IN THE SUPREME COURT OF MISSOURI

No. SC94942

STATE OF MISSOURI ex rel. BOY SCOUTS OF AMERICA, et al.,

Relators,

vs.

THE HONORABLE CHARLES H. McKENZIE,
Circuit Court of Jackson County, Missouri, at Kansas City,

Respondent.

Writ of Prohibition from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Case No. 1116-CV09480, WD Case No. WD78440

BRIEF OF RESPONDENT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Rules

Page(s)

Constitutional Provisions

Statutory Provisions

Page(s)

Miscellaneous

Page(s)

Secondary Sources

JURISDICTIONAL STATEMENT

Respondent and plaintiff agree with relators that this Court has jurisdiction to adjudicate this matter pursuant to Art. V, § 4 of the Missouri Constitution. Respondent and plaintiff respectfully ask the Court to quash the preliminary writ, to dismiss relators' petition and lastly, to remand this matter for trial.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiff John Doe joined the Boy Scouts in 1992, when he was twelve years old. Soon thereafter, Scoutmaster (and defendant) Scott Bradshaw began raping and sexually abusing plaintiff. This abuse took place before, during and after Scouting-related events. The rapes and sexual abuse continued for years. Scoutmaster Bradshaw has asserted his Fifth Amendment right against self-incrimination. Accordingly, plaintiff's testimony is unrefuted.

A. Relevant Procedural History

Plaintiff was born on May 1, 1980. *See* Exhibit A, ¶ 1.[1] This lawsuit was filed on April 14, 2011, two weeks before plaintiff's thirty-first birthday. *Id.* Relators and Scoutmaster Bradshaw were timely served. Scoutmaster Bradshaw timely filed his answer. *See* Exhibit B.

On June 1, 2011, relators obtained from plaintiff an extension of time until July 20, 2011, for relators to file their answers. *See* Exhibit G, p. A51. Relators then obtained a second extension of time until August 5, 2011. *Id.* Respondent held a Case Management Conference ("CMC") on August 1, 2011. *Id.* Relators sent counsel to the CMC, but he inexplicably refused to enter an appearance. *Id.*

[1] The exhibits for this appeal have been a moving target. For the Court's convenience, all exhibits identified in this brief by a letter refer to relators' appendix. All exhibits identified by a number refer to Plaintiff and Respondent's Appendix ("PRApp").

The CMC was continued to August 25, 2011. *Id.* Again, relators refused to file answers. *Id.* As such, respondent continued the CMC to October 13, 2011 and ordered relators to file answers on or before that date. *Id.* Relators appeared at the October 13th, 2011 CMC, but again, they ignored respondent's order and did not file answers. *Id.* Respondent ordered relators to file their answers by October 28, 2011. *Id.* However, *no answers or responsive pleadings were filed by relators on or prior to October 28, 2011*. Plaintiff filed a motion seeking a default judgment on December 9, 2011. *Id.*, p. A50.[2] No answers or other responsive pleadings were filed on or before December 9, 2011. *Id.* On December 11, 2011, relators belatedly filed answers, without leave of the Court. *See* Exhibits E and F. Relators did not raise any constitutional challenges to R.S.Mo. § 537.046 [2004]. *Id.* Relators pled, without proper factual support, that plaintiff's claims were purportedly barred by R.S.Mo. §§ 516.120, 516.140, 537.046 "and/or any other applicable limitations period." *Id.*, pp. A31 and A43. Respondent deemed those answers "filed" as of January 19, 2012. *See* Exhibit G, p. A50-51.

Plaintiff timely moved to strike all of relators' affirmative defenses, or, alternatively, plaintiff asked for an order requiring relators to make their affirmative defenses more definite and certain.[3] Respondent granted, in part and denied, in part, this motion. *See* Exhibit H, pp. A54-55. Respondent ordered

[2] *See* PRApp, Exhibits 1 and 2.

[3] *See* PRApp, Exhibits 3, 4 and 5.

relators to make more definite and certain the affirmative defenses pled in ¶¶ C, D, E, F, I, J, K, L, M and O of their answers. *Id.*[4] Plaintiff's motion to strike all of relators' affirmative defenses was denied, without prejudice. *See* Exhibit H, p. A55. Relators filed amended answers. *See* Exhibits I and J. For the first time, relators: (1) pled that § 537.046 purportedly did not apply to relators; (2) cited the 1990 version of the statute; and (3) raised a constitutional challenge to the 2004 version of the statute. *Id.*, pp. A63-64 and A75-76. Relators also filed a "notice of compliance." *See* PRApp, Exhibit 6. Relators represented that "[i]n their Amended Answers, *the Boy Scout Defendants have withdrawn many of the original Affirmative Defenses that the Court ordered be more specifically pled*." *Id.*, ¶ 3 (emphasis added). Two of the affirmative defenses that relators withdrew from their initial answers were ¶ C (agency/employment) and ¶ F (lack of control, vicarious liability and respondeat superior). *See* Exhibits E, F, I and J.

Relator BSA filed a prior petition seeking a writ of prohibition pertaining to a discovery issue. *See* WD75680. That petition was denied. *Id.*

Respondent issued his order denying relators' summary judgment motions on December 16, 2014. *See* Exhibit V, pp. A366-68. Three months later, with court-ordered mediation and discovery pending, relators filed their second petition seeking a writ of prohibition in the Western District Court of Appeals. *See* WD78440. That petition was denied. *Id.*

[4] *See* Exhibits E and F.

Relators filed their petition seeking a writ of prohibition from this Court on April 22, 2015. On June 30, 2015, the Court entered a preliminary writ. Pursuant to the Court's order, on July 27, plaintiff and respondent timely filed a joint return, answer and response to relators' petition. *See* Exhibit BB, pp. A1293-1378. Plaintiff and respondent pled significant facts along with numerous affirmative defenses. *Id.* Relators failed to file a reply. Accordingly, all of the facts pled by plaintiff and respondent, as well as their affirmative defenses, should be accepted as true (and deemed admitted) by the Court. *State ex rel. Jones v. Nolte,* 165 S.W.2d 632, 634 (Mo.banc 1942).

B. Plaintiff's Claims

Count I of plaintiff's petition brings claims against all of the defendants under R.S.Mo. § 537.046 [2004], the Childhood Sexual Abuse Statute. *See* Exhibit A. In Count I, plaintiff asserts both vicarious claims and direct claims against relators. With respect to vicarious liability, plaintiff has alleged that:

> *Pursuant to R.S.Mo. § 537.046, while acting in the course and scope of his agency and while using the authority and position of trust as a Scoutmaster or as an authorized adult volunteer, Bradshaw engaged in "childhood sexual abuse" of plaintiff. Specifically, his misconduct included rape, sexual assault, sodomy, sexual misconduct and/or sexual abuse. The Boy Scout defendants are vicariously liable or are liable under the doctrine of respondeat*

superior pursuant to R.S.Mo. § 537.046 and related Missouri law for the actions of Bradshaw set forth herein.

Id. With respect to direct liability, plaintiff has alleged that:

The Boy Scout defendants are directly liable to plaintiff under R.S.Mo § 537.046 and related Missouri law in that they: (a) aided and abetted Bradshaw; (b) negligently failed to properly vet Bradshaw before allowing him to be a Scoutmaster or an authorized adult volunteer; and/or (c) negligently failed to properly supervise and monitor Bradshaw's interactions with plaintiff. The Boy Scout defendants assumed a duty to protect plaintiff and to provide him with a safe Scouting experience. Restatement (Second) of Torts, §§ 323 and 324A. The Boy Scout defendants negligently breached that duty by allowing Bradshaw to victimize plaintiff and further, by putting him in a position to do so. This negligence caused or contributed to cause injury and damage to plaintiff, resulting in direct liability under R.S.Mo. 537.046.

Id.

Count II of plaintiff's petition alleges battery. The only claims against relators in Count II are for vicarious liability for the battery committed by Bradshaw. *Id.* Count III of plaintiff's petition alleges negligence against relators.

The Boy Scout defendants had a duty to protect plaintiff and to provide him with a safe Scouting experience. Restatement (Second)

of Torts, §§ 323 and 324A. The Boy Scout defendants breached that duty and failed to exercise reasonable care in the following respects: (a) negligently failing to properly vet Bradshaw before allowing him to be a Scoutmaster or an authorized adult volunteer; (b) negligently failing to properly supervise and monitor Bradshaw's interactions with plaintiff; and/or (c) negligently allowing Bradshaw to engage in illegal sexual activity and to develop an on-going sexual relationship with plaintiff before, during and after Scouting activities. Furthermore, at all relevant times, the Boy Scout defendants knew or should have known that sexual predators were using Scouting to engage in improper sexual relationships with minors like plaintiff. The Boy Scout defendants had a duty to ensure that people like Bradshaw did not use Scouting to secure victims for abuse. The Boy Scout defendants breached that duty and failed to exercise ordinary care with respect to Bradshaw and plaintiff.

Id.

C. Facts Pertaining to Fraud, Improper Acts and Equitable Tolling

Plaintiff pled relators' fraud and improper acts in his petition. *Id.* Relators admitted those allegations by failing to timely file answers.

Notwithstanding the waiver, plaintiff offered significant evidence and testimony in support of his argument that relators engaged in fraud and improper acts and/or that justifies equitable tolling. *See* Exhibit FF, pp. A1789-1800;

Exhibit GG, pp. A1821-1826 (¶¶ 89-131), pp. A1827-1828 (¶¶ 142-148), pp. A1828-1833 (¶¶ 148-189); pp. A1837-1843 (¶¶ 204-258); Exhibit O, pp. A148-151. *Inter alia*, this evidence and testimony establishes the following:

- Relators had decades of *actual notice* that adult leaders were sexually abusing Scouts. In the twenty years prior to when Scoutmaster Bradshaw began abusing plaintiff, BSA banned at least 1,871 people for sexually abusing kids, *an average of 68 people per year*. Over that same time period, at least 2,071 Scouts were abused (many more than once) for *an average of 99 victims per year*. Relators hid this information from parents of potential Scouts.[5]

[5] This information is contained in the "Ineligible Volunteer" or "IV files." The "IV files" contain decades of information and notice to relator with respect to who sexually abuses Scouts, how that abuse occurs and where it occurs. These files are the best evidence of whether policies, procedures and programs implemented by relators, ostensibly to protect Scouts from sexual abuse, are effective. *See T.S., et al. v. Boy Scouts of Am., et al.*, 138 P.3d 1053 (Wash. 2006) and *Jack Doe 1 v. Boy Scouts of Am., et al.*, 280 P.3d 377 (Or. 2012) (discussing the "IV files" and their import in sexual abuse cases against relator BSA and entities like relator HOA-BSA). While plaintiff was being abused by Scoutmaster Bradshaw, relators kept these files (and the information they contained) confidential. The fact that relators hid this information from Scouts and their families could not be more relevant to

- After discovering the abuse of his son, plaintiff's father contacted a Scout representative who assured him the relators would "take care of it . . . ." Plaintiff's father dissuaded plaintiff from pursing a civil lawsuit against relators because he thought relators were good organizations. After dissuading plaintiff from filing a civil lawsuit against relators, plaintiff's father learned for the first time that relators had a long history of Scout leaders sexually abusing kids and moving Scout leaders who abused kids from troop to troop. Prior to finding Bradshaw sexually abusing plaintiff, plaintiff's father had no reason to believe that there might be a problem with child molesters involved with Scouting. Plaintiff's father thought Scoutmasters were good mentors for Scouts. No one involved in Scouting ever warned plaintiff's father that there was a potential that Scoutmasters might be potential child molesters. No one involved in Scouting ever warned plaintiff's father that he should police the interaction between Bradshaw and plaintiff because there might be an inappropriate sexual nature to that interaction. Prior to finding Bradshaw sexually abusing plaintiff, plaintiff's father did not know

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whether all applicable statutes of limitations should be equitably estopped or otherwise tolled by relators' misconduct.

that there were prior reported cases of Scout leaders sexually abusing Boy Scouts.

- When plaintiff got involved in Scouting, relators didn't report child abusers to the police because BSA "wasn't required to" and further, because BSA didn't want to "wreck the[] reputation [of the abusers] at all."
- Relators blame the victims for being abused to protect their organization. True to form, relators blame plaintiff for his abuse in this case.
- Relators regularly spoliate evidence and engage in obfuscation to impede investigations into the sexual abuse of children. Relators have spoliated and allowed the spoliation of significant evidence in this case.
- Lastly, relators work in concert to hide the information they obtain regarding sexual abuse, even from the victims. Relators hid critical records from plaintiff in this case.

D. <u>Facts Pertaining to Control, Agency and Vicarious Liability</u>

Relators admitted all issues pertaining to control, agency and vicarious liability by failing to timely file answers. Further, they expressly withdrew these issues from the case.

Notwithstanding the waiver and withdrawal, plaintiff offered significant evidence and testimony in opposition to relators' second summary judgment

motion. *See* Exhibit JJ, pp. A2478-2495; Exhibit KK, pp. 2541-2571.[6] *Inter alia*, this evidence and testimony establishes the following:

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[6] Relators again argue that plaintiff has "admitted" the issues in the affidavits filed in support of relators' second summary judgment motion by not submitting opposing affidavits. This argument ignores the facts and the law. Plaintiff provided respondent with over thirty authenticated exhibits, including *contrary sworn prior deposition testimony from the very witnesses who provided the affidavits*. *See* Exhibit KK, pp. A2544-48; A2551-59. To the extent the affiants' representations are contrary to their prior sworn testimony in Rule 57.03(b)(4) depositions, plaintiff respectfully objects to and moves to strike the affidavits. *See State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo.banc 2008) (testimony of Rule 57.03(b)(4) representatives "will be admissible against and binding on" relators). The applicable rule is set forth in Mo.R.Civ.P 74.04(c)(2). Under that rule, "[a] denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits *or* affidavits that demonstrate specific facts showing that there is a genuine issue for trial." Mo.R.Civ.P 74.04(c)(2) (emphasis added). Plaintiff opposed relators' affidavits with discovery (prior sworn testimony of the affiants that contradicted the affidavits) and authenticated exhibits. That is proper under Rule 74.04.

- Relators set and enforce the standards for both adults and youth to participate in Scouting. Relators decide who can and who cannot participate in Scouting at the troop level, based on, *inter alia,* their sexual orientation.
- Relators refer to Scouts as "our youth." In "*[t]he BSA's Commitment to Safety*," relators assure parents that "[w]e want you to know that the safety of *our youth*, volunteers, staff and employees cannot be compromised," that "[w]e must protect *our youth* as part of *our program* . . . . In a sense, safety is our license to operate," and that "[p]arents who entrust Scout leaders with their children justifiably expect them to return uninjured." *Id.* (emphasis added).
- Plaintiff was sexually abused by Scoutmaster Bradshaw at facilities owned and/or operated by realtors.
- Plaintiff was sexually abused by Bradshaw before, during and after Scouting events sanctioned and required by realtors.
- Relators promulgate standards and safety guides for the camps at which plaintiff was sexually abused by Bradshaw.
- Relators have extensive involvement with and control of the day-to-day Scouting activities.

- Relators promulgate and are charged with enforcing the very rules and regulations pertaining to sexual abuse that are at issue in this case.
- According to both of relators' corporate representatives, relators establish and enforce the rules designed to protect young scouts from sexual abuse. Those rules are meant to apply from the den and troop level all of the way up the Scouting ladder to realtors.
- In 1992, relators promulgated "Procedures for Maintaining Standards of Membership Including How to Deal with Child Abuse." Relators dictated that the procedures "must be followed at the council, regional and national levels . . ." and that "[c]onscientious adherence to these procedures is mandatory." *Those procedures were not followed in this case*.
- Relators set and enforce the standards for both adults and youth to participate in Scouting. Relators decide who can and who cannot participate in Scouting at the troop level, based on, *inter alia*, their sexual orientation.
- Relators refer to Scouts as "our youth." In "*[t]he BSA's Commitment to Safety*," relators assure parents that "[w]e want you to know that the safety of *our youth*, volunteers, staff and employees cannot be compromised," that "[w]e must protect *our youth* as part of *our program* . . . . In a sense, safety is our license to operate,"

and that "[p]arents who entrust Scout leaders with their children justifiably expect them to return uninjured." *Id.* (emphasis added).

- Plaintiff was sexually abused by Scoutmaster Bradshaw at facilities owned and/or operated by realtors.
- Plaintiff was sexually abused by Bradshaw before, during and after Scouting events sanctioned and required by realtors.
- Relators promulgate standards and safety guides for the camps at which plaintiff was sexually abused by Bradshaw.
- Relators have extensive involvement with and control of the day-to-day Scouting activities.
- Relators promulgate and are charged with enforcing the very rules and regulations pertaining to sexual abuse that are at issue in this case.
- According to both of relators' corporate representatives, relators establish and enforce the rules designed to protect young scouts from sexual abuse. Those rules are meant to apply from the den and troop level all of the way up the Scouting ladder to realtors.
- In 1992, relators promulgated "Procedures for Maintaining Standards of Membership Including How to Deal with Child Abuse." Relators dictated that the procedures "must be followed at the council, regional and national levels . . ." and that

"[c]onscientious adherence to these procedures is mandatory." *Those procedures were not followed in this case*.

- Bradshaw admits that he was selected and approved by relators as a Scoutmaster for plaintiff's Boy Scout troop. He admits that he was selected and approved by relators as a Scoutmaster and that he was expected and intended by relators to educate and train young boys, including plaintiff, in morality, patriotism and assorted civil and life skills. He admits that relators empowered him to perform all duties as a Scoutmaster including educational and tutorial services, counseling, moral guidance, religious instruction and other duties. He admits that, at all relevant times, he was an agent and employee of relators and that he acted with the actual or apparent authority of relators. And he admits that relators knew or should have known of his interactions with all of the Scouts in Troop 46, including plaintiff.

Points Relied On

I. **The preliminary writ of prohibition should be quashed and this case should be remanded for trial because this is not a proper case for prohibition in that relators are asking this Court to issue an improper advisory opinion.**

Mo.R.Civ.P. 84.22(a)

State v. Self, 155 S.W.3d 756, 761 (Mo.banc 2005)

II. **The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators waived and withdrew all of the affirmative defenses raised in their summary judgment motions in that they failed to timely file answers that properly raised affirmative defenses, they were in default and they affirmatively withdrew issues from the case in response to one of respondent's orders.**

Mo.R.Civ.P. 55.08

ITT Commercial Fin. Corp. v. Mid–America Marine Supply Corp.,

854 S.W.2d 371 (Mo.banc 1993)

State v. Wickizer, 583 S.W.2d 519 (Mo.banc 1979)

III. **The preliminary writ of prohibition should be quashed and this case should be remanded for trial because plaintiff's claims were timely**

filed under R.S.Mo. § 537.046 [2000] in that they were filed less than ten years after plaintiff reached the age of twenty-one.

R.S.Mo. § 537.046 [2004]

Mo.R.Civ.P. 55.08

Doe v. Roman Catholic Diocese of Jefferson City,

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

Canton Textile Mills, Inc. v. Lathem, 317 S.E.2d 189 (Ga. 1984)

IV. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because plaintiff's claims against relators pursuant to R.S.Mo. § 537.046 [2000] applies to non-perpetrators as well as perpetrators in that the Missouri Legislature has not excluded claims against non-perpetrators from the scope of the statute.

R.S.Mo. § 537.046 [2000]

Mo.R.Civ.P. 55.08

Hoover's Dairy, Inc. v. Mid-American Dairymen, Inc., 700

S.W.2d 426 (Mo.banc 1985)

V. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because any and all applicable statutes of limitation applicable to plaintiff's claims have been and are tolled in that relators engaged in fraud and/or improper acts as contemplated by R.S.Mo. § 516.280.

R.S.Mo. § 516.280

Howell v. Murphy, 844 S.W.2d 42 (Mo.App. 1992)

Zahner v. Dir. of Revenue, 348 S.W.3d 97 (Mo.App. 2011)

VI. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators can be held vicariously liable for Scoutmaster Bradshaw's abuse of plaintiff in that relators controlled Bradshaw's conduct and further, in that there are significant genuine issues of contested material fact that precluded summary judgment in favor of relators.

Mary Doe SD v. The Salvation Army, WL 2757119 (E.D.Mo. 2007)

Lourim v. Swensen, 977 P.2d 1157 (Or. 1999)

Teitgens v. Gen. Motors Corp., 418 S.W.2d 75 (Mo. 1967)

VII. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators can be held directly liable for Scoutmaster Bradshaw's abuse of plaintiff in that Bradshaw was an agent or servant of both relators, relators controlled Bradshaw's conduct, the abuse of plaintiff was a natural incident of relators' business and further, in that there are significant genuine issues of contested material fact that precluded summary judgment in favor of relators.

Daniels v. Senior Care, Inc., 21 S.W.3d 133 (Mo.App. 2000)

Bach v. Winfield-Foley Fire Prot. Dist., 257 S.W.3d 605 (Mo.banc 2008)

ARGUMENT

Relators have not established a right to summary judgment. Realtors' petition should be denied.

Standard of Review

"Prohibition is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856–57 (Mo.banc 2001). "A writ of prohibition will issue to prevent an abuse of discretion, irreparable harm to a party, or an extra-jurisdictional act and may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo.banc 2008).

The denial of a motion for summary judgment is reviewed under the same standard of review as an order granting summary judgment. *See State ex rel. Pub. Housing Agency of the City of Bethany v. Krohn*, 98 S.W.3d 911, 913 (Mo.App. 2003). Appellate review of a motion for summary judgment is *de novo*. *Kinnaman–Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 764 (Mo.banc 2009). The Court reviews the record in the light most favorable to the party against whom summary judgment is sought. *City of Bethany*, 98 S.W.3d at 913.

When the issuance of the writ depends on the interpretation of a statute, the Court reviews the statute's meaning *de novo*. *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo.banc 2008). In so doing, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute. *Id.*

I. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because this is not a proper case for prohibition in that relators are asking this Court to issue an improper advisory opinion.

A writ should not issue "in any case wherein adequate relief can be afforded by an appeal . . . ." Mo.R.Civ.P. 84.22(a). The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed because relators can obtain any relief to which they may be entitled in an appeal after trial and the entry of a final judgment. Rule 84.22(a).

Further, there has been no showing that a writ of prohibition will prevent unnecessary, inconvenient and/or expensive litigation. Relators' motions for summary judgment would not have been dispositive of the case. Plaintiff's claims against Scoutmaster Bradshaw remain, irrespective of relators' motions. And lastly, relators will likely be involved in litigation addressing issues regarding indemnity, contribution, vicarious liability and/or insurance coverage with respect to any verdict plaintiff obtains against Bradshaw.[7]

Respondent's order to which this appeal pertains (Exhibit V, pp. A366-68) does not specify the grounds on which the summary judgment motions were denied. As such, this Court must necessarily engage in speculation as to whether respondent reached his decision, in whole or in part, on issues of waiver,

[7] Relator BSA routinely engages in such litigation. *See* PRApp, Exhibits 7 and 8.

withdrawal, fraudulent concealment, estoppel or as a sanction. Or, respondent may have concluded there were genuine issues of fact precluding summary judgment or that relators were not entitled to summary judgment as a matter of law.

Given the procedural history of this case and the record, respondent and plaintiff respectfully submit that the preliminary writ of prohibition is improper. Any permanent order of prohibition would necessarily be an advisory opinion in which the Court speculates as the basis (or bases) for respondent's rulings and potentially addresses the constitutionality of a statute that may not be ripe nor proper for appellate review.

"[I]t is not this Court's prerogative to offer advisory opinions on hypothetical issues . . . ." *State v. Self*, 155 S.W.3d 756, 761 (Mo.banc 2005); *see also State ex inf. Danforth v. Cason*, 507 S.W.2d 405, 418 (Mo.banc 1973) ("[W]e do not render advisory opinions"); *State ex rel. Mo. Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 536 (Mo.banc 1968) ("[T]he Court does not render advisory opinions"). Advisory opinions are disfavored by Missouri law and have been condemned by this Court. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 154, n. 6 (Mo.banc 2010). To render what is purely an advisory opinion "is outside this Court's authority." *City of Springfield v. Sprint Spectrum L.P.*, 203 S.W.3d 177, 188 (Mo.banc 2006).

The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed because this is not an appropriate case for an original remedial writ.

II. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators waived and withdrew all of the affirmative defenses raised in their summary judgment motions in that they failed to timely file answers that properly raised affirmative defenses, they were in default and lastly, they affirmatively withdrew issues from the case in response to one of respondent's orders.

Affirmative defenses must be both timely and properly pled.

> In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances . . . . A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.

Mo.R.Civ.P. 55.08. Properly and timely pleading of affirmative defenses is not optional. Indeed, the term "shall" is used twice in Rule 55.08.

Relators ignored repeated orders from respondent and refused to timely file answers raising affirmative defenses. That misconduct alone was sufficient to justify striking all of relators' affirmative defenses.[8]

More importantly, relators were in default. It is uncontroverted that relators

[8] Relators' litigation antics over the duration of this case have caused extensive delays in this case, as well as unnecessary expense.

failed to timely plead any affirmative defenses before plaintiff's motion for default judgment was filed. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, an interlocutory order of default may be entered against that party." Mo.R.Civ.P. 74.05(b). "If the defendant shall fail to file his answer or other pleading within the time prescribed by law or the rules of practice of the court, and serve a copy thereof upon the adverse party, or his attorney, when the same is required, an interlocutory judgment shall be given against him by default." R.S.Mo. § 511.110. The purpose of these rules is to preclude a defendant who is in default from untimely answering or raising a defense to a pleaded right of recovery. *See Smith v. Sayles*, 637 S.W.2d 714 (Mo.App. 1982).

Respondent's order of January 19, 2012, allowed relators to file responsive pleadings out of time to avoid a default judgment. Plaintiff timely moved to strike all of relators' affirmative defenses, raising, *inter alia*, the waiver issue. Respondent denied plaintiff's motion to strike "without prejudice." The waiver issue was made ripe when relators sought summary judgment on affirmative defenses they failed to timely plead. In light of the record, relators are not entitled to judgment as a matter of law on affirmative defenses they waived. *See, e.g.*, *Duncan v. Booker*, 816 S.W.2d 705 (Mo.App. 1991) (plaintiff waived objection to untimely affirmative defense by failing to file a motion for default judgment and by failing to object when the defendant sought to raise the affirmative defense);

Great Western Trading Co. v. Mercantile Trust Co. Nat'l Assoc., 661 S.W.2d 40 (Mo.App. 1993) (same).[9]

Not only did relators fail to timely plead any affirmative defenses, all of the affirmative defenses that were belatedly pled and on which relators' summary judgment motions were based violated Mo.R.Civ.P. 55.08 in that relators failed to plead facts in support of each of those affirmative defenses. For summary judgment to be granted to a defendant on the basis of an affirmative defense, the movant must establish "that there is no genuine dispute as to the existence of *each* of the facts necessary to support movant's *properly-pleaded* affirmative defense." *ITT Commercial Fin. Corp. v. Mid–America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo.banc 1993) (second emphasis added). Relators were obligated to "set forth all applicable affirmative defenses," in a responsive pleading and include for each defense "a short and plain statement of the facts showing that the pleader is entitled to the defense . . . ." Mo.R.Civ.P. 55.08. Bare legal assertions are insufficient to plead an affirmative defense. *ITT Commercial,* 854 S.W.2d at 383. Instead, "[a]n affirmative defense is asserted by the *pleading of additional facts* not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' allegations are sustained by the evidence." *Id.* (internal quotation marks omitted). In other words, the factual

[9] Plaintiff filed a motion for default judgment and repeatedly preserved his objections to relators' efforts to belatedly raise affirmative defenses.

basis for an affirmative defense must be set forth in the same manner prescribed for pleading claims. *Curnutt v. Scott Melvin Transp., Inc.*, 903 S.W.2d 184, 192 (Mo.App. 1995). "'A pleading that makes a conclusory statement and does not plead the specific facts required to support the affirmative defense fails to adequately raise the alleged affirmative defense, and the alleged affirmative defense fails as a matter of law.'" *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 38 (Mo.App. 2013) [quoting *Echols v. City of Riverside,* 332 S.W.3d 207, 211 (Mo.App. 2010)].

Relators failed to plead sufficient facts in support of their belated affirmative defenses that purport to raise certain statutes of limitation. *See* Exhibits E, F, I and J. As such, relators' affirmative defenses pertaining to statutes of limitation are legally deficient as a matter of law. Mo.R.Civ.P. 55.08.

The same fatal flaws doom the affirmative defenses on which relators based their second summary judgment motion. Respondent ordered relators to make all of these affirmative defenses more definite and certain, warning that the failure to comply with Rule 55.08 could result in respondent striking relators affirmative defenses. *See* Exhibit H, pp. A54-55. In response to this order, *relators affirmatively withdrew from the case all of the affirmative defenses on which they later based their second summary judgment motion*. *See* PRApp, Exhibit 6. Notwithstanding the fatal pleading problems, relators are not entitled to summary judgment on issues they intentionally and affirmatively withdrew from the case in response to a court order. A party is not entitled to summary judgment on issues

not properly pleaded. *Memco, Inc. v. Chronister*, 27 S.W.3d 871, 875 (Mo.App. 2000). This is made clear in Rule 74.04(a), providing that summary judgment can only be sought "upon all or any part of the *pending* issues." (emphasis added.)

Lastly, relators argue that R.S.Mo. § 537.046 [2004], the Childhood Sexual Abuse Statute, is unconstitutional. However, challenges to the constitutionality of statutes need to be made and properly preserved at the soonest possible opportunity. *State v. Wickizer*, 583 S.W.2d 519, 522–23 (Mo.banc 1979). By not filing answers on or prior to October 28, 2011, relators waived any constitutional challenges to § 537.046 [2004]. Relators failed to raise any constitutional challenges in their initial answers. *See* Exhibits E and F. Finally, by failing to comply with the fact pleading requirements of Rule 55.08, relators failed to properly preserve any constitutional issues for appellate review.

Relators waived, failed to timely or properly plead and withdrew all of the issues raised in their two summary judgment motions. They were in default in this case as a result of their deliberate litigation decision to ignore repeated orders issued by respondent. Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

III. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because plaintiff's claims were timely filed under R.S.Mo. § 537.046 [2000] in that they were filed less than ten years after plaintiff reached the age of twenty-one.

This case was brought pursuant to R.S.Mo. § 537.046 [2004], the Childhood Sexual Abuse Statute. For the Court's convenience, here is the entire statute:

> *1. As used in this section, the following terms mean:*
>
> > *(1)* ***"Childhood sexual abuse"****, any act committed by the defendant against the plaintiff which act occurred when the plaintiff was under the age of eighteen years and which act would have been a violation of section 566.030, 566.040, 566.050, 566.060, 566.070, 566.080, 566.090, 566.100, 566.110, or 566.120, RSMo, or section 568.020, RSMo;*
> >
> > *(2)* ***"Injury"*** *or* ***"illness"****, either a physical injury or illness or a psychological injury or illness. A psychological injury or illness need not be accompanied by physical injury or illness.*
>
> *2. Any action to recover damages from injury or illness caused by childhood sexual abuse in an action brought pursuant to this section shall be commenced within ten years of the plaintiff attaining the age of twenty-one or within three years of the date the plaintiff discovers,*

> *or reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse, whichever later occurs.*
>
> *3. This section 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.*

R.S.Mo. § 537.046 [2004] (bold in original, underlining added). *See* PRApp, Exhibit 9. There are three enumerated paragraphs in this statute. The first paragraph is definitional, the second sets the statute of limitation and the third states the claims to which the statute applies.

It is uncontroverted that this case was filed less than ten years after plaintiff reached the age of twenty-one and further, that it was commenced after August 28, 2004. Under R.S.Mo. § 537.046 [2004], this case was timely filed. As such, relators are not entitled to summary judgment.

Citing *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 339 (Mo.banc 1993), relators argue that § 537.046 [2004] is unconstitutional in that subsection 3 purportedly violates Art. I, § 13 of the Missouri Constitution. This argument fails for several reasons. First, *Doe* applied to an earlier version of the Childhood Sexual Abuse Statute, not the 2004 version. Second, relators waived and failed to timely and properly preserve any constitutional challenges.

Third and most importantly, § 537.046 [2004] is not unconstitutional. The statute simply made a retroactive procedural change and is neither retrospective

nor is it an *ex post facto* statute. R.S.Mo. § 537.046 [2004] does not take away a vested right. *See Sheehan v. Oblates of St. Francis*, 15 A.3d 1247 (Del. 2011); *see also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945); *Danzer & Co., Inc. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925); *and Campbell v. Holt*, 115 U.S. 620, 628 (1885). Statutes of limitation are procedural, not substantive. Statutes of limitation merely bar a remedy; they do not extinguish the underlying right. *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 114 (Mo.App. 2006) [citing *Maddox v. Truman Med. Ctr., Inc.*, 727 S.W.2d 152, 155 (Mo.App. 1987)].[10] As such, R.S.Mo. § 537.046 [2004] cannot be held to violate Art. I, § 13

[10] Numerous courts have held that retroactive application of statutes of limitation is not unconstitutional. *See, e.g., San Carlos Apache Tribe v. Super. Ct. ex rel. Cnty. of Maricopa*, 972 P.2d 179, 192-93 (Ariz. 1999), *superseded by statute*, ARIZ. REV. STAT. ANN. § 12-505 (2010), *Liebig v. Super. Ct.*, 257 Cal. Rptr. 574 (Cal. Ct. App. 1989), *Mudd v. McColgan*, 183 P.2d 10, 13 (Cal. 1947), *Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319, 322 (Colo. App. 2009) (citing *In re Estate of Randall*, 441 P.2d 153, 155 (Colo. 1968)), *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1005 (Colo. 1997) (en banc), *Roberts v. Caton*, 619 A.2d 844 (Conn. 1993), *Whitwell v. Archmere Acad., Inc.*, C.A. No. 07C-08-006 (RBY), 2008 WL 2735370, at *3, 7-8 (Del. Super. Ct. April 16, 2008), *Vaughn v. Vulcan Materials Co.*, 465 S.E.2d 661 (Ga. 1996), *Gov't Emps. Ins. Co. v. Hyman*, 975 P.2d 211 (Haw. 1999), *Roe v. Doe*, 581 P.2d 310, 314 (Haw. 1978),

Henderson v. Smith, 915 P.2d 6, 10 (Idaho 1996), *Hecla Mining Co. v. Idaho State Tax Comm'n*, 697 P.2d 1161, 1164 (Idaho 1985), *Metro Holding Co. v. Mitchell*, 589 N.E.2d 217, 219 (Ind. 1992), *Ripley v. Tolbert*, 921 P.2d 1210, 1224 (Kan. 1996), *Shirley v. Reif*, 920 P.2d 405, 411-12 (Kan. 1996), *Kienzler v. Dalkon Shield Claimants Trust*, 686 N.E.2d 447, 451 (Mass. 1997), *Rookledge v. Garwood*, 65 N.W.2d 785, 791 (Mich. 1954), *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 419-20 (Minn. 2002), *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 778 (Mont. 1993), *Panzino v. Cont'l Can Co.*, 364 A.2d 1043, 1045-46 (N.J. 1976), *Bunton v. Abernathy*, 73 P.2d 810, 811-12 (N.M. 1937), *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079 (N.Y. 1989), *In Interest of W.M.V.*, 268 N.W.2d 781, 786 (N.D. 1978), *Pratte v. Stewart*, 929 N.E.2d 415, 422 (Ohio 2010), *McFadden v. Dryvit Sys., Inc.*, 112 P.3d 1191, 1195 (Or. 2005), *McDonald v. Redevelopment Auth. of Allegheny Cnty.*, 952 A.2d 713, 717-18 (Pa. Commw. Ct. 2008), *Bible v. Dep't of Labor & Indus.*, 696 A.2d 1149, 1156 (Pa. 1997), *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220, 224 (S.D. 1997), *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914, 923 (Wash. 2006) (en banc), *superseded by statute*, WASH. REV. CODE § 25.15.303 (2013), *as recognized in Chadwick Farms Owners Ass'n v. FHC, LLC*, 207 P.3d 1251, 1260 (Wash. 2009) (en banc), *RM v. State Dep't of Family Servs., Div. of Public Servs.*, 891 P.2d 791, 792 (Wyo. 1995) (all holding that retroactive application of statutes of limitation is not unconstitutional).

of the Missouri Constitution.[11] And even if it did, relators waived this issue by failing to raise the alleged unconstitutionality of the statute at their earliest possible opportunity.

Last month, in *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357 (Conn. 2015), the Connecticut Supreme Court issued a scholarly opinion in a case that challenged the constitutionality of the Connecticut Childhood Sexual Abuse statute. Citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) and *Campbell v. Holt*, 115 U.S. 620 (1885), the court noted that "[t]he relevant federal case law strongly favors the plaintiff, and virtually begs the state constitutional question presented in the present appeal." *Doe*, 317 Conn. at *23. *Campbell* and *Chase Securities Corp.* stand for the rule that there is no absolute vested right in a statute of limitations defense absent entry of a final judgment, as a matter of federal due process. *Id.* at *25.

The *Doe* court also reviewed relevant state law. It first noted that eighteen states follow, at least in part, the federal approach and allow the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims,

[11] The Court is respectfully referred to *Canton Textile Mills, Inc. v. Lathem*, 317 S.E.2d 189, 192 (Ga. 1984), in which the Georgia Supreme Court allowed the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims *despite a Georgia constitutional provision prohibiting retroactive legislation that is virtually identical to Art. I, § 13 of the Missouri Constitution.*

while twenty-four states disagree. *Id.* at *30-31. The court further noted that two states seemingly straddle the two camps made by the other states, with a foot planted in each camp. *Id.* at *31.

"Although both parties can claim some support from the sister state case law factor, we conclude that, on balance, it ultimately favors the position of the plaintiff." *Id.* at *32. In joining the states that allowed the retroactive expansion of statutes of limitation to revive otherwise time-lapsed claims, the *Doe* court concluded that the public policy behind childhood sexual abuse statutes compelled its decision that such statutes were, in fact, constitutional. *Id.* at *33-34.[12]

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[12] The public policy behind this type of statute is to lengthen limitations periods for victims of childhood sexual abuse, not shorten them, and to open previously closed courthouse doors. "Legislation that eliminates the civil [statute of limitations] or includes a discovery rule is supported by various studies on the long-term effects of child molestation and the likely delay in disclosure. Researchers in various studies have found—specifically in men who were sexually abused as children—that long-term adaptation will often include sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia and confusion about sexual orientation, problems with intimacy, shame, guilt and self-blame, low self-esteem, negative self-images, increased anger, and conflicts with authority figures. There is also an increased rate of substance abuse, a tendency to deny and delegitimize the traumatic

experience, symptoms of Post-Traumatic Stress Disorder, and increased probability of fear and depression for all victims. Often, it is not until years after the sexual abuse that victims experience these negative outcomes. As clinician Mic Hunter has observed: 'Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later . . . .'" Marci H. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 Brook. L.Rev. 397, 404–405 (2014) (footnotes omitted). "[L]awsuits filed under window legislation have led to the public identification of previously unknown child predators, which reduces the odds that children will be abused in the future." *Id.* at 405. Leading experts endorse statutes like § 537.046 [2004] as part of the solution to this problem, and argue in support of their constitutionality, even under heightened scrutiny. *See* Hamilton, *supra*, p. 404; *see also* Erin Khorram, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal*, 16 U.C. Davis J. Juv. L. & Pol'y 391, 425 (2012) (arguing that "immunity from civil suit is a vested property right, and a deprivation of such is a violation of the Fourteenth Amendment without a compelling state interest," but contending that "[p]rotecting children through granting legal access is a compelling state interest that should be trumpeted as such"); William A. Gray, *A Proposal for Change in Statutes of Limitations in*

Relators argue that plaintiff's claims are subject to the 1990 version of R.S.Mo. § 537.046, not the 2004 version and as such, relators contend that plaintiff's claims under the statute are time-barred because they were not filed on or before May 1, 2003.[13] Relators are wrong.

First, for all the reasons discussed *supra*, this issue was waived. Relators violated numerous Court orders in failing to raise any statute of limitations issues on or before October 28th, 2011. *That is undisputed*. Further, relators failed to plead any meaningful facts in support of this affirmative defense, in violation of

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Childhood Sexual Abuse Cases, 43 Brandeis L.J. 493, 509 (2004–2005) (noting that "revival statutes . . . help in cases where the applicable statute of limitations has already passed," and urging states to "endeavor to permanently solve the problem of statutes of limitations in childhood sexual abuse cases by drafting forward-thinking legislation designed to confront the myriad facets of the childhood sexual abuse problem"); Jenna Miller, *The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse*, 17 Cardozo J.L. & Gender 599, 624 (2010–2011) ("state courts that interpret their state constitutions as protecting an individual's reliance on statutes of limitations should either alter this interpretation or consider amending their state constitution for the sake of child sexual abuse victims").

[13] May 1, 2003 was five years after plaintiff's eighteenth birthday. *See* R.S.Mo. § 537.046 [1990].

Rule 55.08. Again, *that is undisputed.* Lastly, when they finally got around to belatedly filing answers, *it is undisputed* that relators failed to specifically plead the 1990 version of the statute as opposed to the 2004 version.

Relators argue that plaintiff's claims for battery are time-barred because those claims purportedly expired on May 1, 2003. In support of this argument, relators cite R.S.Mo. §§ 516.140 and 516.170, asserting that the two year statute of limitation was tolled until plaintiff's 21st birthday.

Again, relators waived this argument. More importantly though, specific statutes of limitation prevail over general statutes of limitation. *Airis v. Metro. Zoological Park and Museum Dist.*, 332 S.W.3d 279, 280 (Mo.App. 2011). This is codified in R.S.Mo. § 516.300, which provides that "[t]he provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute."

R.S.Mo. § 516.140 is the general statute of limitation for battery. However, R.S.Mo. § 537.046 [2004] is a specific statute of limitations for childhood sexual abuse. Plaintiff's "battery" claims are for sexual battery. As such, R.S.Mo. § 537.046 [2004], not the general statute of limitation, govern plaintiff's claims. Thus, any claims for battery by plaintiff pertaining to his sexual abuse by Scoutmaster Bradshaw must be brought "within ten years of the plaintiff attaining the age of twenty-one or within three years of the date the plaintiff discovers, or

reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse, whichever later occurs." R.S.Mo. § 537.046 [2004].

Similarly, relators argue that plaintiff's claims for negligence are time-barred because those claims purportedly expired on May 1, 2006. In support of this argument, relators cite R.S.Mo. §§ 516.120 and 516.170, asserting that the five year statute of limitation was tolled until plaintiff's 21st birthday. Again, relators are wrong.

Relators waived this argument. Further, R.S.Mo. § 516.120 is the general statute of limitation for negligence. R.S.Mo. § 537.046 [2004] is a specific statute of limitations for childhood sexual abuse. All of plaintiff's negligence claims relate or pertain to the sexual abuse of plaintiff by Scoutmaster Bradshaw. As such, § 537.046 [2004], and not the general statute of limitation, governs the claims for negligence. Thus, any claims for negligence must be brought "within ten years of the plaintiff attaining the age of twenty-one or within three years of the date the plaintiff discovers, or reasonably should have discovered, that the injury or illness was caused by childhood sexual abuse, whichever later occurs." R.S.Mo. § 537.046 [2004].

It is uncontroverted that plaintiff was born on May 1, 1980. It is uncontroverted that this lawsuit was filed on April 14, 2011, less than ten years

after plaintiff attained the age of twenty-one. As such, plaintiff's claims for battery and negligence are not time barred.[14]

Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

[14] Interestingly, *relators' flawed reasoning concedes that none of plaintiff's negligence claims are time barred*. Relators admit plaintiff's negligence claims were not purportedly time-barred until 2006, two years *after* the revision to the Childhood Sexual Abuse Statute. In other words, those claims were not time barred prior to the enactment of R.S.Mo. § 537.046 [2004]. So even if *Doe* was properly decided, *under relators' analysis, plaintiff's negligence claims against relators must survive summary judgment.*

IV. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because plaintiff's claims against relators pursuant to R.S.Mo. § 537.046 [2000] applies to non-perpetrators as well as perpetrators in that the Missouri Legislature has not excluded claims against non-perpetrators from the scope of the statute.

Relators ask the Court to engraft on R.S.Mo. § 537.046 [2000] an exception for "non-perpetrators." That request is contrary to both the letter and the spirit of the statute.

In interpreting the Childhood Sexual Abuse Statute, the Court must follow the rules of statutory construction. *State v. Rowe*, 63 S.W.3d 647, 649 (Mo.banc 2002). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *Id.* "Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." *Id.* at 650. A statute is plain and unambiguous if its terms are plain and clear to one of ordinary intelligence. *Wolff Shoe Co. v. Dir. Of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988) [citing *Alheim v. F.W. Mullendore*, 714 S.W.2d 173, 176 (Mo.App. 1986)]. "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 107 S.W.3d 235, 239 (Mo.banc 2003). "When the legislature amends a statute, that amendment is presumed to change the existing law." *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003). "[P]rovisions retained are

regarded as a continuation of the former law, while those omitted are treated as repealed." *State ex rel. Klein v. Hughes*,173 S.W.2d 877, 880 (Mo. 1943).

Relators argue that the Legislature used the term "defendant" in the definitional paragraph of the statute and try to graft that onto the second paragraph. The problem, however, is that the Legislature did not do what relators wish it had done. The second paragraph of the Childhood Sexual Abuse Statute does not begin with the phrase "[a]ny action against a perpetrator" or even "[a]ny action against a defendant." The second paragraph simply begins by stating "[a]ny action to recover damages from injury or illness caused by childhood sexual abuse in an action brought pursuant to this section . . . ." There is no limitation with respect to against whom an action can be brought.

The Legislature knows how to limit the application of a statute if it intends the application of a statute to be limited. For example, the Legislature expressly limited the application of R.S.Mo. § 516.097 by including a paragraph that expressly delineated to whom the statute applied. *See* R.S.Mo. § 516.097.2. It made no similar limitation in the Childhood Sexual Abuse Statute. As such, this Court would be wrong to engraft or judicially legislate limitations onto the statute.

This Court's opinion in *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678 (Mo.banc 2000) is highly instructive. In *Budding*, the Court was faced with the question of whether health care providers were subject to 402A strict liability with respect to medical devices provided to patients during their medical treatment. In concluding that health care providers were not subject to 402A strict liability, the

court noted that in R.S.Mo. § 538.300, the Legislature specifically stated that the statutes that codify Missouri's product liability law do not apply in actions against health care providers. *Id.* at 681.

> *The legislature has spoken with reasonable clarity expressing an intent to eliminate liability of health care providers for strict products liability. All canons of statutory construction are subordinate to the requirement that the Court ascertain and apply the statute in a manner consistent with that legislative intent. Butler v. Mitchell–Hugeback, Inc., 895 S.W.2d 15, 19 (Mo.banc 1995). As the briefs of the parties point out, appealing public policy arguments can be made both for and against imposing strict liability where a health care provider transfers a defective product to a patient.* ***However, when the legislature has spoken on the subject, the courts must defer to its determinations of public policy****.*

Id. at 682 (emphasis added).

By comparison, the Legislature has not made any effort to limit the application of the Childhood Sexual Abuse Statute to the perpetrators of the crimes. This Court cannot supply what the legislature has omitted from the statute. *Turner v. Sch. Dist. Of Clayton*, 318 S.W.3d 660, 668 (Mo.banc. 2010); *Bd. Of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo.banc 2001) ("courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters

delegated to a coordinate branch of our tripartite government"). Moreover, it is not within the Court's province to "question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination." *Winston v. Reorganized Sch. Dist. R–2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo.banc 1982). The Court must enforce the law as it is written. And as it is written, it is not limited to "perpetrators."

Relators rely on an Eighth Circuit opinion, *Walker v. Barrett*, 650 F.3d 1198 (8th Cir. 2011), as their authority for the argument that the Childhood Sexual Abuse Statute only creates a cause of action for victims against perpetrators. That was the conclusion reached by the Eighth Circuit. *Id.* at 1208-10. However, the Eighth Circuit has misinterpreted the statute.[15]

The Eighth Circuit's analysis starts and ends with the definitional paragraph of the statute. The court notes that the Legislature defines "childhood sexual abuse" to mean "any act committed by the defendant against the plaintiff . . . ." *Id.* at 1209, citing R.S.Mo. § 537.046.1(1). And it is on this language that the Eighth Circuit concludes that the Childhood Sexual Abuse Statute only applies to

[15] Moreover, whether the statute can apply to non-perpetrators was not at issue in *Walker*, as the opinion concedes plaintiff "has not explicitly argued that § 537.046 applies to all of his claims, nor did he make the argument in the district court." *Id.* at 1204, n. 3. Thus, at best, *Walker* is *dicta.*

perpetrators or abusers and not to other parties who may also have liability for the sexual abuse.

Missing from the Eighth Circuit's perfunctory analysis is any acknowledgment that, in the Childhood Sexual Abuse Statute, "defendant" is not a defined term.[16] If the Legislature intends to limit who can be a "plaintiff" or a "defendant" under a statutory cause of action, it includes those limitations in the statute. For example, the Legislature specifically limited who can be a plaintiff in

[16] The only defined terms in the Childhood Sexual Abuse Statute are "childhood sexual abuse," "injury" and "illness." R.S.Mo. § 537.046.1. And the "childhood sexual abuse" definition simply incorporates the criminal statutes that set forth the criminal acts the Legislature opted to include under the umbrella of "childhood sexual abuse." Of course those criminal acts could only be committed by the perpetrator, who is also going to be a defendant in every case brought under the Childhood Sexual Abuse Statute. If there are no predicate criminal acts, there can be no cause of action under the statute. But whether the predicate criminal acts are present is a separate, distinct and far different question from whether non-perpetrators can be held liable under the statute. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 985 P.2d 262 (Wash. 1999) (en banc) (holding that Washington's version of the Childhood Sexual Abuse Statute applied to non-perpetrators). This is a distinction that the Eighth Circuit, and relators, fail to appreciate.

a wrongful death case in R.S.Mo. § 537.080.[17] Similarly, in R.S.Mo. Chapter 538, the Legislature defined who and what constitute a "health care provider" for purposes of the Chapter 538. R.S.Mo. § 538.205. Respectfully, the Eighth Circuit Court of Appeals is wrong and this Court should not compound the error contained in the Eighth Circuit's *dicta* in the *Walker* opinion, particularly when relators have waived all affirmative defenses.

Missouri's Childhood Sexual Abuse Statute finds its genesis in 1990 legislation that was intended to modernize Missouri's law pertaining to children and sexual abuse. *See* 1990 Mo.Legis.Serv. H.B. 1370, 1037 & 1084 (VERNON'S). As initially proposed, the limitations period for the Childhood Sexual Abuse Statute was to "be within five years of the date the plaintiff attains the age of eighteen or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs." *Id.* at § 3. The Legislature indicated its intent that the statute be applied liberally and broadly to breathe life into claims by

[17] And interestingly, the wrongful death statutes do not expressly include language authorizing vicariously liability or *respondeat superior* claims, but those claims most certainly are proper under Missouri law. *See, e.g., West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7 (Mo.App. 2010) (reversing the entry of summary judgment in favor of the defendant and concluding that issue of agency was for the jury).

mandating that "[t]his section shall apply to any action commenced on or after August 28, 1990, including any action which would have been barred by the application of the statute of limitation applicable prior to that date." *Id.* In 2004, the Legislature revisited the Childhood Sexual Abuse Statute. *See* 2004 Mo. Legis. Serv. S.B. 1211 (VERNON'S). Intending to expand the scope of the statute, the Legislature significantly changed the language of the second paragraph of the statute, expanding the limitations period to "be within ten years of the date the plaintiff attains the age of twenty-one or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs." *Id.*[18]

[18] Legislation was introduced in the past three Missouri legislative sessions and will be introduced again in the 2016 session that would expand the Childhood Sexual Abuse Statute. The proposed legislation mandates that claims for Childhood Sexual Abuse "may be commenced at any time." In other words, if and when this bill is passed, *there would no longer be a statute of limitations in Missouri for claims of "childhood sexual abuse."* That speaks strongly to the intent of the Legislature. Similar bills seeking to eliminate all statutes of limitation for childhood sexual abuse have been pending in North Dakota (Senate Bill S.B. 2331), New York (Assembly Bill No. A02504), Pennsylvania (Senate Bill S.B. 173), Texas (Senate Bill S.B. 113) and Utah (House Bill H.B. 277). Several states (California, Connecticut, Delaware, Hawaii, Massachusetts and

Missouri's Childhood Sexual Abuse Statute does apply to non-perpetrators. *Almonte v. N.Y. Med. Coll.*, 851 F. Supp. 34 (D. Conn. 1994) is helpful. The issue in *Almonte* was whether Connecticut's version of the Childhood Sexual Abuse Statute applied only to perpetrators or if it also applied to non-perpetrators. *Id.* at 37. The court concluded that Connecticut's statute was *not* limited just to perpetrators of the crime.

> *The court's conclusion is driven in large part by the language of the statute. Quite simply, the statute does not expressly limit its application to offenders; rather, reference to the unambiguous language of the statute indicates that the statutory focus is on actions flowing from a particular type of harm, and not parties. In other words, in defining the scope of the statute, courts should look to whether the underlying harm was allegedly "caused by sexual abuse, sexual exploitation or sexual assault," § 52–577d, rather than whether the named defendants are potentially primarily or only secondarily liable for the alleged harm.*

Minnesota) have opened "windows" that allowed the filing of previously time barred claims for childhood sexual abuse. Bills to open similar windows are presently pending in Georgia (House Bill H.B. 17), Iowa (Senate File 107 S.F.), North Dakota (Senate Bill S.B. 2331) and New York (Senate Bill No. 00063).

Such a harm-based (rather than party-based) approach is consistent with the legislative intent behind the statute. As the Connecticut Supreme Court has explained, "[a]lthough statutes of limitation generally operate to prevent the unexpected enforcement of stale claims ...; one object of § 52–577d is to afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action." Roberts v. Caton, 224 Conn. 483, 493, 619 A.2d 844 (1993) (citing to House and Senate debate concerning Public Act 91–240, at 34 H.R.Proc., Pt. 13, 1991 Sess. 4706–4707 and 34 S.Proc., Pt. 7, 1991 Sess. 2495). Indeed, the statute of limitations was extended from two to seventeen years after the victim reaches majority following "substantial testimony before the Committee that minor victims of sexual assault often do not understand or recognize the damage which they have sustained until a substantial number of years after they attain majority." Roberts, 224 Conn. at 493 n. 8, 619 A.2d 844 (quoting comment of Senator Anthony V. Avallone, 34 S.Proc., Pt. 7, 1991 Sess. 2495).

In recognizing that it may take years for a victim to come to terms with the sexual abuse, the Legislature implicitly understood that it may take as much time to identify those responsible for the abuse: It is only logical that the abuse and the abuser must be identified

> *before the chain of responsibility can be discovered. Thus, were § 52–577d limited to actions against perpetrators only, many if not most non-offender prospective defendants would, for all practical purposes, be rendered immune to suit. Such a result is both contrary to public policy and inconsistent with the Legislature's intent to broaden the remedies available to victims of sexual abuse through the extended limitations period.*

Id. at 37-38.

The same rationale applies in this case. The Missouri Legislature intended to create a statute of limitation that gives victims of childhood sexual abuse broad remedies and ample time in which to pursue those remedies. To reach the conclusion sought by relators requires the Court to engage in impermissible judicial legislation and further, requires the Court to ignore the intent of legislation like the Childhood Sexual Abuse Statute. The Childhood Sexual Abuse Statute is unlike every other statute of limitation ever promulgated by the Missouri Legislature. It is unique and it serves a very different purpose than the other statutes of limitation. To the extent that courts fail to recognize this distinction, they ignore the laudable and the important intent of this type of legislation.

Lastly, the Court needs to understand that this case involves numerous claims under the Childhood Sexual Abuse Statute that have not been addressed in other cases in which courts considered whether the Childhood Sexual Abuse Statute or similar statutes from other jurisdictions should be applied to non-

perpetrators like relators. Plaintiff alleges that relators are directly liable under the Childhood Sexual Abuse Statute in that they: (1) aided and abetted Scoutmaster Bradshaw; (2) negligently failed to vet Scoutmaster Bradshaw before allowing him to be a Scoutmaster; and/or (3) negligently failed to properly supervise and monitor Bradshaw's interactions with plaintiff.[19]

Plaintiff further alleges that relators assumed a duty to protect plaintiff and to provide him with a safe Scouting experience, specifically citing the Restatement (Second) of Torts §§ 323 and 324A (1965). *See* Exhibit A. This Court adopted § 323 in *Stanturf v. Sipes*, 447 S.W.2d 558 (Mo.banc 1969). Missouri recognizes a cause of action under § 323. *See Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426 (Mo.banc 1985) (recognizing cause of action). Missouri has

[19] The Eighth Circuit conceded in *Walker* that an "aiding and abetting" theory can subject a non-perpetrator to liability under the Childhood Sexual Abuse Statute. *Walker*, 650 F.3d at 1208-10. However, the *Walker* court concluded that the plaintiff failed to adequately plead "aiding and abetting." This is inconsistent with the suggestion by relators that *Walker* precludes claims against non-perpetrators. Further, it bears noting that relators have not filed a motion to strike plaintiff's "aiding and abetting" allegations or a motion asking the Court to order plaintiff to make those allegations more definite and certain. As such, at a minimum, there is a question of fact regarding whether relators "aided and abetted" Scoutmaster Bradshaw, thus precluding the entry of summary judgment.

adopted § 324A. *See Kennan v. Miriam Found.*, 784 S.W.2d 298 (Mo.App. 1990) (Discussing § 324A in opinion recognizing a duty). With § 324A, a duty may be assumed or undertaken, and when so assumed, a defendant must exercise reasonable care in carrying out the duty. *See Bowman v. McDonald's Corp.*, 916 S.W.2d 270 (Mo.App. 1995) (discussing application of § 324A).

When a non-perpetrator assumes a duty under the law and then, when it negligently breaches that duty and, as a result, a perpetrator sexually assaults a child, can the non-perpetrator be held directly liable under the Childhood Sexual Abuse Statute? In a jurisdiction like Missouri that has adopted the Restatement (Second) of Torts §§ 323 and 324A, the answer is "yes."

Remarkably, relators argue they had no duty to protect plaintiff and to provide him with a safe Scouting experience. In determining whether a duty exists, the Court must ignore relators' argument and instead, should be guided by this Court's ruling in *Hoover's Dairy*, *supra*.

> *The judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; consideration of cost and ability to*

spread the risk of loss; the economic burden upon the actor and the community—the others.

Id. at 432 (citations omitted).

These factors all weigh strongly in favor of finding that relators had a duty under the Restatement (Second) of Torts §§ 323 and 324A to protect plaintiff from sexual abuse. While this is an issue of first impression in Missouri, the conclusion is obvious. Equally obvious is the conclusion that relators are not entitled to summary judgment. *See, e.g.*, *Millard v. Corrado*, 14 S.W.3d 42 (Mo.App. 1999) (reversing the entry of summary judgment and holding that emergency room doctor who never saw patient and who never had a physician/patient relationship with patient still owed certain duties to patient under Missouri common law, citing the Restatement).

Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

V. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because any and all applicable statutes of limitation applicable to plaintiff's claims have been and are tolled in that relators engaged in fraud and/or improper acts as contemplated by R.S.Mo. § 516.280.

In the alternative, plaintiff submits that any and all applicable statutes of limitation have been tolled by fraud and/or improper acts as contemplated by R.S.Mo. § 516.280. Plaintiff further submits that any applicable statutes of limitation were equitably tolled and that relators should be equitably estopped from raising those affirmative defenses.

Plaintiff affirmatively pled fraud, improper acts and equitable tolling of any applicable statutes of limitation. Relators failed to timely deny these allegations in an answer or responsive pleading filed on or before October 28th, 2011. As such, these allegations have been admitted by relators. Mo.R.Civ.P. 55.09.

Defendants that act improperly are not allowed to protect themselves from tort liability by relying on statutes of limitation. "If any person, by 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." R.S.Mo. § 516.280. In addition, Missouri recognizes the doctrine of "equitable tolling." The doctrine of equitable tolling permits a plaintiff to toll a statute of limitations where "the defendant has actively misled the plaintiff respecting the cause of action, or

where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Ross v. Union Pac. R.R. Co.*, 906 S.W.2d 711, 713 (Mo.banc 1995) [quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir.1978) (internal quotation marks omitted)].

Relators engaged in fraud and/or improper acts as contemplated by R.S.Mo. § 516.280 and as such, any and all statutes of limitations pertaining to plaintiff's claims against relators have been and are tolled. An analogous case was recently pending before The (now retired) Honorable Michael Manners. In *Teeman v. Monsignor Thomas O'Brien,* Judge Manners was faced with whether the defendants' cover-up of Monsignor O'Brien's sexual abuse of the decedent and other kids rose to the level of fraud necessary to toll the running of the wrongful death statute of limitations.[20]

Judge Manners concluded that the defendants' cover-up constituted fraud and concealment and found that the wrongful death statute of limitations was tolled. He found *Howell v. Murphy*, 844 S.W.2d 42 (Mo.App. 1992) to be controlling. *Id.* The *Howell* court wrote that:

> *Statutes of limitations are intended to prevent fraud, to keep parties from asserting rights after a lapse of time has destroyed or impaired the evidence which would show that such rights never existed, or*

[20] *See* PRApp, Exhibit 10.

> *had been satisfied, transferred or extinguished if they ever did exist. To hold that by concealing fraud, or by committing fraud in such a manner as to conceal it until after the party committing the fraud could plead the statute of limitations to protect itself, is to make fraud the means by which it is successful and secure.*

Howell, 844 S.W.2d at 74 [citing *Baker v. Beech Aircraft Corp.*, 39 Cal.App.3d 315, 114 Cal.Rptr. 171, 177 (1974)].[21]

This case presents fraud, concealment and improper acts that dwarf those in *Teeman.* Relators had decades of *actual notice* that adult leaders were sexually abusing Scouts at a frightening rate. In the twenty years prior to when

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[21] Plaintiffs and Relator are cognizant of this Court's recent seemingly contradictory opinions in *State ex rel. Beisly v. Perigo*, No. SC 94030, 2015 WL 4929188 (Mo.banc Aug. 18, 2015) and *Boland v. Saint Luke's Health Sys., Inc.*, No. SC 93906, 2015 WL 4926961 (Mo.banc Aug. 18, 2015). Citing *Boland*, relators may argue that plaintiff's claims are barred under R.S.Mo. § 537.046 [2004]. A lengthy analysis of *Boland* and *Perigo* is not necessary in this case, nor is a discussion of how these cases impacted *Howell* needed. Plaintiff's claims pursuant to R.S.Mo. § 537.046 [2004] were timely filed and as such, the tolling argument need not apply to those claims. If and only if the Court believes that § 516.140 and § 516.120 apply to plaintiff's battery and negligence claims, then this tolling argument applies.

Scoutmaster Bradshaw began abusing plaintiff, relators banned at least 1,871 people for sexually abusing Scouts, *an average of 68 people per year*. Over that same time period, at least 2,071 Scouts were abused (many more than once) for *an average of 99 victims per year*. Yet relators kept this information confidential and didn't pass it along to parents of potential Scouts. As a result, parents had no idea that by putting their kids in Scouts, they were exposing them to sexual abuse.[22]

The unrefuted testimony of plaintiff's father explains the result of relators' concealment of their institutional sexual abuse problem. After learning about the abuse of his son by Scoutmaster Bradshaw, plaintiff's father contacted a Scout official who assured him the Scouts would "take care of it . . . ." Plaintiff's father's goal in reporting Scoutmaster Bradshaw to relators was to get Bradshaw out of the Scouts so he couldn't victimize any more children. Initially, plaintiff's father dissuaded plaintiff from pursing a civil lawsuit against relators because he thought the Boy Scouts was a good organization. After initially dissuading plaintiff from filing a civil lawsuit against relators, plaintiff's father learned for the first time that relators had a history of Scout leaders sexually abusing kids and moving Scout leaders who abused kids from troop to troop.

[22] According to relators' own records, kids are statistically more likely to suffer from sexual abuse in Scouting than they are to suffer *serious injury or death combined*.

Prior to learning about Scoutmaster Bradshaw's sexual abuse of plaintiff, plaintiff's father believed that Bradshaw was a mentor to plaintiff, was teaching him leadership skills and that Bradshaw could not have been a child molester because Bradshaw was marrying a woman. Plaintiff's father thought Boy Scouts was a good organization. Plaintiff's father encouraged plaintiff to become a Boy Scout. Prior to finding Scoutmaster Bradshaw sexually abusing plaintiff, plaintiff's father had no reason to believe that there might be a problem with child molesters involved with Scouting. Plaintiff's father thought Scoutmasters were good mentors for Scouts.

No one involved in Scouting ever warned plaintiff's father that there was a potential that Scoutmasters might be potential child molesters. No one involved in Scouting ever warned plaintiff's father that he should police the relationship between Scoutmaster Bradshaw and plaintiff because there might be an inappropriate sexual nature to that relationship. Prior to finding Scoutmaster Bradshaw sexually abusing plaintiff, plaintiff's father did not know that there were prior reported cases of Scout leaders sexually abusing Boy Scouts. No one involved in Boy Scouts ever told plaintiff's father that relators had a long, documented history of adult leaders sexually molesting kids. Had plaintiff's father been warned of the long, documented history of Scoutmasters sexually abusing young Scouts in their troops, plaintiff's father would have approached Scouting differently and would have been more involved in the process.

Paul Ernst was an employee of relator BSA and was responsible for maintaining the "IV files" from 1972 until 1993, a time period that overlaps with Scoutmaster Bradshaw's sexual abuse of plaintiff. While Mr. Ernst was responsible for the "IV files," relator BSA didn't report suspected child abusers in Scouting to authorities because BSA "wasn't required to" and further, because BSA didn't want to "wreck their reputation at all . . . ." While Mr. Ernst was responsible for the "IV files," relators didn't tell families of Scouts that thousands of adult leaders had been banned for sexually abusing Scouts. While Mr. Ernst was responsible for the "IV files," relators didn't tell families of Scouts that thousands of Scouts had been sexually abused by adult Scout leaders.

In the decades preceding plaintiff's abuse at the hands of Scoutmaster Bradshaw, relators engaged in a deliberate conspiracy of silence. Their own records showed relators that they were banning adults for sexually abusing kids at a rate of more than one a week for a twenty year period. Their records showed relators that young Scouts were being sexually abused by adult leaders at a rate of nearly a hundred victims per year, or two child victims per week, over a twenty year period. Relators hid that problem from Scouts and their families. And relators refused to report that problem to authorities, *for fear of injuring the reputations of the abusers*.

Relators do not take responsibility for the abject failure of their organization to protect children. Instead, they brazenly blame the victims and

their families. In this case, relators blame plaintiff and his parents for Scoutmaster Bradshaw's repeated assaults of plaintiff. *See* Exhibits I and J.

Relators play games in discovery and spoliate evidence to hide the truth from victims, courts and juries. When Scoutmaster Bradshaw was first introduced to Troop 46, it was represented to the parents that Scoutmaster Bradshaw was a "Scout official" who had been involved in Scouting for a long time, in another state. Relators' prior counsel pretended not to know anything about Scoutmaster Bradshaw's prior work in Scouting, even though it was ultimately proven that relators had records proving that Scoutmaster Bradshaw was living in North Dakota and was involved in Scouting prior to becoming involved in Troop 46.

All of the records pertaining to Scoutmaster Bradshaw's prior involvement in Scouting . . . including the reasons why he left North Dakota . . . were destroyed *after relators were put on notice of Scoutmaster Bradshaw's abuse of plaintiff*. Furthermore, the documents pertaining to Scoutmaster Bradshaw that were not destroyed are incomplete and have evidently been sanitized to protect relators.

Significant evidence has been spoliated. Missouri courts recognize the doctrine of spoliation. *Baldridge v. Dir. of Revenue*, 82 S.W.3d 212, 222 (Mo.App. 2002). The doctrine of spoliation pertains to "the destruction or significant alteration of evidence." *Id.* (internal quotation omitted). When a party intentionally spoliates evidence, that party is subject to an adverse evidentiary inference. *Zahner v. Dir. of Revenue*, 348 S.W.3d 97, 101 (Mo.App. 2011).

The inference in this case is that relators knew Scoutmaster Bradshaw was a sexual predator who had prior accusations made against him when he was involved with Scouts in the years prior to his abuse of plaintiff. Scoutmaster Bradshaw is asserting his Fifth Amendment right against self-incrimination. Relators have spoliated the evidence. As such, the inference will be uncontroverted at trial.

The conspiracy of silence and the affirmative actions taken by relators to keep families of Scouts from learning the truth and further, to frustrate and impede Scouts who file suit over their sexual abuse are outrageous and constitute fraud and/or improper acts as contemplated by R.S.Mo. § 516.280. Alternatively, these facts support equitable tolling. Either way, any and all applicable statutes of limitation applicable to this case (assuming *arguendo* that relators did not waive all such defenses) are and should be tolled.

Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

VI. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators can be held vicariously liable for Scoutmaster Bradshaw's abuse of plaintiff in that relators controlled Bradshaw's conduct and further, in that there are significant genuine issues of contested material fact that precluded summary judgment in favor of relators.

Relators' second summary judgment motion raised defenses pertaining to control, vicarious liability and *respondeat superior*. All of these arguments were waived by relators when they ignored repeated orders from respondent and refused to timely file answers in this case. More importantly, relators willingly withdrew these affirmative defenses in response to an order from respondent requiring relators to make these affirmative defenses more definite and certain.

Relators cite no authority for the proposition that they are entitled to summary judgment on grounds that relators not only waived, but in fact, *affirmatively withdrew from the case in response to a valid, proper court order*. No such authority exists because it is such a patently absurd proposition. Ignoring the absurdity of their position, relators argue that they purportedly cannot be vicariously liable to plaintiff under the doctrine of agency or under *respondeat superior*. Clearly, all of those issues have been waived and/or withdrawn by relators. Nevertheless, these arguments lack merit.

The existence of an agency relationship is typically a question of fact for the jury. *Emily West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 11 (Mo.App.

2010) (reversing summary judgment in favor of the defendant on the issue of agency and holding that the issue of agency was for the jury). Further, whether an agent is acting in the course and scope of his agency is a question of fact for the jury. *See Agri Process Innovations, Inc. v. Envirotrol, Inc.*, 338 S.W.3d 381, 388-89 (Mo.App. 2011).

Scoutmaster Bradshaw has admitted that he was selected and approved by relators as a Scoutmaster for plaintiff's Boy Scout troop. He admits that he was selected and approved by relators as a Scoutmaster for plaintiff's Boy Scout troop and that he was expected and intended by relators to educate and train young boys, including plaintiff, in morality, patriotism and assorted civil and life skills. He admits that relators empowered him to perform all duties as a Scoutmaster including educational and tutorial services, counseling, moral guidance, religious instruction and other duties. He admits that, at all relevant times, he was an agent and employee of relators who acted with the actual or apparent authority of relators. And he admits that relators knew or should have known of his interactions with all of the Scouts in Troop 46, including plaintiff. Relators obviously deny his admissions. Nevertheless, the judicial admissions of Scoutmaster Bradshaw raise numerous questions of material fact that precludes summary judgment.

A claim that an individual was acting within the course and scope of his employment when he committed the acts alleged comes within the purview of *respondeat superior*. *Studebaker v. Nettie's Flower Garden, Inc.*, 842 S.W.2d

227, 229 (Mo.App. 1992) [citing *Light v. Lang*, 539 S.W.2d 795, 799 (Mo.App. 1976)]. This principle is applicable when it is claimed that a principal is liable for the conduct of its agents. *Id.* The requirements for application of *respondeat superior* are as follows:

> *The test to determine if respondeat superior applies to a tort is whether the person sought to be charged as master had the right or power to control and direct the physical conduct of the other in the performance of the act. Id. If there was no right to control there is no liability; for those rendering services but retaining control over their own movements are not servants. Id. The master-servant relationship arises when the person charged as master has the right to direct the method by which the master's service is performed. Id. An additional inquiry is whether the person sought to be charged as the servant was engaged in the prosecution of his master's business and not simply whether the accident occurred during the time of employment. Gardner v. Simmons, 370 S.W.2d 359, 364 (Mo. 1963). Whether a party is liable under the doctrine of respondeat superior depends on the facts and circumstances in evidence in each particular case and no single test is conclusive of the issue of the party's interest in the activity and his right of control. Sharp v. W. & W. Trucking Co., 421 S.W.2d 213, 220 (Mo. banc 1967).*

Id.

Under Missouri law, "a servant may act within the scope of his employment even though pursuing his own ends, if he is at the same time doing his master's business." *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422, 1425 (8th Cir. 1991). "In fact the servant's predominant motive may be to benefit himself . . . but there can be *respondeat superior* as long as 'the master's business actuates the servant to any appreciable extent.'" *Id.* [citing Restatement (Second) of Agency, § 236 (1958)].

There is a question of fact as to whether relators put Bradshaw in the Scoutmaster position and vested him with their authority to interact with young boys. There is no dispute that, as part of carrying out his duties as a Scoutmaster for relators, Bradshaw met plaintiff. There is no dispute that the sexual abuse of plaintiff included abuse that occurred during Scouting events and functions. It is clear from plaintiff's uncontroverted testimony that Scoutmaster Bradshaw, while acting in the course and scope of his agency and while using the authority and position of trust as a Scoutmaster, through the "grooming" process, induced and directed plaintiff to engage in sexual acts. This "grooming" was: (a) committed in direct connection with and in furtherance of defendant Bradshaw's employment, agency and/or relationship with relators; (b) committed within the course and scope of defendant Bradshaw's work as a Scoutmaster; (c) done initially and at least in part from a desire to serve the business interests of relators; (d) done directly in the performance of defendant Bradshaw's duties and responsibilities as Scoutmaster; (e) consisted generally of actions of a kind and nature that defendant

Bradshaw was required to perform as a Scoutmaster; and (f) was done at the direction of and pursuant to the power vested in defendant Bradshaw by relators.

Plaintiff's testimony is unrefuted by Scoutmaster Bradshaw. The only sworn testimony in this case is that Scoutmaster Bradshaw sexually abused plaintiff, repeatedly, before during and after the Scouting events that relators sanctioned and authorized. At a minimum, there are genuine issues of material fact that preclude summary judgment on the issue of whether relators can be held vicariously liable for sexual abuse of plaintiff.

There can be . . . and there is . . . vicarious liability for sexual abuse. *Mary Doe SD v. The Salvation Army*, No. 4:07CV362MLM, 2007 WL 2757119 (E.D. Mo. Sept. 20, 2007) is instructive. *Mary Doe* was a childhood sexual abuse case brought against the Salvation Army. *Id.* at *1. Like relators, the Salvation Army claimed it could not be held vicariously liable for the sexual abuse perpetrated by a Salvation Army volunteer. In rejecting the Salvation Army's argument, the court noted that:

> *Even if he was pursuing his own ends while engaging in the conduct of which Plaintiff complains, Captain Mitchell was doing so in the course of his employment. According to the allegations of Plaintiff's Complaint, Captain Mitchell only gained access to Plaintiff as a result of his employment by and position with Defendant. Further, when Captain Mitchell allegedly inquired of Plaintiff regarding her relationship with the camp supervisor he was unequivocally acting*

> *within the scope of his employment. Under such circumstances, respondeat superior may apply.*

Id. at *3.

The same result should be reached in this case. It is unrefuted that, but for his role as a Scoutmaster, Bradshaw never would have had the opportunity to meet plaintiff, groom and condition him and ultimately, molest him. It is unrefuted that much of the abuse happened at Scouting-related events, including, but not limited to meetings, activities and campouts, events where Bradshaw was undeniably operating within the scope of his agency with relators. Under *Mary Doe*, summary judgment would be improper.

Another case that is instructive is *Lourim v. Swensen*, 977 P.2d 1157 (Or. 1999). *Lourim*, a case virtually identical to this case, involved claims of direct and vicarious liability against the regional and national Boy Scout organizations for sexual abuse perpetrated by a Boy Scout leader. *Id.* at 1158.

> *[A] jury reasonably could infer that the sexual assaults were merely the culmination of a progressive series of actions that involved the ordinary and authorized duties of a Boy Scout leader. Additionally, a jury could infer that, in cultivating a relationship with plaintiff and his family, Swensen, at least initially, was motivated by a desire to fulfill his duties as troop leader and that, over time, his motives became mixed. A jury also reasonably could infer that Swensen's performance of his duties as troop leader with respect to plaintiff*

> *and his family was a necessary precursor to the sexual abuse and that the assaults were a direct outgrowth of and were engendered by conduct that was within the scope of Swensen's employment. Finally, a jury could infer that Swensen's contact with plaintiff was the direct result of the relationship sponsored and encouraged by the Boy Scouts, which invested Swensen with authority to decide how to supervise minor boys under his care.*

Id. at 1160.

The same day it issued the *Lourim* opinion, the Oregon Supreme Court issued an opinion in *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999). *Fearing* was a childhood sexual abuse case against, *inter alia*, a priest and an Archdiocese. The issue on appeal was whether the trial court properly concluded that the plaintiff could not establish *respondeat superior* liability with respect to the Archdiocese. In holding that the trial court and court of appeals both were wrong, the Oregon Supreme Court wrote that:

> *The complaint alleges that Bucher used his position as youth pastor, spiritual guide, confessor, and priest to plaintiff and his family to gain their trust and confidence, and thereby to gain the permission of plaintiff's family to spend large periods of time alone with plaintiff. By virtue of that relationship, Bucher gained the opportunity to be alone with plaintiff, to touch him physically, and then to assault him sexually. The complaint further alleges that those*

activities were committed in connection with Bucher's employment as youth pastor and priest, that they were committed within the time and space limitations of Bucher's employment, that they were committed out of a desire, at least partially and initially, to fulfill Bucher's employment duties as youth pastor and priest, and that they generally were of a kind and nature that was required to perform as youth pastor and priest.

More than one plausible inference may be drawn from the foregoing allegations: The jury could infer that Bucher took the job solely to gratify his own deviant desires and that all the activities preceding the sexual abuse were motivated solely to further his own interests, not those of the Archdiocese. Or, as plaintiff contends, a jury could infer that the sexual assaults were the culmination of a progressive series of actions that began with and continued to involve Bucher's performance of the ordinary and authorized duties of a priest. Viewing the complaint in that light, the jury also could infer that, in cultivating a relationship with plaintiff and his family, Bucher, at least initially, was motivated by a desire to fulfill his priestly duties and that, over time, his motives became mixed. We conclude that the amended complaint contains allegations sufficient to [establish respondeat superior liability].

Id. at 1166-67. The Archdiocese argued that the plaintiff's complaint did not identify any interests of the Archdiocese that were benefitted by the sexual abuse or that the abusive priest was hired to engage in improper conduct. This argument missed the point.

> *[I]n the intentional tort context, it usually is inappropriate for the court to base its decision regarding the adequacy of the complaint on whether the complaint contains allegations that the intentional tort itself was committed in furtherance of any interest of the employer or was of the same kind of activities that the employee was hired to perform. Such circumstances rarely will occur and are not, in any event, necessary to vicarious liability. Rather, the focus properly is directed at whether the complaint contains sufficient allegations of Bucher's conduct that was within the scope of his employment that arguably resulted in the acts that caused plaintiff's injury.*

Id. at 1167 (emphasis added). In ultimately rejecting the Archdiocese's argument, the court concluded that:

> *Here, plaintiff alleges that Bucher "us[ed] and manipulat [ed] his fiduciary position, respect and authority as youth pastor and priest" to befriend plaintiff and his family, gain their trust, spend large periods of time alone with plaintiff, physically touch plaintiff and, ultimately, to gain the opportunity to commit the sexual assaults*

> *upon him. A jury reasonably could infer that Bucher's performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of Bucher's employment.*

Id. at 1168.

Lourim and *Fearing* are both instructive. Of course relators did not intend for Bradshaw to sexually abuse plaintiff. However, they did intend for him to befriend plaintiff and his family; to gain the trust of plaintiff and his family as an educational, moral and spiritual guide and as a valuable and trustworthy adult mentor to plaintiff; to gain the permission, acquiescence and support of plaintiff's family to spend substantial periods of time alone with plaintiff; and to seek and gain the instruction of plaintiff's parents to plaintiff that he was to have respect for defendant Bradshaw's authority as Scoutmaster and that plaintiff was to comply with defendant Bradshaw's instruction and requests. These acts were all clearly in the course and scope of Bradshaw's role as a Scoutmaster and further, they were a prerequisite to and indeed, they led directly to the sexual abuse at issue in this case.

Interestingly, both of these Oregon cases are remarkably similar in legal analysis to that done by this Court in *Teitjens v. Gen. Motors Corp.*, 418 S.W.2d 75 (Mo. 1967). *Teitjens* was a fraud case and a key issue on appeal was whether an employee of the defendant who committed fraud was acting within or without

the "course and scope" of his employment when he committed the fraud. The court concluded that the focus was not on whether the actor had been given authority to commit the fraudulent act, but rather, *whether the actor had been given authority to engage in the conduct during which the fraudulent act occurred*. *Id.* at 83-4. If so, vicarious liability applied, even if the employer never authorized the fraud. *Id.* The very same logic applies here. Relators may not have given Bradshaw authority to sexually abuse plaintiff, but they certainly gave him authority to engage in all of the actions that led to and included the abuse. As such, they are liable for those actions under the doctrine of vicarious liability and/or *respondeat superior*.

Relators cite *Hobbs v. Boy Scouts of Am., Inc.*, 152 S.W.3d 367 (Mo.App. 2004) for the proposition that neither of the relators have day-to-day control over the Scout troops and sponsoring organizations. *Hobbs* is inapplicable. As the court noted in *Hobbs*:

> *At the outset, it should be noted that Plaintiff does not claim that Fleer was an agent of any of the defendants. Plaintiff did not seek recovery on a theory of "respondeat superior" liability. Plaintiff does not claim that Defendants had any control over the activities of Fleer. Plaintiff also does not claim that defendants had knowledge that Fleer was a pedophile. Nor does he claim that Defendants were negligent in approving the application of Fleer to become a scout leader.*

Id. at 369. In other words, *Hobbs* contained *none of the claims or allegations at issue in this case*. In this case, Scoutmaster Bradshaw *admits that he was an agent of relators and acting in the course of scope of his agency when he abused plaintiff*. The plaintiff's testimony regarding the sexual abuse is uncontroverted. As such, *Hobbs* is no help to relators.

Similarly, relators' reliance on *Wilson v. St. Louis Area Council, Boy Scouts of Am.*, 845 S.W.2d 568 (Mo.App. 1992) is misplaced. *Wilson* was a tragic case in which a young Scout suffered a fatal electrocution injury on a non-Scout sanctioned trip with his Scout Troop to Fort Leonard Wood. *Id.* at 570. The trial court granted summary judgment in favor of the defendant Scout Council, holding that it was not vicariously liable for the negligence of the volunteer Troop leaders. That ruling was upheld on appeal by the Eastern District. The court concluded that there was no evidence that the Scout Council controlled the Troop leaders or ran the program at Fort Leonard Wood. *Id.* at 572.

Wilson has no applicability. There is a tremendous difference between an unsanctioned field trip to a military base where kids are left unsupervised and sexual molestation that occurred before, during and after Scouting-related events and at campgrounds owned and/or operated by relators. In that regard, the following is uncontroverted:

- Scoutmaster Bradshaw first kissed and sexually abused plaintiff soon after a Scouting-related float trip.

- After the first kissing and sexual abuse, Scoutmaster Bradshaw told plaintiff that he had been with other boys, that what happened was a secret between he and plaintiff and that plaintiff was not to tell anyone about what transpired between them that night.
- Plaintiff didn't tell his family about this first instance of kissing and abuse because Scoutmaster Bradshaw was "very threatening" and plaintiff was "afraid of what he would do . . . . "
- Scoutmaster Bradshaw threatened plaintiff on "several different instances" not to tell anyone else about Bradshaw's sexual abuse of plaintiff.
- Scoutmaster Bradshaw was much larger than plaintiff and plaintiff was intimidated by and afraid of Bradshaw.
- Plaintiff tried to resist Scoutmaster Bradshaw's advances, but these efforts only made Bradshaw angry.
- Scoutmaster Bradshaw told plaintiff that he had sexual relationships with other boys in Troop 46 and with other boys in prior Boy Scout troops with which Bradshaw had been involved.
- Plaintiff tried to get away from Scoutmaster Bradshaw and get out of the Boy Scouts, but when he did, Bradshaw got angry and violent with plaintiff. This included hitting, slapping and choking plaintiff. Once, Bradshaw choked plaintiff until plaintiff was unconscious.

- After Scoutmaster Bradshaw's sexual abuse of plaintiff was revealed, plaintiff initially told the Department of Social Services the false story Bradshaw had previously instructed plaintiff to tell in the event they were ever discovered.
- Scoutmaster Bradshaw provided plaintiff and other minor boys, some who were involved in Scouting and other who were not, alcohol. This was used to facilitate relationships between Bradshaw and the minor boys. The alcohol was occasionally purchased with Scouting money and consumed by the boys before, during and after Scouting events.
- Prior to the report of the sexual abuse of plaintiff by Scoutmaster Bradshaw, parents of other boys complained to relators about Bradshaw supplying young boys with alcohol.
- Plaintiff estimates that he and Scoutmaster Bradshaw had some form of sexual contact 1,500 to 2,000 times.
- Probably three-fourths of the sexual contact between plaintiff and Scoutmaster Bradshaw occurred before, during or after BSA and/or HOA-BSA Scouting-related events.
- Sexual contact took place between Scoutmaster Bradshaw and plaintiff dozens of times at the BSA campouts in Osceola.

- On at least three occasions, Scoutmaster Bradshaw drove plaintiff over state lines, from Missouri to Arkansas and back, to attend Scouting events. Bradshaw sexually abused plaintiff on these trips.
- On at least one occasion, Scoutmaster Bradshaw drove plaintiff over state lines, from Missouri to Iowa and back, to attend a Scouting event at which Bradshaw sexually abused plaintiff.
- On one occasion, at a BSA campout in Osceola, Scoutmaster Bradshaw arranged a "three-way" sexual encounter with plaintiff, Bradshaw and another Scout.
- Scoutmaster Bradshaw sexually abused and raped plaintiff on dozens of occasions while they were performing community service work for the Boy Scouts at a Red Cross facility.
- Scoutmaster Bradshaw sexually abused plaintiff on dozens of occasions while they were doing community service work for the Boy Scouts at St. Peter's Episcopal Church.
- Scoutmaster Bradshaw sexually abused plaintiff on dozens of occasions while they were doing community service work for the Boy Scouts at Avila College.
- Scoutmaster Bradshaw sexually abused plaintiff while plaintiff and other Scouts were doing fund raising work at Avila College so they could participate in Scouting-related events, including BSA campouts.

- Scoutmaster Bradshaw used his role as a Scoutmaster to get plaintiff alone and sexually abuse him.
- The first time Scoutmaster Bradshaw and plaintiff had anal sex, Bradshaw forced himself on plaintiff and raped him.
- Scoutmaster Bradshaw forced himself on plaintiff sexually at least 500 to 1,000 times.
- Plaintiff did whatever Scoutmaster Bradshaw told him to do.
- But for Scouting, plaintiff would not have had any involvement with Scoutmaster Bradshaw.

Interestingly, *Wilson* cites case law holding that when the scoutmaster's misconduct occurs at a function *directly sponsored and supervised by the local council*, the local council is vicariously liable. *See Riker v. Boy Scouts of Am., Saratoga Cnty. Council, Inc.*, 8 A.D.2d 565 (N.Y. 1959). It is uncontroverted that plaintiff was sexually abused by Scoutmaster Bradshaw at camps and camp events that were sponsored and supervised by relators. Relators are therefore vicariously liable for the misconduct of Scoutmaster Bradshaw.

Relators rely on numerous cases involving alleged sexual abuse by priests or religious leaders. However those cases are inapplicable because they rely heavily on excessive religious entanglement in dismissing claims such as negligent hiring because "ordination of a priest is a 'quintessentially religious matter.'" *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo.banc 1997); *see also D.T. v. Catholic*

Diocese of Kansas City-St. Joseph, 419 S.W.3d 143 (Mo.App. 2013). Obviously the vetting of a scoutmaster is not a religious matter, quintessentially or otherwise.

Similarly, relators cite *H.R.B. v. J.L.G.*, 913 S.W.2d 92 (Mo.App. 1995) and *P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d 622 (Mo.App. 1994). *H.R.B.* is an Eastern District case (that, interestingly, did not even cite R.S.Mo. § 537.046). In *H.R.B.*, the Eastern District simply held that the "*acts of defendant alleged in plaintiff's and wife'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." *H.R.B.*, 913 S.W.2d at 97 (emphasis added). So *H.R.B.* was not a blanket prohibition against such claims, but rather, the opinion was simply a reflection of (and thus, is limited to) the plaintiff's pleadings in that case. *P.S.* is also an Eastern District case. The holding in *P.S.* is limited to the therapist/patient relationship. *P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d at 625. Thus, neither case is of any import in this case.

Relators failed to bring to the Court's attention a highly analogous case, *M.V. v. Gulf Ridge Council Boy Scouts of Am., Inc.*, 529 So.2d 1248 (Fl. Dist. Ct. App. 1988). *M.V.* was a sexual abuse case brought against the local Boy Scout council (like relator HOA-BSA) that sought to hold the local council vicariously liable for sexual abuse that occurred at a camp operated by the council. The abuse was perpetrated by a camp first aid worker who had inappropriate sexual contact with a Scout that followed the first aid worker providing medically necessary aid

to the Scout. The trial court directed a verdict in favor of the council on the plaintiff's vicarious liability claims. *Id.* at 1248. The court of appeals reversed and remanded the case for a new trial. The court concluded that:

> *[T]he intentional tort here is a "mixed bag" involving medically permitted touching followed by unpermitted touching. This created a jury question of whether the employee's intentional tort was within the scope of his employment with appellee.*

Id. at 1249.

The *M.V.* opinion is particularly important given how Scoutmaster Bradshaw's relationship with plaintiff evolved. Just like the plaintiff in *M.V.*, plaintiff's sexual abuse by Scoutmaster Bradshaw evolved from non-sexual touching in the course and scope of the Scouting relationship. As such, the issue of whether relators are vicariously liable for Scoutmaster Bradshaw is a question for the jury.

Relators would have the Court believe that there simply can be no vicarious liability for sexual abuse. That is false. Numerous courts around the country have held otherwise. *See, e.g., Plummer v. Ctr. Psychiatrists, Ltd.*, 476 S.E.2d 172, 174 (Va. 1996) (whether psychiatrist who engaged in sexual intercourse with patient acted within the scope of his employment was a question for the jury); *Chesterman v. Barmon*, 753 P.2d 404 (Or. 1988) (construction worker, while under the influence of hallucinogenic drugs taken in an effort to increase his energy and enhance his work performance, went to plaintiff's home and raped her;

held, although acts of breaking and entering and sexual assault were outside the scope of worker's employment as a matter of law, employer could still be vicariously liable if "the assault was a result of the ingestion of the drug and found that the ingestion of the drug was within the scope of employment"); *Doe v. Sisters of Holy Cross*, 895 P.2d 1229 (Idaho Ct. App. 1995) (in case involving child molestation by hospital employee that occurred *ten months after employee had been fired*, issue of hospital's liability . . . that is, whether molestation was reasonably foreseeable from acts of grooming that took place during, and as part of, perpetrator's employment . . . was for the jury); *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) (employer liable for sexual assault by deliveryman whose job gave him access to plaintiff's home, and whose dispute with plaintiff was employment-related); *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571 (La. Ct. App. 1992), writ denied, 599 So. 2d 316 (La. 1992) (hospital vicariously liable for sexual assault by nurse's assistant, whose job gave him access to and authority over victim); *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990) (employer vicariously liable for conduct of therapist who seduced his patient during counseling sessions).

In reality, it strains credulity to suggest that relators do not have "control" over Scouts, adult volunteers and troops.[23] Relators dictate and enforce the rules, regulations and standards for the entire Scouting organization.[24]

This raises an important issue . . . relators have thousands of "IV Files" documenting sexual abuse of young Scouts by adult leaders. A known hazard gives rise to vicarious liability for sexual abuse. *Fahrendorff ex rel. Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 911–912 (Minn. 1999) (a group home resident sexually assaulted by a counselor created a jury question on the issue of the group home's vicarious liability because inappropriate sexual contact in group home situation was a well-known hazard). One would be hard pressed to find

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[23] Relator BSA ignores the fact that it established its legal ability and right to control Scout leaders. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), relator BSA successfully litigated its right to control who can and who cannot be Scout leaders based only on their sexual orientation.

[24] Relators are routinely held vicariously liable for the sexual abuse of Scouts. Exhibits 7 and 8 are two complaints filed by relator BSA, seeking to recover money from insurance carriers for defense costs and/or indemnification related to other cases involving sexual abuse. The impression that relators are trying to convey . . . that they are never vicariously liable for sexual abuse . . . is simply a false narrative created by defense lawyers and is designed to try to evade liability for a problem that has plagued relators for decades.

another organization that has as much actual institutional knowledge as relators that some of its adult volunteers used their organization to abuse children.

The notion that there cannot be vicarious liability for sexual abuse of children offends both common sense and logic. The North Dakota Supreme Court pointed this out in a case in which it imposed vicarious liability for sexual abuse on a county whose social worker molested a child he was counseling.

> *It would be legally unthinkable, for instance, to let a bank evade responsibility for a customer's money embezzled by an employee because the employee's intentional acts did not serve the employer's purposes. The custody of children is no less important than the custody of funds.*

Nelson v. Gillette, 571 N.W.2d 332, 337 (N.D. 1997).

When not defending litigation, relators agree with this proposition. In promotional materials, relators refer to Scouts as "our youth." In "*[t]he BSA's Commitment to Safety*," relators assure parents that "[w]e want you to know that the safety of *our youth*, volunteers, staff and employees cannot be compromised," that "[w]e must protect *our youth* as part of *our program* . . . . In a sense, safety is our license to operate," and that "[p]arents who entrust Scout leaders with their children justifiably expect them to return uninjured." *Id.* (emphasis added). *See* Exhibit KK, p. A2570 (¶¶ 148-52); pp. A3365-66. Relators should not be heard to speak out of both sides of their mouths.

In sum, there are a host of reasons why relators can and should be held vicariously liable for Scoutmaster Bradshaw's sexual abuse of plaintiff. Further, there are genuine issues of material fact. Lastly, relators waived and withdrew all of these arguments. As such, summary judgment would be improper.

Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

VII. The preliminary writ of prohibition should be quashed and this case should be remanded for trial because relators can be held directly liable for Scoutmaster Bradshaw's abuse of plaintiff in that Bradshaw was an agent or servant of both relators, relators controlled Bradshaw's conduct, the abuse of plaintiff was a natural incident of relators' business and further, in that there are significant genuine issues of contested material fact that precluded summary judgment in favor of relators.

Again, relators waived and affirmatively withdrew all of their affirmative defenses pertaining to control, vicarious liability and *respondeat superior*. In the interest of brevity, respondent and plaintiff incorporate herein by reference the arguments and authorities cited in support of the preceding Point Relied On.

In their final argument, relators add little to their previous argument. They do, however, focus heavily on *M.L. v. Civil Air Patrol*, 806 F. Supp. 845 (E.D. Mo. 1992). In *M.L.*, plaintiffs brought an action against relator BSA and the Civil Air Patrol ("CAP") for sexual abuse perpetuated by a defendant, who was a volunteer of a dually chartered CAP/BSA post. *Id.* at 847. The volunteer was on probation for molesting three boys at a church youth camp in Michigan when he became a BSA volunteer. *Id.* There was no evidence, however, to show that relator BSA had knowledge of the volunteer's "past convictions or that he was in any manner 'unfit.'" *Id.* Further, the court noted that "[n]o improprieties concerning [the volunteer] had even been reported to BSA prior to the occurrence

of the alleged incidents." *Id.* Regarding plaintiffs' *respondeat superior* claim, the court held "there was no evidence presented that BSA or even the local council manifested control over the trooper leader's activities." *Id.* at 848. Regarding the negligent hiring and retention claim, the court found that the abuser was "not an employee, agent or servant of BSA" and that "BSA neither selects or retains the adult volunteers who administer the programs." *Id.* at 848.[25]

M.L. is inapplicable for several reasons. First, it is uncontroverted that Scoutmaster Bradshaw sexually abused plaintiff at camps and camp events that were sponsored and supervised by relators. Relators are therefore vicariously liable for the misconduct of Bradshaw. Further, unlike in *M.L.*, it is uncontroverted that there were complaints about Scoutmaster Bradshaw. Prior to the discovery of the sexual abuse of plaintiff by Scoutmaster Bradshaw, parents of other boys complained to relators about Bradshaw supplying young boys with alcohol. Lastly, unlike in *M.L.*, Scoutmaster Bradshaw has admitted that he was selected and approved by relators as a Scoutmaster for plaintiff's Boy Scout troop. He admits that he was expected and intended by relators to educate and train young boys, including plaintiff, in morality, patriotism and assorted civil and life skills. He admits that relators empowered him to perform all duties as a

[25] In an inherently conflicting opinion, the court found this despite earlier references in the opinion to relator BSA's process of taking volunteer adult leader forms and checking them against their ineligible volunteer files.

Scoutmaster including educational and tutorial services, counseling, moral guidance, religious instruction and other duties. He admits that, at all relevant times, he was an agent and employee of relators who acted with the actual or apparent authority of relators. And he admits that relators knew or should have known of his interactions with all of the Scouts in Troop 46, including plaintiff. Relators deny his admissions. This creates questions of material fact that precludes summary judgment.

"'Generally, the relationship of principal-agent . . . is a question of fact to be determined by the jury when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship.'" *Bargfrede v. Am. Income Life Ins. Co.*, 21 S.W.3d 157, 161 (Mo.App. 2000) [quoting *Johnson v. Bi–State Dev. Agency*, 793 S.W.2d 864, 867 (Mo.banc 1990)]. "'The employment relation is a question of law for the court *only* where the material facts from which it is to be inferred are not in dispute and *only* one reasonable conclusion can be drawn therefrom.'" *Id.* [quoting *Smoot v. Marks*, 564 S.W.2d 231, 236 (Mo.App. 1978)]. "'Where the record reasonably supports any inference other than those necessary to support a judgment for the movant, a genuine issue of material fact exists and the movant's motion for summary judgment should be overruled.'" *Daniels v. Senior Care, Inc.*, 21 S.W.3d 133, 138 (Mo.App. 2000) [quoting *Birdsong v. Christians*, 6 S.W.3d 218, 224 (Mo.App. 1999)].

Lastly, respondent and relator note that, under Missouri agency law, the *right to control*, rather than the *actual* exertion of control, is sufficient to permit vicarious liability to attach. *Bach v. Winfield–Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo.banc 2008); *Hodges v. City of St. Louis*, 217 S.W.3d 278, 282 (Mo.banc 2007) (Price, J., concurring in part) (the right to control is the "principal consideration" in determining whether an agency relationship exists); *Bost v. Clark*, 116 S.W.3d 667, 676 (Mo.App. 2003) (the touchstone in establishing agency is whether the party sought to be held liable has the right to control the conduct of another); *Ascoli v. Hinck*, 256 S.W.3d 592, 594 (Mo.App. 2008) (the party resisting summary judgment is not required to show actual control, but instead only the right to control).

It is beyond rational dispute that relators had the right to control Scoutmaster Bradshaw. They had the right to approve or reject him as a Scout leader. They litigated to the highest court in the land to establish their right to know and act upon his sexual orientation. They promulgated rules and regulations that Scoutmaster Bradshaw was supposed to follow. To suggest that relators did not have the right to control Bradshaw strains credulity.

Relators are not entitled to summary judgment on any issue. The preliminary writ should be quashed and relators' Petition for Writ of Prohibition should be dismissed.

CONCLUSION

For all of the reasons set forth *supra,* respondent and plaintiff respectfully ask the Court to quash the preliminary writ, to dismiss relators' petition and lastly, to remand this matter for trial.

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Certificate of Compliance and of Service

The undersigned certifies that: (1) this brief complies with the Missouri Rules of Civil Procedure; (2) this brief complies with all of the pertinent provisions and limitations set forth in Rule 84.06(b); (3) this brief was prepared in Microsoft Word in Times New Roman with 13 point font; (4) this brief contains 20,859 words; and (5) a copy of the foregoing (and the separate appendix) was served via email and U.S. Mail, postage prepaid, this 14th day of September, 2015, to:

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