

IN THE SUPREME COURT OF MISSOURI

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

**BRIEF OF RELATOR
BRAD HALSEY**

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Upon application by Relator Brad Halsey, this Court issued a Preliminary Writ of Prohibition on September 25, 2018. (APPENDIX A0000001) This Court has jurisdiction to adjudicate this matter pursuant to Article V, § 4 of the Missouri Constitution. Relator seeks a Permanent Order of Prohibition to prevent the Honorable Jennifer Phillips from taking any further action other than granting Relator's Motion to Dismiss based on the application of the statute of limitations and Missouri case law.

STATEMENT OF FACTS¹

The Parties

The Relator, Brad Halsey, is the defendant in the underlying case of *Jennifer Dachenhausen v. Brad Halsey*,² docket number 1816-CV11837 (hereinafter referred to as the "underlying case"), now pending in the Circuit Court of Jackson County, Missouri at Independence. (Amended Petition for Damages, **Exhibit B**, INDEX 000009)

The Respondent, the Honorable Jennifer M. Phillips, is the judge sitting in the Sixteenth Division of the Circuit Court of Jackson County, Missouri, to whom the underlying case is assigned. Jennifer Dachenhausen (hereinafter referred to as "Plaintiff")

¹ For ease of the Court and Respondent, and as allowed by Court procedure, Relator refers to its exhibits and index to its Petition for Writ of Prohibition filed July 18, 2018. Documents not included in the Index and referred to herein are included in the Appendix filed herewith pursuant to Rule 84.04(h).

² Though the Amended Petition for Damages (**Exhibit B**, INDEX 000009) names the defendants Brad Halsey and the City of Independence, the City of Independence was voluntarily dismissed as a defendant as of May 27, 2018.

is the Plaintiff in the underlying case. Her attorneys of record are R. Mark Nasteff, Jr. and Amy Diane Quinne of Nasteff & Quinn, LLC.

Procedural Background

Plaintiff filed her original Petition for Damages on May 9, 2018, asserting one collective claim for assault and battery, and one claim for intentional infliction of emotional distress. (Petition for Damages, **Exhibit A**, INDEX 000001) Relator timely filed a motion to dismiss in lieu of an answer, which was later denied as moot after Plaintiff filed her Amended Petition for Damages on May 28, 2018. (**Exhibit B**, INDEX 000009) Relator then filed a Motion to Dismiss the Amended Petition on June 5, 2018 (Defendant Halsey's Motion to Dismiss, **Exhibit C**, INDEX 000017-18), filed contemporaneously with Suggestions in Support (Suggestions in Support of Defendant Halsey's Motion to Dismiss, **Exhibit D**, INDEX 000020-32), which was denied by Respondent's Order on June 20, 2018 (Relator's Order, **Exhibit F**, INDEX 000040; APPENDIX 000002).

Underlying Claims

While Plaintiff's original Petition has been superseded by her Amended Petition, it is helpful to note some points of comparison between the original Petition and the Amended Petition to inform the issues in this appeal. In her original Petition, Plaintiff's claims boiled down to two interactions. The primary claim was alleged to have occurred on May 17, 2013, in which she claims the Relator grabbed her buttocks, and then later her face was near his crotch and put her in fear of an offensive touching.³ (**Exhibit A**, INDEX

³ For ease of reference, the allegation of defendant grabbing Plaintiff's buttocks is referred to as the alleged "battery" and the allegation of Plaintiff's face being in proximity to

000004-5, ¶ 24, 29) The second interaction in Plaintiff's original Petition was referenced as occurring sometime in 2012, allegedly involving illicit text messages. (**Exhibit A**, INDEX 000003, ¶ 18) The primary focus of Plaintiff's original Petition was the alleged May 2013 interaction.

In response to a motion to dismiss, Plaintiff filed her Amended Petition, which contained two main distinctions from the original. The first major distinction of the Amended Petition is in Count I, the collective claim for assault and battery, Plaintiff alleged she did not appreciate the full extent of the "scope and impact of Defendant Halsey's conduct" until the "Me Too" movement began in fall 2017. (**Exhibit B**, INDEX 000012, ¶ 30) The second distinction involves the allegedly assaultive actions—when Plaintiff alleges her face was in close proximity to Relator's crotch. In the Amended Petition, the facts of the alleged assault were completely removed from the assault and battery cause of action (Count I). (See **Exhibit B**, generally, INDEX 000011-13) Currently, the alleged assault is claimed only in Count II for intentional infliction of emotional distress, and an added Count III, for negligent infliction of emotional distress.

The singular claim describing the alleged assault in the Amended Petition is the statement "Defendant Halsey placed his erect penis near Plaintiff Dachenhausen's face." (**Exhibit B**, INDEX 000013, 14, ¶ ¶ 33, 41) All reference to the date when the alleged assault occurred was also removed from the Amended Petition. (See generally **Exhibit B**,

defendant's crotch is referred to as the alleged "assault." Relator denies that he engaged in any of the behaviors described in the Petition or the Amended Petition, but accepts same as true for the purposes of the underlying motion to dismiss.

INDEX 00009-16) Previously, the assault was alleged to have occurred contemporaneously with the battery. (**Exhibit A**, INDEX 000004, ¶¶ 26-29) Plaintiff's Amended Petition claims Relator inflicted emotional distress (both intentional and negligent) in (1) the alleged assault involving Plaintiff's face being near the defendant's crotch, and (2) an alleged text message exchange from 2012. (**Exhibit B**, INDEX 000011, 13-14, ¶¶ 16, 33, 41)

POINT RELIED ON

I. Relator is entitled to a permanent order prohibiting Respondent from taking any further action other than to grant Relator's motion to dismiss because the theories properly presented in Plaintiff's Amended Petition are time-barred in that they were not filed within the applicable statute of limitations.

Mo. Rev. Stat. § 516.140

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

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

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

ARGUMENT

Standard of Review Applicable to Writ of Prohibition

"A writ under article V, section 4.1 of the Missouri Constitution [writ of prohibition] is the appropriate remedy to prevent a lower court from proceeding on an action barred by the statute of limitations." *State ex rel. Holzum v. Schneider*, 342 S.W.3d 313, 315 (Mo. banc 2011) (holding the three-year statute of limitations applied to bar a medical malpractice cause of action and issuing a permanent writ of prohibition); *State ex rel. Greufe v. Davis*, 407 S.W.3d 710, 711 (Mo. Ct. App. 2013) (issuing a permanent writ of

prohibition because the statute of limitations had expired to bring criminal charges against the defendant on child pornography charges); *State ex rel. Biesly v. Perigo*, 469 S.W.3d 434, 436 (Mo. banc 2014) (quashing the writ of prohibition because actions of the defendant tolled the wrongful death cause of action by equitable estoppel when the defendant concealed facts surrounding killing his estranged wife and destroyed evidence); *State ex rel. Church & Dwight Co. v. Collins*, 543 S.W.3d 22, 26-27 (Mo. banc 2018) (holding the 90-day statute of limitations within the Missouri Human Rights Act should be strictly construed, and upholding issuance of a writ of prohibition to dismiss plaintiff's claims for untimely filing); *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 584 (Mo. banc 2018) (issuing a writ of prohibition because plaintiffs' medical malpractice cause of action was time-barred).

It is proper to issue a writ of prohibition when a plaintiff has failed to state a cause of action, because "it is fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation in addition to being a waste of judicial resources and taxpayer money." *Collins*, 543 S.W.3d at 26 (internal quotations omitted) (citing *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009)). Where the issuance of the writ is dependent upon statutory interpretation, the court reviews the statute *de novo*. *Greufe*, 407 S.W.3d at 712.

Standard of Review Applicable to Motion to Dismiss

As stated in *Henley*, 285 S.W.3d at 329:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally

grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Id. at 329 (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

THE PERMANENT WRIT SHOULD ISSUE BECAUSE THE PLAINTIFF'S CLAIMS ARE TIME-BARRED

I. Plaintiff's claims in her Petition are barred by the two-year statute of limitations applicable to assault and battery.

Plaintiff's claims for assault and battery stemming from the May 17, 2013 interaction are clearly time-barred under Missouri law, which provides a two-year statute of limitations to file a claim for intentional torts, like assault and battery. Mo. Rev. Stat. ¶ 516.140. Plaintiff's Petition was not filed until May 9, 2018, almost three years after the cause of action accrued. Plaintiff's sole allegation to extend the statute of limitations is that plaintiff did not appreciate the full scope of the Relator's actions until fall 2017 in the wake of the "Me Too" movement. In well-settled Missouri law, this claim is insufficient to extend the statute of limitations, and the Circuit Court erred in denying Relator's Motion to Dismiss.

"To avoid the statute of limitations, a plaintiff bears the burden of showing that [s]he strictly comes within a claimed exception. The statutes of limitations are favored in the law and so any exceptions must be strictly construed, even in cases of hardship." *Graham v. McGrath*, 243 S.W.3d 459, 464 (Mo. Ct. App. 2007) (internal citations and quotations

omitted). The statute of limitations for claims of assault or battery is two years from the date the cause of action accrued. Mo. Rev. Stat. §§ 516.100, 516.140. A cause of action accrues at such time as “the damage resulting therefrom is sustained and is capable of ascertainment.” Mo. Rev. Stat. § 516.100.

The determination of when damages are “capable of ascertainment” is an objective test, not a subjective one. *Graham*, 243 S.W.3d at 462. “[T]he issue is not when a plaintiff is *subjectively* aware of [the] injury; subjective awareness of damages does not resolve the question of when those damages were *objectively* capable of ascertainment.” *Id.* at 463 (emphasis in original). “The statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.” *Powel v. Chaminade College Preparatory*, 197 S.W.3d 576, 582 (Mo. banc 2006).

The answer to the exact question posed in this case, whether the statute of limitations begins to run although the plaintiff does not yet know the full extent of his or her alleged psychological injuries, has been discussed and dismissed in favor of the defendant by the Supreme Court of Missouri and Missouri Court of Appeals. The Courts in *Powel* and *Graham* dismissed claims that the plaintiff’s ascertainment of damages was delayed, even under extreme circumstances. *See Powel*, 197 S.W.3d at 577-78; *Graham*, 243 S.W.3d at 460.

The plaintiff in *Graham* claimed he was a victim of sexual abuse as a child, and that he was not aware he had been injured by acts which occurred approximately twenty years prior to the date of filing his claims for battery. *Graham*, 243 S.W.3d at 463. The Court noted, “because all possible damages do not have to be known, or even knowable, before

the statute accrues, the date Plaintiff completed his psychological process of uncovering is irrelevant.” *Id.* (quoting *Powel* at 584) (internal quotations omitted). The Court thus agreed the statute of limitations had passed for the plaintiff to bring a cause of action against the defendant and upheld dismissal of plaintiff’s claims. *Id.*

The claims in *Powel* were similar to *Graham* in severity and outcome. The plaintiff in *Powel* alleged he had repressed memories between the ages of 17 and 40 regarding prior sexual abuse. The Court relied on the plaintiff’s statement that, at a minimum, he always knew he had been molested and remembered it from the outset without any assistance from others. *Powel* at 588. The Court pointed to plaintiff’s admission that the acts “were overt, traumatic and painful at the time of their occurrence.” *Id.* The Court ultimately upheld dismissal of the plaintiff’s claims because the injury was ascertainable on the date of the incident, even though the extent of the damage may not have been, and the allegation of memory repression was not an excuse for filing his claim out of time. *Id.* at 589.

The Court reached a similar result in *Glover v. Palmer*, wherein the plaintiff alleged the defendant battered her by pushing her back into an electrical box. *Glover*, 129 S.W.3d 498, 499 (Mo. Ct. App. 2004). The Court held injuries were ascertainable on the date of the alleged battery, because, even though plaintiff claimed the full physical effects were not realized until almost a year after the incident, she had some knowledge that an actionable injury occurred on the date of the incident, evidenced by affirmative actions of the plaintiff like calling the police. Thus, her claims against the defendant for battery were properly dismissed. *Id.* at 500.

Plaintiff here makes similar claims to those in *Graham* and *Powel* in that she did not understand the full psychological effects of the alleged sexual battery and/or assault on the date the incident occurred. Plaintiff has made no allegation that she was not capable of ascertaining any injury on the date of the incident, but rather that she did not appreciate the *full extent* of the injury until some time later. **Exhibit B**, INDEX 000012, ¶ 30. This assertion has been explicitly rejected to extend the statute of limitations for actions of assault and battery in well-established Missouri precedent.

Accepting Plaintiff's allegations as true, the Amended Petition on its face demonstrates that at least some damage was ascertainable—and actually ascertained—on the date of the alleged incident. In the Amended Petition, Plaintiff alleges “[i]mmediately after the incident, Plaintiff Dachenhausen fled Defendant Halsey’s presence;” “Defendant Halsey by his behavior placed Ms. Dachenhausen in fear of an offensive touching;” “[the battery] was offensive because such a touching of a woman **would offend a reasonable person’s sense of personal dignity**” (emphasis added); “[t]he actions of Defendant Halsey so shocked Ms. Dachenhausen that she was forced to resign to avoid further actions from Defendant Halsey.”⁴ **Exhibit B**, INDEX 000012, ¶ ¶ 25-27, 29. Plaintiff thereby shows the objective test has been met, and a reasonably prudent person would have ascertained injuries on the date of the incident, namely an offense to his or her sense of personal dignity.

⁴ Further, the language used in Count II, Intentional Infliction of Emotional Distress, belies the argument of unrealized damages, stating the conduct was “so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious and utterly intolerable in a civilized community.” **Exhibit B**, INDEX 000014, ¶ 38. Such language does not confer a type of subtle injury not able to be ascertained by an objective and reasonably prudent individual.

In her opposition brief to the underlying Motion to Dismiss, Plaintiff cited *Lomax v. Sewell*, 1 S.W.3d 548, 552-53 (Mo. Ct. App. 1999) that the statute of limitations is an issue for the jury when “contradictory or different conclusions may be drawn from the evidence” as to when the statute of limitations has run. **Exhibit E**, INDEX 000034. That is not the issue here. There are no contradictory or alternative conclusions which Relator asked the Circuit Court to make. Rather, all allegations made by Plaintiff were taken as true. For example, the Relator (for purposes of the underlying motion only) accepted as true that Plaintiff did not realize the full scope and extent of Relator’s alleged actions until fall 2017. However, even accepting that as true, Plaintiff’s claims are nevertheless time-barred, because not appreciating the full extent of the damages does not toll running of the statute. The cause of action accrued on the date of the alleged incident, May 17, 2013, because some damages were objectively ascertainable on that date.

Plaintiff also argued that injuries with respect to sexual assault are complicated as they are psychological in nature. The claimed psychological injuries in this case are of a similar type, though to a different degree, than those in *Powel* and *Graham*, in which the Court dismissed the plaintiff’s claims as a matter of law. Again, as stated in those cases, the test is not when Plaintiff actually ascertained damages, but an objective test when a reasonably prudent person would have ascertained damages. If the claims in Plaintiff’s Amended Petition are taken as true, a reasonably prudent person would have ascertained damages on the date of the incident (**Exhibit B**, ¶ 27). Because the cause of action accrued on the date of the incident, the statute on Plaintiff’s causes of action ran on May 17, 2015.

Plaintiff's claims are time-barred as the Petition was not filed until almost three years after the statute of limitations ran, on May 9, 2018.

II. Plaintiff's claims for intentional and negligent infliction of emotional distress do not state a cause of action independent from a traditional tort.

As outlined above, Plaintiff's Amended Petition makes a claim for intentional infliction of emotional distress (Count II) and negligent infliction of emotional distress (Count III). **Exhibit B**, INDEX 000013-15. Both emotional distress claims are based on (1) the allegation that Relator's groin was placed near Plaintiff's face (referred to herein as the "assault"), and (2) an alleged text message exchange from 2012.⁵ **Exhibit B**, INDEX 000013-14, ¶¶ 33, 41. In the original Petition, the assault allegedly occurred on the same date as the battery on May 17, 2013. In the Amended Petition, the alleged fact is not accompanied by a date. Both of these claims for intentional and negligent infliction of emotional distress are properly subject to dismissal because the underlying allegations (1) constitute the basis for a traditional tort, and thus cannot also be made as a separate claim for emotional distress, and (2) are time-barred.

The statute of limitations for intentional or negligent infliction of emotional distress is five years. Mo. Rev. Stat. § 516.120. On its face, the Amended Petition does not show the negligent or intentional infliction of emotional distress claims are timely because the alleged text message exchange is from 2012, and there is no time frame alleged with respect to the alleged assault. Even if the 2012 text messages could make up the basis of an

⁵ The details of the alleged text message exchange are described in Plaintiff's Amended Petition, ¶ 16. **Exhibit B**, INDEX 0000011. Again, the Relator denies the misconduct alleged by Plaintiff but accepts same as true for the purposes of the underlying motion.

emotional distress claim, such would be time-barred as the cause of action accrued sometime in 2017. In her opposition brief to Relator's motion to dismiss, plaintiff did not address that her claims involving 2012 conduct were time-barred. *See Exhibit E*, generally, INDEX 000033-39. In addition, she made no allegation in the Amended Petition that her ascertainment of the full extent of damages was delayed for negligent or intentional infliction of emotional distress (in other words, there is no reference to the "Me Too" movement under Counts II and III).⁶

Even if the other alleged act is assumed to occur on the date in the original Petition, May 17, 2013, it is still an improper attempt by Plaintiff to categorize an assault claim as a claim for infliction of emotional distress to avoid the statute of limitations. This alleged act would constitute the basis for a traditional assault claim. *Phelps v. Bross*, 73 S.W.3d 651, 655 (Mo. Ct. App. 2002) ("assault is defined as any unlawful offer or attempt to injure another with the apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril"). Physical contact is not required to prove assault, though it is rare when a case of assault is not accompanied by a claim for battery. *Id.* Thus, the

⁶ In her suggestions in opposition to the Motion to Dismiss the Amended Petition, Plaintiff stated "Defendant Halsey 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." (*Exhibit E*, INDEX 000036). None of these facts are contained within the Amended Petition and should be disregarded by the Court in further consideration, as a motion to dismiss only looks at facts contained within the petition. The only factual allegation in the Amended Petition is "events at work where Defendant Halsey placed his erect penis near Ms. Dachenhausen's face." Plaintiff is attempting to have it both ways by relying on her original petition to substantiate some underlying facts but not others, namely ignoring that the alleged assault is part of the same set of circumstances as the alleged battery.

true cause of action for this claim is for assault, and Plaintiff cannot attempt to color this alleged act as intentional or negligent infliction of emotional distress to thereby avoid a clear statute of limitations violation.

a. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is not meant to provide a duplicate avenue for recovery, and thereby duplicate damages, for a traditional cause of action already recognized. *See Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. banc 1993) (“any recovery for emotional distress as an independent tort would duplicate part of the recovery for a slander claim [the underlying cause of action] arising out of the same conduct”); *see also K.G. v. R.T.R.*, 918 S.W. 795, 799 (Mo. banc 1996). Rather, it was intended to create a cause of action to supplement recovery for actions that society deems as unconscionable, but do not offend a traditional cause of action. *K.G.*, 918 S.W. at 799 (“[t]he rationale behind this rule is that the tort of intentional infliction of emotional distress is a relative newcomer to the common law. As such, it was intended to supplement existing forms of recovery, not swallow them.”)

Plaintiff here may not attempt to avoid the two-year statute of limitations for assault (or battery) by repacking the claim as one for intentional infliction of emotional distress.

As explained in *K.G.*:

[W]here one’s conduct amounts to the commission of one of the traditional torts, such as battery, and the conduct was not intended only to cause extreme emotional distress to the victim, the tort of intentional emotional distress will not lie, and recovery must be had under the appropriate traditional common law action.

Id. at 799.

The Court in *Nazeri* upheld as proper the dismissal of plaintiff's claim for intentional infliction of emotional distress because it was not predicated upon any additional facts from the underlying claim of slander. *Nazeri*, 860 S.W.2d at 316. Similarly in *K.G.*, the Court upheld the dismissal of plaintiff's intentional infliction of emotional distress claim because the underlying cause of action was based on actions dependent upon a battery. *K.G.*, 918 S.W.2d at 800.

To state a claim for intentional infliction of emotional distress, "a plaintiff must plead extreme and outrageous conduct by a defendant who intentionally or recklessly causes severe emotional distress that results in bodily harm." *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. banc 1997). The sole purpose of the conduct must be only to cause extreme emotional distress to the victim. *Id.*

This specific issue, where a plaintiff has attempted to evade an expired statute of limitations by categorizing such claim as one for emotional distress, was at issue in *K.G.* *K.G.*, 918 S.W. at 800. The Court held the plaintiff could not evade the statute of limitations of the underlying cause of action by reclassifying it as a claim for intentional infliction of emotional distress, explaining:

Where, as here, no cause of action for the intentional infliction of emotional harm would exist but for the allegations of the commission of a battery, § 516.140 is the applicable statute of limitations. Many battery actions, particularly those involving sexual contact, involve an offensive touching that is extreme and outrageous and may result in emotional distress. Nevertheless, such actions are at their core an action for battery. **To hold that the specific two-year statute was not applicable would evade a clearly expressed legislative policy.**

Id. (emphasis added).

Here, Plaintiff's claim forms the basis for an assault claim, which is subject to the two-year statute of limitations. Plaintiff cannot evade the statute of limitations applicable to her claim, in contrary to direct case law and legislative policy, simply by attempting to repackage the theory as intentional infliction of emotional distress without alleging any additional facts specifically related to an intentional infliction of emotional distress claim, not related to another tort, entitling her to relief. Accordingly, Plaintiff's Count II should be dismissed as she has failed to state a claim upon which to proceed against Relator.

b. Plaintiff has also failed to state a claim for negligent infliction of emotional distress against Relator because there have been no negligent actions pled.

Plaintiff's Amended Petition adds an additional claim for negligent infliction of emotional distress. In addition to failing to plead the actions of the negligent infliction of emotional distress claim fall within the applicable statute of limitations, Plaintiff has also failed to establish the basic elements of a negligent infliction of emotional distress claim because she has failed to allege any negligent conduct. To state a claim for negligent infliction of emotional distress, "a plaintiff must show: (1) the defendant should have realized that its conduct involved an unreasonable risk of causing the distress, and (2) the emotional distress or mental injury must be medically diagnosable and sufficiently severe to be medically significant." *Gibson v. Brewer*, 952 S.W.2d 239, 248-49 (Mo. banc. 1997).

Negligent intentional infliction of emotional distress was also claimed by the plaintiff and summarily dismissed by the Court in *K.G. v. R.T.R. K.G.*, 918 S.W.2d at 800. In *K.G.*, the Court dismissed the negligent infliction of emotional distress claim (as it did the intentional infliction of emotional distress claim) because the underlying allegation was

that the defendant engaged in offensive sexual contact. *Id.* (stating “[t]he allegations are that [the defendant] engaged in offensive sexual contact...While he may not have intended the specific emotional harm alleged, sexual contact is the lynchpin of plaintiff’s claim.”). The Court found the petition only contained mere conclusory statements that the defendant acted negligently, but “[t]he specific allegations contradict any possibility that the defendant’s conduct was mere negligence.” *Id.* In other words, the plaintiff’s “only cause of action asserted in [the] petition is one for battery,” though the plaintiff attempted to disguise same in the alternative as emotional distress claims. *Id.*

Here, the claim for negligent infliction of emotional distress is based on the same alleged incidents as the intentional infliction of emotional distress claim. There is no allegation of any negligent conduct on behalf of the Relator. Even by her own allegations within the claim for negligent infliction of emotional distress, Plaintiff clearly contradicts her claim for *negligent* conduct, claiming “[t]he actions of Defendant Halsey were outrageous, willful and/or a reckless disregard of the harm directed toward Ms. Dachenhausen.”⁷

Plaintiff makes no factual allegations that Relator acted in a negligent manner, except the conclusory assertion that “Defendant Halsey’s conduct...was negligent and tortious.” There are no facts supporting a claim that Relator acted negligently. Similarly to *K.G.*, the lynchpin of Plaintiff’s claims is alleged sexual contact or threat of contact. Plaintiff merely pulled out what may be classified as an assault from her previous

⁷ This claim under Count III for negligent infliction of emotional distress is identical to the claim in Count II for intentional infliction of emotional distress.

allegations and retitled the alleged acts as emotional distress to try and avoid the statute of limitations.

Accordingly, Plaintiff has not stated a cause of action for negligent infliction of emotional distress by which she can recover against Relator and such claim must be dismissed. She has not claimed any facts that Relator was negligent, even in the light most favorable to the Plaintiff. Plaintiff has merely attempted to improperly extend the statute of limitations for alleged actions that occurred in 2013, which actually make up her claim for assault and battery in Count I. Because the statute of limitations has run on a claim for battery or assault for actions alleged to have occurred in 2013 or 2012, Plaintiff's claims against Relator should be dismissed.

CONCLUSION

The undisputed facts demonstrate that Relator is entitled to dismissal of this action against him based on the statute of limitations. The Circuit Court erroneously failed to grant Relator's motion to dismiss, and therefore deprived him of an absolute defense of the statute of limitations. For the reasons stated herein, Relator respectfully requests the Court make its preliminary writ of prohibition permanent, requiring Respondent to grant Relator's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by rule 55.3 and complies with the limitations contained in Rule 84.06(6); and was prepared in Microsoft Word in Times New Roman with 13-point font, and there are approximately 5,230 words in the brief.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed with the Court via the ECF filing system on November 21, 2018, and a true and correct copy of the foregoing was sent via electronic mail to the following recipients:

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