IN THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI

JOHN DOE KK,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	Cause No. 052-01647
	)	
ROMAN CATHOLIC ARCHDIOCESE OF ST. LOUIS, an unincorporated association, ARCHBISHOP RAYMOND BURKE, of the Archdiocese of St. Louis, MO,	)	Division 17
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT ARCHDIOCESE'S MOTION FOR SUMMARY JUDGMENT

Plaintiff responds to defendant Archdiocese's Motion for Summary Judgment and will show that defendant's motion is legally defective and that there are material issues of fact in dispute and the motion should be denied.

STATEMENT OF ADMITTED AND CONTROVERTED FACTS

Defendant's statement of so-called uncontroverted material facts fails to comply with the requirements of Rule 74.04, in that it does not contain any ultimate facts or essential facts that either defeat plaintiff's claim or establish defendant's affirmative defense based on the statute of limitations. *See* Bush, *How to Write a Motion for Summary Judgment*, 63 Journal of the Missouri Bar 68, 69-70 (March-April 2007) (attached as Exhibit E). Instead, defendant sets forth detailed portions of the evidence developed in discovery. Defendant does not plead material

facts that show it is entitled to judgment as a matter of law. Defendant's motion should be denied for its failure to comply with the requirements of Rule 74.04.

Plaintiff admits the facts and evidence set forth in defendant's motion, but as explained below, because defendant has failed to address the essential material facts, that does not mean that defendant is entitled to summary judgment.

ADDITIONAL MATERIAL FACTS

Plaintiff sets forth the following additional facts that demonstrate that defendant is not entitled to judgment as a matter of law. Some of the additional facts are not in dispute; others may be in dispute but cannot be resolved without a trial.

1. DEFENDANTS WERE ON NOTICE, PRIOR TO NORMAN CHRISTIAN'S SEXUAL ABUSE OF PLAINTIFF IN THE 1970'S, THAT CHRISTIAN POSED A DANGER THAT HE WOULD SEXUALLY ABUSE CHILDREN.

The facts and evidence in support of that material fact include the following:

A. Norman Christian was ordained as a priest in 1961. Ex. A, 243 (Exhibit A consists of documents obtained from defendant Archdiocese as the "personnel file of Norman Christian").

B. Sometime during the early 1960s Christian informed his supervising pastor that he had a sexual relationship with an 18 year old male. Intake documents written by Christian at a treatment facility in 1995, when he was being treated for sexual abuse, state, "after acting out and falling in love with an 18 yr old male (a mutual experience) I sought referral help thru my pastor." Ex. B, SLCC 6 (Exhibit B contains portions of the records of the St. Louis Consultation Center ("SLCC") regarding treatment of Norman Christian for his sexual misconduct (see Final

Report to Archdiocese, Ex. A, 85-90)). Elsewhere in the intake documents Christian makes clear that "acting out" refers to sexual relations. Ex. B, SLCC 8 ("Sex began for me . . . . In 6th grade regular acting out began in a neighbor kids play house."). Christian stated that after his "lover" went away to a seminary college, Christian began weekly sessions with a psychiatrist, Dr. Dermott Smith, for one and one-half years. Ex. B, SLCC 6. In the same document, Christian said that his treatment by Dr. Smith was during his first assignment, which, according to defendant's records, was from 1961-67. Ex. B, SLCC 5; Ex. A, 244.

C. During his second assignment, at Ascension Parish in Normandy, Missouri, between 1967 and 1969 (Ex. A, 244), Christian informed the Archbishop, Cardinal Carberry, that he wanted a "completely private" meeting with him; that Christian was questioning whether he could remain a priest; and stated, that "[t]here is a definite problem." Ex. A, 407-08. There is no record of that meeting, although on April 21, 1969, Cardinal Carberry assured Christian that he would meet with him upon the Cardinal's return from Rome. Ex. A, 409.

D. That same Spring, on May 13, 1969, Christian wrote to defendants' Personnel Committee, with a copy to Cardinal Carberry, and informed them that he had concluded that Ascension Parish "would be better served by someone other than myself." Ex. A, 404-05. Christian explained:

> I am not happy at Ascension Parish, and when I am unhappy I find myself **committing many blunders both in my ministry and my personal life, blunders that could retard the spiritual growth of the parish and myself**. Therefore, I request positively that I be included in the assignments and transfers that will follow the June Ordinations this year. Please honor my request as **my continued stay at Ascension could become troublesome for the diocese as well as the parish.**

Id. (emphasis added).

E. Christian reported that his assignment at Ascension Parish ended when he was "asked to move after 2 yrs. I was acting out by cruising park to pickup boys." Ex. B, SLCC 9 (Intake Form). Christian's Ascension Parish assignment ended on June 12, 1969, when he was assigned to Sacred Heart Parish in Jefferson County (Festus and Crystal City). Ex. A, 244.

F. While Christian was at Sacred Heart Parish in Jefferson County, from 1969 to 1971, he sexually abused many teenaged boys. Christian described his behavior during that time, and his transfer to another parish, in a group therapy session in the 1990's:

> He reported that in his third assignment, he began the pursuit of victims. He said at first he didn't recognize what was happening, he just wanted someone to connect with sexually because his "addict" had done that in fantasy. He said in fantasy he was an adolescent because that was when he most enjoyed himself and he wanted to get back there. Consequently, this age group was the focus of his fantasy. He said he had liked children, in general, and taught the servers their lessons and knew them through that. He said he would do somtething with the servers during the summer. Some of the boys led him to their swimming hole and Norm both watched them and played water games and eventurally ended up molesting them. He also invited certain boys to a private viewing room at the movie theatre. He did not realize that what he was doing was a felony until he asked someone about it. **He said that he was transferred and not given treatment because no one knew to give treatment at that time.**

Ex. B, SLCC 1(Group Therapy Notes May 29, 1996).

G. After becoming a priest, Christian reported to his "big brother" and spiritual director at the seminary about his sexual acting out. Ex. B, SLCC 3 (Group Therapy Notes January 19, 1996). Christian attended Kenrick Seminary, in St. Louis, which has always been owned by the Archdiocese of St. Louis. Ex. A, 441; Ex. C (Deposition of Monsignor Richard Stika, from *Doe GJ* case, at 22-23).

2. A REASONABLE PERSON IN THE POSITION OF PLAINTIFF KK WOULD HAVE BEEN PUT ON NOTICE THAT AN INJURY AND SUBSTANTIAL DAMAGES MAY HAVE OCCURRED AND WOULD HAVE UNDERTAKEN TO ASCERTAIN THE EXTENT OF THE DAMAGES ONLY WHEN HE LEARNED IN 2003 THAT OTHER CHILDREN HAD BEEN SEXUALLY ABUSED

Affidavit of Stephen E. Peterson, M.D., in general, and in particular ¶14, attached hereto as Exhibit D. Regarding the date of the media report, see also, D's Ex. 2, P's Int Resp 17, 22; D's Ex. 1, P's Depo at 186 - 87; D's Motion ¶¶5, 36.

3. BEFORE THE MEDIA REPORTED ALLEGATIONS OF SEXUAL MISCONDUCT BY FATHER CHRISTIAN IN 2003, JOHN DOE KK DID NOT DISCOVER AND COULD NOT REASONABLY BE EXPECTED TO DISCOVER THAT HE HAD BEEN INJURED BY CHILDHOOD SEXUAL ABUSE.

Affidavit of Stephen E. Peterson, M.D., in general, and in particular ¶17. Attached hereto as Exhibit D. Regarding the date of the media report, see also, D's Ex. 2, P's Int Resp 17, 22; D's Ex. 1, P's Depo at 186 - 87; D's Motion ¶¶5, 36.

4. THE NATURE OF FATHER CHRISTIAN'S SEXUAL GROOMING, SEXUAL ATTACK, AND THEN UNWAVERING PRESSURE TO KEEP SILENT CAUSED JOHN DOE KK TO EXPERIENCE THE MENTAL CONDITION OF CHILDHOOD SEXUAL ABUSE WITH STRONG OVERLAP OF CHILDHOOD POSTTRAUMATIC STRESS DISORDER. TOGETHER, FATHER CHRISTIAN'S RELENTLESS COERCION AND JOHN DOE KK'S REACTION OF ACCEPTING UNREASONABLE GUILT INCAPACITATED JOHN DOE KK

FROM DISCOVERING HIS INJURY UNTIL HIS DEFENSES WERE BREACHED UPON DISCOVERY OF THE MEDIA REPORTS IN 2003 THAT FATHER CHRISTIAN HAD MOLESTED OTHER BOYS.

Affidavit of Stephen E. Peterson, M.D., in general, and in particular ¶18. Attached hereto as Exhibit D. Regarding the date of the media report, see also, D's Ex. 2, P's Int Resp 17, 22; D's Ex. 1, P's Depo at 186 - 87; D's Motion ¶¶5, 36.

The facts and evidence regarding Christian's sexual abuse of plaintiff and in support of material facts 2, 3, and 4, above, include the following:

H. Plaintiff John Doe KK was 13 or 14 years old when he was first sexually abused by Norman Christian in Christian's room in the rectory. See D's Motion ¶8. Christian came out of the shower wearing a towel, with an erection, and then dropped the towel and began groping plaintiff. *Id.* ¶¶*9-10.* Plaintiff protested and resisted at first, but Christian continued. *Id.* ¶11. Plaintiff was scared and felt shame and guilt over that first incident. *Id.* ¶14.

I. However, a week later plaintiff returned to Christian's rectory room and Christian forced himself on plaintiff again. Id. ¶*16.* Plaintiff again resisted, but then became resigned to let it happen. *Id.* ¶17. Plaintiff blamed himself for the abuse. *Id.* ¶18.

J. Christian also abused plaintiff at a swimming hole. *Id.* ¶19. Christian also had plaintiff and other boys play strip pinochle and poker in Christian's rectory room. *Id.* ¶20.

K. Christian's abuse of plaintiff included oral sex and continued for one and one-half to two years. *Id.* ¶¶22-23. Plaintiff was scared, nervous and ashamed by the oral sex. *Id.* ¶24.

L. Plaintiff didn't tell anyone about the sexual abuse by Christian because of plaintiff's shame and guilt, his thought that he would not be believed, and because he felt

responsible for letting it happen. *Id.* ¶¶*26-27*, 30. Plaintiff explained that he kept the memory of the abuse locked away in a box. *Id.* ¶¶4, 31. Plaintiff did not always remember the abuse because he kept it locked away and put it out of his memory. *Id.* ¶¶*31-35* (see deposition testimony quoted at D's p. 26). Plaintiff did not did not think about the sexual abuse when he was in high school, when he was 21, or when he or in the Marines. *Id.* at 26-28. He spent his entire adult life keeping the abuse locked away. *Id.* at 28.

M. Plaintiff did not think about the abuse until his memory was triggered during a telephone call from his brother after he saw a newspaper article about a sexual abuse lawsuit filed by another victim of Christian. D's Ex. 2, P's Int Resp numbers 17, 22; D's Ex. 1, P's Depo at 186 - 87. Plaintiff told no one about the abuse until he told his wife, after that telephone call, in 2003. D's Motion ¶¶5, 36.

N. Dr. Stephen E. Peterson, M.D., is a licensed physician in the State of Missouri, a Board Certified Psychiatrist, a Board Certified Forensic Psychiatrist, and a Diplomate of the National Board of Medical Examiners. He has been a physician for over twenty years, specializing in Forensic, Adolescent, and Adult Psychiatry since completing residency training in 1990. During those years, he treated or evaluated hundreds of sexual abuse victims. Ex. D (Affidavit of Dr. Peterson), ¶1.

O. In 2006 Dr. Peterson performed a psychiatric evaluation of plaintiff. Ex. D, ¶2. For this case he provided background information about common experiences of sexual abuse survivors. He presents his opinions to a reasonable degree of psychiatric certainty. Ex. D, ¶3.

P. According to Dr. Peterson, plaintiff's DSM-IV diagnosis is as follows:

Axis I: 995.53 Victim of Childhood Sexual Abuse

305.00 Alcohol Abuse.

Axis II: 799.9 Diagnosis deferred on Axis II.

Axis III: No Contributory Diagnoses.

Axis IV: John Doe KK is experiencing enduring psychosocial stressors related to having been sexually abused by Father Christian. These include that he bears inappropriate guilt for having been manipulated, greatly mistrusts male authority, is striving to provide a positive Catholic faith for his children but is vigilant for pedophiles, that he feels his parents were blinded by their own beliefs, that he still struggles with internal anger, and that he still deals with the errant belief that "might makes right." He also expresses restlessness, probably related to his feelings of powerlessness with Father Christian that he reacted to by striving to overcome any career adversity or challenge. He still has a great deal of anger to deal with. Some of this is directed to his parents for their actions, some towards his parents for their ignorance about the molestation, and a great deal of anger towards both Father Christian and the Catholic Church.

Separate from Father Christian's actions, John Doe KK continues to have a very strained parental relationship. He felt somewhat abandoned by his parents, as they did not supervise him enough. He may wish they understood what Father Christian was doing to him and so would have put greater controls on him. He had blamed himself for Father Christian’s actions for many years.

Axis V: GAF 85. This is the highest GAF in the past year. John Doe KK possesses many psychological strengths. These are evidenced by his financial stability, high degree of energy, high degree of personal satisfaction, positive marriage, positive approach parenting, good humor, forgiving spirit, and positive spirituality.

Ex. D, ¶2.

Q. Children and adolescents who are sexually abused are at an elevated risk to experience a variety of psychiatric disorders, substance abuse, and other significant health-related problems throughout their lifetime. Ex. D, ¶4.

R. The variety of clinical presentations is very significant because the Court is given the task of ascertaining what a reasonable sexual abuse victim would do or how a reasonable sexual abuse victim would react. Thus, it is important to understand that the reasonable sexual abuse victim who suffers from one or more psychiatric disorders, substance abuse, or other health-related problem, which have a variety of clinical presentations, may not be fully aware of the causes of their difficulties. Ex. D, ¶5.

S. One of the most significant consequences of childhood sexual abuse that finds application in the present issue is the symptom of trauma-induced dissociation or avoidance. Effectively, this psychologically defensive maneuver involves avoidance of stimuli associated with the trauma. It can take the form of making efforts to look away from thoughts, feelings, or conversations associated with the trauma, and avoiding activities, places, or people that arouse recollections of the trauma. The effort may be conscious or unconscious, meaning in or out of the person's awareness and incapacitates the perception of the psychological injury. Ex. D, ¶6.

T. Children do not report abuse like adults would expect them to, especially retrospectively. For example, a “reasonable person" child sexual abuse victim (Exhibit 103) does not report the abuse in up to 90% of cases. Because individuals close to the child often commit the sexual abuse, delayed disclosure, unsupportive reactions by caregivers, lack of intervention, and possible memory failure are common. Even so, when adults recall the abuse the truth of the memories is not correlated with memory persistence. Self-protective cognitive mechanisms may underlie the "forgetting of abuse." Also, boys involved in coercive experiences are more likely to blame themselves (Exhibit 102). This may arise from an errant belief that as males they failed to meet a social expectation of self-protection. A resulting minimization may complicate the boy's reactions after the abuse. Similarly, sexually victimized males are not likely to speak about the experience. As noted in Exhibit 102, "none of the 40 abused adolescent boys from an adolescent medicine clinic had ever told their primary care providers about their abuse history, and only 15% ever told anyone." Thus, low rates of disclosure are the counterintuitive reality to the present retrospective expectation that children would have or should have immediately reported inappropriate sexual acts towards them. Ex. D, ¶7.

U. The patient will often describe that he or she “buried” the memory and simply did not think about it. This traumatic avoidance is more severe than a normal process of forgetting and remembering. Avoidance, as used here, is a mental process used to protect self from awareness of the painful memories. Significantly, if a victim traumatically avoids or maladaptively suppresses the sexually abusive events, the victim is not able ascertain the effect of the events. Ex. D, ¶8.

V. Thus, from research sources, the "reasonable" person does not usually meet the present expectation for immediate reporting. In fact, the child may have coped with the sexually abusive experience by pushing it completely out of their memory through dissociation (Exhibit 102) or a kind of "purposeful forgetting" (Exhibit 104). Ex. D, ¶9.

W. One very interesting aspect of this type of traumatic avoidance is that the victim often initially does not appear aware of the sexually abusive events as being psychologically injurious. A reason for this may be related to the fact that the victim experienced sexual pleasure during the abusive acts. That can lead to an intolerable false belief that the child voluntarily participated in the abuse and therefore bears some responsibility for bringing on the abuse. For example, a male may have become sexually excited or ejaculated and a female may have experienced vaginal lubrication, other signs of sexual arousal, or orgasm. Thus, the victim can become confused about whether or not they consented during the sexual acts and not perceive that the perpetrator manipulated them. Another reason for the victim looking away from the events as psychologically painful is that the abuser is often a trusted adult or an authority that the victim believes would never do anything to hurt the victim. Thus, the child may assume a sense of responsibility for protecting the abuser and bury their psychological pain. In any event, maladaptive avoidance of the memories of the traumatic sexual acts is one of the most significant roadblocks for a sexual abuse victim to recognize that he or she was substantially injured by the abusive acts. Ex. D, ¶10.

X. It is often not until an externally imposed event pierces the very strong defenses, which enables a person to reveal the sexually abusive acts to a third party. Then, the abuse victim becomes conscious that he or she may have been impacted or injured by the abusive acts.

Sexual abuse victims may reveal some of the abusive events to a counselor, therapist, family doctor, or family member. That person's influence helps the adult realize the childhood experience was sexually abusive and harmful. Ex. D, ¶11.

Y. Even in cases where the sexual abuse victim had initially considered the sexual acts emotionally painful, the victim will often not realize that he or she was permanently injured by the sexual acts. This can cause delayed disclosure of the sexual abuse. It is common for significant time to elapse between the sexually abusive acts and awareness of psychiatric symptoms. Years, if not decades, may pass before a sexual abuse victim becomes aware of psychiatric symptoms from the sexual abuse. Nelson, E. et al., "Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes," Arch. Gen. Psychiatry, Feb 2002, Vol 59, pp. 139 - 145, 141. Attached as Exhibit 106. This makes it difficult for the victim to make independent reasonable connections between the abuse and psychiatric symptoms. This is especially true when psychiatric symptoms are not immediately directly relatable to acts of sexual abuse, such as genital scars or sexually transmitted disease would be readily noticed. A prime example of this occurs when a sexual abuse victim experiences apparently unexplained anxiety or difficulty trusting others or anger as a symptom of Posttraumatic Stress Disorder, long after seductive sexually abusive acts. Many do not connect the symptoms to consequences of sexual abuse because they errantly took on blame for the actions of the abuser. Ex. D, ¶12.

Z. The persisting influence of the abuser often makes it impossible for the sexual abuse victim to understand that he or she was injured by the sexual abuse. This is true even when the sexual abuse victim experienced inappropriate shame, guilt or embarrassment related to

the abusive acts. The training of the child to satisfy the abuser overwhelms the child's capacity to face the loss of innocence and escape other than by just growing out of the target age group. Some children then just lose conscious awareness of the abuse and do not show outward evidence of the abuse for a long period. Ex. D, ¶13.

AA. Based upon his clinical experience, psychiatric assessment of John Doe KK, and understanding of the professional literature, it is Dr. Peterson's opinion, to a reasonable degree of psychiatric certainty, that a reasonable sexual abuse victim in plaintiff's position would have been put on notice that he had been injured by the acts of Christian and that substantial damages had occurred only when he learned that other children had been sexually abused. The media report allowed him to gain perspective that what had happened to him was abusive. Before then, a reasonable person like the plaintiff had defenses, which were too strong for him to be aware of the injury. A reasonable person like the plaintiff who wrongly accepted responsibility for Christian's actions would have experienced a severely inability to understand he was injured. It was only with the external influence that a reasonable person like the plaintiff overcame the false belief of responsibility for the actions of the priest. Only at that point, a reasonable person like the plaintiff would be able to begin to become aware of the extent of his psychological damage. Ex. D, ¶14.

BB. Based upon his clinical experience, psychiatric assessment of John Doe KK, and understanding of the professional literature, it is Dr. Peterson's opinion, to a reasonable degree of psychiatric certainty, that John Doe KK discovered he had been injured by the acts of Christian and that substantial damages had occurred as a result after news of other victims by Christian was brought to his attention by his family. At that point, his psychological defenses of

dissociative looking away or traumatic avoidance were breached. John Doe KK described not recalling the "sexual things" with Father Christian (John Doe KK May 18, 2007 deposition p143). He revealed to his wife and brother, who then urged him to do something. Before that, he described having “locked it away," (John Doe KK May 18, 2007 deposition p144), which is consistent with purposeful forgetting or dissociation, a common pathway to Childhood Sexual Abuse induced PTSD in children (DSM-IV-TR page 463-468 Posttraumatic Stress Disorder) (Exhibit 105). PTSD in children is not as well formed as in adults due to childhood cognitive and emotional immaturity. However, persistent difficulties with trust, anger control, intimacy, and avoidance of awareness of trauma is common. Ex. D, ¶15.

CC. Before then, John Doe KK was unable to overcome Christian’s priestly authority, overpowering physical presence, and persistence (John Doe KK May 18, 2007 deposition page 169 "my priest;" page 166 "I said no, no and he continued;" page 171 "didn't fight Father Christian again;" and, page 185 "resigned yourself to letting it happen..."). Ex. D, ¶16. With the help of his family in 2003 or 2004, whenever the news article came out about Christian, John Doe KK realized he was not alone, that he could help protect others, and could hold the church accountable for his abuse. Ex. D, ¶17. In summary, before the media reported allegations of sexual misconduct by Christian, John Doe KK did not discover and could not reasonably be expected to discover that he had been injured by childhood sexual abuse. Ex. D, ¶17.

DD. The question whether plaintiff was mentally incapacitated such that he was prevented from bringing suit addresses one of the core difficulties sexually abused children face. It is thought in the present day that children are obligated, like adults, to reveal immediately and that as adults they were aware of the need as children to have immediately sought rescue from

the abuse. This is not the general nature of children, especially children who did not feel parents would believe them (John Doe KK May 18, 2007 deposition page 177) or children who fear parental blame or rejection (Exhibit 102). Reasonable children do not report sexual abuse up to 90% of the time. Some reasonable children, even when in a safe setting do not spontaneously report the abuse they experienced (Exhibit 102). The silence can follow a wanting to forget the event and fearing the reactions of others (Exhibit 102). John Doe KK resigned himself to the Priest's overwhelming conduct then incorrectly took on responsibility for the abuse because it was mixed with special attention (special attention, less discipline at school, trips, meals, and secret belonging) and physical/psychological intensity he was unable to resist. Christian overwhelmed young John Doe KK then programmed John Doe KK's behavior by repetition to keep the secret. Prominent to incapacitating John Doe KK was his thinking that he "let it happen." Until he realized through the news media that Father Christian sexually abused other children, he was unable to overcome his defenses, realize his injury, and find help. John Doe KK still has great difficulty discussing what happened and does not know the full extent of the sexual abuse. This speaks to tremendous incapacity caused by Father Christian's actions. For example, even in his deposition John Doe KK still could not describe what happened with Father Christian except by using a defensive psychological distancing maneuver to "be the robot, the soldier" (John Doe KK May 18, 2007 deposition page 168). In summary, the nature of Christian's sexual grooming, sexual attack, and then unwavering pressure to keep silent caused John Doe KK to experience the mental condition of Childhood sexual abuse with strong overlap of childhood Posttraumatic Stress Disorder. Together, Christian's relentless coercion and John Doe KK's reaction of accepting unreasonable guilt incapacitated John Doe KK from discovering his injury

until his defenses were breached upon discovery of the media reports that Father Christian had molested other boys. Ex. D, ¶18.

PLAINTIFF'S LEGAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY

Defendant asserts two separate grounds in support of its motion for summary judgment: first, lack of prior notice that Fr. Christian was a dangerous child abuser, and secondly, that the statute of limitations has expired. There are material facts in dispute that require denial of defendant's motion for summary judgment:

- whether defendant knew that Christian was likely to sexually abuse young males but disregarded this known risk resulting in plaintiff's injury;
- when a reasonable person in the position of plaintiff would have known that the sexual abuse caused him substantial damage (under §516.100 RSMo),
- when plaintiff discovered, or reasonably should have discovered, that his injury or illness was caused by childhood sexual abuse (under §537.046 RSMo); and
- whether from the time of the sexual abuse, plaintiff was mentally incapacitated such that he had a mental condition that prevented him from bringing suit (under §516.170 RSMo).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is inappropriate if the non-moving party can produce evidence from which a jury could conclude that the non-moving party has proven the essential elements of his claim.

"To be entitled to summary judgment, the moving party must demonstrate that: (1) there is no genuine dispute as to the material facts on which the party relies for summary judgment; and (2) on those facts, the party is entitled to judgment as a matter of law. Rule 74.04." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). In considering summary judgment, the court must view the evidence in the light most favorable to the party against whom judgment is sought. *Id.* The Court must "accord the non-movant the benefit of all reasonable inferences from the record." *Id.* "The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, **where the trial court**, in order to grant summary judgment, **must overlook material in the record that raises a genuine dispute as to the facts** underlying the movant's right to judgment, **summary judgment is not proper**. *Id.* at 378 (emphasis added).

III. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON ITS ALLEGED LACK OF NOTICE

The elements of a claim for intentional failure to supervise clergy are "(1) a supervisor (or supervisors) exists (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the

supervisor's inaction caused damage, and (5) the other requirements of the Restatement (Second) of Torts, section 317 are met." *Gibson v. Brewer*, 952 S.W. 2d 239, 248 (Mo. Banc 1997). Essentially, under the holding in *Gibson v. Brewer*, defendant can be held responsible for its intentional failure to supervise clergy which resulted in damage to plaintiff.

The gist of defendant's argument is that no one knew about Christian's abuse of plaintiff. D's Motion at 35-36. Defendant's argument is based on one assertion of fact: "Plaintiff's sworn deposition testimony conclusively demonstrates that the Archdiocese was not aware during the 1974-1976 time frame that Christian previously had sexually abused children prior to Christian's abuse of Plaintiff." D's Motion at 36. The only so-called undisputed material fact set forth by defendant on this issue is its paragraph 6, which shows only that "[p]laintiff testified at his deposition that he is not aware of ***anyone*** in the Archdiocese who knew that Christian sexually abused children before Christian sexually abused Plaintiff." D's Motion at 5. Certainly plaintiff is not limited to his own personal knowledge of whether defendant had prior notice of Christian's dangerous propensities. As outlined in the factual portion of this response to defendant's motion, there is abundant evidence that the Archdiocese knew that Christian had been abusing other children before he abused plaintiff in the mid-1970s.

- In the early 1960s, during his first assignment as a priest, Christian informed his supervising pastor that he had a sexual relationship with an 18 year old male. Christian's own words state: "after acting out and falling in love with an 18 yr old male (a mutual experience) I sought referral help thru my pastor."

A jury could easily infer from the that evidence that Christian informed his pastor of the reason for needing psychiatric help.

- Later in the 1960s, during his second assignment, Christian sought and was granted a "completely private" meeting with the Archbishop, Cardinal Carberry, and informed him "[t]here is a definite problem" that related to Christian's ability to continue as a priest.
- Around the same time, Christian wrote to defendants' Personnel Committee and Cardinal Carberry, and informed them that he was "committing many blunders both in my ministry and my personal life, blunders that could retard the spiritual growth of the parish and myself," and that his "continued stay at Ascension could become troublesome for the diocese as well as the parish."
- Christian later reported that his assignment at Ascension Parish ended when he was "asked to move after 2 yrs. I was acting out by cruising park to pickup boys."

That evidence creates a strong inference, from Christian's correspondence and meeting with his supervisors, that he was asked to move because he was acting out with boys.

- In his third assignment, at Sacred Heart Parish in Jefferson County, from 1969 to 1971, Christian sexually abused many young boys from the parish. He later reported in group therapy, "that he was transferred and not given treatment because no one knew to give treatment at that time."

That evidence creates another powerful, even inescapable, inference that Christian's supervisors knew that he was sexually abusing the boys in 1971, but transferred him without treatment because they did not know at that time to give treatment.

- After becoming a priest, Christian reported to his "big brother" and spiritual director at defendant's Kenrick Seminary about his sexual acting out.

Each of those pieces of evidence, standing alone, would be sufficient to allow a jury to conclude that plaintiff has proven the elements of intentional failure to supervise clergy. *Gibson v. Brewer, supra.* Before the 1974-76 time frame when Christian abused plaintiff, Christian's supervisors knew that harm was certain or substantially certain to result, they disregarded that known risk by moving Christian from Parish to Parish without treatment, and their inaction caused plaintiff damage. Defendant's motion must be denied on the first ground asserted, that defendant had no notice of Christian's dangerous propensities.

IV. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS DEFENSE

Defendant's motion for summary based on the statute of limitations is not properly before the Court. A summary judgment motion based on an affirmative defense cannot be presented unless it is based on a well pleaded defense in the answer. *ITT Comm'l Fin. Corp. V. Mid-American Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993); Bush, *How to Write a Motion for Summary Judgment*, 63 Journal of the Missouri Bar 68, 68 (March-April 2007) (attached as Exhibit A). Defendant's Answer, filed on or about July 22, 2005, does not contain the factual allegations necessary to sustain its alleged affirmative defense. It contains only bare legal conclusions. Answer, Defenses and Affirmative Defenses of Archdiocese of St. Louis, etc., at 6, ¶II.

Even if this Court were to consider the merits of this motion, it must be denied.

The Missouri Supreme Court, in *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576 (Mo. Banc 2006), described the standards that apply when a defendant seeks summary judgment based on a statute of limitations:

> The moving party bears the burden of establishing a right to judgment as a matter of law. . . . The statute of limitations is an affirmative defense, Rule 55.08, and respondents who move for summary judgment on that basis bear the burden of showing that it bars plaintiffs claims.

197 S.W.3d at 580. In addition, courts considering any motion for summary judgment must review the record "in the light most favorable to the non-movant," and accord to that party "the benefit of all reasonable inferences from the record." *Powel*, 197 S.W.3d at 580; *Smith v. Aquila, Inc*., 2007 Mo. App. LEXIS 656 (Mo. App. W.D. April 24, 2007); *Mallek v. First Banc Insurors Agency, Inc.*, 220 S.W.3d 324, 327 (Mo. App. E.D. 2007). The Supreme Court in *Powel* also explained:

> Because the capable of ascertainment standard is an objective one, where relevant facts are uncontested, the statute of limitations issue can be decided by the court as a matter of law. "However, ***when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide***."

197 S.W.3d at 585 (emphasis added). A motion for summary judgment based upon statute of limitations cannot be granted "unless the evidence is so clear that there is no genuine factual issue." *Mallek v. First Banc Insurors Agency, Inc.*, *supra,* 220 S.W.3d at 329 (reversing summary judgment based on "contradictory and confusing information in the record" as to when

a victim of fraud "discovered, or through the exercise of reasonable diligence, could have discovered, the alleged fraud").

Defendant addresses only one aspect of the statute of limitations issue in its motion for summary judgment, when a reasonable person in the position of plaintiff would have been capable of ascertaining that sexual abuse caused him substantial damage under §516.100 RSMo. There are two other factual issues that are in dispute and two other statutes at issue, and neither is addressed by defendant's motion:

- when plaintiff discovered, or reasonably should have discovered, that his injury or illness was caused by childhood sexual abuse (under §537.046 RSMo); and
- whether from the time of the sexual abuse, plaintiff was mentally incapacitated such that he had a mental condition that prevented him from bringing suit (under §516.170 RSMo).

A. Mo. Rev. Stat. §516.100 and §516.120 - Powel v. Chaminade

Plaintiff agrees with defendant that Mo. Rev. Stat. §516.120 provides a five year statute of limitations for claims of intentional failure to supervise clergy. When that five-year period begins to run was the question addressed in *Powel*, which held that under Mo. Rev. Stat. §516.100, a "tort claim such as that asserted" here "does not accrue, and the limitations period does not begin to run, 'when the wrong is done or the technical breach of . . . duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment.'" *Powel*, supra at 577, quoting the statute. *Powel* clarified the standards for applying Section 516.100's "capable of ascertainment" test for accrual.

Legally, defendant's arguments ignore two critical aspects of the *Powel* decision:

- **when contradictory conclusions can be drawn from the evidence, statute of limitations issues must be submitted to the jury, and**
- **before the statute of limitations begins to run, *Powel* requires that substantial damages be capable of ascertainment, not just knowledge of wrongdoing.**

Defendant greatly oversimplifies the *Powel* decision and relies almost exclusively on one statement from the opinion in that case: "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.'" D's Motion at 12-13; D's Memo at 13-17. Defendant ignores the *Powel* Court's explanations of the meaning of the phrase, "potentially actionable injury," and instead applies defendant's own interpretation that it means knowledge that the conduct was wrong. *See, e.g.*, D's Memo at 39, 41-45. Defendant's statement of facts and its legal arguments focus on plaintiff's knowledge that the sexual abuse was wrong and ignore the issue whether there is evidence that he had an injury.

In the *Powel* decision, however, the Supreme Court stated over and over that the issue under §516.100 is when a reasonable person in the position of the plaintiff would have known that the sexual abuse caused him substantial damage.

First, when the Court first described the issue to be decided it stated:

> While it is clear that the record contains conflicting evidence of what Michael knew at what point, the salient issue for statute of limitations purposes is whether these conflicts in evidence create a question of fact on the key issue whether, prior to his alleged memory repression, a reasonable person in Michael's position would have known or been put on inquiry ***notice not just of the wrong and nominal immediate injury therefrom, but also that substantial, non-transient damage had resulted and was capable of ascertainment***.

Powel, 197 S.W.3d at 578 (emphasis added).

Secondly, in its discussion of the previous Supreme Court cases applying the capable of ascertainment test, the Court noted that in *Chem. Workers Basic Union, Local Number 1744 v. Arnold Sav. Bank*, 411 S.W.2d 159 (Mo. Banc 1966), it held the limitations period began to run **not from notice of the wrong, but from notice of "*consequential injury*."** *Powel*, 197 S.W.3d at 582-83 (emphasis added).

Thirdly, the Court went on to describe its holding in *Dixon v. Shafton*, 649 S.W.2d 435 (Mo. Banc 1983), and stated: "***Notice of some substantial damage resulting from the wrong*** was also identified as the triggering event." *Powel*, 197 S.W.3d at 583 (emphasis added).

Fourthly, when it discussed its decision in *Martin v. Crowley, Wade & Milstead, Inc.,* 702 S.W.2d 57 (Mo. Banc 1985), the Court said it "gave the phrase 'capable of ascertainment' a practical construction; until plaintiff has sufficient knowledge to be put on 'inquiry notice' of the ***wrong and damages***, that standard is not met." *Powel*, 197 S.W.3d at 583 (emphasis added).

Fifthly, the Court described its holding in *Bus. Men's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501 (Mo. Banc 1999), as giving the statute a "realistic" and "practical" construction, and explained that "*BMA* took the approach that it is ***not the existence of a nominal claim for damage, but the occurrence and capability of ascertaining actual and substantial damage***, that begins the running of the statute." *Powel*, 197 S.W.3d at 583-84 (emphasis added).

Sixthly, the Court summarized its discussion of its previous cases and stated:

> ***In sum***, under the above cases the capable of ascertainment test is an objective one. The issue is not when the injury occurred, or when plaintiff subjectively learned of the wrongful conduct and that it caused his or her injury, but ***when a reasonable person would have been put on notice that an injury and substantial damages may have occurred*** and would have undertaken to ascertain the extent of the damages. At that point, the damages would be sustained and capable of ascertainment as an objective matter.

Powel, 197 S.W.3d at 584-85 (emphasis added).

Seventhly, when the Court explained its reasons for reversing and remanding the case, it explained: "Additional discovery may clarify whether a reasonable person in Michael's situation would have been ***capable of ascertaining the substantial nature of the damages*** he suffered and for which he now seeks recompense." *Powel*, 197 S.W.3d at 585-86 (emphasis added).

Thus, at least seven times in the Supreme Court's *Powel* decision the Court made it clear that knowledge of the wrong and of nominal damages are not sufficient notice of a "potentially actionable injury," but the capable of ascertainment test requires notice of substantial damages before the statute of limitations begins to run.

The Court of Appeals in *Graham v. McGrath*, No. ED89168, 2007 Mo. App. Lexis 1695 (Mo. App. E.D. Dec. 11, 2007), applied *Powel v. Rigali* to the particular facts of Herb Graham's case. In Graham's case, which was filed in 2003, the evidence showed that the plaintiff began to understand he was injured more than five years before, in 1995. Slip Op. at 6-7. The Court explained:

> In 1995 and 1996, Plaintiff had memory of the acts constituting sexual abuse, he was beginning to understand that he was a victim of sexual abuse, and he confided in his loved ones about these acts. These facts show that the evidence was then sufficient to put a reasonable person on notice that "an injury and substantial damages may have occurred;" therefore, Plaintiff's damages were capable of ascertainment in 1996 at the latest. Powel, 197 S.W.3d at 584. Because Plaintiff filed his claim more than five years later in 2003, his causes of action against Archdiocese are barred by the statute of limitations. Section 516.120(4).

Slip Op. at 7.

It is clear, therefore, that the Court of Appeals was looking for some evidence that showed that after Mr. Graham became an adult, he had some awareness that "an injury and substantial damages may have occurred." That is what the Supreme Court held in *Powel*:

> ***In sum***, under the above cases the capable of ascertainment test is an objective one. The issue is . . . ***when a reasonable person would have been put on notice that an injury and substantial damages may have occurred*** and would have undertaken to ascertain the extent of the damages. At that point, the damages would be sustained and capable of ascertainment as an objective matter.

Powel, 197 S.W.3d at 584-85 (emphasis added).

Likewise, in *State ex rel. Marianist Province v. Ross*, No. SC88779 (Mo. banc April 1, 2008), the Supreme Court merely applied the ruling in *Powel* to the unusual facts of the case then before it. The Court reiterated that the *Powel* test requires "notice that an **injury and substantial damages** may have occurred." Slip Op. at 3. The Court held that the incidents that the plaintiff always remembered, of making him hyperventilate to the point of unconsciousness, having him strip to his underwear, blindfolding him, and holding a knife to his throat, were sufficient to put a reasonable person on notice of injury. *Id.*

Obviously, the facts of this case are quite different from those in *Graham* and *Marianist Province*. In *Graham*, the Court of Appeals pointed to the **fact** that plaintiff was "beginning to understand that he was a victim of sexual abuse, and he confided in his loved ones about these acts" more than five years before he filed suit. Even though the *Powel* case requires an objective analysis, the factual situation of the plaintiff is central to the analysis. This Court must consider how a reasonable sexual abuse victim would react in the situation of this plaintiff. The Supreme Court made it clear that applying an objective test means looking at a reasonable person in the position of the plaintiff. Referring to the plaintiff in the *Powel* case, the Court used the phrase, "a reasonable person in Michael's position," and later, "a reasonable person in Michael's situation." *Powel*, 197 S.W.3d at 578 and 585. In *Graham,* the Court of Appeals said plaintiff was beginning to understand his injuries and confided in his relatives more than five years pre-suit. In this case, John Doe KK

was beginning to understand his injuries only two years before he filed suit. Defendant cites no evidence that shows plaintiff was capable of ascertaining that he suffered a substantial injury from Christian's sexual abuse - none. All defendant attempted to show in its motion is that plaintiff knew the conduct was wrong, and that he experienced fear, shame, guilt, embarrassment, and self-blame.

When determining what a reasonable sexual abuse victim would do, it is important to consider how sexual abuse victims are different from non-victims. According to Dr. Stephen Peterson, an experienced psychiatrist in the field of sexual abuse, children and adolescents who are sexually abused are at an elevated risk to experience psychiatric disorders and other significant health-related problems throughout their lifetime. Ex. D, Affidavit of Dr. Peterson. Understanding the prevalence of psychiatric disorders is important because each of these disorders carries with it a number of psychological consequences that impact a sexual abuse victim's ability to understand that he or she was injured and substantially damaged as a result of the sexual abuse. It is common for sexual abuse victim to not understand that he or she has been injured until after an externally imposed psychologically meaningful event. This can be the result of "traumatic avoidance," a psychological process that helps protect a child from the impact of the abuse, and, at the same time, prevents the victim from recognizing they were substantially injured by the abuse.

According to Dr. Peterson, a reasonable person in the position of plaintiff KK would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages only when he learned in 2003 that other children had been sexually abused by Christian. Exhibit D.

Defendant's argument is based on the fact that plaintiff has long known that Christian's actions were wrong. But that is not dispositive under *Powel*. Dr. Peterson's testimony clearly

creates at least an issue of fact for the jury under *Powel.* As the Court stated, "when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide." 197 S.W.3d at 585.

Consequently, this Court cannot hold as a matter of law that the statute of limitations began to run before 2005. As defendant states, plaintiff filed the current lawsuit on May 13, 2005. This is within the five-year statute of limitations that governs plaintiff's claim. As a result, plaintiff's claim is timely under Mo. Rev. Stat. §516.100 and §516.120 and the *Powel* decision.

The results in the trial courts of Missouri, after *Powel*, are mixed. That is understandable given the different factual basis of each case. Defendant has presented the Court with examples of cases in which summary judgment has been granted. Trial courts in other cases have denied such motions. Arguments similar to those made by defendant in this case were rejected in two childhood sexual abuse cases decided by Judge Barbara Wallace in the St. Louis County Circuit Court. Plaintiff attaches hereto copies of that Court's Orders denying summary judgment, and the moving papers filed by those defendants, so this Court can see the bases for defendants' motions. *John Doe AJ v. Roman Catholic Archdiocese of St. Louis*, Cause No. 06CC-002439 (Order and Motion attached as Exhibit F); *Bryan Bacon v. Brother William Mueller*, Cause No. 05CC-005015 (Order, Motion, and Memorandum in Support attached as Exhibit G). In *John Doe AJ*, the same defendant Archdiocese represented by the same attorneys were the defendant, and it was their motion for summary judgment that was denied by Judge Wallace.

In another similar case from the Western side of the State, Judge John O'Malley of the Jackson County Circuit Court reinstated claims against the Diocese of Kansas City-St. Joseph that he had formerly dismissed. Judge O'Malley originally ruled that under §516.100 the question of

statute of limitations was one best left to the jury. He later dismissed the same claims, believing he was compelled to do so by an intervening Court of Appeals decision. Following the *Powel* decision, however, Judge O'Malley reinstated plaintiff's claims, emphasizing once again that the statute of limitations question should be a jury decision. A copy of that series of short decisions is submitted as Exhibit H. *White v. Father Francis McGlynn, et al.*, Case No. 03CV227564 (last decision dated December 5, 2006).

B. Mo. Rev. Stat. § 537.046 - Discovery of Injury

A completely different statute of limitations applies in this case and has not been addressed in defendant's motion. Mo. Rev. Stat. §537.046 [1] creates a different statute of limitations and a different test for accrual for any tort seeking to recover damages for psychological injury sustained as a result of childhood sexual abuse. Section 2 of the statute provides:

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[1]§ 537.046. Childhood sexual abuse, injury or illness defined--action for damages may be brought, when

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.

HISTORY: L. 1990 H.B. 1370, et al. § 3, A.L. 2004 H.B. 1055 merged with H.B. 1453 merged with S.B. 1211

*Sections 566.050, 566.080, 566.110, and 566.120 were repealed by S.B. 693 in 1994.

> ***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.
>
> (Emphasis added.)

Section 1. (2) provides that injury includes a "psychological injury or illness" and that those "need not be accompanied by physical injury or illness."

Section 1. (1) defines "childhood sexual abuse" to mean acts committed when the plaintiff was "under the age of eighteen" which would have been a violation of various criminal statutes, including Mo. Rev. Stat. §566.110. That statute, which was repealed in 1994, prohibited "subject[ing] another person to whom he is not married to sexual contact, when the other person is incapacitated or twelve or thirteen years old." Mo. Rev. Stat. §566.110 (1993). "Sexual contact" under that statute included "any touching of the genitals . . . of any person . . . for the purpose of arousing or gratifying sexual desire of any person." Mo. Rev. Stat. §566.010 (1993). Christian's behavior, therefore, was clearly included in the definition of "childhood sexual abuse."

In *Powel v. Chaminade*, 197 S.W.3d at 585, the Supreme Court acknowledged that §537.046 could be applied in that case as long as the plaintiff's sexual abuse claim had not expired prior to that statute's enactment in 1990. (*Id*. at footnote 4). It is noteworthy that the only defendants involved in the *Powel* appeal were the corporate or not-for-profit entities Chaminade College Preparatory, Inc. and the Marianist Province of the United States.

The Court of Appeals decision in *Graham v. McGrath* provides further support for plaintiff's argument that §537.046 applies to his claims against the Archdiocese in this case. With respect to plaintiff Graham's cause of action for childhood sexual abuse, the Court of Appeals stated: "Plaintiff's claim under this count is governed by Section 537.046, which establishes a separate statute of limitations for childhood sexual abuse claims." Slip Op. at 10. Defendant Archdiocese argued in *Graham* and that §537.046 applies only to the person directly molesting the plaintiff. That position clearly was rejected by the Court of Appeals in *Graham*, as only the Archdiocese and Archbishop Rigali were defendants in the judgment being appealed in that case. Slip Op. at 1.

Although plaintiff's specific claim for childhood sexual abuse in Count I of his Petition was dismissed in this case in the Court's Order of July 12, 2007, that only meant that the statute did not create a new cause of action against the Archdiocese. There is no reason, however, why this statute of limitations would not apply to plaintiff's claim for intentional failure to supervise clergy. Additionally, this Court, *sua sponte*, could now reinstate that count against the Archdiocese, based on *Graham v. McGrath.* The plain language of §537.046 (2) does not include any limitation about who the defendants in the subject actions may be. It not only does not make a limitation, but it states that the time limits set forth apply in "Any action to recover damages from injury or illness caused by childhood sexual abuse. . ."

The provisions of a statute should be construed to effect the lawful purpose of the act. *See State v. Wright*, 515 S.W.2d 421, 427 (Mo. Banc 1974); *State v. Kraus*, 530 S.W.2d 684, 685 (Mo. Banc 1975). "[I]t is clearly consistent with the stated public policy of this State

to recognize tort liability where doing so will further the State's interest in protecting children from future abuse." *Bradley v. Ray*, 904 S.W.2d 302, 310 (Mo.App.W.D. 1995)(discussing need to recognize common law duty to report child abuse in wake of the rising incidence of child abuse in Missouri.) Section 537.046 should be construed to achieve this deterrent effect.

Straub v. Tull, 128 S.W.3d 157 (Mo. App. S.D. 2004), is the only direct precedent regarding how the "discovery test" of §537.046 operates. In *Straub*, the plaintiff was a childhood sex abuse victim who was born in 1967, and suffered sexual abuse on roughly 20 occasions between 1974 and 1984, while she was between the ages of 7 and 17. She filed suit against the abuser in 2000, at the age of 33. *Straub*, 128 S.W.3d at 159-60. Significantly, the *Straub* plaintiff had testified that she always had memory of the abuse. It was not until she entered counseling for depression that she connected the abuse she suffered as a child with her present psychological troubles. *Straub*, 128 S.W.3d at 157-62. The *Straub* court held that the defendant could not succeed on a statute of limitations defense because the defendant had not shown that the plaintiff "reasonably should have discovered" her injury more than three years before filing suit. *Id* at 162-63.

In this case, defendant has failed to establish the absence of dispute as to the material fact of when plaintiff discovered or reasonably should have discovered his injury. Moreover, the Affidavit of Dr. Peterson establishes that before the media reported allegations of sexual misconduct by Christian in 2003, John Doe KK did not discover and could not reasonably be expected to discover that he had been injured by childhood sexual abuse. Plaintiff filed suit in 2005, within three years of his discovery of injury.

C. Mo. Rev. Stat. §516.170 - Mental Incapacity

One additional statute makes plaintiff's lawsuit timely. Section 516.170, RSMo allows a plaintiff to delay filing a lawsuit during periods of mental incapacity. The statute provides:

> Except as provided in section 516.105, if any person entitled to bring an action in sections 516.100 to 516.370 specified, at the time the cause of action accrued be either within the age of twenty-one years, or mentally incapacitated, such person shall be at liberty to bring such actions within the respective times in sections 516.100 to 516.370 limited after such disability is removed.

The Missouri Supreme Court's decision in *Wheeler v. Briggs*, 941 S.W.2d 512 (Mo. 1997), is instructive. The Court explained:

> Mentally incapacitated persons, unlike minors, are not legally prohibited from filing suit. They have the right to pursue in the courts any cause of action the substantive law recognizes. Instead, it is their own disability that prevents, as a practical matter, meaningful access to the courts.

941 S.W.2d at 515.

"[A] plaintiff who seeks to toll a limitations period due to mental incapacity must set forth facts which show that plaintiff was deprived of an ability . . . which disability prevented plaintiff from bringing suit." *Kellog v. Kellog*, 989 S.W. 2d 681, 685 (Mo. App. 1999). The Court in *Kellog* stated that one of the "most common means used to demonstrate mental incapacity" is "**a medical diagnosis** of a condition," and that in that case the "plaintiff . . .

did not provide an affidavit of a physician attesting to a mental disability, his psychologist's affidavit was conclusory and did not address the salient issues of mental disability, and his own conclusory and contradictory averments were insufficient to create an issue of fact." *Id.* at 687 (citations omitted, emphasis added.) *Vance v. Stevens*, 930 F.2d 661 (8th Cir. 1991) (summary judgment granted where plaintiff "failed to provide the affidavits of his treating physicians or other experts to establish a genuine issue of material fact for trial as to his mental disability.) *Stoll v. Runyon*, 165 F. 3d 1238 (9th Cir. 1999) (tolling appropriate where defendant's sexual abuse of plaintiff was cause of plaintiff's disability that prevented her from earlier filing her claim.)

Here, however, plaintiff John Doe KK has submitted an affidavit of an expert, Dr. Peterson, a psychiatrist, "attesting to a mental disability" and setting forth a "medical diagnosis of a condition" which "incapacitated John Doe KK" from filing his petition earlier than he did. Ex. D, Peterson Affidavit, ¶18. While the Court of Appeals in *Kellog*, described a much broader definition of "mentally incapacitated," that discussion is *dicta*, and the definition is not what the Supreme Court described in *Wheeler v. Briggs*, where the Court explained that "it is their own disability that prevents, as a practical matter, meaningful access to the courts." With the Affidavit of Dr. Peterson, plaintiff John Doe KK has met his burden and submitted the necessary evidence that his disability tolled the statute, or at least that creates an issue of fact for the jury.

CONCLUSION

Viewing the facts in the light most favorable to plaintiff and according to plaintiff the benefit of all reasonable inferences from the evidence, this Court should find that there are

material facts in dispute and defendant has not met its burden of establishing a right to judgment as a matter of law. Defendant's motion for summary judgment, therefore, must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing and all exhibits were sent on April 7, 2008, by courier to counsel for Defendants.

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