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

REPLY BRIEF OF RELATOR BRAD HALSEY

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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)

REPLY ARGUMENT

The Court should make its writ of prohibition permanent because Plaintiff's claims in her Petition are time-barred. Plaintiff's battery cause of action is barred by a two-year statute of limitations. The damages from the alleged battery were objectively ascertainable on the date the alleged battery occurred in May 2013, despite Plaintiff's assertion that she realized further damages, namely psychological, at a later date. Plaintiff has cleverly attempted to repackage her assault claim by pleading it as intentional and negligent infliction of emotional distress claims, which both carry a longer five-year statute of limitations. However, intentional and negligent infliction of emotional distress claims will not sustain a traditional cause of action, like assault or battery. Plaintiff's claim is limited to an assault or battery cause of action, and both are time-barred because the underlying alleged acts occurred in 2013 or prior, more than the two years allowed under Mo. Rev. Stat. § 516.140.

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

In her Opposition Brief, Plaintiff argues there is no bright line test to determine when a cause of action accrues in Missouri. This is not the case. As held by this Court in *Powel v. Chaminade College Preparatory*, 197 S.W.3d 576, 582 (Mo. banc 2006) "a consistent approach is evident upon careful review of this court's decisions from the last 40 years: *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*. At that point, damages would be sustained and capable of ascertainment as an objective matter – or, in the words of Professor Davis, that is the moment when the damages would be substantially complete." *Id.* (internal citations omitted) (emphasis in original).[1]

The term "substantially complete" refers to damage being objectively ascertainable; it does not mean all damages must be known or knowable to the Plaintiff before the cause of action accrues. This was expressly stated in *Powel*: "[o]f course, as this Court reiterated in *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997), all possible damages do not have to be known, or even knowable, before the statute accrues." In practical effect, this is the logical rule, and without it, statutes of limitations would have no meaning. In the

[1] The Court in *Powel* acknowledged that this rule is consistent with previous Missouri cases, but that it had not previously been specifically articulated. 197 S.W.3d at 582. *Sheehan*, a previous case, was heavily cited in *Powel* and consistent with the newly articulated rule. In *Sheehan*, the court held that involuntary repressed memory could extend the statute of limitations because the damages may not yet be objectively ascertainable. *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. banc 1995). *Graham* was also consistent with this bright line rule, reiterating that the cause of action accrues when damages are such to "place a reasonably prudent person on notice of a potentially actionable injury." *Graham v. McGrath*, 243 S.W.3d 459, 463 (Mo. Ct. App. 2007) (citing *Powel*, 197 S.W.3d at 583).

case of a simple motor vehicle accident, if the cause of action did not accrue until all damages were complete, a plaintiff could argue the cause of action did not accrue until all treatment for injuries was complete – a process which could last indefinitely. For example, a plaintiff with a broken knee could argue the cause of action did not accrue until emergency treatment, knee replacement surgery, and physical therapy had all been completed. Application of Plaintiff's interpretation of the statute of limitations trigger is not only contrary to Missouri law, it is illogical. Rather, the bright line rule, as stated in Relator's Brief, is that the cause of action accrues when damages are objectively ascertainable, not when all damages have been realized by the Plaintiff.

In *Klemme*, cited in *Powel*, the Court reiterated that the objective test triggers accrual of the cause of action, noting that an affirmative act on behalf of the Plaintiff indicated at least an objective ascertainment of damages. *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997). In *Klemme*, the Plaintiff's hiring of a second attorney was enough to show at least objective awareness of damages of her legal malpractice claim, as the first attorney's omission should have then been discovered. *Id.*; *see also Powel* at 584. Here, Plaintiff's damages were objectively ascertainable on the date the alleged battery occurred, as demonstrated by affirmative acts alleged in her Petition. As stated in Plaintiff's Amended Petition, actions of Plaintiff that occurred immediately after the alleged incident indicate the damages were objectively ascertainable on the same date the alleged battery occurred:

> 25. Immediately after the incident, Plaintiff Dachenhausen fled Defendant Halsey's presence.

> 26. Defendant Halsey by his behavior placed Ms. Dachenhausen in fear of an offensive touching.
> 27. Defendant Halsey touching Ms. Dauchenhausen's buttocks was offensive because such a touching of a woman ***would offend a reasonable person's sense of personal dignity***.

Exhibit B, INDEX 000012, ¶ ¶ 25-27 (emphasis added).

A reasonable person would have understood the cause of action accrued on the date the alleged conduct occurred, and Plaintiff's allegations in her Petition support this conclusion. Simply because, as Plaintiff appears to argue, a reasonable woman would be *more* offended, damaged, or psychologically aware of effects of battery after the "Me Too" movement, does not mean that at least some damages were not objectively ascertainable on the date the alleged incident occurred. Plaintiff's argument in her brief and the allegation in her Amended Petition that the scope of the alleged conduct was unknown to her at the time of the incident (INDEX 000012, ¶ 30), only factor toward subjective ascertainment of damages, not objective. All of the allegations in her Amended Petition, including those cited above as well as her allegation that the conduct was so shocking she was forced to resign (INDEX 000012, ¶ 29), are consistent that a reasonable person would have ascertained at least some level of damages on the date the alleged incident occurred. Thus, Plaintiff's cause of action accrued on the date the alleged incident occurred, in May 2013, and her action against Relator is time-barred and properly subject to dismissal.

II. Intentional and Negligent Infliction of Emotional Distress are improper claims to support traditional causes of action in tort, like assault and battery.

Plaintiff's argument in her Opposition Brief is the alleged acts which make up the claims for intentional and negligent infliction of emotional distress are separate from the battery and constitute a separate cause of action. This argument was anticipated and addressed by Relator in his original Brief. It is important to highlight that the only fact stated in her Amended Petition relative to the acts constituting the basis for the intentional and negligent infliction of emotional distress claims is the following:

> 33. Defendant Halsey's conduct toward Ms. Dachenhausen was extreme and outrageous on numerous occasions, including but not limited to events at work where Defendant Halsey placed his erect penis near Plaintiff Dachenhausen's face, asked her to send naked photographs of herself, and sent pictures of a naked woman's breasts to Ms. Dachenhausen purporting to be naked photos of Defendant Halsey's wife.

Exhibit B, INDEX 000013 (¶ 33).[2]

Plaintiff's Amended Petition fails on its face to plead a viable cause of action regarding negligent or intentional infliction of emotional distress as Plaintiff does not allege when the acts are alleged to have occurred. No inquiry needs to be made by this Court regarding whether the causes of action are properly pled as infliction of emotional distress claims or another traditional tort because Plaintiff has failed to plead a fact to place these claims within *any* arguable statute of limitations. In her Opposition Brief, Plaintiff does not even attempt to argue her infliction of emotional distress claims were brought in a timely manner, whether within a two-year or five-year statute of limitations.

[2] The claim under Count III, negligent infliction of emotional distress, is identical to that of intentional, except that it states the conduct was instead "negligent and tortious" rather than "extreme and outrageous." **Exhibit B**, INDEX 000014, ¶ 41.

However, even if she could show that some or all of the acts were brought within the statute of limitations, the claims are still barred because they should be pleaded as a traditional tort of assault or battery, not emotional distress claims, and are barred by the statute of limitations. Pleading the actions as intentional and negligent infliction of emotional distress is an attempt to avoid a clear statute of limitations violation, as the emotional distress claims fall under the longer five-year statute of limitations under Mo. Rev. Stat. § 516.120.

Respondent argues in her Opposition Brief that her cause of action for intentional infliction of emotional distress is not duplicative because it is separate from factual allegations in Count I, the battery cause of action. That is not the proper inquiry. The inquiry should be whether the actions complained of in the intentional infliction of emotional distress cause of action would make up a traditional tort. The creation of the intentional and negligent infliction of emotional distress causes of action was meant to provide an alternative form of recovery for those actions that are not technically prohibited as a traditional tort, but so offend a reasonable person's dignity that recovery is warranted anyway. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. banc 1993); *see also K.G. v. R.T.R.*, 918 S.W. 795, 799 (Mo. banc 1996). The purpose of the infliction of emotional distress cause of action was not to provide another avenue of recovery under a longer statute of limitations for a Plaintiff who did not bring her claims in a timely manner.

Plaintiff should have brought her claim for these causes of action under an assault or battery theory, in which case such would clearly be barred by the two-year statute of limitations. Because Plaintiff contends the actions are separate from those actions claimed

under Count I is of no consequence. Plaintiff is essentially attempting to benefit from not actually claiming the acts from Counts II (¶ 33) and III (¶ 41) as a separate claim for assault. However, the inquiry is whether the acts would constitute a traditional tort, not whether plaintiff actually claimed so in her Amended Petition.

In this case, and as argued in Relator's Brief, the actions claimed in ¶¶ 33 and 41 of Plaintiff's Amended Petition, which are the only alleged facts underlying her intentional and negligent infliction of emotional distress claims, would constitute a traditional tort of assault and potentially battery. Assault is "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." *Phelps v. Bross*, 73 S.W.3d 651, 655 (Mo. Ct. App. 2002). "Battery is defined as an intended, offensive bodily contact with another." *Id.* at 656.

The actions claimed under ¶ ¶ 33 and 41 are Relator placing his erect penis near Plaintiff's face, and asking for her to send and sending nude photographs.[3] Each of these allegations each should be pled as an assault. For each alleged act, Plaintiff is attempting to plead Relator offered or attempted to cause her injury by effectuating offensive contact. Because the actions should be pled as a traditional tort, they cannot be pled as an emotional distress claim.

[3] As a reminder, the alleged text message exchange was originally pled to have occurred in 2012, which would be outside even the five-year statute of limitations for emotional distress claims. **Exhibit A**, INDEX 000003, ¶ 18. In the Amended Petition, all reference to the date the alleged text message exchange occurred was removed. *See* **Exhibit B**, INDEX 000013-14, ¶ 33, 41.

As with intentional infliction of emotional distress, recovery may not be had for negligent infliction of emotional distress for a cause of action of a traditional tort. *See e.g. K.G. v. R.T.R.*, 918 S.W. 795, 799 (Mo. banc 1996). 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."). Thus, the negligent infliction of emotional distress claim should be dismissed because the actions should be pled as assault, and the only avenue of recovery for same is by pleading those causes of action.

Relator's argument in his original Brief that the negligent infliction of emotional distress claim should be dismissed was also based on Plaintiff's failure to plead any negligent acts on behalf of Relator. This argument was not addressed by Plaintiff and remains unchallenged. Therefore, Plaintiff's negligent infliction of emotional distress claim should also be dismissed because the actions constitute the basis for a traditional tort and Plaintiff has not claimed any negligent acts on behalf of Relator.

CONCLUSION

The Court should make its Writ of Prohibition permanent and require the Honorable Jennifer M. Phillips to dismiss Plaintiff's claims against Relator in this case. 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 2,463 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 December 21, 2018, and a true and correct copy of the foregoing was sent via electronic mail to the following recipients:

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