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

RELATORS HEART OF AMERICA COUNCIL, BOY SCOUTS OF AMERICA, AND BOY SCOUTS OF AMERICA

REPLY IN SUPPORT OF THEIR BRIEF

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Nowhere in Plaintiff's eighty-seven Respondent's brief does he acknowledge the decisive fact governing the outcome of these writ proceedings: ***by his own admission, Plaintiff has always remembered and been aware of the alleged abuse that began approximately twenty-three (23) years ago.*** Indeed, Plaintiff consulted an attorney about the possibility of filing a lawsuit approximately ten (10) years before deciding to file his suit. (Appx.[1] 2, A1812). When he ultimately decided to file this lawsuit, the statutes of limitations governing his claims already had expired.

Plaintiff filed this lawsuit in 2011 – nearly 19 years after the alleged abuse began, nearly 13 years after he reached the age of 18, nearly 10 years after he reached the age of 21 and approximately 10 years after he first met with an attorney. (Appx. 2, A1808-A1812). The applicable statutes of limitations governing his claims for childhood sexual abuse under Missouri Revised Statute § 537.046 (1990), common law battery and common law negligence – each of which is either two- or five-years – expired long before Plaintiff filed this lawsuit. Plaintiff's claim is barred under established Missouri law.

In denying Relators' summary judgment motions, Respondent disregarded this Court's directive in *State ex rel. Marianist Province of U.S. v. Ross,* 258 S.W.3d 809 (Mo.

[1] All citations to the record are to materials contained in Relators' Appendices 1 and 2 filed with their opening Relators' brief.

banc 2008). This Court in *Marianist Province* made clear that when a plaintiff does not establish repressed memory, the statute of limitations begins to run when his cause of action is "capable of ascertainment." *Id.* at 811. In other words, it begins to run when a reasonably prudent person would be on notice of a potentially actionable injury. *Id.*

Plaintiff here admits that he remembers and has always remembered the purported sexual abuse that occurred while he was a minor. (Appx. 2, A1808; Appx. 1, A1296). Under *Marianist Province,* his claims were capable of ascertainment at that time. *Id.* While the statutes were tolled until he reached the age of majority, the limitations periods of two and five years began to run immediately upon him reaching the age of majority and expired long before he filed this lawsuit.

In his Respondent's brief, Plaintiff completely ignores this Court's opinion in *Marianist Province*. Nowhere in his brief does he so much as mention that opinion. Instead, he seeks to avoid the running of the limitations periods through a series of arguments misapplying Missouri law and relying on decisions from other jurisdictions.

He contends that Relators waived their defenses by failing to timely answer, though they filed answers with leave of court. He contends that Relators concealed his cause of action from him, though he admits that he has always remembered the alleged abuse giving rise to this claim. (Appx. 2, A1808; Appx. 1, A1296). Perhaps more telling, Plaintiff contends Relators concealed his cause of action from him, though he consulted with an

attorney regarding filing such suit in 2001 – approximately 10 years before he filed his lawsuit. (Appx. 2, A1812).

In his Respondent's brief, Plaintiff asks this Court to disregard the law of Missouri. He cites to cases from other jurisdictions and advances arguments regarding the policy behind Missouri Revised Statutes § 537.046. While these policy concerns obviously are noteworthy, not even the policy behind this statute can allow this Court to ignore the law of Missouri or the Missouri Constitution. Missouri courts have long acknowledged the need for statutes of limitations. Such statutes are necessary to prevent the assertion of stale claims. *Business Men's Assur. Co. of Am. v. Graham,* 984 S.W.2d 501, 507 (Mo. banc 1999) (citing *Thatcher v. De Tar,* 351 Mo. 603, 173 S.W.2d 760, 761 (Mo. 1943). Courts have long acknowledged that statutes of limitations:

> rest upon sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of witnesses.

Id. (citing *Baron v. Kurn,* 349 Mo. 1202, 164 S.W.2d 310, 317 (Mo. 1942).

As this Court so aptly stated just last month, even in the face of tragedy and compelling policy arguments for why a suit should be allowed to proceed, a "proposed 'freewheeling' approach to statutory interpretation… is also troubling, particularly when

the precedent of this Court counsels a different result." *Boland v. Saint Luke's Health System, Inc.*, No. SC93906, 2015 WL 4926961, at *6 (Mo. banc Aug. 18, 2015).

Plaintiff's claims fail for the reasons set forth both herein and in Relators' opening brief. Accordingly, Relators request that this Court make absolute its preliminary writ and prevent litigation of Plaintiff's long-expired claims.

1. Each of Plaintiff's claims is barred by the applicable statute of limitations.

In his Respondent's brief, Plaintiff argues that his entire lawsuit is governed by the statute of limitations set forth in Missouri Revised Statute § 537.046 (2004), which includes a statute of limitations of 10 years from Plaintiff's twenty-first birthday.

Plaintiff's argument ignores the fact that he has asserted three separate causes of action against Relators: Count I for childhood sexual abuse under § 537.046[2]; Count II for common law battery and Count III for common law negligence. Section 537.046 applies only to his Count I brought under that statute. The statute has no bearing on his common law claims for battery and negligence. These are separate claims subject to the separate

[2] Missouri Revised Statute § 537.046 (1990) and the statute of limitation set forth therein govern Plaintiff's Count I, as discussed in Relators' opening brief and addressed below. The version of the statute at issue does not affect that each of Plaintiff's three claims is governed by a different statute of limitations. As such, Relators will discuss § 537.046 without reference to the applicable version for this Section 1 of their Reply.

statutes of limitations governing those claims, Missouri Revised Statutes §§ 516.140 and 516.120, respectively. *See Walker v. Barrett*, 650 F.3d 1198, 1204 n.3 (8th Cir. 2011) ("Walker states that 'this is a childhood sexual abuse *case*' … implicitly suggesting that the longer statute of limitations in Missouri Revised Statute § 537.046 should apply to all of his claims. Section 537.46 provides for a distinct cause of action … It does not apply to entire cases that involve allegations of childhood sexual abuse.") (internal citations omitted).

As set forth in Relators' opening brief, each of these statutes expired long before Plaintiff filed his lawsuit in 2011. The two-year statute of limitations for battery claims expired two years after Plaintiff turned 21, or on May 1, 2003; and the five-year statute of limitations for negligence claims expired five years after Plaintiff turned 21, or on May 1, 2006. Additionally, the applicable statute of limitation set forth in § 537.046 (1990) governing Plaintiff's Count I under this statute expired five years after Plaintiff turned 18, or on May 1, 2003.

Plaintiff elected to pursue separate theories of liability. Each of these theories is governed by its own statute of limitations. The suggestion that the statute of limitations governing one count of his petition should apply to the other counts of his petition contradicts common sense and common practice.

Each of Plaintiff's separate causes of action is governed by its own statute of limitations, each of which expired long before he filed his lawsuit. Plaintiff's claims, therefore, are barred as a matter of law.

2. Relators cannot have concealed Plaintiff's purported cause of action from him so as to toll the running of the limitations periods because Plaintiff has always remembered the alleged abuse giving rise to this lawsuit.

It is undisputed that this is not a repressed memory case. Plaintiff admits that he remembers and has always remembered the alleged abuse giving rise to this lawsuit. (Appx. 2, A1808; Appx. 1, A1296). Nevertheless, Plaintiff contends that Relators concealed his cause of action from him through fraud or improper acts. Plaintiff fails to explain, however, how Relators could have concealed from him conduct he has always been aware of and remembered. Plaintiff fails to explain this because there is no credible explanation.

Plaintiff asserts that the statutes were tolled due to alleged fraud or improper acts pursuant to Missouri Revised Statute § 516.280 in an attempt to avoid the running of the statute. This statute provides "[i]f any person, but absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented." MO. REV. STAT. § 516.280.

Plaintiff alleges various fraudulent or improper acts in purported support for his contention that the statutes of limitation should be tolled. None of these supposed facts is

supported by citation to the record, and most of these facts are irrelevant. He argues, for instance, that his father persuaded him to refrain from filing a lawsuit based on his allegedly erroneous belief that the "Boy Scouts was a good organization." (Brief of Respondent, Point V, p. 55). He devotes an entire page of his brief to discussing Plaintiff's father's purported impressions of Relators as a basis for tolling the statutes of limitations. (Brief of Respondent, Point V, p. 56).

Yet, the purported beliefs or impressions of Plaintiff's father have no bearing on the merits of Plaintiff's claim or the running of the limitations period. Likewise, the purported facts regarding Relators' alleged notice of sexual abuse claims or spoliation of evidence – devoid of evidentiary support in Plaintiff's brief – have no bearing on the issues before the Court. These arguments do nothing but distract from the crucial fact defeating Plaintiff's argument: ***Plaintiff admits that he has always remembered the alleged abuse.*** Prior decisions from this Court make clear that his cause of action was capable of ascertainment at the time that it occurred, meaning his cause of action accrued at that time. *See Marianist Province,* 258 S.W.3d at 811.

The simple truth is that Relators could not have concealed his purported cause of action from him when he was aware of the alleged conduct giving rise to this lawsuit at the time that it occurred, always remembered the alleged abuse and even consulted with an attorney regarding his claim long before filing suit.

Missouri law confirms this evident principle. Missouri law holds that Plaintiff cannot establish fraudulent concealment to avoid the statute of limitations because he has always known of and remembered the alleged abusive acts. *Doe v. O'Connell*, 146 S.W.3d 1, 3-4 (Mo. App. 2004) ("There can be no fraudulent concealment that will prevent the running of the statute of limitations where the plaintiff knows of the cause of action or there is a presumption of such knowledge.") (internal citations omitted).

As Plaintiff has always remembered the purported conduct giving rise to his claim, he cannot now argue that Relators prohibited him from discovering or investigating his alleged claim. Indeed, the undisputed fact that Plaintiff consulted an attorney about bringing a civil lawsuit as early as 2001 belies any claim that Plaintiff was not aware of a potential claim. (Appx. 2, A1812).

Plaintiff notes that this Court recently has issued two opinions discussing whether § 516.280 applies to the specific statute of limitations set forth in Missouri Revised Statute § 537.080 governing wrongful death actions in *Boland v. Saint Luke's Health System, Inc.*, No. SC93906, 2015 WL 4926961, (Mo. banc Aug. 18, 2015) and *State ex rel. Beisly v. Perigo,* No. SC94030, 2015 WL 4929188, (Mo. banc Aug. 18, 2015). These cases differ from the present matter in several ways.

Most importantly, the plaintiffs in *Boland* and *Beisly* were not aware of the facts giving rise to their causes of action until years after they had accrued. *Boland,* No. SC93906, 2015 WL 4926961 (finding claim barred by specific statute of limitations for

wrongful death actions even though plaintiffs were not aware of facts giving rise to cause of action until after the statute had run); *Beisly*, No. SC94030, 2015 WL 4949188 (finding statute of limitations tolled because plaintiff did not have necessary facts to bring cause of action for wrongful death because of fraudulent concealment). Unlike *Boland* and *Beisly*, Plaintiff has admitted that he was aware of the alleged facts necessary to bring his claim. Plaintiff simply chose not to pursue his claim (even after consulting with a lawyer in 2001) until after the limitations period had expired.

Plaintiff filed his lawsuit after the statutes of limitations had expired. He readily admits that he remembered the purported abuse. He readily admits that he contacted an attorney about filing a suit. His reasons for electing not to file suit within the limitations period are irrelevant.

3. The 1990 version of § 537.046 governs Count I of Plaintiff's Petition.

Plaintiff purports to assert a claim against Relator organizations under § 537.046 (2004). This Court need not consider whether the 1990 or the 2004 version of this statute applies because as Plaintiff cannot assert a claim against Relator organizations under any version of the statute. Rather, as set forth in detail in Relators' opening brief, § 537.046 provides a cause of action against only the alleged perpetrator of the abuse at issue – ***it does not provide a cause of action against Relator organizations.*** *See Walker*, 650 F.3d 1198.

Assuming *arguendo* that the statute could be deemed to allow a cause of action against Relators, the 1990 version of § 537.046 would govern Plaintiff's claim under

established precedent from this Court. This Court has made clear that under Missouri law, Relators have a vested right under the Missouri Constitution to be free of Plaintiff's purported claim under § 537.046. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 342 (Mo. banc 1993). Any purported claim Plaintiff had against Relators under this statute expired before the 2004 amendment extending the statute of limitations claims brought under the statute.[3] *Id.* Because such claimed already had expired, Relators

[3] Throughout his brief, Plaintiff asserts various purported arguments based on waiver, including that Relators waived their argument that § 537.046 (1990) governs this claim a that it is partially unconstitutional as applied to this claim by failing to properly and timely assert these defenses as an affirmative defense. In their amended answers filed March 28, 2012 – ***with leave of court*** – Relators asserted that if § 537.046 is inapplicable to them as organizations. They asserted as an alternative affirmative defense that if the statute can be applied to Relator organizations – which is contrary to Missouri law – then this claim is barred by § 537.046 (1990), expressly citing the applicable version of the statute. Additionally, Relators asserted affirmative defenses stating that § 537.046 (2004) is partially unconstitutional to the extent it is alleged to apply to this claim.

Plaintiff also suggests in the factual background section of his brief that Relators waived certain arguments because they did not file an "answer to his answer" to Relators' writ petition, suggesting that they were required to do so and citing to *dicta* from a 1942

had a vested right to be free from such suit under the Missouri Constitution. The legislature cannot revoke that right. To hold otherwise would violate the Missouri Constitution and law of this state.

Yet, this is exactly what Plaintiff tries to achieve in arguing that the 2004 version of the statute applies – he attempts to violate the Missouri Constitution and revive a cause of action long expired.

The alleged abuse at issue here occurred before Plaintiff's eighteenth birthday. When Plaintiff turned 18 on May 1, 1998, the version of § 537.046 in place provided that Plaintiff could bring a claim either within 3 years of the purported abuse or within 5 years of his eighteenth birthday, whichever occurred later. § 537.046 (1990). Under this version of the statute, Plaintiff had until May 1, 2003 to bring a claim under § 537.046. May 1, 2003 came and went without Plaintiff filing a lawsuit. At that time, Relators had a vested right under Missouri law to be free from a lawsuit by Plaintiff under § 537.046.

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opinion in *State ex rel. Jones v. Nolte*, 165 S.W.2d 632 (Mo. banc 1942). However, neither Rule 82.24 governing writ proceedings nor the entire Missouri Rules of Civil Procedure so much as mentions such "answer to an answer" in prohibition proceedings. *Nolte* was decided long before the current version of the rules was enacted. Accordingly, Plaintiff's argument, abandoned in his argument section, bears no merit.

Plaintiff states that the 2004 version of the statute applies because this version states that it "shall apply to any action commenced on or after August 28, 2004, including any action which would have been barred by the application of the statute of limitation applicable prior to that date." § 537.046.3 (2004). In support, Plaintiff relies on cases from other jurisdictions holding that statutes of limitations are procedural in nature and thus may be applied retroactively.

In doing so, Plaintiff directly contradicts precedent from this Court holding such claims are barred by article I, section 13 of the Missouri Constitution. *Doe*, 862 S.W.2d at 341. This Court expressly found:

> This Court has held that once the original statute of limitation expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature, and therefore, ***article I, section 13 prohibits the legislative revival of the cause of action*** … Moreover, this appears to the be majority view among jurisdictions with constitutional provisions similar to *article I, section 13.* We see no reason to depart from our precedent.

Id. (internal citations omitted) (emphasis added).

When the legislature amended § 537.046 in 2004 to include a longer statute of limitations, Plaintiff's purported claim against Relators under this statute already had expired. Relators had a vested right to be free from Plaintiff's claim under this statute. The

legislature did not and does not have the authority to revive that cause of action. *Id.* ("and therefore, *article I, section 13* prohibits the legislative revival of the cause of action"). To do so would violate the Missouri Constitution and Relators' vested right. Moreover, Relators should not be subject to a claim under this statute simply because Plaintiff missed the applicable limitations period by so long that the legislature had time to amend the statute.

Binding Missouri law holds that Relators had a vested right to be free from a claim under § 537.046 long before Plaintiff filed this lawsuit. Accordingly, his claim against Relators fails as a matter of law.

4. Relators cannot be held vicariously liable for the purported conduct of Bradshaw.

Plaintiff seeks to hold Relators vicariously liable for Bradshaw's alleged conduct based on a theory of respondeat superior. Missouri law previously has held that the Boy Scouts of America and local councils like Heart of America Council, Boy Scouts of America have no control over troop volunteers like Bradshaw. *Wilson v. St. Louis Area Council, Boy Scouts of America,* 845 S.W.2d 568, 571 (Mo. App. 1992); *Hobbs v. Boy Scouts of America, Inc.,* 152 S.W.3d 367, 371 (Mo. App. 2004). Because control or the right to control is an essential element of respondeat superior, Relators cannot be held vicariously liable for the purported acts of Bradshaw.

Plaintiff again contends that Relators waived their argument that they lack the requisite relationship with Bradshaw to be held vicariously liable. Plaintiff contends that they waived this argument by failing to timely answer the petition and by withdrawing an affirmative defense based on the lack of such relationship.

As set forth above, Relators filed their answers with leave of court. Any waiver argument based on their purported failure to timely answer is moot. Moreover, because the lack of an agency relationship is not an affirmative defense, Plaintiff's waiver argument bears no merit.

Plaintiff seeks to hold Relators vicariously liable for the purported conduct of Bradshaw. As the party seeking to hold Relators liable, it is Plaintiff who bears the burden of proof. *Stiff v. Stiff,* 989 S.W.2d 623, 628 (Mo. App. 1999); *see Ewing-Cage v. Quality Productions, Inc.*, 18 S.W.3d 147 (Mo. App. 2000) ("The plaintiff has the burden of proving that an employee's tortious conduct was within the course and scope of his or her employment."). It is Plaintiff who has the burden of providing that Relators had the right of power to control Bradshaw. *Wilson,* 845 S.W.2d at 570.

As defendants, Relators have no burden of disproving Plaintiff's claim. This is an elementary principle of law. Relators, therefore, were not required to assert the lack of respondeat superior as an affirmative defense. *See Blumenkamp v. Tower Grove Bank & Trust Co.*, 483 S.W.2d 611, 613 (Mo. App. 1972) ("Obviously agency is not among the specifically enumerated affirmative defenses required to be pleaded.").

Plaintiff's argument that Relators should be held vicariously liable likewise fails in substance. He recites a litany of purported "facts" in an attempt to establish a master/servant relationship. Yet, nowhere in his brief does point to evidence to support these supposed "facts." Both his Point VI on this issue and his factual background section are completely devoid of a citation to the record. (*See* Brief of Respondent, Point IV and Procedural History and Factual Background, Facts Pertaining to Control, Agency and Vicarious Liability, p. 10-15). Plaintiff's bare assertions without requisite evidentiary support carry no weight in establishing such relationship.

Missouri courts previously have held that Boy Scouts of America and local councils similar to Heart of America Council, Boy Scouts of America lack control over volunteers such as Bradshaw. Absent this control, Relators cannot be held vicariously liable. *Wilson*, 845 S.W.2d at 571 (finding local council chartered by Boy Scouts of America could not be held vicariously liable for troop leader because "[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); *see also Hobbs*, 152 S.W.3d at 369 (finding Boy Scouts of American and local council could not be held directly liable because "[i]t is 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. Thus, these defendants had no supervisory authority over the decision to hold a camping trip, any transportation to the trip, or any activity of [the scout leader]").

In an attempt to avoid Missouri precedent, Plaintiff primarily relies upon two cases: *Mary Doe SD v. The Salvation Army*, No. 4:07CV362MLM, 2007 WL 2757119 (E.D.Mo. Sept. 20, 2007), an unpublished decision discussing whether the plaintiff sufficiently pleaded her claim against an unrelated organization for purposes of surviving a motion to dismiss; and *Lourim v. Swensen*, 977 P.2d 1157 (Or. 1999), a Connecticut case also discussing whether the plaintiff had sufficiently pleaded his claim for purposes of surviving a motion to dismiss. These cases do not apply, particularly since they contradict more analogous precedent from Missouri appellate courts.

As previously decided by Missouri appellate courts, Relators lacked the ability to control Bradshaw. Plaintiff offers no *evidence* to show otherwise. For these same reasons, Relators also may not be held directly liable to Plaintiff for negligence. Accordingly, to the extent Plaintiff seeks to hold Relators vicariously or directly liable for Bradshaw's purported conduct, these claims cannot be sustained.

5. This is a proper case for prohibition.

Plaintiff argues in his Point I that this is not a proper case for prohibition, arguing that Relators seek an advisory opinion. Plaintiff has already asserted his argument in his Motion to Quash and to Dismiss Relators' Petition for Writ of Prohibition and this Court has already rejected that argument by denying his motion. As such, Relators only briefly respond to Plaintiff's point on this issue.

Missouri law is clear that prohibition is "an appropriate remedy for an erroneous decision to overrule a party's motion for summary judgment." *Marianist Province*, 258 S.W.3d at 810. Indeed, this Court entered a permanent order in prohibition in that case where the trial court denied relators' summary judgment motion without specifying the reason for its denial. *Id.*

Prohibition is a proper remedy under these circumstance to avoid the expense and burden of trial when the claim clearly is barred. *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. 1985). Plaintiff argues that prohibition will not avoid such expenses and burdens because the motions are not dispositive of the case in that his claim against Bradshaw will remain pending. However, such claim does not involve Relators and has no bearing on whether prohibition is proper.

These arguments have already been considered and rejected by this Court in denying Plaintiff's Motion to Quash or to Dismiss the writ petition. These arguments should again be rejected. Prohibition is not only proper but also necessary here to afford Relators a remedy so that they are not forced to undergo the expense and burden of trial on a time-barred claim. Prohibition is Relators' only remedy.

CONCLUSION

Based on the above, this Court should make absolute its Preliminary Writ as the uncontested facts establish that Plaintiff's claim is time barred under the statutes of limitations set forth in §§ 537.046 (1990), 516.120 and 516.140; that Relators may not be held vicariously liable for Bradshaw's purported conduct; and that Relators may not be held directly liable to Plaintiff for Bradshaw's purported conduct.

This Court should make absolute its Preliminary Order of Prohibition by ordering Respondent to take no action in this case other than to vacate his order denying summary judgment for Relators and enter an order granting summary judgment in favor of Relators, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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Certificate of Service and Compliance

The undersigned certifies that true and accurate copies of Relators' Reply in Support of their Brief in printed form via U.S. Mail, postage prepaid and E-Mail were served this 23rd day of September, 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 4,980 words.

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