under Missouri Revised Statute § 516,120, which is tolled as to a minor until he reaches the age of 21. Mo. Rev. Stat. § 516.170. (Appx. 1, A1380-A1381). As with his claim for battery, Plaintiff's negligence claim had long expired by the time he filed his lawsuit in 2011.

An action for negligence accrues "when the damage resulting therefrom is sustained and is capable of ascertainment." *Dempsey v. Johnston*, 299 S.W.3d 704, 706 (Mo. App. 2009). The Missouri Supreme Court has clarified that damages are capable of ascertainment and the statute of limitations begins to run "when a reasonable person would have been put ***on notice*** that an injury and substantial damages ***may have occurred*** and would have undertaken to ascertain the extent of the damages." *Marianist Province*, 258 S.W.3d at 811 ("The issue is not when the injury occurred or when a plaintiff subjectively learned of the wrongful conduct.") (emphasis added) (Appx. 1, A1385-A1387). The relevant inquiry is "when a reasonable person would have been put on

notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages." *Id*. (citation omitted).

The concept of "inquiry notice" requires reasonable diligence on the part of a plaintiff to prevent running of the statute of limitations. *Id.*; *Klemme*, 941 S.W.2d at 497; *O'Reilly v. Dock*, 929 S.W.2d 297, 301 (Mo. App. 1996). The issue is not when a party "discovered" injury or wrongful conduct on the part of defendant but rather ***whether the evidence is such to place a reasonable person in plaintiff's situation on inquiry notice of a potentially actionable injury***. *Powel*, 197 S.W.3d at 584 (noting that "[t]he issue…is when a reasonable person would have been put on notice that an injury and substantial damages **may have occurred**.") (emphasis added); *Klemme*, 941 S.W.2d at 497 ("…the fact of damage **could have been discovered** or made known." (emphasis added).

The facts here make it clear not only that a reasonable person could have ascertained the alleged injury or wrongful conduct before his twenty-first birthday but that Plaintiff *did* ascertain the purported damage before that time. As discussed above, there are numerous uncontroverted facts showing that Plaintiff was put on notice of a potentially actionable injury before he turned 21 and the statute began to run: Plaintiff admits that this is not a repressed memory case; Plaintiff's parents learned of the alleged abuse and contacted the KCPD, Missouri Department of Social Services and a private detective before Plaintiff turned 21; and Plaintiff had started gathering evidence for a lawsuit before he turned 21. Moreover, Plaintiff consulted an attorney in 2001 about

potentially filing a lawsuit. This in and of itself establishes that his cause of action had accrued and the statute began to run when he turned 21. *See Klemme*, 941 S.W.2c at 497-98.

Because Plaintiff's alleged injuries were capable of ascertainment well before his twenty-first birthday, the statute of limitations began to run when Plaintiff turned 21 and expired five years later, on May 1, 2006. Respondent, therefore, erred in denying Relators' summary judgment motion on Plaintiff's purported claim for negligence.

c. Even if Plaintiff's Count I for Childhood Sexual Abuse under Missouri Revised Statute § 537.046 could be brought against Relator organizations – which is contrary to Missouri law – this claim fails as a matter of law because it is barred by the applicable five-year statute of limitations, which expired on May 1, 2006.

Plaintiff purports to assert a cause of action for this alleged abuse against Relators pursuant to Missouri Revised Statute § 537.046. (Appx. 1, A1383-A1384). This claim fails, however, because Relators *cannot* be held liable under this statute. *See Walker v. Barrett*, 650 F.3d 1198 (8th Cir. 2011) (concluding that § 537.046 applies only human perpetrators and not organizations) (Appx. A1388-A1397). As organizations, Relators cannot be held liable pursuant to § 537.046 as a matter of law because this statute applies only to human perpetrators.

Even if this statute could be said to apply to Relator organizations, Plaintiff's claim under this statute nevertheless fails as a matter of law because it is barred by the statute of limitations. The version of § 537.046 that was in effect at the time of the alleged abuse – Missouri Revised Statute § 537.046 (1990) – imposed a five-year statute of limitations on Plaintiff's claim, meaning Plaintiff's purported cause of action against Relators under this statute expired five years after Plaintiff reached the age of majority. As Plaintiff failed to file this lawsuit until April 11, 2011 – nearly 13 years after Plaintiff turned eighteen, over thirteen years after third parties discovered the alleged abuse and nearly ten years after Plaintiff turned twenty-one – Plaintiff's purported claim under § 537.046 (1990) is time barred.

Plaintiff alleges in his Petition that Bradshaw began abusing Plaintiff in 1992 and that the alleged abuse continued until it was discovered in 1997, meaning the alleged abuse occurred between the years 1992 and 1997. (Appx. 1, A1-A18). Under Missouri law, Plaintiff's claim is subject to the five-year statute of limitations set forth in Section 537.046 (1990). *See Doe,* 862 S.W.2d 338; *see also Dalba v. YMCA of Greater St. Louis*, 69 S.W.3d 137, 140 (Mo. App. 2002) (citing *Holden v. Antom, Inc.*, 930 S.W.2d 526, 528 (Mo. App. 1996)) (holding statutes generally are to be applied prospectively).

The Missouri Supreme Court in *Doe* stated that a defendant has a vested right to be free from suit once the original cause of action expires. 862 S.W.2d at 340. A statute purporting to extend the statute of limitations for a cause of action that expired before the

statute was enacted violates Missouri's constitutional prohibition against retrospective laws. *Id.* at 342.

Plaintiff alleges that the purported abuse occurred between 1992 and 1997. As set forth above, he has never claimed to have repressed the memories surrounding the abuse, but rather readily admits that this is not a repressed memory case. (Appx. 1, A1296; Appx. 2, A1808). Accordingly, his cause of action accrued at the time of the alleged abuse but was tolled under Section 537.046 until his eighteenth birthday on May 1, 1998. Under Section 537.046, the five-year statute of limitations then began to run, expiring on May 1, 2003, before the legislature amended Section 537.046 in 2004 extending statute of limitations. Before the amendment to Section 537.046 in 2004, Plaintiff's purported cause of action against Relators already had expired under the previous statute of limitations. Under *Doe*, Relators had a vested right to be free from Plaintiff's suit and to hold otherwise would violate Missouri's constitutional prohibition against retrospective laws. 862 S.W.2d at 342.

Accordingly, Plaintiff's purported claim against Relators pursuant to § 537.046 is barred by the applicable statute of limitations under established Missouri law. Plaintiff cannot attempt to hold Relators liable under this statute years after his claim had expired. To hold otherwise would deprive Relators of their vested rights in violation of the Missouri Constitution.

As such, Relators are entitled to judgment as a matter of law, and Respondent erred when he denied Relators' Motions for Summary Judgment and allowed a case to proceed that was filed well after the statute of limitations lapsed. Thus, a permanent writ of prohibition is the appropriate remedy.

II. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment with respect to Count I, because Missouri law does not recognize a cause of action under Missouri Revised Statute § 537.046 against Relator organizations, in that § 537.046 applies only to human perpetrators and therefore does not apply to Relators as a matter of law.

A. Introduction

Relators seek from this Court relief from the burden and expense of the unwarranted litigation of a lawsuit that, as a matter of law, cannot be brought against Relators. Respondent erred when he denied Relators' motions for summary judgment as to Count I because a claim of Childhood Sexual Abuse pursuant to Missouri Revised Statute § 537.046 cannot be brought against non-perpetrators and non-humans. Accordingly, a permanent order prohibiting Respondent from taking any action in the underlying case other than granting summary judgment in favor of Relators is warranted.

B. Plaintiff's Count I Fails As A Matter Of Law Because The Plain Language Of The Childhood Sexual Abuse Statute and Case Law

Demonstrate That The Statute Applies Solely To Perpetrators and Does Not Apply To Collateral Defendants Such As Relators.

In Count I, Plaintiff alleges that Relators have violated § 537.046. This claim must fail because § 537.046 applies only to the perpetrator of the alleged sexual abuse—Bradshaw. Because Plaintiff does not and cannot contend that Relators sexually abused him, § 537.046 is inapplicable and Count I of Plaintiffs Petition must be dismissed.

Under Missouri law, "childhood sexual abuse" is a statutory cause of action defined as:

> [A]ny 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 [rape], 566.040 [sexual assault], 566.050 [sexual assault in the second degree (repealed)], 566.060 [forcible sodomy], 566.070 [deviate sexual assault], 566.080 [deviate sexual assault in the second degree – repealed], 566.090 [sexual misconduct in the first degree], 566.100 [sexual abuse], 566.110 [sexual abuse in the second degree – repealed], 566.120 [sexual abuse in the third degree – repealed], or 568.020 [incest]; …

MO. REV. STAT. § 537.046(1) (1990) (emphasis added) (FN omitted) (Appx. 1, A1383-A1384). Because only a human perpetrator can commit rape, sexual assault, forcible

sodomy, sexual misconduct or incest, it is clear from the plain language of the statute that § 537.046 cannot apply to Relators. In fact, Plaintiff admits that Relators are non-human entities and that Bradshaw was the sole alleged perpetrator of the purported sexual abuse. (Appx. 1, A130-A153). By the plain language of the statute and Plaintiff's own admissions, Respondent should have granted Relators' motion for summary judgment as to Count I of Plaintiff's Petition. *See* MO. REV. STAT. § 1.090. ("Words and phrases shall be taken in their plain and ordinary and usual sense…"); *State ex rel Wright v. Carter*, 319 S.W.2d 596 (1958) ("In construing statutes, significance and effect should be given to every word, every phrase, sentence and part thereof, and words and phrases may be stricken or disregarded only in extreme cases.").

Case law further supports the fact that § 537.046 does not apply to non-perpetrators such as Relators. While this precise issue has not been addressed by the Missouri Supreme Court, the United States Court of Appeals for the Eighth Circuit in *Walker* applied Missouri law to anticipate the decision that would most likely be reached by Missouri's highest court and, therefore, is instructive. *See TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.*, 114 F.3d 731, 773 (8th Cir. 1997) ("When a state's highest court has not addressed the precise question of state law at issue, a federal court must decide 'what the highest state court would probably hold were it called upon to decide the issue.'" (citation omitted)).

Walker held that "the Missouri legislature did not intend to subject nonperpetrator defendants to liability under § 537.046" because a non-perpetrator defendant could not commit the acts enumerated in § 537.046. *Id.* at 1209. (Appx. 1, A1388-A1397). In further support of its holding, the Court pointed out that the legislature could have but did not include aiding and abetting (§ 562.041)—a crime that can be committed by a non-perpetrator and/or non-human—in the definition of "childhood sexual abuse." *Id.* Likewise, the Missouri legislature could have but did not incorporate § 537.036 (accountability for conduct) and/or § 537.041 (responsibility for the conduct of another) into the definition of "childhood sexual abuse" in § 537.046. *See Cervisour v. Hendrix*, 136 S.W.2d 404 (Mo. App. 1940) ("It is an elementary rule of almost universal application that the expression of one thing is the exclusion of another."); *Betz v. Columbia Telephone Co.*, 24 S.W.2d 224, 228 (Mo. App. 1930) ("Courts can not interpolate in a statute where omission is not plainly indicated."). Therefore, it is clear that Relators, which are both non-perpetrators and non-human, cannot be sued for violation of § 537.046.

Furthermore, the Missouri Supreme Court and Missouri appellate courts have implicitly held that § 537.046 only applies to perpetrators of sexual abuse. In *Marianist Province*, after reviewing briefing and hearing argument as to whether § 537.046 applies to non-perpetrators, this Court denied plaintiff's motion for rehearing based on an argument that § 537.046 applies to non-perpetrators. 258 S.W.3d at 811. (Appx. 1,

A1385-A1387). In *H.R.B.*, the Court of Appeals acknowledged the presumption that § 537.046 applies only to perpetrators and humans and not to an archdiocese and church that employed an alleged perpetrator. 18 S.W.3d 440 ("The parties are in agreement that the statute of limitations [under § 537.046] … does not apply to the facts of their case."). These cases further support the fact that Respondent should have dismissed Relators from Count I.

Missouri trial courts have likewise held that § 537.046 does not apply to non-human entities. The United States District Court for the Western District of Missouri in *Walker* stated:

> [S]everal Missouri courts, in unpublished opinions, have held that § 537.046 does not apply to a business entity. In an order filed on March 10, 2008, in *Timothy P. Dempsey and John Doe CL v. Father Robert Johnston, Archdiocese of St. Louis, and Archbishop Raymond Burke,* 22042–09280, Circuit Judge Donald McCullin of the 22nd Judicial Circuit in the City of St. Louis held that § 537.046 does not apply to a non-perpetrator defendant …
>
> Circuit Judge John Riley, also of the 22nd Judicial Circuit in the City of St. Louis, issued an identical ruling on February 25, 2005, in *Allen Klump v. Father Michael S. McGrath and the Archdiocese of St. Louis*, 032–01727.

2010 WL 363865, *4 (W.D. Mo. 2010).

Moreover, courts across the county construing identical or substantially similar statutes have also rejected applying these statutes to non-perpetrating, non-human defendants. *See Kelly v. Marcantonio*, 678 A.2d 873, 877 (R.I. 1996) (statute with nearly identical language to § 537.046 "has no application to claims made against nonperpetrator-defendants"); *Bernie v. Blue Cloud Abbey*, 821 N.W.2d 224, 225 (S.D. 2012) (holding that a similar childhood sexual abuse does not apply to entity defendants because they were not perpetrators); *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 602-03 (Co. App. 2000).

In an effort to circumvent the limited reach of § 537.046, Plaintiff previously has argued that Relators can be held liable under § 537.046 based on theories of aiding and abetting and vicarious liability/respondeat superior. However, the *Walker* court expressly rejected any theory of non-perpetrator aiding and abetting liability under § 537.046 and the theories of vicarious liability and respondeat superior cannot be used to prosecute a claim under § 537.046. 650 F.3d at 1209 (Appx. 1, A1388-A1397); *see Doe HL v. James*, No. 4:05-cv-2032 CAS, 2006 WL 6677124, at *3 (E.D. Mo. Aug. 15, 2006) (relying on *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997) ("[I]ntentional sexual misconduct and intentional infliction of emotional distress are not within the scope of employment … and are in fact forbidden.")).

In light of the foregoing, Respondent erred when he denied Relators' motions for summary judgment as to Plaintiff's claim for childhood sexual abuse (Count I). Thus, a permanent writ of prohibition is the appropriate remedy.

III. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment on Counts I and II of Plaintiff's Petition, because Relators cannot be held liable for Bradshaw's purported conduct, in that they did not control Bradshaw's activities and therefore there was no relationship between Bradshaw and Relators that would give rise to respondeat superior liability.

A. Introduction

Relators seek from this Court relief from the burden and expense of the unwarranted litigation of a lawsuit that, as a matter of law, cannot be brought against Relators. Respondent erred when he denied Relators' motions for summary judgment as to Counts I and II because Bradshaw was not an employee, agent or servant of Relators and Missouri courts have firmly decided, specifically, that Boy Scouts of America and local councils like Heart of America Council, Boy Scouts of America have no vicarious liability over troop volunteers like Bradshaw. *See Wilson v. St. Louis Area Council, Boy Scouts of America*, 845 S.W.2d 568 (Mo. App. 1992). Accordingly, a permanent order prohibiting Respondent from taking any action in the underlying case other than granting summary judgment in favor of Relators is warranted.

B. Counts I and II Against Relators Must Be Dismissed Because Plaintiff Cannot Show That Relators Are Vicariously Liable Under A Theory Of Respondeat Superior.

Missouri law makes clear that the Boy Scouts of American and local councils such as Heart of America Council, Boy Scouts of America are not vicariously liable for troop volunteers like Bradshaw. *Wilson*, 845 S.W.2d 568. The *Wilson* Court determined that these organizations lack the requisite level of control over such volunteers to be held vicariously liable. *Id.* at 572. Relators, therefore, cannot be held vicariously liable to Plaintiff for the purported acts of Bradshaw.[6]

Under the doctrine of respondeat superior, a principal may be found vicariously liable for the negligent acts or omissions of its agent *only if the principal had the power to control the purported agent. Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 66 (Mo. App. 2003) ("[i]f there is no right to control, there is no liability") (internal citations omitted). If a master-servant relationship exists, the employer is liable for the servant's acts only

[6] Relators note that Plaintiff attempts to hold them liable in his Count II for battery based on a theory of vicarious liability, as Relator organizations cannot be held directly liable for battery by definition. *See Presley v. Central Terminal Co.*, 142 S.W.2d 799 (Mo. App. 1940) (noting that employer company could be found liable for alleged assault and battery only on a theory of derivative liability).

when those acts are: "(1) within the scope of employment and (2) done as a means or for the purpose of doing the work assigned by the principal." *Gibson*, 952 S.W.2d at 245-46; *see also Studebaker v. Nettie's Flower Garden, Inc.*, 842 S.W.2d 227, 229 (Mo. App. 1992) (explaining that: a) whether a master-servant agency relationship existed, and b) whether the tortfeasor was acting under scope of employment, are two inquiries.). Plaintiff must prove *both* a master-servant relationship *and* that Bradshaw acted in the scope of his employment.

In his petition, Plaintiff alleges that Relators are liable under the doctrine of respondeat superior for Bradshaw's alleged commission of child sex abuse pursuant to § 537.046 in Count I and his alleged battery of Plaintiff (specifically, rape, sexual assault, sodomy, sexual misconduct, and/or sexual abuse) in Count II. These counts against Relators are without merit and Respondent should have granted Relators' motions for summary judgment as to Counts I and II.

a. In Missouri, it is settled that Boy Scouts of America and local councils do not have vicarious liability over troop volunteers because Boy Scouts of America and local councils do not control volunteers' activities.

Relators cannot be held vicariously liable for Bradshaw's purported conduct as he was not an employee, agent or servant of Relators. In fact, Missouri courts have already and firmly decided that Boy Scouts of America and local councils like Heart of America

Council, Boy Scouts of America have no vicarious liability over troop volunteers like Bradshaw. *See Wilson*, 845 S.W.2d 568.

To hold Relators vicariously liable for Bradshaw's purported conduct "requires some evidence that a master-servant relationship existed between the parties." *Id.* at 570. Plaintiff would need to establish that Relators as Bradshaw's master "had the right or power to control and direct the physical conduct of [Bradshaw] in the performance of the act." *Id.* Absent a showing that Relators had the right of control, Relators cannot be held liable. *Id.* While unpaid volunteers may qualify as servants in certain situations, Missouri courts have made clear that BSA and local councils lack the requisite control over their volunteers so as to be held liable. *Id.* at 571 (finding "no evidence that Council either controlled or had the right to control the leaders' activities" and thus could not be held vicariously liable).

Missouri courts already have determined that the organizational structure of Relators precludes respondeat superior over adult volunteers. In *Hobbs v. Boy Scouts of America*, the Western District Court of Appeals found it was "clear that neither the Boy Scouts of America, nor the Heart of America Council…has any day-to-day control over the activities of the local chartering organizations.…The only organization with any supervisory authority with regard to specific activities was the local chartering organization, which was not joined to the lawsuit." 152 S.W.3d 367, 369 (Mo. App. 2004); *see also M.L. v. Civil Air Patrol*, 806 F. Supp. 845, 849 (E.D. Mo. 1992) (finding

adult volunteer was not "an employee, agent or servant of BSA. BSA neither selects or retains the adult volunteers who administer the programs.").

Likewise, in *Wilson v. Boy Scouts of America*, the Court determined that BSA could not be held vicariously liable for a volunteer because it lacked control over the volunteer. 784 F.Supp. 1422, 1424 (E.D. Mo. 1991). The plaintiffs were the parents of a scout who died after he was electrocuted on a trip to Fort Leonard Wood, Missouri with his Boy Scout troop. *Id.* Despite the fact that the volunteers were, "serving the general goals of scouting" on the trip, the court found that plaintiffs failed to produce evidence BSA had the right to or did in fact control acts of the volunteers. *Id.* at 1426. In support its finding that BSA lacked control over adult volunteers, the court stated: "[t]he national organization similarly does not choose or directly supervise the scoutmaster or other volunteers at the troop level. If anything, the relationship is even more remote." *Id.* at 1425.

The local council was a defendant in a separate action arising from the same electrocution at Fort Leonard Wood. *Wilson,* 845 S.W.2d 568. As in the prior case against BSA, the Court of Appeals found that the organizational structure of BSA and the local councils ruled out respondeat superior liability because the organizational structure "established the autonomy of the troop and its leaders with regard to troop activities." *Id.* at 571 (noting that the Council "did not direct, or have knowledge of" the Fort Leonard Wood visit and "[t]here was no evidence that Council either controlled or had the right to

control the leaders' activities on the trip to Fort Leonard Wood."). Therefore, the appellate court found that the leaders "were not the servants or agents of Council while participating in the program at Fort Leonard Wood" and affirmed summary judgment for the local council. *Id.*

Multiple courts concur with the *Hobbs* and *Wilson* opinions and have held that the very structure of the BSA, local councils and chartering organizations precludes BSA and local council liability for the acts of chartering organization adult volunteers. *See Mauch v. Kissling*, 783 P.2d 601 (Wash. Ct. App. 1989); *Glover By & Through Dyson v. Boy Scouts of America*, 923 P.2d 1383 (Utah 1996); *John Roe No.1 v. Boy Scouts of America Corp.*, No. 35155, 147 Con.App. 622 at *5, 9 (Conn. App. Ct. Jan. 21, 2014); *Roe v. Boy Scouts of America Corp.*, No. HHDCV095033135S, 2012 WL 3933184 at *3 (Conn. Super. Ct. Aug. 16, 2012); *Doe v. Boy Scouts of America*, No. 2-13-012, 2014 IL App (2d) 130121 at *8 (Ill. App. Ct. Jan. 24, 2014) (finding as a matter of law BSA had no employment relationship and had no right to control former paid employee of a local council); *Santa v. Williams*, No. 1-12-1905, 2013 IL App (1st) 121905-U at *10 (Ill. App. Ct. June 18, 2013) (finding no agency relationship between the local council and the chartering organization particularly because the local council lacked control over the chartered organization's operations); *Anderson v. Boy Scouts of America, Inc.*, 589 N.E.2d 892, 894-95 (Ill. App. Ct. 1992) (finding no agency relationship and therefore no vicarious liability for BSA and local council when a scout leader injured the plaintiff

scout with his car as the court could "find no provisions in the charter, bylaws, rules and regulations promulgated by the BSA…which specifically grant BSA or its district councils' direct supervisory powers over the method or manner in which adult volunteer scout leaders accomplish their tasks."); *O'Lear v. Boy Scouts of America.,* 821 N.Y.S2d 903, 903-04 (N.Y. App. Div. 2006) (finding BSA and the local council were not liable under negligent supervision for scout's drowning death because they did not exercise supervisory control over the troop or its leaders); *Boy 1 v. Boy Scouts of America,* No. C10–1912–RSM, 2014 WL 64168 at *6-7 (Wash. Ct. App. Jan. 8, 2014) ("The evidence fails to show that BSA maintained the right to control the day-to-day activities of the troop leaders or sponsoring organizations…. Plaintiffs have failed to raise a material issue of fact with respect to agency."); *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 307 P.3d 730, 739 (Wash. Ct. App. 2013) (finding BSA and the local council, as opposed to the chartering organization, had no custodial duty to troop members); *Gordon v. Boy Scouts of America, Inc.,* No. 27754–2–III, 153 Wash.App. 1043 at *2 (Wash. Ct. App. Dec. 22, 2009) (finding the chartered organization and its leaders were not acting at the behest of the regional or national scouting organizations, and "[t]he fact that [the chartered organization] was chartered by a national organization did not mean that it was acting under the control of that organization. There was no evidence presented that would allow a rational person to conclude otherwise.").

Apart from processing his paperwork and performing an initial internal safety check, Relators have no relationship with Bradshaw. (Appx. 1, A282-A287).[7] They did not know what activities he planned for the chartering organization's troop, much less have any control over them. (Appx. 1, A282-A287). Absent this requisite element of control, Relators simply cannot be held vicariously liable for Bradshaw's purported conduct under well-established principles of Missouri law, and Plaintiff's Counts I and II fail as a matter of law.

b. Bradshaw's alleged abuse of Plaintiff was outside the scope of any purported relationship Bradshaw had with Relators.

Because sexual abuse is clearly not within the course and scope of a Boy Scout volunteer's employment, Relators cannot be held vicariously liable for Bradshaw's alleged acts. Therefore, Counts I and II should have been dismissed as to Relators.

Vicarious liability under respondeat superior requires "that the injury-causing conduct of an employee be within the course and scope of employment." *Cluck v. Union Pac. R. Co.*, 367 S.W.3d 25, 29 (Mo. banc 2012), *reh'g denied* (July 3, 2012), *cert.*

[7] Affidavits establishing the material facts of agency accompanied Relators' motion for summary judgment. Therefore, Plaintiff was required to submit opposing affidavits. *Mattes*, 828 S.W.2d at 907. Because Plaintiff failed to submit opposing affidavits, the facts specified in Relators' affidavits are deemed admitted as true by Plaintiff. *Id.* at 906.

denied, 133 S. Ct. 932 (2013). Missouri law holds that sexual assault and battery are ***never*** within the course and scope of the employment of teachers, priests, and therapists. *See Gibson*, 952 S.W.2d at 246; *see also P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.622, 624 (Mo. App. 1994). It is likewise axiomatic that Bradshaw's alleged sexual abuse Plaintiff cannot possibly be considered within the scope of Bradshaw's employment for Relators or in the furtherance of Relators' interests.

An act performed in the course and scope of employment is an act that both: (1) is done under the general authority and direction of the employer to further the business or interests of the employer—even if the act is not specifically authorized; and (2) "naturally arises from the performance of the employer's work." *Daugherty v. Allee's Sports Bar & Grill*, 260 S.W.3d 869, 873 (Mo. App. 2008); *see also* Missouri Approved Instruction, 3d 13.02. As respondeat superior requires the employee's act to be a *natural* outgrowth of work for the employer, Missouri courts analyze the foreseeability of the act. *See Maryland Cas. Co. v. Huger*, 728 S.W.2d 574, 579-80 (Mo. App. 1987) ("'[N]aturally' implies that the employees' conduct must be usual, customary and expected. This amounts to a requirement of foreseeability."). Citing the Restatement (Second) of Agency, the Missouri Supreme Court said of foreseeability that "the master is not responsible for acts which are clearly *inappropriate to* or unforeseeable in the accomplishment of the authorized result." *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 58 (Mo. 1973) (emphasis added).

An act is not foreseeable if it is "so outrageous and criminal—so excessively violent as to be totally without reason or responsibility—and hence must be said, as a matter of law, not to be within the scope of his employment." *Id.* As Bradshaw's alleged acts were so outrageous and criminal, they are, as a matter of law, not within the scope of his employment with Relators.

In *P.S.*, for example, the Court addressed the sexual misconduct of a psychiatrist with his patient. 887 S.W.2d at 623. The patient alleged that the psychiatrist used therapy sessions to broach inappropriate and suggestive sexual topics and initiated "numerous" sexual encounters and sought to hold his employer vicariously liable. *Id.* at 624. The Court found that the psychiatrist's employer was not vicariously liable for his acts because the sexual misconduct was "not the general kind of activity a therapist is employed to perform", the sexual encounters "resulted from purely private and personal desires", "[t]he acts did not occur as part of any therapy program", and the acts "were not intended to further employer's business." *Id.* at 624-25. Accordingly, the psychiatrist had not been acting within the scope of his employment giving rise to vicarious liability. *Id.*

Following *P.S.*, the Eastern District Court of Appeals considered whether a plaintiff who alleged he was abused by a priest teaching at his school could state a cause of action under respondeat superior against the archbishop who supervised the school or against the school itself. *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 94, 97 (Mo. App. 1995). The court noted the aberrance between the church's mission and the individual's act of sexual

abuse. *Id.* at 97. The court referenced other jurisdictions that had refused to find religious organizations vicariously liable under respondeat superior when an individual priest committed sexual abuse because the defendants priests' sexual misconduct "is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by the diocese." *Id.* at 97, *quoting Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo.1988). For the same reason, the *H.R.B.* court found the archbishop and the church could not be vicariously liable as "[t]he acts of defendant alleged in plaintiff's…petition clearly were not part of defendant's duties as a priest or as a teacher, nor were they intended to further any religious or educational interests of the Catholic Church." *Id. See also, Juarez v. Boy Scouts of America, Inc.*, 97 Cal. Rptr. 2d 12, 23 (Cal. Ct. App. 2000) (finding BSA not liable under respondeat superior for sexual abuse committed by troop leader as his sexual misconduct was outside the course and scope of employment).

As in *P.S.*, Bradshaw's purported sexual abuse of Plaintiff could not be deemed to have occurred in the scope of his role as a scouting volunteer, even though they may have occurred in connection with scouting activities. The fact that Bradshaw's alleged sexual assaults may have occurred in connection with scouting activities does not put those assaults in the scope of his role as scouting volunteer. Even if Bradshaw used scouting events to build rapport and groom Plaintiff, his motives were his own and remove his acts from the scope of employment. *See P.S.*, 887 S.W. at 624 (that the employee took advantage of his position to "groom" his patient for an inappropriate sexual relationship

did not give rise to vicarious liability because bad motive removed acts from the scope of employment). An employer is not responsible for acts which are inappropriate to the employer's desired result. *Wellman*, 504 S.W.2d at 58. Little could be more inappropriate to the Relators' mission than the alleged sexual abuse of a boy scout. Therefore, Bradshaw's acts were obviously not in furtherance of the Relators' goals and there can be no vicarious liability.

In light of the foregoing, Respondent erred when he denied Relators' motions for summary judgment as to Plaintiff's respondeat superior claims (Counts I, II). Thus, a permanent writ of prohibition is the appropriate remedy.

IV. Relators are entitled to a permanent order prohibiting Respondent from enforcing his order denying Relators' motion for summary judgment on Counts I and III of Plaintiff's Petition, because Relators cannot be held directly liable on Plaintiff's claims, in that Relators and Bradshaw had no master-servant relationship, Relators did not control or direct Bradshaw's acts and Bradshaw's alleged abuse was not a natural incident of Relators' business.

A. Introduction

Relators seek from this Court relief from the burden and expense of the unwarranted litigation of a lawsuit that, as a matter of law, cannot be brought against Relators. Respondent erred when he denied Relators' motions for summary judgment as

to Counts I and III because there was no master-servant relationship between Relators and Bradshaw, no control over Bradshaw, and because Bradshaw's acts were utterly divorced from the aims of Relators. Therefore, Plaintiff has not and cannot establish negligence as a matter of law. Accordingly, a permanent order prohibiting Respondent from taking any action in the underlying case other than granting summary judgment in favor of Relators is warranted.

B. Counts I and III Alleging Direct Liability Against Relators Must Be Dismissed Because Relators and Bradshaw Had No Master-Servant Relationship, Relators Did Not Control Or Direct Bradshaw's Acts, And Bradshaw's Alleged Abuse Was Not A Natural Incident Of Relators' Business.

Because Bradshaw and Relators had no master-servant relationship, Relators did not control or direct Bradshaw's acts and Bradshaw's alleged abuse of Plaintiff therefore was not a natural incident of Relators' business. Relators had no duty to supervise or "vet" Bradshaw. Likewise, as Relators are so removed from Bradshaw to preclude respondeat superior liability, there is no viable argument that Relators 'aided or abetted' Bradshaw in the violation of § 537.046.

In *M.L. v. Civil Air Patrol,* the court recognized that the Boy Scout organization has no liability in negligence where there is no employment relationship. 806 F.Supp. at

849. After finding that BSA did not have the requisite control over the defendant to give rise to respondeat superior liability, the court said:

> "It is clear that in the present case, defendant [] was not an employee, agent or servant of the BSA. BSA neither selects or retains the adult volunteers who administer the programs. CAP is the locally chartered organization who selected and retained defendant [].…BSA, therefore did not exercise the control necessary to select or retain defendant [] in order to establish plaintiffs' cause of action for negligent hiring or retention."

Id. Here, Relators likewise did not exercise the control necessary to select or retain Bradshaw and thus Plaintiff's direct liability claims as to Relators (Counts I, III) must fail.

Plaintiff's claim for negligent failure to "vet" Bradshaw is really a claim for negligent hiring. "To establish a claim for negligent hiring or retention, a plaintiff must show: (1) the employer knew or should have known of the employee's dangerous proclivities, and (2) the employer's negligence was the proximate cause of the plaintiff's injuries." *Gibson*, 952 S.W.2d at 246. The beginning and end of analyzing Plaintiff's

negligent hiring claim here is the fact that Relators did not hire Bradshaw.[8] If any entity hired Bradshaw, it was the chartering organization. *M.L.*, 806 F.Supp. at 849.

Likewise, liability for negligent failure to supervise requires a relationship of control that does not exist between BSA or local councils and troop volunteers. "Negligent supervision implicates the duty of a master to control conduct of a servant." *Gibson*, 952 S.W.2d at 247 (emphasis added). In *Gibson*, the Missouri Supreme Court articulated the following elements of negligent supervision:

> A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if
>
> (a) the servant
>
> > (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
> >
> > (ii) is using a chattel of the master, and

[8] Even if the Court were to find that Relators are not entitled to summary judgment on the respondeat superior issues, Plaintiff still cannot establish negligence, aiding or abetting, or other theories of recovery against Relators under Missouri law.

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control

952 S.W.2d at 247 (citing Restatement (Second) of Torts). But Relators do not and do not have the ability control Bradshaw because Relators "do[] not choose or directly supervise the scoutmaster or other volunteers at the troop level." *Wilson*, 784 F. Supp. 1422, 1425. The reasons that Relators are not vicariously liable for Bradshaw's activities fold into the direct liability/negligence-analysis. Because there was no master-servant relationship, no control over Bradshaw, and because Bradshaw's acts were utterly divorced from the aims of Relators, Plaintiff has not and cannot establish negligence as a matter of law. Therefore, Respondent should have granted Relators' motion for summary judgment as to Counts I and III.

CONCLUSION

For the foregoing reasons, Relators request that this Court:

(a) Make its writ of prohibition permanent and direct Respondent to refrain from taking any further action in this matter other than vacating his order denying Relators' motions for summary judgment and enter an order granting summary judgment in favor of Relators; and

(b) Grant other such relief as the Court deems just and proper under the circumstances.

Respectfully Submitted,

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Cases, Statutes, Rules and Other Authorities

IN THE SUPREME COURT OF MISSOURI

HEART OF AMERICA COUNCIL, BOY SCOUTS OF AMERICA, and BOY SCOUTS OF AMERICA,	)	**SC94942**
Relators,	)	
v.	)	
THE HONORABLE CHARLES H. MCKENZIE, JUDGE, CIRCUIT COURT OF JACKSON COUNTY, MISSOURI	)	
Respondent.	)	

Certificate of Service and Compliance

The undersigned certifies that true and accurate copies of Relators' Brief and Appendix in printed form via U.S. Mail, postage prepaid and E-Mail were served this 26th day of August, 2015 to the **THE HONORABLE CHARLES H. MCKENZIE,** Circuit Court of Jackson County, Jackson County Courthouse, Division 13, 415 East 12th Street, Fifth Floor, Kansas City, MO 64106, div13.cir16@courts.mo.gov, **RESPONDENT**, Mr. Randall L. Rhodes, Douthit Frets Rouse Gentile & Rhodes, L.L.C., 5250 W. 116th Place, Suite 400, Leawood, KS 66210, rrhodes@dfrglaw.com, *Attorneys for Plaintiff* and Mr. Kenneth C. Hensley, Hensley Law Office, 401 West 58 Highway, P.O. Box 620, Raymore, MO 64083, *Attorney for Defendant Scott Alan Bradshaw*.

The undersigned further certifies that this Brief complies with the Missouri Rules of Civil Procedure. This Brief complies with the limitation set forth in Rule 84.06(b) and was prepared in Microsoft Word in Times New Roman with 13 point font and contains approximately 11,354 words.

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