IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE MC-1,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN, AND THE REGENTS OF THE UNIVERSITY OF MICHIGAN (official capacity only),

Defendants.
_____/

Case No. 2:20-CV-10568

Hon. Victoria A. Roberts
Hon. Elizabeth A. Stafford

PLAINTIFF JOHN DOE MC-1'S REPLY BRIEF IN SUPPORT OF HIS EMERGENCY MOTION FOR LEAVE TO TAKE THE DEPOSITION AND PRESERVE THE TESTIMONY OF TOM EASTHOPE PRIOR TO THE PARTIES' FED. R. CIV. P. 26(f) CONFERENCE

Defendants University of Michigan and its Regents ("Defendants" or "UM") state at the outset of their response that they do "***not oppose a deposition of Thomas Easthope…happening before a Rule 26 discovery conference***."[1] Defendants then inexplicably spend the remainder of their brief seeking to stonewall Plaintiff's deposition of Tom Easthope, a former Vice-President of the UM, and now 87-year old man, who fired UM physician Robert Anderson for molesting male students in his examination room years before Anderson committed sexual assaults on the then 17-year old Plaintiff, and hundreds of other student-male athletes, all under the guise of medical treatment. Mr. Easthope is the lone surviving witness to many decisions, conversations, and events that will decide not only the merits of this case, but also to UM's fraudulent concealment of its knowledge that Anderson was a sexual predator of male students *before* UM coaches ordered Plaintiff, a then male undergraduate athlete at UM, to treat with Anderson.

1. The preservation of Mr. Easthope's testimony is necessary to timely and meritoriously resolve Plaintiff's claims and UM's defenses.

Now is the right, and potentially only, time to preserve Mr. Easthope's testimonial evidence. Mr. Easthope is 87 years old. He is the *sole* remaining witness to critical decisions, events and direct conversations that form significant evidentiary bases of the counts in the Plaintiff's complaint,[2] UM's prospective defenses to those

[1] UM's Response, p. 1.
[2] Complaint, at ¶¶ 39- 66.

counts, and UM's fraudulent concealment of its knowledge that Anderson was a sexual predator of its male students[3] (information which UM seeks to suppress *before* arguing its premature motion to dismiss – a motion which turns on the very issue of fraudulent concealment).[4]

UM relies on several nonprecedential district court opinions that state age *alone* does not warrant the taking of an early deposition.[5] But UM's argument is misplaced. In each of the cases, the party requesting an early deposition failed to present any reason *other than* "advanced age".[6] In contrast, Plaintiff's motion is premised on three distinct issues which warrant deposing Mr. Easthope as soon as possible: (a) Mr. Easthope's advanced age of 87; (b) his unique status as the ***only*** witness to have several key conversations directly with Anderson about his sexual abuse of male students, at least one of which elicited an adoptive admission of guilt[7]; and (c) the need to identify other key witnesses who are aged, but may still be alive.

UM's own employee, Detective West, during his investigation of the Anderson allegations, identified at least 18 now-deceased UM administrative, medical and sports figures, "people with a connection," whom *West himself* wanted

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[3] *Id.*, at, among other allegations, ¶¶ 39- 66, ¶¶ 113-163.
[4] Mr. Easthope's testimony is also relevant to Plaintiff's substantive legal claims that UM, among other claims, violated Title IX, 20 U.S.C. § 1681(A), et seq., (Complaint, Count I) and 42 U.S.C. § 1983, (Complaint, Counts II-IV) .
[5] UM's Response, pp. 6-7.
[6] See cases cited in UM's Response, pp. 12-13.
[7] Complaint, at ¶¶ 41-42.

to interview.[8] This fact *coupled with* Easthope's age, and Easthope's unique status as a person who had one-on-one conversations with Anderson about Anderson's predatory conduct, demonstrates good cause for deposing him now.

Plaintiff spent weeks seeking UM's concurrence for Mr. Easthope's early deposition before he was forced to file this motion. Within one day of learning UM's retention of Bush Seyferth PLLC ("BSP"), Plaintiff's attorneys sought concurrence from BSP to depose Mr. Easthope.[9] Ignoring Local Rule 7.1, UM now disingenuously characterizes Plaintiff's attempt at concurrence as improper delay.[10]

2. Preservation of Mr. Easthope's testimony is even more important now that UM is denying it engaged in fraudulent concealment.

Last Friday, UM moved this Court to dismiss Plaintiff's case *before discovery*.[11] That same day, UM filed its response to prevent the deposition of 87-year old Easthope to preserve his testimony regarding decisions, events and conversations to which he is the lone surviving witness. The convergence of these two pleadings now creates a second and independent reason to order Easthope's deposition: to conduct discovery on UM's challenge to Plaintiff's well-pled allegations of fraudulent concealment.[12]

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[8] Plaintiff's Motion, **Exhibit 3**, at WCP00008.
[9] Plaintiff's Motion, **Exhibit 7**.
[10] UM's Response, p. 13.
[11] UM's Response, p. 2; UM's Motion to Dismiss, ECF No. 21, pp. 22-30.
[12] Complaint, ¶¶113-146.

Despite "not oppos[ing] a deposition of Thomas Easthope," UM opposes Plaintiff's Motion because Mr. Easthope, a retired UM executive, will likely provide or lead Plaintiff to critical and relevant information about UM's fraudulent concealment, including but not limited to: (1) Easthope's discovery of Anderson's sexual abuse of male students; (2) Anderson's admission to Easthope that he, in fact, molested UM's students; (3) other UM executives, managers, or employees' knowledge of Anderson's sexual abuse; (4) efforts of UM executives or employees to conceal this fact from students, including athletes; (5) other witnesses Easthope told about his decision to fire Anderson for sexual assaulting male students and how the termination was reported to others, including the human resources department; (6) which UM officials concealed Anderson's firing and orchestrated Anderson's move to UM's Athletic Department despite Easthope's firing of Anderson; (7) why UM's then-president falsely published in his 1980 Annual Report and other UM publications that Anderson "resigned"; (8) which UM officials told Plaintiff's coaches and trainers to represent to Plaintiff that Anderson was a safe, competent, and ethical doctor and thus would not harm Plaintiff; and, (9) which other UM officials or employees concealed from Plaintiff the true nature of Anderson's acts (the concealed claim here) and concealed the identity of UM as a defendant, through its aiding and abetting Anderson and concealing the true nature of his acts done in the guise of medical treatment. Where, as they did in their initial responsive

pleading, Defendants seek to challenge Plaintiff's well-pled facts of UM's fraudulent concealment of a campus sexual predator within its employ, Plaintiff is entitled to secure Mr. Easthope's sworn testimony of his personal knowledge of facts directly exposing UM's fraudulent concealment.

In Michigan,[13] fraudulent concealment is defined as a plan designed to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action.[14] When genuine issues of material facts exist as to whether a defendant employed such a plan, as Judge Roberts has previously found, a Rule 12(b)(6) motion must be denied:

> [I]n *McDonald Dairy Co.*, 905 F.Supp. at 453, the court held that under the facts of that case, granting a Rule 12(b)(6) motion based on the statute of limitations, would be premature, and is a question of fact which should be addressed no sooner than on summary judgment.[15]

Michigan courts generally refuse to dismiss claims involving fraudulent concealment claims prior to discovery because they are fact-intensive inquiries.[16]

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[13] Federal courts apply the state law where the injury occurred (Michigan) when addressing fraudulent concealment provisions such as M.C.L. §600.5855. *Perreault v. Hostetler*, 884 F.2d 267, 270 (6th Cir. 1989); *see also Bowling v. Holt Public Schools*, No. 16-CV-1322, 2017 WL 4512587 (W.D. Mich. 2017) (**Exhibit 3**).

[14] *Doe v. Archdiocese of Detroit*, 264 Mich. App. 632, 642-643; 692 N.W.2d 398 (2004).

[15] *Toyz, Inc. v. Wireless Toyz, Inc.*, 799 F. Supp. 2d 737, 744 (E.D. Mich. 2011); *see also Allstate Ins. Co. v. Frankel*, 259 F.R.D. 274, 276 (E.D. Mich. 2009).

[16] *Mays v. Snyder*, 323 Mich. App. 1, 58-60, 916 N.W.2d 227 (2018) ("[w]hether plaintiffs can satisfy the [fraudulent concealment] exception is a question that involves disputed facts and is subject to further discovery").

"Questions of concealment and diligence are questions of fact."[17] And so, Michigan courts generally permit discovery and/or hearings to address fraudulent concealment claims.[18] This is even more so the case where the fraudulent concealment involves a doctor-patient relationship.[19]

3. Unable to deny the factual and legal merits that demonstrate the propriety of Mr. Easthope's early deposition, UM instead employs obfuscation to oppose Easthope's deposition.

Conveniently neglecting the 51 other victims with pending lawsuits before this court, UM claims the deposition of Mr. Easthope is premature because this Plaintiff is but one victim. Yet Mr. Easthope's early deposition preserves critical testimony for the 51 other plaintiffs (all of whom are represented by Plaintiff's counsel) – as well as for any other future plaintiff.[20]

Lastly, UM seeks refuge in the current COVID-19 pandemic. UM complains

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[17] *Int'l Union United Auto. Workers of Am. v. Wood*, 337 Mich. 8, 13, 59 N.W.2d 60, 62 (1953).

[18] As the Sixth Circuit trenchantly wrote in *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968):"the issue as to whether the statute of limitations has been tolled by fraudulent concealment should be determined only after hearing the evidence."

[19] *Groendal v. Westrate*, 171 Mich. 92, 96, 137 NW 87 (1912), holding that when a patient alleges fraudulent concealment against a doctor, "the relations of the parties, and the acts, statements, and representations of defendant to the plaintiff, must be critically examined [and]…the question of her diligence to discover her condition was one of fact, to be submitted to the jury."

[20] UM refers to other possible victims who *may* file claims. The rights of Plaintiff and the 51 other survivors who have filed lawsuits should not be impaired by possible plaintiffs who may or may not ever file suit.

it is too difficult to prepare for a remote deposition. Yet, the wise drafters of Fed. R. Civ. P. 30(b)(4) foresaw such difficulties when they provided "a deposition be taken by telephone or other remote means" in anticipation of the myriad of possible situations, including pandemics, that may prevent in-person depositions. Further, because Governor Whitmer's shelter-at-home order expires on May 28, 2020, the date of the hearing of this motion, it is highly likely that UM's *faux* concerns will evaporate.[21] Even if Governor Whitmer extends her order, Rule 30(b)(4) and common sense will simply dictate a videotaped deposition.[22]

For all these reasons, Plaintiff respectfully requests that this Honorable Court enter an Order allowing Mr. Easthope's deposition to be scheduled as soon as possible.

Respectfully submitted,

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Dated: May 8, 2020

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Attorney for Plaintiff

Dated: May 8, 2020

[21] **Exhibit 1**: "Whitmer orders Michigan theaters, bars to remain closed until May 28," Detroit Free Press, May 1, 2020.

[22] In *In re Flint Water Cases*, Case No. 5:16-cv-10444-JEL-MKM, U.S. District Judge Judith E. Levy noted the parties' counsel (including UM's counsel here, Bush, Seyferth, PLLC) has been conducting remote depositions during the COVID pandemic. See, **Exhibit 2**, "Order Granting Putative Class Plaintiffs' Motion for Issuance of a Letter Rogatory" at p. 2.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, I electronically filed the foregoing document with the Clerk of the Court through the CM/ECF system, which will send notices of electronic filing to all counsel of record.

/s/ Mihaela Iosif
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2	*In re Flint Water Cases*, Case No. 5:16-cv-10444-JEL-MKM, Order Granting Putative Class Plaintiffs' Motion for Issuance of a Letter Rogatory
3	*Bowling v. Holt Public Schools*, No. 16-CV-1322, 2017 WL 4512587 (W.D. Mich. 2017)

EXHIBIT 1

Whitmer orders Michigan theaters, bars to remain closed until May 28

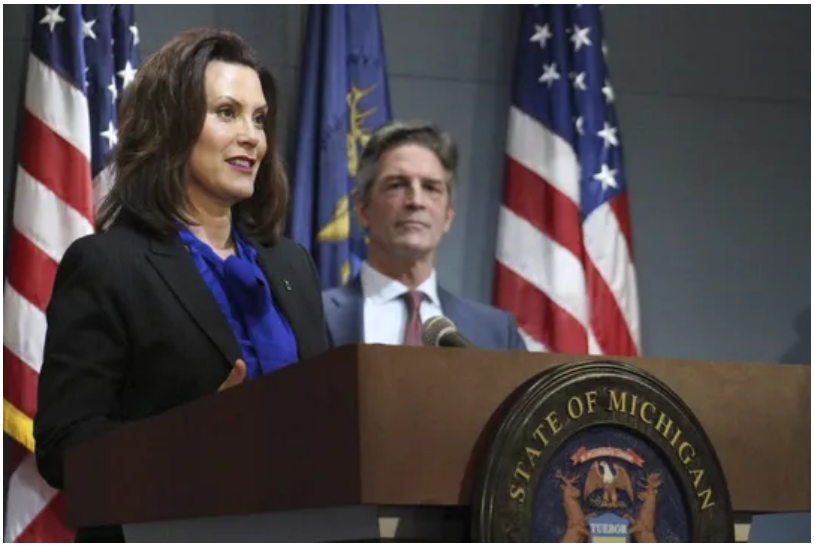
Darcie Moran, Detroit Free Press Published 6:09 a.m. ET May 1, 2020 | **Updated 11:03 a.m. ET May 1, 2020**

Gov. Gretchen Whitmer has ordered theaters, restaurants, bars, casinos, gyms and other places of accommodation to remain shuttered until May 28 amid the novel coronavirus pandemic.

They remain limited to carry-out and delivery orders only.

The order also continues the closure, through May 28, of all "non-essential personal care services," that require individuals to be within six feet of each other, including hair and nail salons, barber shops, and tanning, massage, spa, tattoo, and piercing services. The order does not apply to personal services that are medically necessary.

The executive order issued Thursday extends one set to expire and came as the governor also extended a state of emergency without approval from the Republican-controlled Legislature. The state of emergency was set to expire Thursday night.



Gov. Gretchen Whitmer at coronavirus news conference as DTE Energy Executive Gerry Anderson looks on from Lansing Monday, April 27, 2020. *(Photo: Michigan Executive Office of the Governor)*

Whitmer and the Legislature are at war over her legal authority to now enforce emergency orders. The Legislature plans to take the governor to court. (/story/news/local/michigan/2020/04/30/gop-whitmer-emergency-powers-lansing-protests/3058666001/)

Protesters, some armed, also expressed their opposition to the state of emergency Thursday at the Capitol. (/story/news/local/michigan/2020/04/30/capitol-protesters-urge-end-michigan-state-of-emergency/3055294001/)

More: Capitol protesters urge an end to Michigan's state of emergency (/story/news/local/michigan/2020/04/30/capitol-protesters-urge-end-michigan-state-of-emergency/3055294001/)

More: GOP lawmakers want to take Whitmer to court over emergency powers (/story/news/local/michigan/2020/04/30/gop-whitmer-emergency-powers-lansing-protests/3058666001/)

The state has seen more death from COVID-19 than deaths from the Vietnam War, Whitmer said in a press release on Thursday night.

“Although we are beginning to see the curve flatten, we are not out of the woods yet,” she said. “We must all continue to be diligent, observe social distancing and limit in-person interactions and services to slow the spread of COVID-19.”

The places of accommodation under the latest order do not include grocery stores, food pantries, pharmacies, office buildings, providers of medical equipment, health care facilities, residential care facilities, warehouse and distribution centers, or industrial and manufacturing facilities.

Those included are encouraged to offer food and beverage delivery and pickup services with social distancing in mind. In addition, restaurants may only allow five people, six feet apart from each other, inside at a time for pickup orders.

Contact Darcie Moran: dmoran@freepress.com.

Read or Share this story: https://www.freep.com/story/news/local/michigan/2020/05/01/michigan-emergency-order-whitmer-closures/3062771001/

EXHIBIT 2

2020 WL 2097652
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

IN RE FLINT WATER CASES.

5:16-cv-10444-JEL-MKM
|
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ORDER GRANTING PUTATIVE CLASS PLAINTIFFS' MOTION FOR THE ISSUANCE OF A LETTER ROGATORY [1084]

JUDITH E. LEVY, United States District Judge

***1** On March 12, 2020, Putative Class Plaintiffs filed a motion asking the Court to issue a letter rogatory for international judicial assistance in taking a deposition in France. (ECF No. 1084.) Plaintiffs seek to depose Laurent Obadia, a communications executive with Veolia Environnement S.A. ("VE") who is located in France. Veolia North America, LLC, Veolia North America, Inc., and Veolia Water North America Operating Services, LLC ("the VNA Defendants") filed a response opposing Plaintiffs' motion. (ECF No. 1101.) Although VNA is a separate entity from VE, VNA opposes the motion because of the burden the deposition would pose to this litigation, and because VNA contests the relevance of the information sought.

For the reasons set forth below, the Court grants Plaintiffs' motion to issue a letter rogatory.

Legal Standard

Letters rogatory allow a court in one country to request a court of another country to assist in producing evidence located in that other country. The Court can issue letters rogatory under the Hague Convention on the Taking of Evidence in Civil or Commercial Matters ("Hague Evidence Convention"), of which France is a signatory. A court has inherent authority to issue letters rogatory, *United States v. Reagan*, 453 F.2d 165, 172 (6th Cir.

1971), and maintains discretion over whether to issue such a letter. "[Hague] Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 541 (1987). Letters of request for depositions in a foreign country are authorized by Fed. R. Civ. P. 28(b)(1) but are reviewed keeping in mind the principles of Fed. R. Civ. P. 26(b) and (c) applicable to all forms of discovery. *See Perrigo Co. & Subsidiaries v. United States*, 294 F. Supp. 3d 740, 742 (W.D. Mich. 2018); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 776 (S.D.N.Y. 2012); *Asis Internet Servs. v. Optin Global, Inc.*, No. C-05-05124, 2007 WL 1880369, at *3 (N.D. Cal. June 29, 2007).

Analysis

Putative Class Plaintiffs contend that Laurent Obadia is an important witness because he coordinated "Veolia's media campaign to spread misinformation in order to shift blame publicly for its role in causing the Flint water crisis." (ECF No. 1084, PageID.27300.) In their motion, Plaintiffs explain that the nature of Obadia's deposition questioning will regard "the actions and inactions of Veolia Environnament SA and its subsidiary companies" about the "water contamination in Flint, Michigan." (ECF No. 1084-1, PageID.27310.)

The VNA Defendants oppose issuing the letter because (1) the process of issuing a letter rogatory and subsequent international deposition taking would be burdensome and costly, and (2) the discovery request would not produce relevant evidence. (ECF No. 1101, PageID.27464–27465.) Although Putative Class Plaintiffs do not explain the relevance of Obadia's deposition in their motion or attached letter rogatory, at a conference with the parties on April 29, 2020, Interim Co-Lead Class Plaintiffs explained the discovery was relevant to defenses that Plaintiffs expect VNA to raise at trial.

***2** The Court finds that the requested discovery may be relevant to Putative Class Plaintiffs' ability to respond to VNA's defenses at issue in this action. Given that Plaintiffs' request is designed to elicit relevant evidence, the request is within the scope of discovery and not unduly burdensome. The parties have been conducting depositions remotely since early April due to the travel challenges posed by COVID-19. There is a remote deposition protocol in place in this case, and a remote deposition provides a cost-saving opportunity to the parties so that international travel is not necessary. This deposition will be no exception to that protocol.

Therefore, the Court grants Putative Class Plaintiffs' motion to issue a letter rogatory to depose Obadia. However, any delay in this deposition cannot be used as a basis to seek scheduling extensions in the Case Management Order dates.

Putative Class Plaintiffs must submit a fillable PDF version of its letter rogatory by email to the Court's Case Manager so that it may be signed and entered.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 2097652

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EXHIBIT 3

2017 WL 4512587
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

Lyndsay BOWLING, Plaintiff,
v.
HOLT PUBLIC SCHOOLS, Dr. Johnny Scott, Kim Reichard, Scott Szpara, Wayne Abbott, Nick Johnson, and Other Unidentified Does, Defendants.

Case No. 1:16-CV-1322
|
Signed 05/26/2017

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MEMORANDUM ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

GORDON J. QUIST, UNITED STATES DISTRICT JUDGE

***1** Plaintiff, Lindsay Bowling, sued Defendants, alleging that they violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, by failing to take prompt and effective remedial action after Bowling was sexually assaulted by another student. Bowling also alleges a claim under 42 U.S.C. § 1983 for violating her rights to personal security and bodily integrity and Equal Protection under the Fourteenth Amendment. Defendants moved to dismiss Bowling's claims as untimely, arguing that Bowling failed to file them within one year after she turned 18 years old, as required by M.C.L. § 600.5851(1), and alternatively, that Bowling's claims are barred by the three-year statute of limitations under M.C.L. § 600.5805(10). Bowling responds that her claims are not based on the sexual assaults by the fellow student, but instead are based on Defendants' failure to protect Bowling from the fellow student beginning in January 2012, and continuing through April 2014. Bowling argues that the continuing violation doctrine renders her claims timely. The Court heard oral argument on May 24, 2017, and now grants the motion.

Bowling alleges that she was sexually assaulted on five occasions by a fellow student, T.B., while she was a freshman at Holt High School. T.B. had special needs because of his Asperger's syndrome and other problems. Four of the assaults occurred in December 2011, and the final assault occurred on May 18, 2012. (ECF No. 1 at PageID.6–7.) Following the last assault in May 2012, Bowling's parents reported TB's behavior to law enforcement. T.B. was criminally charged and pled guilty to assault and battery. The sentencing judge ordered T.B. not to have any contact with Bowling. (*Id.* at PageID.10.) During the 2012–13 school year, T.B. had no contact with Bowling. (*Id.* at PageID.10.) During Bowling's junior year, 2013–14, however, T.B. expressed his anger at Bowling by punching a wall near Bowling and talking about her to other students. In addition, T.B. was repeatedly in Bowling's presence in the lunchroom and other areas of the school without a para-professional or social coach accompanying him, as the School District had promised. In February 2014, Bowling took photos of T.B. in the lunchroom unaccompanied by a para-professional and showed the photos to her counselor, but Defendants took no action to separate T.B. from Bowling. (*Id.* at PageID.11.)

When, as is true with Title IX and § 1983, a federal statute does not contain a statute of limitations, courts look to the applicable state law where the injury allegedly occurred to determine the statute of limitations for personal injury. *See Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985). Here, the parties do not dispute, and the Court so concludes, that Bowling's Title IX and § 1983 claims are subject to the three-year statute of limitations set forth in M.C.L. § 600.5805(1). *See Carroll V. Wilkerson*, 782 F.2d 44, 45 (6th Cir. 1986) (§ 1983); *Doe v. Ann Arbor Pub. Schs.*, No. 08-CV-10129, 2008 WL 880538, at *2 (E.D. Mich. Mar. 31, 2008) (Title IX). The question of when a claim accrues is governed by federal law. *See LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1107 (6th Cir. 1995). A claim accrues on the date when the plaintiff knew, or through reasonable diligence should have known, of an injury giving rise to her cause of action. *Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001) (noting that under federal law, the statute of limitations begins to run "when plaintiffs knew or should have known of the injury which forms that basis of their claims"). In addition, M.C.L. § 600.5851(1), a tolling provision that this Court must consider, *Perreault v. Hostetler*, 884 F.2d 267, 270 (6th Cir. 1989), provides that a person who is a minor at the time a

claim accrues "shall have 1 year ... to bring the action although the period of limitations has run." *See Doe v. Ann Arbor Pub. Schs.*, No. 08-CV-10129, 2008 WL 880538, at *2 (E.D. Mich. Mar. 31, 2008) (applying § 600.5851(1) in a Title IX case).

***2** Bowling's Title IX and § 1983 claims are untimely regardless of whether the Court applies the three-year limitations period or the one-year tolling provision. Bowling's allegations show that her claims are based on the sexual assaults by T.B., the last of which occurred on May 18, 2012. Thus, her claims accrued, at the latest, on May 18, 2012—even if Bowling's claim is based on Defendants' actions or inactions in failing to protect her from T.B. because Bowling knew of Defendants' inaction. Bowling filed her complaint in this case on November 11, 2016—more than three years after the last sexual assault by T.B. and more than one year after Bowling turned 18 years old.

Bowling relies on the continuing violation doctrine to salvage her claim, arguing that Defendants' failure to properly respond to T.B.'s assaults failed to extinguish the hostile sexual environment that T.B. created. Bowling cites *Stanley v. Trustees of California State University*, 433 F.3d 1129 (9th Cir. 2006), as support for the application of the continuing violation doctrine in Title IX cases. *Stanley*, a Ninth Circuit case, is, of course, not binding on this Court. Moreover, as the Third Circuit has recently observed, courts are split on whether the doctrine applies to Title IX claims: "[s]ome courts suggest is does," while "[o]thers suggest it doesn't." *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 566 (3d Cir. 2017). It remains an "open question" in the Third Circuit. *Id.* A judge in the Eastern District of Michigan, noting the Sixth Circuit's observation that courts are reluctant to a apply the doctrine outside of Title VII, concluded that the doctrine does not apply in Title IX cases. *Dibbern v. Univ. of Mich.*, No. 12-15632, 2016 WL 2894491, at *19 (E.D. Mich. May 18, 2016) (citing *LRL Props.*, 55 F.3d at 1105).

This Court need not decide whether the continuing violation doctrine applies in the context of Title IX, because even if it does, Bowling's allegations show that it does not apply. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002), the Supreme Court held the continuing violation doctrine applies to hostile environment claims under Title VII because such claims "involve[ ] repeated conduct." *Id.* at 115, 122 S. Ct. at 2073. The discrimination does not occur "on any particular day," but instead "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act may not be actionable on its own." *Id.* In the case of a hostile work environment claim, a court may consider acts occurring within the entire time period of the hostile environment so long as an act contributing to the claim falls within the filing period. *Id.* 117, 122 S. Ct. at 2074. The only acts alleged in the complaint that occurred within the three-year period preceding the date of filing are T.B. punching a wall near Bowling; T.B. being present in the lunchroom and other places in the school at the same time as Bowling, without being accompanied by a para-professional; T.B. talking about Bowling to other students; and Bowling taking photos of T.B. in the lunchroom on one occasion. These acts cannot be considered related to the sexual assaults by T.B. outside the limitations period because they are not sexual in nature. *See Jenkins v. Mabus*, 648 F.3d 1023, 1027 (8th Cir. 2011) (observing that "the Navy's post-December 4 conduct consisted of insults, slights, and affronts that were markedly different from the original sexual advances," primarily because the plaintiff's commanding officer took immediate action to end the sexually harassing conduct); *Menefee v. Montgomery Cnty. Bd. of Educ.*, 137 Fed.Appx. 232, 233–34 (11th Cir. 2005) (holding that the plaintiff's evidence of acts of a non-sexual nature was insufficient to show that the timely acts were part of the same hostile workplace environment based on acts outside the limitations period); *Kettering v. Diamond-Triumph Auto Glass, Inc.* 24 Fed.Appx. 352, 356 (6th Cir. 2001) (holding that the continuing violation doctrine did not apply because "Kettering cannot rely on her additional allegations of harassment because those incidents were not 'sexual' in nature or directed to Kettering because of her gender"). Moreover, the criminal case against T.B., and the resulting no-contact order, served to sever the sexual assaults in 2011–12 from T.B.'s acts in 2013–14. *Cf. Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 738 (5th Cir. 2017) (noting that in a Title VII case, "intervening action by the employer, among other things, will sever the acts that preceded it from those subsequent to it") (citing *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009)). Thus, the timely acts are not part of the sexually-hostile environment based on the untimely acts.

***3** Therefore,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 10) is **GRANTED**, and Plaintiff's complaint is **DISMISSED WITH PREJUDICE**.

A separate judgment will enter.

All Citations

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