IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. BRAD HALSEY Relator, vs. THE HONORABLE JENNIFER M. PHILLIPS, Judge for the Sixteenth Judicial Circuit of Missouri Respondent.	)	Case No. SC97288 Writ of Prohibition Cause No.: 1816-CV11837

On Prohibition from the Circuit Court of Jackson County

The Honorable Jennifer M. Phillips

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF PROHIBITION

Respectfully submitted,

NASTEFF & QUINN, LLC

R. Mark Nasteff, Jr., MO 38015
Amy D. Quinn, MO 66166
118 N. Water Street
Liberty, Missouri 64068
(816)792-3529 (telephone)
(816)781-9885 (facsimile)
Email: marknasteff@naqlaw.com
Email: amyquinn@naqlaw.com

ATTORNEYS FOR JENNIFER DACHENHAUSEN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Civil Procedure

Statutes

INTRODUCTION AND SUMMARY

Relator Brad Halsey, the current Police Chief of Independence, Missouri, would have this Court believe that this case is a simple matter of static review of the Statute of Limitations applicable to Battery, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress. He asserts that The Honorable Jennifer M. Phillips, a judge of the Circuit Court of Jackson County, Missouri, overreached in denying his Motion to Dismiss. He asserts that a cause of action in tort accrues on the day the tort is completed. Relator ignores the plethora of case law that establishes that a tort action accrues when the damages from the tort sustained are capable of ascertainment. Judge Phillips correctly applied the law and determined that the Battery claim was made within two years of the date the damages were capable of ascertainment

Additionally, Judge Phillips reviewed the Amended Petition and correctly determined that the facts which gave rise to the emotional distress claims are independent of the battery claim. As such, Judge Phillips correctly applied the law and determined that the emotional distress claims are based upon independent facts and are not subsumed in the battery claim.

STATEMENT OF FACTS[1]

Ms. Dachenhausen was an employee of the Police Department of the City of Independence, Missouri. (Amended Petition for Damages at ¶7, Appendix 0001-0008). During Ms. Dachenhausen's employment with the Independence Police Department Relator was the Deputy Chief of Police. (Amended Petition for Damages at ¶9, Appendix 0001-0008). Ms. Dachenhausen was supervised by Relator. (Amended Petition for Damages at ¶14, Appendix 0001-0008).

A. Pertinent omitted facts related to the battery

On May 17, 2013, Relator placed his hands on the buttocks of Ms. Dachenhausen and pulled her into his erect penis. (Amended Petition for Damages at ¶23, Appendix 0001-0008). Ms. Dachenhausen resigned to avoid further contact with Relator. (Amended Petition for Damages at ¶29, Appendix 0001-0008). Ms. Dachenhausen did not appreciate the impact of Relator's actions until the fall of 2017 with the prominence of the "Me Too" movement. (Amended Petition for Damages at ¶30, Appendix 0001-0008). In the fall of 2017, Ms. Dachenhausen began to see a medical professional to address her emotional state. (Amended Petition for Damages at ¶31, Appendix 0001-0008).

[1] For the most part, Respondent does not take issue with Relator's Statement of Facts, however, there are several factual missteps or omissions that Respondent believes need to be brought to the Court's attention. Further, Relator's argument in his Statement of Facts should be disregarded as it is not permitted under Mo. Sup. Ct. R. 84.04(4). Additionally, Relator's reference to the original and abandoned Petition for Damages has no bearing on this Court which is limited to a review of the current Amended Petition for Damages.

B. Pertinent facts related to the Intentional Infliction of Emotional Distress claim.

Relator intentionally placed his erect penis near the face of Ms. Dachenhausen, asked her to send him naked pictures of herself, and sent her naked pictures a female's breasts purporting to be pictures of Relator's wife. (Amended Petition for Damages at ¶33, Appendix 0001-0008).

C. Pertinent facts related to the Negligent Infliction of Emotional Distress claim.

Relator negligently placed his erect penis near the fact of Ms. Dachenhausen, asked her to send him naked pictures of herself and sent her naked pictures a female's breasts purporting to be pictures of Relator's wife. (Amended Petition for Damages at ¶41, Appendix 0001-0008).

RESPONSES TO POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DENYING RELATOR'S MOTION TO DISMISS BECAUSE THE TRIAL COURT CORRECTLY RULED THAT THE PETITION WAS FILED WITHIN TWO YEARS OF THE DATE DAMAGES WERE SUSTAINED AND CAPABLE OF ASCERTAINMENT

Graham v. McGrath, 243 S.W.3d 459 (Mo.App.E.D. 2007)

Powel v. Chaminade College Preparatory, Inc., 197 S.W.3d 576 (Mo. banc 2006)

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

Mo. Rev. Stat. § 516.100 (2005)

II. THE TRIAL COURT DID NOT ERR IN DENYING RELATOR'S MOTION TO DISMISS BECAUSE THE TRIAL COURT CORRECTLY RULED THAT THE PETITION PLED FACTS ESTABLISHING TORTS OF EMOTIONAL DISTRESS WHICH ARE INDEPENDENT OF THE FACTS ESTABLISHING THE BATTERY CLAIM AND THAT THE PETITION SUFFICIENTLY PLED A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993)

State ex rel. BP Products North America, Inc. v. Ross, 163 S.W.3d 922 (Mo. banc 2005)

STANDARD OF REVIEW

I. Legal Standard in Reviewing a Preliminary Writ of Prohibition

A writ of prohibition is an "extraordinary remedy" and not a "writ of right." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. Banc 1999). The writ of prohibition is to be used "with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). Because prohibition is a writ "divesting the body against whom it is directed to cease further activities," the use of prohibition has been limited to three unusual circumstances. *State ex rel. Riverside Joint Venture, et al. v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221(Mo. banc 1998). The first type of case where prohibition is appropriate is where the court exceeds its subject matter jurisdiction or its personal jurisdiction. *Id*. Second, prohibition is proper where the court lacked the authority to act as the court did. *Id*. The third case pertains to those very limited situations when an "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order." *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983). The third type of case may include situations where a trial court erroneously decides an important question of law and the decision would otherwise escape review on appeal, causing the party to suffer expense and hardship as a consequence of the error. *State ex rel. Noranda Aluminum v. Rains*, 706 S.W.2d 861, 862–3 (Mo. banc 1986); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). The burden is on the relator to show that the case is within one of these rare

situations and that the respondent exceeded its jurisdiction. *State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm'n*, 159 S.W.3d 376, 383 (Mo.App.W.D. 2004). The relator must also show that no adequate remedy is available through appeal. *Id.*

II. Legal Standard in Reviewing a Motion to Dismiss under Supreme Court Rule 55.27(a)(6)

Appellate review of a trial court's ruling on a Motion to Dismiss is a de novo review. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010). A Motion to Dismiss under Rule 55.27(a)(6) is appropriate only when there are no facts pled that meet a recognizable cause of action under Missouri law. *Id.*(citing *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993)). The review of the pleadings is simply an academic exercise to test the sufficiency of the pleadings. *Id.(*citing *Reynolds v. Diamond Food & Poultry*, 79 S.W.3d 907, 909 (Mo. banc 2002)). The averments of the plaintiff will be accepted as true and inferences from the pleadings will be liberally granted and must be taken in favor of the plaintiff. *Id.* The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Bell v. Twombly*, 550 U.S. 544, 556 (2007). A viable complaint must include "enough facts to state a claim for relief that it is plausible on its face." *Id.* A motion to dismiss is not an opportunity to weigh the credibility or persuasiveness of the facts alleged. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010)(citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING RELATOR'S MOTION TO DISMISS BECAUSE THE TRIAL COURT CORRECTLY RULED THAT THE PETITION WAS FILED WITHIN TWO YEARS OF THE DATE DAMAGES WERE SUSTAINED AND CAPABLE OF ASCERTAINMENT

Defendant Halsey argues that the two year statute of limitations bars Ms. Dachenhausen's claim for battery. There is no dispute that the lawsuit was filed almost five years after the date Defendant Halsey grabbed Ms. Dachenhausen's buttocks and pulled her into his erect penis without her consent. However, the requisite inquiry by this Court does not focus on that date of the offense but rather the date upon which all of the elements of a battery have been met and the cause of action accrues.

The elements of battery consist of the intentional offensive physical contact with another. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 246 (Mo.App.E.D. 2006)(citing, *Duvall v. Lawrence*, 86 S.W.3d 74, 80 (Mo.App.E.D. 2002)). Contact with the body is offensive, and sustains a claim for battery, if it offends a reasonable sense of personal dignity. *Id.*(citing, *J.D. v. M.F.*, 758 S.W.2d 177, 178 (Mo.App.E.D. 1988). The cause of action accrues when and originates where damages are sustained and capable of ascertainment. Mo. Rev. Stat. § 516.100(2005)(APPENDIX 0009). When contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question for the jury to decide. *Lomax v. Sewell*, 1 S.W.3d 548,

552-53 (Mo.App.W.D. 1999).

The critical question before Judge Phillips, and now this Court, is when the damages were ascertainable. Relator argues that Ms. Dachenhausen's damages were readily ascertainable at the time of the offending conduct. However, a series of cases that have been before this Court have evidenced that there is no bright-line test to determine when damages are ascertainable, especially in instances of sexual battery. See, *Sheehan v, Sheehan,* 901 S.W.2d 57 (Mo. banc 1995); *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576 (Mo. banc. 2006); *Graham v. McGrath,* 243 S.W.3d 459 (Mo.App.E.D. 2008).

This Court in *Sheehan, Powel* and *Graham* considered the circumstances under which a cause of action accrued in a sexual battery.

In *Sheehan,* this Court refused to limit the plaintiff's claims to two years from the date of the occurrence and instead remanded the matter to the lower court to flesh out facts to determine if the pleading was within the statute of limitations. *Sheehan,* 901 S.W.2d at 59.

In *Powel,* this Court again refused to begin the statute of limitations from the date of the wrong and determined that there were a series of check points for the Court to review. This Court stated that a cause of action is an evolution. First, a wrong has to occur. Second, damages must be present. Lastly, the damages must be "substantially complete." *Powel*, 197 S.W3d at 581. "The consequential injury was the triggering factor, not the wrong." *Id.*

In *Graham,* again this Court refused to assign the accrual of the cause of action to the date the conduct occurred. Rather, damages were ascertainable "when all the damages may be recovered and full and complete relief obtained." *Graham,* 243 S.W.3d at 462. The test is when a reasonable person would have been put on notice that an injury and substantial damages may have occurred. *Id.*

In each instance this court was reticent to pronounce that the cause of action necessarily begins to run on the date of the offense. Rather, the Court applied the objective standard of ascertainment of damages in a manner in which the complete and substantial damages are known to the claimant.

Relator directs this Court to *Glover,* which is easily distinguished. *Glover v. Palmer,* 129 S.W.3d 498, 499 (Mo.App.S.D. 2004). In *Glover* the claimant was injured at work due to a battery and called the police and complained about the contact and her injuries on the night of the battery. Later on, Ms. Glover sought an extensive medical exam and claimed additional injuries including internal injuries. The Court of Appeals correctly upheld the trial court's decision to dismiss the case in a manner consistent with *Sheehan* and the subsequent decisions of this Court.

Ms. Dachenhausen has pled a cause of action that falls within the Statute of Limitations. While the actual offending contact may have occurred in May of 2013, the damages, in this case psychological in nature, were not readily ascertainable in May of 2013. As the "Me Too" movement has become prominent in the last year, more women have come to terms with the harm caused by previously "accepted" but illegal touching.

What was accepted by a reasonable woman in the workplace as boorish is now quite obviously an illegal battery. In light of that backdrop, Ms. Dachenhausen has now been able to fully understand the damages and impact that Relator's battery caused her. Ms. Dachenhausen has begun counseling and for the first time has determined the readily ascertainable damages to her due to Relator's physically grabbing her by the buttocks and pulling her into his erect penis on May 17, 2013. Due to the unique nature of the harm attendant to a battery, a jury should determine whether the cause of action accrued at the time of the touching or at the time when the harm was readily ascertainable. However, at this stage of the proceeding, the inquiry is whether there is a claim that is plausible on the face of the pleading. In the instant case, there is no question that such a claim has been pled.

II. THE TRIAL COURT DID NOT ERR IN DENYING RELATOR'S MOTION TO DISMISS BECAUSE THE TRIAL COURT CORRECTLY RULED THAT THE PETITION PLED FACTS ESTABLISHING TORTS OF EMOTIONAL DISTRESS WHICH ARE INDEPENDENT OF THE FACTS ESTABLISHING THE BATTERY CLAIM AND THAT THE PETITION SUFFICIENTLY PLED A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM

A. Ms. Dachenhausen has pled sufficient independent facts to establish her emotional distress claims to overcome Relator's Motion to Dismiss

Ms. Dachenhausen filed an Amended Petition for Damages which supersedes the original pleading. "Once a pleading is amended, all prior pleadings are abandoned." *Smith v. St. Louis*, 409 S.W.3d 404, 417 (Mo.App.E.D. 2013). Any reference by Relator to the abandoned pleading has no impact upon this Court's review as the review is limited to the face of the Amended Petition for Damages in an academic manner to glean whether a viable cause of action has been pled. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010).

Count II of Ms. Dachenhausen's First Amended Petition for Damages pleads a cause of action for intentional infliction of emotional distress. "In Missouri, to state a claim of intentional infliction of emotional distress, a plaintiff must plead: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; and (3) the conduct caused severe emotional distress resulting in bodily

harm." *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. Banc 1997); *K.G. v. R.T.R.*, 918 S.W.2d 795,799 (Mo. Banc 1996). The conduct must have been "so outrageous in character and so extreme in degree that it is beyond all possible bounds of decency" and is intolerable in a civilized community. *Thomas v. Special Olympics Missouri, Inc.*, 31 S.W.3d 442, 446 (Mo. App. W.D. 2000) (citing, *Gibson*, 952 S.W.2d at 249). "Furthermore, the conduct must have been intended only to cause extreme emotional distress to the victim." *Id.*

This Court has previously held that where the conduct amounts to the commission of a traditional tort, not intending only to cause extreme emotional distress to the victim, recovery must be had under the appropriate tort. *K.G.*, 918 S.W.2d at 799. If the claim for intentional infliction of emotional distress could not be maintained as a separate cause of action jointly with other tort claims, the claim would be duplicative. *Diehl v. Weber*, 309 S.W.3d 309, 322 (Mo.App.E.D. 2010). However, this Court acknowledged that claims that exist independently of the underlying claim are not barred. *State ex rel. BP Products North America, Inc. v. Ross*, 163 S.W.3d 922, 926 (Mo. banc 2005).

Here, Ms. Dachenhausen's claim is not duplicative. Independent facts support Ms. Dachenhausen's emotional distress claims. The battery claims involve a physical touching of Ms. Dachenhausen's buttocks and pressing her against Relator's penis. However, the emotional distress claims are based upon independent facts which do not support a claim for battery. First, Relator stood near Ms. Dachenhausen's desk, while she was seated, and called her attention to his erect penis, asking "are my pants too tight?"

while standing in close proximity to Ms. Dachenhausen's face. Relator requested that Ms. Dachenhausen send him nude pictures of herself. Last, Defendant Halsey also sent to Ms. Dachenhausen photographs of a naked woman purported to be his wife. These instances have no relationship to a sexual battery. Relator acted in a series of sexually explicit misconduct that culminated with his placing his penis near Ms. Dachenhausen's face and directing her attention to his penis.

At this stage of the case, the analysis necessarily stops there. No legal theories bar Ms. Dachenhausen's claim of Intentional Infliction of Emotional Distress. The resolution of the claim is a question of fact regarding Relator Halsey's actions, when sexually tormenting Ms. Dachenhausen, to be answered by a jury.

B. Ms. Dachenhausen has pled the essential facts necessary to overcome Relator's Motion to Dismiss her Negligent Infliction of Emotional Distress claim under Missouri Supreme Court Rule 55.27(a)(6) for failing to state a claim upon which relief may be granted.

Ms. Dachenhausen has pled that she suffered severe emotional distress through negligent actions of Relator Halsey. A claim for negligent infliction of emotional distress has the four elements of a general negligence action, as well as two additional elements. *Thornburg v. Federal Express Corp.*, 62 S.W.3d 421, 427 (Mo.App.W.D. 2001). The first four elements are that of general negligence, and they are as follows: 1) a defendant with a legal duty to protect the plaintiff from injury, 2) breach of that duty, 3) proximate cause, and 4) injury to the plaintiff. *Id.*(Citing *Pendergist v. Pendergist*, 961 S.W. 919, 923 (Mo.

App.W.D. 1998)). A claim for negligent infliction of emotional distress "requires proof of two additional elements: 1) that the defendant should have realized that his conduct involved an unreasonable risk of causing distress, and 2) that the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant." *Id.*

Relator Halsey, Ms. Dachenhausen supervisor, owed Ms. Dachenhausen a legal duty not to place her in harms way at the workplace, especially when the harm is from his actions. Relator breached that duty when he engaged in sexually charged behaviors, including calling her attention to his erect penis which was in close proximity to her face and sending her naked photos of a woman purported to be his wife and requesting that Ms. Dachenhausen send the same type of photos of herself to him. The breach of Relator Halsey's duty to Ms. Dachenhausen is the proximate cause of her injury. Relator Halsey should have realized his conduct involved an unreasonable risk of causing Ms. Dachenhausen distress. In a civilized society, all people, especially in supervisory roles, should realize that sexually tormenting an employee involves an unreasonable risk of causing the employee distress. This emotional distress has caused her bodily harm, and this bodily harm has caused medically diagnosable emotional distress. She has attended counseling and continues this course of treatment. In fact, if Ms. Dachenhausen had not received medical treatment, Relator would complain that she had not pled the necessary elements of a negligent infliction of emotional distress. Thus, until the fall of 2017, no cause of action accrued from a negligent infliction cause of action. She has pled, on the

face of the First Amended Petition, an independently sustainable cause of action for negligent infliction of emotional distress.

This Court's review of the Amended Petition for Damages is a purely academic basis to test for sufficiency of the pleading on its face to assert viable causes of action for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. For the reasons set forth above, such a review confirms that Ms. Dachenhausen has properly pled all of her claims.

Conclusion

For the reasons set forth herein, Jennifer Dachenhausen, on behalf of Respondent, Honorable Jennifer M. Phillips, prays this Court enter an Order quashing the Preliminary Writ, denying Relators' Petition for Writ of Prohibition and for other such relief as this Court deems appropriate.

Respectfully submitted,

/s/ R. Mark Nasteff, Jr.
R. Mark Nasteff, Jr. MO #38015
Amy D. Quinn MO #66166
NASTEFF & QUINN, LLC
118 North Water Street
Liberty, MO 64068
Telephone: (816) 792-3519
Telecopier: (816) 781-9885
Email: marknasteff@naqlaw.com
amyquinn@naqlaw.com

Attorneys for Respondent
Jennifer Dachenhausen

CERTIFICATE OF SERVICE

I hereby certify that on this 10th of December 2018, I placed a pdf of this pleading within the court E-Filing System, and I further certify that I served a copy of the document upon the following via electronic mail:

David S. Baker
Nicholas Caldwell
Fisher, Patterson, Saylor & Smith, LLP
9229 Ward Parkway, Suite 370
Kansas City, Missouri 64114

Attorneys for Brad Halsey

/s/ R. Mark Nasteff, Jr.
Attorneys for Jennifer Dachenhausen

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), the undersigned hereby certifies the Respondent's Brief contains 3848 words, exclusive of the cover, certificate of services, this certificate, and signature block, according to the word count in Microsoft Word and thus complies with Rule 84.06(b). This Brief also contains the information required under Missouri Supreme Court Rule 55.03.

/s/ R. Mark Nasteff, Jr.
Attorney for Respondent