

Spring 2007

Determining When to Start the Clock: The Capable Ascertainment Standard and Repressed Memory Sexual Abuse Cases

John Daly Cooney

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

John Daly Cooney, *Determining When to Start the Clock: The Capable Ascertainment Standard and Repressed Memory Sexual Abuse Cases*, 72 MO. L. REV. (2007)

Available at: <https://scholarship.law.missouri.edu/mlr/vol72/iss2/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Determining When to Start the Clock: The “Capable of Ascertainment” Standard and Repressed Memory Sexual Abuse Cases

*Powel v. Chaminade College Preparatory, Inc.*¹

I. INTRODUCTION

In Missouri, for purposes of determining when the statute of limitations begins to run, a cause of action shall not be deemed to accrue when the alleged wrong or breach of duty occurs, but rather when the “damage resulting therefrom is sustained and is capable of ascertainment.”² While this test has governed Missouri tort cases since 1919, when it was explicitly written into Missouri statutory law, courts have struggled in determining when damages are “capable of ascertainment” in order to satisfy the test.³

In *Powel v. Chaminade College Preparatory, Inc.*, the Supreme Court of Missouri attempted to establish a generally applicable, objective standard for determining when damages are “sustained and . . . capable of ascertainment.”⁴ While the court succeeded in clearly prescribing a standard, application of the standard under the specific facts of *Powel* set a troubling precedent in repressed memory sexual abuse cases.

II. FACTS AND HOLDING

On June 2, 2002, Michael Powel filed suit in the Circuit Court of the City of St. Louis against Chaminade College Preparatory School (“Chaminade”), Father William Christensen, and Brother John Woulfe, for damages resulting from childhood sexual abuse.⁵ Specifically, Powel alleged that Father Christensen and Brother Woulfe had regularly and repeatedly engaged in sexual contact with him while he was a student attending and living at Chaminade in the 1970s.⁶ Further, Powel alleged that Chaminade had intentionally failed to supervise its clergy.⁷

In the fall of 1973, Michael Powel, then age 15, began attending Chaminade College Preparatory School in St. Louis, Missouri, as a boarding stu-

1. 197 S.W.3d 576 (Mo. 2006) (en banc).

2. See MO. REV. STAT. § 516.100 (2000).

3. See *Powel*, 197 S.W.3d at 581.

4. See *id.* at 582.

5. *Id.* at 579.

6. *Id.* at 577.

7. *Id.* at 579.

dent.⁸ Michael remained a boarding student until the spring of 1975, when Chaminade expelled him for selling alcohol to other students at the school.⁹ It was established that before becoming a student at Chaminade, Michael had been sexually abused numerous times, by both family members and non-family members.¹⁰

In February 2000, Michael was diagnosed with a brain tumor.¹¹ During the course of treatment, he regained previously repressed memories of sexual abuse at the hands of defendants Father Christensen and Brother Woulfe.¹² In his suit, Powel alleged that the sexual abuse he had suffered while he was a student at Chaminade caused post-traumatic stress disorder that subconsciously affected his conduct.¹³ He claimed that this disorder was what caused him to act out inappropriately, resulting in his expulsion from Chaminade and his inappropriate sexual conduct over the succeeding decades.¹⁴ He also claimed that he was not aware that the prior abuse was the cause or contributing cause for his improper conduct until he regained his repressed memories in 2000 and began receiving therapy and treatment from a psychologist.¹⁵

Chaminade's attorneys filed a motion for summary judgment, claiming that his suit was barred by the applicable statute of limitations.¹⁶ Chaminade pointed out that the report of his own expert psychologist stated that Michael had remembered being molested until approximately age 17, but then repressed his memories.¹⁷ Powel argued that his claim was not time-barred

8. *Id.* at 578. Powel was a boarding student at the school between the ages of 15 and 17. *Id.* Defendants Christensen and Woulfe also lived in Canning Hall on the property of the school during the time that Powel was a student there. *Id.*

9. *Id.*

10. *Id.* Once expelled from Chaminade, Michael Powel, then age 17, moved to the home of a friend and fellow Chaminade student in Springfield, Illinois, where he was sexually abused by his friend's mother and forced to leave her home. *Id.* At this point, Michael felt he was good for nothing but sexual abuse and he began hitchhiking, sometimes receiving money from men for sexual favors. *Id.* This conduct continued for the next four years, and Michael Powel continued to display a multitude of emotional and physical problems prior to the filing of his cause of action. *Id.* at 578-79.

11. *Id.* at 579.

12. *Id.* Michael Powel specifically recalled five occasions of sexual abuse by Father Christensen and three occasions of sexual abuse by Brother Woulfe, including incidents of fondling, oral sex, and sodomy. *Id.* Michael also recalled Father Christensen introducing him and another student to pornography at a St. Louis movie theater. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* At his deposition, Michael Powel testified that he always knew he had been abused. *Id.*

because he had filed suit only after he was able to ascertain that he had been abused by the defendants and that the abuse had caused or contributed to his psychological problems, and therefore was within the statutory period prescribed under Missouri law.¹⁸

The Circuit Court of the City of St. Louis held that damages resulting from sexual abuse were sustained and “capable of ascertainment” at the moment when the sexual abuse occurred. The court also held that the statute of limitations was not tolled during the time that Michael suppressed his memory,¹⁹ and therefore, the court granted Chaminade’s summary judgment motion.²⁰ Powel appealed to the Missouri Court of Appeals for the Eastern District, which transferred the case to the Supreme Court of Missouri in order to resolve the apparent conflict regarding the interpretation of the phrase “sustained and capable of ascertainment.”²¹

The Supreme Court of Missouri held that, when determining when the statute of limitations begins to run, the issue is not when the injury occurred or when the plaintiff subjectively learned of the wrongful conduct and that it caused an injury, but when a reasonable person would have been put on notice that an injury and substantial damages may have occurred.²² Thus, the court held that Powel’s damages resulting from sexual abuse would not, as a matter of law, necessarily be found to be “capable of ascertainment” at the time when the abuse occurred.²³ The court subsequently reversed the decision of the trial court and remanded the case, with instructions to apply the objective standard for determining when damages are capable of ascertainment.²⁴

III. LEGAL BACKGROUND

A. Developing the “Capable of Ascertainment” Test in Missouri

In 1919, the Missouri Legislature amended the statute of limitations to read that a “cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment.”²⁵ This stan-

18. *Id.* He also filed affidavits to refute the defendants’ contention that Michael was aware of the sexual abuse he suffered before he repressed his memories. *Id.*

19. *Id.* at 579-80.

20. *Id.*

21. *Id.* at 580.

22. *Id.* at 582.

23. *Id.* at 585.

24. *Id.* at 586.

25. *Thorne v. Johnson*, 483 S.W.2d 658, 660 (Mo. App. W.D. 1972). *See* MO. REV. STAT. § 516.100 (2000).

dard was a sharp departure from the standard that Missouri courts had previously employed.²⁶

Before 1919, in Missouri, the period of limitations began to run on the date when the wrongful act occurred, and not the date on which the actual damage was suffered by the plaintiff.²⁷ In *Rankin v. Schaeffer*, the plaintiff sought to recover damages for professional negligence on the part of the defendant.²⁸ The Missouri Court of Appeals looked to English common law to determine that, when a cause of action alleges a breach of duty and consequential damage, “the statute runs from the time the breach of duty is committed, and not from the time the consequential damage ensued.”²⁹ Ultimately, the *Rankin* court held that the “cause of action accrues the moment the defendant failed to do what he agreed to do.”³⁰

The Missouri courts further clarified this standard in *Schade v. Gehner*.³¹ In *Schade*, the plaintiff filed an action for damages against the defendant for negligence in examining titles to real estate.³² In determining whether the plaintiff’s right of action for negligence had accrued, the Supreme Court of Missouri acknowledged that the law in this area was “fairly well settled.”³³ Citing *Rankin*, the court held that the “statute begins to run from the time of the breach, and not from the time the consequential damages ensued.”³⁴

Consequently, the 1919 amendment to the Missouri statute of limitations represented a radical departure from the standard prescribed by *Rankin* and *Schade*.³⁵ No longer would a cause of action be deemed to accrue “when the wrong is done,” but rather, the statute of limitations would commence to run only from the time “when the damage resulting therefrom is sustained and is capable of ascertainment.”³⁶ This “capable of ascertainment” test has re-

26. *Thorne*, 483 S.W.2d at 661.

27. *Id.* at 660.

28. 4 Mo. App. 108, 109 (1877).

29. *Id.*

30. *Id.* at 110.

31. 34 S.W. 576 (Mo. 1896).

32. *Id.* at 576.

33. *Id.* at 578.

34. *Id.* In further discussing these standards, the Missouri Court of Appeals, in *Fehrenback*, stated that *Rankin* and *Schade* followed a general rule that “a wrongful act causing damage which may be sued for at the time sets the statute in motion, and the same is not postponed because the amount or extent of the damages is not then *ascertained or ascertainable*.” *Thorne v. Johnson*, 483 S.W.2d 658, 661 (Mo. App. E.D. 1972). (quoting *State ex rel. Fehrenback v. Logan*, 190 S.W. 75, 78 (Mo. Ct. App. 1916) (emphasis added)).

35. *Thorne*, 483 S.W.2d at 661-62.

36. *Id.*

mained the applicable standard for Missouri tort cases since its adoption in 1919.³⁷

Once the “capable of ascertainment” test was incorporated into Missouri law, and courts were aware that a tort cause of action would not begin to accrue until some time after the initial wrongful conduct, Missouri courts were faced with the inevitable question of exactly when damages were “sustained and capable of ascertainment” and how to apply the new standard. In *Chemical Workers Basic Union, Local No. 1744 v. Arnold Savings Bank*, the Supreme Court of Missouri attempted to answer this question.³⁸ In *Chemical Workers*, the court held that damages are indispensable elements of the wrongful conduct that occurred,³⁹ and that they are ascertainable in order to trigger the running of the statute of limitations “whenever . . . [the damage] can be discovered or made known.”⁴⁰ However, the court cautioned that the “capable of ascertainment” standard should not be construed to mean that accrual of a cause of action is postponed until discovery of a wrongful act.⁴¹ Rather, once an act has occurred, a plaintiff should make an inquiry and use reasonable diligence to discover that the act was legally injurious and that a cause of action had accrued.⁴² Thus, the statute does not begin to run when the plaintiff actually discovers injury or wrongful conduct, but when the fact of damage is capable of being discovered.

After *Chemical Workers*, the perception arose that the Missouri Supreme Court intended the “capable of ascertainment” standard to be synonymous with the “discovery” of a wrongful act or the damages resulting therefrom. In *Jepson v. Stubbs* though, the Supreme Court of Missouri plainly rejected this idea.⁴³ In *Jepson*, the plaintiff argued that the statute of limitations should have started to run on the date that he discovered the alleged negligence.⁴⁴ The court recognized that some states had adopted a “discovery” rule for determining when the statute of limitations begins to run, but that Missouri had no such rule.⁴⁵ Ultimately, it held that Missouri has a “ca-

37. *Id.* at 660. In *Thorne v. Johnson*, the Missouri Court of Appeals considered exactly what effect was to be given to the 1919 amendment. *Id.* In *Thorne*, the court stated that “[t]he 1919 amendment had the effect of disapproving” the standards set in *Rankin* and *Schade*. *Id.* at 661. Further, the *Thorne* court held that failing to give effect to the 1919 amendment “would violate the clear intention by the Legislature to correct an unfair rule which had resulted from the past mechanical application of ancient legal dogma.” *Id.* at 662.

38. See 411 S.W.2d 159 (Mo. 1966) (en banc) (per curiam).

39. *Id.* at 163-64.

40. *Id.* at 164.

41. *Id.*

42. *Id.* at 164-65.

43. See 555 S.W.2d 307, 312 (Mo. 1977) (en banc).

44. *Id.* at 309.

45. *Id.* at 312.

pable of ascertainment” test and that, if the legislature had intended to prescribe a “discovery” test, they would have expressly done so.⁴⁶

B. Applying the “Capable of Ascertainment” Standard to Childhood Sexual Abuse Cases

Applying the “capable of ascertainment” standard to childhood sexual abuse cases is a challenging task for courts to undertake because of the complex and emotional nature of the issues involved. The task becomes especially challenging when the plaintiffs are adults who suffered some form of sexual abuse as children and are attempting to bring a lawsuit years later. Another complicating factor is that many victims of childhood sexual abuse are prone to involuntary repression of the memories of the abuse, prompting them to not recall the abuse until later in life. This involuntary repression of memory leads many victims to file lawsuits against their alleged abusers when they regain their memory. The lengthy time period between the alleged abuse and the lawsuits creates problematic statute of limitations issues that the courts have tried to resolve.

In enacting Mo. Rev. Stat. § 537.046, the Missouri legislature attempted to resolve the issue of repressed memories in childhood sexual abuse cases, and their relation to statutes of limitations. This statute, effective August 28, 2004, prescribed that any action to recover damages for childhood sexual abuse shall be commenced within ten years of the plaintiff turning twenty-one or “within three years of the date the plaintiff discovers, or reasonably should have discovered, that the injury . . . was caused by childhood sexual abuse, whichever later occurs.”⁴⁷ While this extension of the period of limitations regarding childhood sexual abuse cases accounts for the often lengthy time period between the date of the alleged abuse and the subsequent recovery of repressed memories, it did not resolve the issue entirely.

In *Doe v. Roman Catholic Diocese of Jefferson City*, the plaintiff sought damages for sexual abuse he had suffered as a minor.⁴⁸ The plaintiff alleged that he was abused by the defendant priest while he was a minor, and that he was unable to fully realize that he had suffered physical and emotional injuries related to that abuse until December of 1989, because he had repressed the memories of the abuse.⁴⁹ The plaintiff filed a petition alleging a battery and attempting to bring the action within section 537.046, which had just been passed in the previous year.⁵⁰ However, the trial court granted the de-

46. *Id.* at 312-13. The court looked to the legislative intent behind the “capable of ascertainment” test to make a plain distinction between it and the “discovery” test used by the courts of some other states. *Id.*

47. See MO. REV. STAT. § 537.046 (Supp. 2004).

48. 862 S.W.2d 338, 339 (Mo. 1993) (en banc).

49. *Id.*

50. *Id.*

fendant's motion to dismiss, finding that the suit was barred by Missouri's two year statute of limitations for battery.⁵¹ The trial court held that section 537.046 was unconstitutional because it allowed plaintiffs to bring claims that would have already been barred under the previous statute that applied to childhood sexual abuse cases.⁵²

The Supreme Court of Missouri affirmed the dismissal, holding that the previous period of limitations for childhood sexual abuse cases created a vested right in favor of the defendants to be free from suit, because the limitations period under the old statute had already expired.⁵³ Therefore, to the extent that section 537.046 allowed plaintiffs to bring causes of action that would have been barred under the original statutes of limitation, the court held that section 537.046 violated the constitutional provision against retrospective laws.⁵⁴

Because of the holding in *Doe*, Missouri courts were forced to apply either a two or five year period of limitations for some childhood sexual abuse cases.⁵⁵ As mentioned earlier, childhood sexual abuse cases often involve plaintiffs who have involuntarily repressed the memories of the defendants' wrongful conduct for many years. Therefore, Missouri courts were faced with the difficult task of determining when these plaintiffs' damages were "sustained and capable of ascertainment," so that courts could determine whether their cases could be brought, or when they would be barred because the period of limitations had expired. The Supreme Court of Missouri case, *Sheehan v. Sheehan*,⁵⁶ dealt with exactly this issue.

In *Sheehan*, the plaintiff sued her father for damages, alleging that he had sexually abused her as a child, which resulted in her suffering consequential physical and emotional injuries.⁵⁷ The plaintiff also claimed that she involuntarily repressed the memories of the abuse throughout her childhood and young adulthood until approximately three years before she filed her petition.⁵⁸ The trial court granted the defendant father's motion to dismiss the case, reasoning that the plaintiff's claim was not brought within five years after her 21st birthday, and was therefore time barred.⁵⁹

After determining that the trial court had correctly applied the five year statute of limitations to the case because of the holding in *Doe*, the Supreme Court of Missouri considered exactly when the plaintiff's damages were "sustained and suffered" in order to establish whether the plaintiff's petition was

51. *Id.*

52. *Id.*

53. *Id.* at 342.

54. *Id.*

55. *See id.*

56. *See* 901 S.W.2d 57 (Mo. 1995) (en banc).

57. *Id.* at 57-58.

58. *Id.*

59. *Id.* at 58.

time barred.⁶⁰ The court first noted that the moment at which damages are ascertainable is an objective determination.⁶¹ According to the court, it was ambiguous as to when the plaintiff could have discovered or made known her damages.⁶² Therefore, because the plaintiff's damages may not have been ascertainable until after she regained her repressed memories, her petition did not clearly indicate on its face that her suit was time barred. Consequently, the trial court had erred in dismissing her case.⁶³

The Supreme Court of Missouri reached a similar result in *K.G. v. R.T.R.*, in which the plaintiff alleged that her father had subjected her to inappropriate sexual touching as a child.⁶⁴ The plaintiff alleged that her father had sexually abused her between the ages of three and seven years, and that she involuntarily repressed those memories for more than twenty years, until she regained them in 1990, three years before she filed her petition.⁶⁵ The trial court granted the defendant's motion to dismiss after concluding that the two-year statute of limitations for battery had expired.⁶⁶

Following an opinion by the Missouri Court of Appeals, the case was transferred to the Supreme Court of Missouri.⁶⁷ The Supreme Court found that in cases of involuntary repressed memory, the date the injury occurs may be later in time than the battery.⁶⁸ Further, the court noted that it is the memory of the consequential injury and damages, and not the memory of the identity of the perpetrator, that triggers the running of the statute of limitations.⁶⁹ Despite this important acknowledgement, the Supreme Court affirmed the trial court's dismissal of the plaintiff's case. The court held that, even if the statute of limitations was tolled until the plaintiff regained her repressed memories, the cause of action was still not filed in time.⁷⁰

However, not every court in Missouri has steadfastly followed *Sheehan* or *K.G.* For example, in *H.R.B. v. Rigali*, the plaintiff sued the Archbishop of the Archdiocese of St. Louis for intentional failure to supervise clergy.⁷¹ He filed his petition in September, 1994,⁷² alleging that he had suffered sexual

60. *Id.* at 58-59.

61. *Id.* at 59.

62. *Id.*

63. *Id.*

64. See 918 S.W.2d 795 (Mo. 1996) (en banc).

65. *Id.* at 797.

66. *Id.* at 798. See MO. REV. STAT. § 516.140 (2000) (providing the two-year statute of limitations for battery).

67. *K.G.*, 918 S.W.2d at 797.

68. *Id.* at 798.

69. *Id.*

70. *Id.* at 798-99.

71. 18 S.W.3d 440, 442 (Mo. App. E.D. 2000). See *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 580 (Mo. App. W.D. 2001) (listing the elements of a cause of action for intentional failure to supervise clergy).

72. *H.R.B.*, 18 S.W.3d at 442.

abuse at the hands of a Roman Catholic priest employed by the Archdiocese while he was a student at a Catholic grade school in St. Louis in 1964.⁷³ The plaintiff argued that he had repressed any memories of the abuse until October 1992, and that his repression of memory should toll the statute of limitations until that date.⁷⁴ The trial court found in favor of the plaintiff and awarded damages for his claim of intentional failure to supervise, effectively tolling the five-year statute of limitations that applied to the action.⁷⁵ The defendant Archbishop appealed, arguing that the claim should have been barred by the statute of limitations and that the plaintiff's damages were "capable of ascertainment back when he suffered the sexual molestation in the summer of 1964."⁷⁶

The Missouri Court of Appeals began its analysis of the case by acknowledging that whether damages are "sustained and capable of ascertainment at a given time is an objective standard and is a matter of law to be decided by the judge."⁷⁷ The court then held that the plaintiff's repression of his memory should not toll the statute of limitations because, when "an overt sexual assault occurs, the injury and damage resulting from the act are capable of ascertainment at the time of the abuse."⁷⁸ Therefore, the Court of Appeals reversed the trial court's decision.⁷⁹

IV. THE INSTANT DECISION

In *Powel v. Chaminade College Preparatory, Inc.*, the Supreme Court of Missouri, sitting en banc, sought to answer the question of whether Michael Powel's claims against the respondents for intentional failure to supervise clergy were barred by Missouri's five-year tort statute of limitations.⁸⁰ All parties in *Powel* agreed that Missouri Revised Statutes section 516.120 provided the five-year statute of limitations that governed Michael Powel's claim.⁸¹ However, the parties disagreed as to when it began to run.⁸² This

73. *Id.*

74. *Id.* at 444.

75. *Id.* at 442.

76. *Id.* at 443.

77. *Id.* (citing *Sheehan v. Sheehan*, 901 S.W.2d 57, 58-59 (Mo. 1995) (en banc)).

78. *Id.*

79. *Id.* at 446.

80. 197 S.W.3d 576 (Mo. 2006) (en banc). Missouri Revised Statutes section 516.120(4) provides a five-year limitations period for "[a]n action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." MO. REV. STAT. § 516.120(4) (2000) (emphasis added).

81. *Powel*, 197 S.W.3d at 580.

82. *Id.*

was the only question addressed by the Missouri Supreme Court in this case.⁸³

The Supreme Court began by citing Missouri Revised Statutes section 516.100, noting that, in Missouri, a cause of action does not accrue until the damage resulting from a wrongful act is “sustained and is capable of ascertainment.”⁸⁴ Then, the court acknowledged that the more difficult issue in resolving the case was to determine what the legislature meant by the phrase “sustained and . . . capable of ascertainment.”⁸⁵ In attempting to resolve this issue, the court looked to the plaintiff’s and the respondents’ interpretations of the phrase.⁸⁶

Plaintiff Michael Powel argued that the legislature had intended that the statute of limitations would not begin to run until the victim subjectively became aware that he or she had suffered damages that were caused by the actions of the specific individuals in question.⁸⁷ The court found Michael Powel’s suggested standard to be similar to the “discovery” test that was specifically rejected in an earlier Supreme Court of Missouri case.⁸⁸ Because of this similarity, the court in the instant case rejected Powel’s proposed standard.⁸⁹

The respondents argued that the proper interpretation of “capable of ascertainment” was that the statute begins to run when the sexual abuse allegedly occurred, because that is when the injury could have been objectively discovered or made known had the plaintiff not repressed his memory of it.⁹⁰ The court rejected this proposed interpretation as well.⁹¹ The court reasoned that, while the respondents were correct in suggesting an objective standard to be used for determining when a cause of action shall accrue, the test they proposed would make the statute begin to run at the time of the wrongful act in almost every sexual abuse case.⁹² While such a test had been used in the Missouri Court of Appeals for the Eastern District and was followed by the trial court in this case, the Supreme Court of Missouri had previously rejected tests that allowed for the cause of action to accrue at the time the wrongful act was done,⁹³ and did so again in this case.⁹⁴ Therefore, after rejecting the plaintiff’s and the respondents’ proposed interpretations of what is meant by

83. *Id.*

84. *Id.* at 581. *See* MO. REV. STAT. § 516.100 (2000).

85. *Powel*, 197 S.W.3d at 581.

86. *Id.* 581-82.

87. *Id.* at 581.

88. *Id.* *See* *Jepson v. Stubbs*, 555 S.W.2d 307, 313 (Mo. 1977).

89. *Powel*, 197 S.W.3d at 581.

90. *Id.* at 581-82.

91. *Id.* at 582.

92. *Id.*

93. *See* *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977); *Thorne v. Johnson*, 483 S.W.2d 658 (Mo. App. W.D. 1972).

94. *Powel*, 197 S.W.3d at 582.

“sustained and . . . capable of ascertainment,” the court was faced with clearly articulating a specific, generally applicable test for determining precisely when the statute of limitations begins to run in Missouri tort cases such as *Powel*.⁹⁵

After rejecting both the plaintiff’s and the respondents’ interpretations, the court looked to its prior holdings to develop a specific test for making the determination of when damages were “sustained and capable of ascertainment” in Missouri.⁹⁶ The court concluded that the statute of limitations begins to run in Missouri when the “evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.”⁹⁷

After prescribing this new objective standard for determining when a cause of action is deemed to accrue, the court then had to apply the standard to cases like *Powel* that involved plaintiffs who had repressed their memories of sexual abuse.⁹⁸ In applying its new standard, the court held that, in cases where the memory of a wrongful act was repressed before the victim had notice that a wrong had occurred and that substantial damage had resulted, the claim would not have accrued at the time the victim repressed his or her memory of the events.⁹⁹ The court further held that, only when the victim regained the repressed memories would he or she have reason to question the defendant’s conduct and have information sufficient “to place a reasonably prudent person on notice of a potentially actionable injury.”¹⁰⁰ The court concluded that in cases of repressed memory, the relevant inquiry 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 examine the extent of the damages.”¹⁰¹ The court held that “[a]t that point, the damages would be sustained and capable of ascertainment as an objective matter.”¹⁰²

After developing a new, objective capable of ascertainment standard, and determining how to generally apply the standard to repressed memory cases, the court applied the standard to the instant case.¹⁰³ Specifically, the court needed to decide whether the trial court was correct in granting summary judgment in favor of the respondents, in light of the court’s new standard.¹⁰⁴ The court first noted that, in cases where “different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it

95. *Id.*

96. *Id.*

97. *Id.* (quoting *Bus. Men’s Assurance Co. of Am. v. Graham (BMA)*, 984 S.W.2d 501, 507 (Mo. 1999) (per curiam).

98. *Id.* at 584.

99. *Id.*

100. *Id.* (quoting *BMA*, 984 S.W.2d at 507).

101. *Id.*

102. *Id.* at 584-85.

103. *See id.* at 585.

104. *See id.*

is a question of fact for the jury to decide.”¹⁰⁵ The court held that, because of the parties’ differing evidence regarding Michael Powel’s repressed memories, there were significant genuine issues of fact that could not be resolved on summary judgment.¹⁰⁶ The court reasoned that this case, particularly, could not be resolved on summary judgment because the trial court was without the benefit of the new standard that it had just developed.¹⁰⁷

Accordingly, the Supreme Court reversed the decision and remanded the case to the Circuit Court of the City of St. Louis.¹⁰⁸ The court was also clear in overruling several Missouri Court of Appeals cases, such as the one that the trial court originally followed in *Powel*.¹⁰⁹

Following the decision by the majority in *Powel*, Justice Price wrote a dissenting opinion, in which he agreed with the trial court’s finding that Michael Powel’s claim should have been barred by the applicable statute of limitations.¹¹⁰ In dissent, Justice Price argued that the majority stated “an ‘objective’ standard, but appl[ied] a ‘subjective’ one.”¹¹¹ He further argued that under a truly objective standard, a reasonable and competent person in Michael Powel’s position would know soon after the repeated sexual abuse that he had suffered harm.¹¹²

V. COMMENT

In *Powel v. Chaminade College Preparatory, Inc.*, the Supreme Court of Missouri was faced with the difficult task of interpreting what the Missouri legislature meant by the phrase that damages must be “sustained and capable of ascertainment.”¹¹³ Before *Powel*, Missouri courts at all levels had been inconsistent in determining when damages were “sustained and capable of ascertainment,” and therefore, the court was eager to develop a specific, generally applicable test to be used in making this determination.¹¹⁴

While the new standard developed in *Powel* may be useful in its purported objectivity, and may in fact accurately state the intent of the Missouri legislature when they penned the phrase “sustained and . . . capable of ascertainment,” the Missouri Supreme Court seems to have misapplied its new objective standard to cases of repressed memory. The apparent purpose of developing a new standard for determining when damages would be sustained

105. *Id.* (quoting *Lomax v. Sewell*, 1 S.W.3d 548, 552-53 (Mo. App. W.D. 1999)).

106. *Id.* at 586.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 592-93 (Price, J., dissenting).

111. *Id.* at 592.

112. *Id.*

113. *See id.* at 577-78 (majority opinion).

114. *See id.* at 581-82.

and capable of ascertainment was to clear up inconsistency in Missouri case law. However, in misapplying the new standard in *Powel*, the Supreme Court has only complicated the law in repressed memory cases and overruled some seemingly legally sound case law in the process. In doing so, the court has potentially opened the door for more spurious claims from plaintiffs, and allowed for a dangerous level of legal and financial exposure to certain defendants.

In interpreting what the Missouri legislature intended by the phrase, “sustained and . . . capable of ascertainment,” the court in *Powel* rejected two possible interpretations proposed by the parties in the case.¹¹⁵ The court rejected the plaintiff’s interpretation because it felt it was too similar to a “discovery” test that has been used as the standard in other states, but had been specifically rejected in Missouri.¹¹⁶ Alternatively, the court rejected the respondents’ interpretation because it would have had the effect of making the statute of limitations begin to run upon the occurrence of the wrongful act in almost all sexual abuse cases.¹¹⁷ The court found the respondents’ interpretation to be too similar to a “wrongful act” test that is rejected in the specific language of *section 516.100*, which sets out the “capable of ascertainment” test that governs Missouri tort cases.¹¹⁸

In rejecting both of the proposed interpretations put forth by the parties in *Powel*, the court made a significant logical error. It failed to recognize that in certain types of cases, proper application of one standard may bring about the same result as application of a different standard. Specifically, proper application of the “capable of ascertainment” standard in sexual abuse cases may cause the statute of limitations to begin running at the same time that it would begin to run using a “wrongful act” standard. This notion was never considered in *Powel*.

The court was quick to reject the respondents’ argument that a reasonable person in Mr. Powel’s position could have objectively discovered that he had been harmed at the time that the alleged sexual abuse took place.¹¹⁹ The court’s rationale was that a Missouri statute specifically required that “a court *cannot* make the time the wrong is done . . . the time when the cause of action accrues.”¹²⁰ In delineating its standard for when damages are capable of ascertainment, the court was clear to emphasize that the standard is an objective one that relies on when a reasonable person would be aware that they have suffered harm.¹²¹ Viewed together with the creation of the new “capable of ascertainment” standard, the rejection of the respondents’ argument reveals a

115. *See id.*

116. *Id.* at 581.

117. *Id.* at 582.

118. *Id.*

119. *See id.* at 581-82.

120. *Id.* at 582.

121. *Id.*

significant omission in the court's reasoning. The court failed to consider that, in sexual abuse cases such as *Powel*, a "reasonably prudent person" would be put "on notice of a potentially actionable injury" at the time of the alleged sexual abuse. The respondents in *Powel* were not asking that the court apply a "wrongful act" standard that would be inconsistent with Missouri law; they were merely asking that the court apply the "capable of ascertainment" standard properly. By stating that "a court *cannot* make the time the wrong is done . . . the time when the cause of action accrues," the court made an overbroad generalization and failed to consider that many causes of action, especially those involving a battery, will accrue at the time the wrongful act is committed, regardless of what test is used to determine its accrual.

After articulating its new "capable of ascertainment" test, the court cited several cases that supported the new standard.¹²² However, the cases cited by the court are certainly not dispositive of the respondents' contention that sexual abuse victims, such as Michael Powel, should be held to have reasonably known that they had suffered actionable harm at the time of the alleged sexual abuse.

One of the cases relied on heavily by the *Powel* court was *Business Men's Assurance Co. v. Graham (BMA)*.¹²³ In *BMA*, the defendant was hired to install marble panels on the outside of a large office building.¹²⁴ The marble panels were defective at the time of their installation, but the defects were not visible from the outside and could only be observed if they were removed from the building.¹²⁵ Over twenty years after the panels were installed, the plaintiff company discovered the defects in the panels and sued the defendant for negligence and breach of contract.¹²⁶ The defendant argued that the claim was barred because the statute of limitations began to run at the time the damaged panels were installed.¹²⁷ However, the Supreme Court of Missouri held that the cause of action accrued over twenty years later when the panels began to fall off of the building.¹²⁸ The court reasoned that at that point the evidence was such "to place a reasonably prudent person on notice of a potentially actionable injury."¹²⁹

Another case relied on by the *Powel* court involved a business executive who secretly stole money from his employer by committing forgeries;¹³⁰ another case involved a defendant who caused his business partners significant damage by writing a clause into a contract that the other partners did not

122. *See id.* at 582-84.

123. 984 S.W.2d 501 (Mo. 1999) (per curiam).

124. *Id.* at 502.

125. *Id.* at 502-03.

126. *Id.*

127. *Id.* at 506-07.

128. *Id.* at 508.

129. *Id.* at 507.

130. *See Chem. Worker's Basic Union v. Arnold Sav. Bank*, 411 S.W.2d 159 (Mo. 1966) (per curiam).

know about;¹³¹ and still another involved a defendant who was hired to survey some property, and did so negligently, unbeknownst to the plaintiff, causing him damage.¹³² All of these cases are alike in that they involve acts of fraud, deception, or some wrong that is not clearly visible at the time the wrongful act is committed. In each of the cases, reasonable plaintiffs could not objectively be held to know that they had been injured at the time of the wrongful conduct because their injury was somehow hidden from them as a result of the defendants' actions. In each of these cases, the plaintiffs' cause of action could not, and should not accrue at the time the wrongful act occurred.

However, cases of sexual abuse are unlike each of the cases cited by the court in *Powel*. Sexual abuse often involves acts that are "overt, traumatic, painful and violent."¹³³ By its very nature, this type of abuse usually involves direct physical contact between the victim and another person and is classified as a type of battery.¹³⁴ Unlike the wrongful conduct that occurred in the cases cited by the court, there is nothing hidden or deceptive about most cases of sexual abuse.

In Justice Price's dissent, the explicit nature of the wrongful conduct in sexual abuse cases caused him to apply the court's new objective standard differently than the majority.¹³⁵ Justice Price cited Justice Holstein's dissenting opinion in *Sheehan* before arguing that, while the majority in *Powel* "state[d] an 'objective' standard, [it] appl[ied] a 'subjective one.'"¹³⁶ He argued that, under an objective standard, "a reasonable and competent 15-to-17-year-old man would know that he suffered harm from repeated sexual abuse by his teachers" at school.¹³⁷ Justice Price acknowledged that, if the victim was a younger child or incompetent in some way, then the victim might not know that he or she had been damaged. In these cases, Justice Price would argue that the statute of limitations should start to run at a later time.¹³⁸ However, barring these limited exceptions, the dissent ultimately argued that, if the court truly applied an objective standard, it would not matter that a particular plaintiff may have repressed the memories of the alleged sexual abuse;

131. See *Dixon v. Shafton*, 649 S.W.2d 435 (Mo. 1983) (en banc).

132. See *Martin v. Crowley, Wade & Milstead, Inc.*, 702 S.W.2d 57 (Mo. 1985) (en banc).

133. See *H.R.B. v. Rigali*, 18 S.W.3d 440, 443 (Mo. App. E.D. 2000).

134. *Id.* at 445.

135. See *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 592-93 (Mo. 2006) (en banc) (Price, J., dissenting).

136. *Id.*

137. *Id.* Similarly, in *Sheehan*, Justice Holstein argued that, "as a matter of law, a reasonable 14-year-old competent female should be held to know that she has been damaged at the time she is sexually assaulted." See *Sheehan v. Sheehan*, 901 S.W.2d 57, 60 (Mo. 1995) (en banc) (Holstein, J., dissenting).

138. *Powel*, 197 S.W.3d at 59-60 (en banc) (Price, J., dissenting).

but rather, the plaintiff should be held to know that they were harmed by sexual abuse at the time the abuse occurred.

Justice Price's view was also the view taken by the Missouri Court of Appeals in *H.R.B. v. Rigali*.¹³⁹ In *H.R.B.*, the court ruled against a plaintiff who had repressed memories of sexual abuse for over thirty years before bringing his cause of action.¹⁴⁰ The court reasoned that, when an "overt sexual assault occurs, the injury and damage resulting from the act are capable of ascertainment at the time of the abuse."¹⁴¹ The decision in *H.R.B.* was applied by the trial court in *Powel* in granting summary judgment in favor of the respondents at the trial level.¹⁴² However, *H.R.B.* was overruled by the Supreme Court in *Powel*, along with the other Missouri decisions that followed *H.R.B.*¹⁴³

In overruling *H.R.B.* and all similar decisions that hold that victims of sexual abuse should be held to have objectively ascertained that they were damaged at the time of the wrongful acts, the Supreme Court created a precedent that effectively eliminates the statute of limitations in all repressed memory sexual abuse cases. By allowing certain plaintiffs to bring a cause of action after he or she allegedly recovers repressed memories of sexual abuse, that plaintiff is essentially given an unlimited time to bring the action. The obvious problems with this are embedded in the logic behind all statutes of limitation. As the age of the alleged incident increases, the facts of the incident become increasingly difficult to determine, and witnesses are increasingly hard to procure. By allowing a plaintiff unlimited time to bring a claim, the potential for spurious claims is increased, and the capability of the court to determine the truth is greatly reduced. Furthermore, potential defendants in repressed memory sexual abuse cases face increased exposure to liability because of these plaintiffs' ability to get their cases over the statute of limitations hurdle and past the summary judgment stage in the litigation process.

In achieving its result in *Powel*, the Supreme Court of Missouri likely was influenced by its desire to punish sexual predators, regardless of how many years have passed since they committed their abusive acts. While barring plaintiffs who have suffered traumatic psychological and physical damage as a result of sexual abuse from bringing an action can easily be seen as troubling, a court simply cannot ignore the imposition of a meaningful statute of limitations in tort actions, regardless of their reason for doing so. However, based on its holding in *Powel*, that is precisely what has happened.

139. See 18 S.W.3d at 440.

140. *Id.* at 446.

141. *Id.* at 443.

142. See *Powel*, 197 S.W.3d at 577.

143. *Id.* at 586.

VI. CONCLUSION

In *Powel*, the Supreme Court had a very ambitious desire to develop a generally applicable standard for determining when damages are “sustained and . . . capable of ascertainment” in Missouri. While it may, in fact, have developed such a standard, its misapplication of its new standard to repressed memory sexual abuse cases created several unintended consequences that only further confuse the law in this area. By overruling several Missouri cases, the *Powel* court has given certain plaintiffs unlimited time to bring their actions, as long as they are claiming that they had repressed memories. While the holding in *Powel* will certainly be responsible for bringing some sexual predators to justice, its more significant effect will be to completely frustrate the purpose of the statute of limitations in repressed memory sexual abuse cases.

JOHN DALY COONEY

