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

JOHN DOE MC-4,

Plaintiff,

v.

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

Defendants.
_____/

Case No. 20-CV-10582

Hon. David M. Lawson
Magistrate Judge Michael J. Hluchaniuk

THE UNIVERSITY'S MOTION TO DISMISS

The Regents of the University of Michigan and the University of Michigan (together, the "University") respectfully move, under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), for an order dismissing the complaint.

Plaintiff alleges that he was sexually assaulted many years ago by Robert Anderson, a former University doctor who died in 2008. The University condemns Anderson's misconduct. The University recognizes the harms he caused and is committed to developing a fair, just, timely, and efficient resolution process—one that does not require drawn-out litigation. The University has been engaged in productive conversations with several attorneys representing former students. The University is eager to continue this dialogue as it assesses over the next few

months the best approach to bring closure and resolution to these matters. That process will take time, but it has already begun.

What matters for purposes of this motion, however, is that Plaintiff's lawsuit cannot proceed. *First*, it was filed decades too late. Anderson has been dead for 12 years; he has not been employed by the University for 17 years; and the conduct at issue in Plaintiff's complaint occurred more than 30 years ago. The three-year limitations period—which was neither delayed by a discovery rule nor tolled by alleged fraudulent concealment—has thus long expired. *Second*, the University is a state instrumentality, and sovereign immunity bars all of Plaintiff's claims except those brought under Title IX.

If this case proceeds in any form, however, the "University of Michigan" should be dismissed as an improper defendant. The Regents of the University of Michigan is the body corporate with authority to be sued under law. *See* Mich. Comp. Laws § 390.4.

In support of this Motion, the University relies on the attached brief and exhibits. As Local Rule 7.1 requires, undersigned counsel contacted Plaintiff's counsel on May 1, 2020 to ask whether counsel would concur in the motion. Plaintiff's counsel did not concur in the University's requested relief.

For these reasons, the University respectfully requests that the Court grant its motion and dismiss Plaintiff's complaint in full. In the alternative, the University of Michigan should be dismissed as an improper defendant.

Respectfully submitted,

BUSH SEYFERTH PLLC
Attorneys for the University

/s/ *Cheryl A. Bush*
Cheryl A. Bush (P37031)
Stephanie A. Douglas (P70272)
Derek J. Linkous (P82268)
Andrea S. Carone (P83995)
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
bush@bsplaw.com

Dated: May 1, 2020

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MEMORANDUM IN SUPPORT OF
THE UNIVERSITY'S MOTION TO DISMISS

STATEMENT OF ISSUES PRESENTED

Plaintiff seeks damages from the University, a state instrumentality, stemming from sexual assaults by a former University doctor who died in 2008. Those alleged assaults occurred, at the latest, in 1991. The issues presented by this Motion are:

I.A. Are Plaintiff's federal claims barred by the statute of limitations?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

I.B. Is Plaintiff's Section 1983 claim barred by the University's sovereign immunity?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

II.A. Are Plaintiff's state-law claims barred by the University's sovereign immunity?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

II.B.1. Are Plaintiff's state-law claims barred by the statute of limitations?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

II.B.2. Are Plaintiff's state-law claims barred by the Court of Claims Act?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

III. Should the University of Michigan be dismissed as an improper party?

The University answers:	Yes
Plaintiff answers:	No
This Court should answer:	Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Federal Claims

Mich. Comp. Laws § 600.5805(2)

Owens v. Okure, 488 U.S. 235 (1989)

Johnson v. Memphis Light Gas & Water Div., 777 F.3d 838 (6th Cir. 2015)

Twersky v. Yeshiva Univ., 993 F. Supp. 2d 429 (S.D.N.Y. 2014)

Guy v. Lexington-Fayette Urban Cty. Gov't, 488 F. App'x 9 (6th Cir. 2012)

Doe v. Roman Catholic Archbishop of Archdiocese of Detroit, 692 N.W.2d 398 (Mich. Ct. App. 2004)

Evans v. Pearson Enters., Inc., 434 F.3d 839 (6th Cir. 2006)

Stoneman v. Collier, 288 N.W.2d 405 (Mich. Ct. App. 1979)

Estate of Ritter by Ritter v. Univ. of Mich., 851 F.2d 846 (6th Cir. 1988)

State-Law Claims

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)

Harris v. Univ. of Mich. Bd. of Regents, 558 N.W.2d 225 (Mich. Ct. App. 1996)

Mich. Comp. Laws § 600.6452(1)

Trentadue v. Buckler Lawn Sprinkler, 738 N.W.2d 664 (Mich. 2007)

Doe v. Roman Catholic Archbishop of Archdiocese of Detroit, 692 N.W.2d 398 (Mich. Ct. App. 2004)

Mich. Comp. Laws § 600.6431

McCahan v. Brennan, 822 N.W.2d 747 (Mich. 2012)

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INTRODUCTION

The University of Michigan is confronting through credible allegations the sad reality that some of its students suffered sexual abuse at the hands of one of its former employees. In particular, the University has learned that Robert Anderson, a former University doctor who died in 2008, sexually assaulted students. The University is determined to acknowledge and reckon with that past and, to the extent possible, provide justice—including in the form of monetary relief—to Anderson's survivors.

The University has commissioned an independent, outside law firm to investigate the allegations against Anderson and the University's knowledge of that conduct and the harms that resulted. And it has encouraged, through broad outreach efforts, survivors to participate and be confidentially interviewed by an investigating law firm.[1] Once that firm determines, in its own professional judgment, that its investigation is complete, it will issue a non-privileged report to the Regents and the public simultaneously. The University is committed to grappling with those findings, whatever they may be, to ensure that nothing like this can ever happen again. The University has further announced its commitment to assessing over the

[1] The University also has encouraged survivors to receive free confidential counseling through a national counseling firm with extensive experience facilitating confidential and sensitive support services.

next few months a fair, just, timely, and efficient resolution process for the former patients he harmed—one that does not require drawn-out litigation.

Plaintiff's lawsuit, however, cannot proceed for two fundamental reasons.

First, Plaintiff's claims—which involve a perpetrator who has been dead for 12 years, who has not been employed by the University for 17 years, and who assaulted him decades ago—are barred by the three-year statute of limitations.

Limitations periods are fundamental to the operation of courts, "vital to the welfare of society," and provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). And they "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944). As numerous other courts have recognized in dismissing similar claims, those policies preclude recovery for sexual misconduct that occurred in decades past.

Second, with the exception of Plaintiff's Title IX claim, basic principles of sovereign immunity foreclose his lawsuit. "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts" by protecting state instrumentalities like the University of Michigan from suits for money damages. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Although Title IX abrogates sovereign immunity, the rest of Plaintiff's lawsuit must yield to that limit.

The University does not here question Plaintiff's claim that Anderson abused him or the harm he suffered as a result. Indeed, the University stands ready to compensate Plaintiff through a resolution approach it will be developing in the coming months.[2] But the statutes of limitations and sovereign immunity prevent him from recovering damages in court. Plaintiff's complaint should be dismissed.

PLAINTIFF'S COMPLAINT

Robert Anderson worked for the University of Michigan from 1966 to 2003—first for the University Health Service and later for the Athletic Department. ECF No. 1, Compl. ¶¶ 22–23, 46.[3] According to the complaint, Plaintiff Doe MC-4 came to the University of Michigan on a wrestling scholarship in 1987. *Id.* ¶ 68. Plaintiff alleges that, between 1987 and 1991, he saw Anderson approximately 16 times (roughly 4 visits a year); he estimates he was assaulted during each of those visits. *Id.* ¶¶ 74, 88. Although Plaintiff never saw Anderson for issues related to his genitals or anus, he alleges that the assaults included nonconsensual digital anal penetration and genital fondling. *Id.* ¶¶ 73, 83–84. Anderson's "treatments made

[2] The University is engaged in productive conversations with a number of attorneys representing former patients. The University is eager to continue this dialogue as it assesses over the next few months the best approach to bring closure and resolution to these matters. That process will take time, but it has already begun. *See* Apr. 28, 2020 Announcement (available at: https://record.umich.edu/articles/university-will-create-process-for-resolving-anderson-claims/).

[3] Unless otherwise noted, all emphases and alterations are added, and all internal quotation marks, citations, and footnotes are omitted.

Plaintiff uncomfortable," *id.* ¶ 86, and Plaintiff believed that Anderson's treatment was "odd or weird," *id.* ¶ 104. Nonetheless, Plaintiff alleges that he was not aware at the time that Anderson's conduct was not medical treatment because he had no medical training and because he was alone and away from home for the first time when it began. *Id.* ¶¶ 90–91.

According to Plaintiff, other students told individuals at the University about Anderson's misconduct. *Id.* ¶¶ 24, 31, 32, 37, 39. Plaintiff alleges that the University's response was inadequate and that it concealed Plaintiff's cause of action from him. On this score, he highlights Volume III of the 1979–80 President's Report, where the University "thanked" Anderson and noted his "resign[ation] . . . to devote more time to . . . athletic medicine." *Id.* ¶ 51. Plaintiff does not say that he read this Report—much less relied on it—before enrolling at the University years later. *See generally id.* Nor does he allege that the Report included representations that could plausibly be understood to comment on or conceal any "odd," "weird," or "uncomfortable" conduct by Anderson during exams. *See id.* ¶¶ 86, 104.

Plaintiff alleges that he first realized he had a possible cause of action when he read a newspaper article about Anderson on or about February 19, 2020. *Id.* ¶ 122. He filed his complaint on March 5, 2020.

LEGAL STANDARD

A motion to dismiss takes non-conclusory allegations as true and asks whether, assuming the truth of such allegations, a plaintiff has stated a plausible claim for relief. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). For a complaint to survive, the Court, drawing on its "judicial experience and common sense," must be able to reasonably infer from "well-pleaded facts" that the plaintiff's entitlement to relief is plausible. *Iqbal*, 556 U.S. at 678–79. When "a complaint pleads facts that are merely *consistent* with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief," and dismissal is required. *Id.* at 556. Moreover, allegations of fraud must be pleaded with particularity—that is, the plaintiff must specifically allege the "who, what, when, where, and how" of the claimed fraudulent statement or omission. *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 255–56 (6th Cir. 2012); *see* Fed. R. Civ. P. 9(b).

Legal defenses like untimeliness and immunity are properly considered at the motion-to-dismiss stage. *See, e.g.*, *Myers v. U.S.*, 526 F.3d 303, 305–06 (6th Cir. 2008) (untimeliness); *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 599 (6th Cir. 2016) (immunity). In particular, a limitations dismissal is warranted where, as here, "the allegations in the complaint affirmatively show that the claim is time-barred." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012).

ARGUMENT

I. PLAINTIFF'S FEDERAL CLAIMS SHOULD BE DISMISSED.

Plaintiff attempts to plead two types of federal claims: a Title IX claim and Section 1983 claims. All are time-barred. The Section 1983 claims also fail on sovereign-immunity grounds.

A. Plaintiff's Title IX and Section 1983 claims are barred by a three-year statute of limitations.

1. The statute of limitations for Plaintiff's federal claims is three years.

When a federal statute does not provide a statute of limitations, courts "borrow[] . . . the state law of limitations governing an analogous cause of action." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483–84 (1980). "[C]ourts considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Owens v. Okure*, 488 U.S. 235, 250 (1989). The same is true of Title IX. *See Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996); *accord King-White v. Humble Ind. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015) (collecting cases). That means the three-year statute of limitations found in Mich. Comp. Laws § 600.5805(2) applies to all of Plaintiff's federal claims. *See Green v. City of Southfield*, 759 F. App'x 410, 414 (6th Cir. 2018).

2. That limitations period began to run decades ago.

The "accrual date of a federal cause of action is a matter of federal law." *King-White*, 803 F.3d at 762; *see also McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019).

The "standard rule" is that accrual occurs—and the limitations period begins to run—"when the plaintiff has a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Therefore, Section 1983 and Title IX claims based on allegations of sexual assault accrue at the time of the assault itself. *See, e.g.*, *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1215 (10th Cir. 2014); *Gilley v. Dunaway*, 572 F. App'x 303, 308 (6th Cir. 2014); *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014), *aff'd*, 579 F. App'x 7 (2d Cir. 2014).

Plaintiff's claims accrued—at the latest—in 1991, when he last saw Anderson. *See* Compl. ¶ 5.

Allegations that the University failed to report Anderson's abuse of others do not result in a later accrual date. In *Guy v. Lexington-Fayette Urban County Government*, 488 F. App'x 9 (6th Cir. 2012), the Sixth Circuit rebuffed the plaintiffs' efforts to restyle their injury as the county's "failure to report" alleged abuse. *Id.* at 15. The abuse itself, the court emphasized, was "the injury that [gave] rise to plaintiffs' claims." *Id.* The limitations period began to run when the abuse occurred. So too here.

3. The discovery rule did not delay the accrual of Plaintiff's claims.

Where a "discovery rule" applies, a claim accrues only when the plaintiff discovers or reasonably should have discovered his injury. The discovery rule does not apply here but, even if it did, it did not postpone the accrual of Plaintiff's claim.

As an initial matter, the U.S. Supreme Court has cast doubt on the application of a federal discovery rule unless specifically *mandated* by statute. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (explaining that courts should not "read in" a discovery rule to statutes of limitations; rejecting an "expansive approach to the discovery rule"). There is no such mandate here.

Regardless, when applying a discovery rule, the Supreme Court "ha[s] been at pains to explain that" the limitations period begins to run upon "discovery of the injury, not discovery of the other elements of a claim." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *see also Anderson v. Bd. of Educ. of Fayette Cty.*, 616 F. Supp. 2d 662, 668 (E.D. Ky. 2009) (A claim "accrues when [the plaintiff] discovers that he has been injured, *not* when he determines that the injury was unlawful.").

Moreover, under a discovery rule, the limitations period begins when a person "has *reason* to know of his injury"—even if he does not actually learn about the injury until later on. *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015); *see Owner-Operator Indep. Drivers Ass'n, Inc. v. Comerica Bank*, 562 F. App'x 312, 319 (6th Cir. 2014) (explaining that the discovery rule is triggered when the plaintiff acquires inquiry notice). "A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Johnson*, 777 F.3d at 843.

This is an objective inquiry. *Id.* That is, courts do not ask whether a plaintiff in fact *knew* about his injury, but rather whether the "event" at issue—here, the sexual abuse—"should have alerted the typical lay person to protect his or her rights." *Helm v. Eells*, 642 F. App'x 558, 561 (6th Cir. 2016).

Here, the allegations in the complaint establish that Plaintiff was aware of his injury—or could have discovered it through reasonable diligence—at the time the assaults occurred. According to the complaint, "[n]ot once did Plaintiff see Anderson for issues related to his genitals or anus; yet most of the times," Plaintiff was made to "drop his pants." Compl. ¶ 84. Plaintiff alleges that these "treatments made [him] uncomfortable," *id*. ¶ 86, and that he thought Anderson's treatment was "odd or weird," *id*. ¶ 104. Plaintiff also alleges that Anderson told Plaintiff that he "should not question and/or report [Anderson's] conduct to appropriate authorities," *id*. ¶ 114(e)—a statement that would give the "typical layperson" every reason to expect wrongdoing. *See Varnell*, 756 F.3d at 1216 (rejecting delayed discovery where plaintiff alleged, *inter alia*, abuser told plaintiff "not to tell anyone"). In fact, Plaintiff himself affirmatively alleges that other students—including scholarship athletes like Plaintiff—knew of their own injuries from Anderson's abuse at the time it was happening. *See* Compl. ¶¶ 31–32.

Even if a discovery rule applied, the allegations in Plaintiff's complaint conclusively establish that Plaintiff was at least on inquiry notice that he had been

injured at the time the abuse occurred. And this Court can reasonably infer that such notice would have only increased in the intervening years, when Plaintiff presumably obtained medical treatment that did *not* involve the kind of inappropriate, uncomfortable, odd, and weird conduct Anderson initiated. *See, e.g.*, *Doe v. Univ. of S. Cal.*, 2019 WL 4228371, at *3 (C.D. Cal. Apr. 18, 2019) ("Plaintiff undoubtedly had further gynecological examinations . . . over the 27 years since and would have had a basis to conclude that Dr. Tyndall's conduct fell outside of medically acceptable standards.").

Other courts applying these principles to similar facts have dismissed analogous claims as untimely. In *Twersky*, for example, a group of former high school students brought claims stemming from abuse that occurred between 1971 and 1992. *See* 993 F. Supp. 2d at 432. The plaintiffs, who filed suit in July 2013 after a newspaper reported on abuse at the high school, argued that there was a delayed accrual under the discovery rule. *Id.* at 436–37. The court rejected that view and explained that, under the federal discovery rule, the limitations period "begins to run when the plaintiff has inquiry notice of his injury, namely when he discovers or reasonably should have discovered the injury." *Id.* at 439. And it rejected plaintiffs' contention that the news article triggered the discovery of their claims, holding that the plaintiffs knew or should have known of their injury at the time the abuse occurred. *Id.* at 440. The district court therefore granted dismissal,

id. at 452, and the Second Circuit affirmed. *See Twersky v. Yeshiva Univ.*, 579 F. App'x 7 (2d Cir. 2014).

Court after court has applied a similar analysis to dismiss claims involving sexual abuse that occurred outside the statute of limitations. For example:

- *Doe v. Pasadena Hosp. Ass'n, Ltd.*, 2020 WL 1529313, at *5 (C.D. Cal. Mar. 31, 2020) – Finding that the plaintiff had "reason to suspect . . . wrongdoing, causation, and harm" at the time abusive gynecological examinations occurred.

- *Doe v. USC*, 2019 WL 4228371, at *4 – "The fact that Plaintiff only learned [in 2018] that she was not the only female patient abused by Dr. Tyndall [during a gynecological exam] does not affect Plaintiff's knowledge of the abuse she received back in 1991."

- *Doe v. Kipp DC Supporting Corp.*, 373 F. Supp. 3d 1, at *8 (D.D.C. 2019) – Holding that the discovery rule did not delay accrual of a claim where a survivor of sexual abuse "recall[ed] that abuse but d[id] not appreciate its wrongfulness" at the time.

- *King-White*, 803 F.3d at 762, 764 – Rejecting discovery-rule accrual where the survivor was "was sadly quite aware of the abuse she suffered" at the time of her abuse, but did not file until her suit until four years later.

The same result is required here. Plaintiff's claims accrued and the statute of limitations began to run at the latest in 1991.

4. Fraudulent-concealment tolling does not apply.

Just as the discovery rule did not delay the beginning of the limitations period on Plaintiff's claims, fraudulent concealment did not delay that period's expiration. Unlike accrual, fraudulent-concealment tolling is governed by state law, even for

federal claims. *See Tomanio*, 446 U.S. at 485. Michigan's fraudulent-concealment tolling law provides:

> *If a person* who is or may be liable for any claim *fraudulently conceals the existence of the claim* or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the *action may be commenced at any time within 2 years after* the person who is entitled to bring the action discovers, or *should have discovered, the existence of the claim* or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Mich. Comp. Laws § 600.5855. "Courts are to strictly construe and narrowly apply the fraudulent concealment exception." *B&P Process Equip. & Sys., LLC v. Applied Indus. Techs.*, 2015 WL 13660565, at *3 (E.D. Mich. Feb. 3, 2015).

"Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 692 N.W.2d 398, 405 (Mich. Ct. App. 2004). "[S]ilence" is not enough to establish fraudulent concealment; instead, the defendant's allegedly concealing acts must be "affirmative." *Id*. at 406–07.

There are two independent reasons why fraudulent-concealing tolling does not apply here: (a) fraudulent concealment does not toll the limitations period for an injury that the plaintiff already should have discovered, and (b) Plaintiff 's complaint does not adequately plead fraudulent concealment.

a. *Fraudulent concealment cannot toll the limitations period for an already-discovered claim.*

"It is well established . . . that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, *or should have been*, discovered by the plaintiff." *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 226–27 (2012); *see also The Reserve at Heritage Vill. Ass'n v. Warren Fin. Acquisition, LLC*, 850 N.W.2d 649, 665 (Mich. Ct. App. 2014) ("If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute."). As explained above, the law requires that Plaintiff knew or reasonably should have known of his injury at the time of his abuse. *See supra* at I.A.2. Hence Plaintiff's fraudulent-concealment allegations fail for the same reason his discovery-rule allegations do.

The Michigan Court of Appeals' decision rejecting fraudulent concealment allegations in *Archdiocese of Detroit* is instructive. There, the plaintiff brought a claim in 2002 for abuse that occurred between 1972 and 1976. The plaintiff alleged that "he did not discover his claims" until he saw "widespread media coverage" about Catholic clergy abuse and learned that his priest had been criminally prosecuted for abusing another boy. *Archdiocese of Detroit*, 692 N.W.2d at 401–02. The Court of Appeals rejected fraudulent-concealment tolling because "[t]he facts that plaintiff alleged in support of his claims were all facts that plaintiff knew or should have known at the time of his injury." *Id.* at 405–06; *see also Doe v.*

Bishop Foley Catholic High Sch., 2018 WL 2024589, at *6 (Mich. Ct. App. May 1, 2018) ("For a cause of action to accrue, the entire theory of the case need not be apparent, nor is certitude required."). The same is true here. Plaintiff had knowledge of the relevant facts at the time of his injury; accordingly, Plaintiff "has failed to allege a claim of fraudulent concealment . . . because [his] causes of action were not concealed from him." *Archdiocese of Detroit*, 692 N.W.2d at 406.

Courts in other jurisdictions have reached the same result under the same or similar fraudulent-concealment standards. In *Doe v. USC*, 2019 WL 4228371 at *5, for example, the court found that "even if USC attempted to conceal Dr. Tyndall's improper behavior for years following Plaintiff's examination," the plaintiff's "own allegations show[ed] that she independently had reason to believe that Dr. Tyndall did not conduct the examination . . . according to accepted medical standards." Likewise, in *Doe v. Pasadena Hospital*, 2020 WL 1529313, at *1, a plaintiff alleged that a doctor had "misrepresent[ed] that his conduct was for a legitimate medical purpose and/or conformed to accepted medical practice." The court nonetheless agreed with the Hospital's argument that "fraudulent concealment d[id] not toll Plaintiff's claims because" the complaint established "actual or presumptive knowledge" of her claims, pointing to, among other allegations, "aggressive and prolonged" and inappropriate examinations that the plaintiff "*suspected . . . [were] strange*." *Id*. at *3–4; *see also, e.g.*, *Gourd v. Indian Mountain Sch., Inc.*, 2020 WL

1244920, at *6 (D. Conn. Mar. 16, 2020) (finding that the plaintiff's discovery of his claim precluded fraudulent concealment where the plaintiff knew he "was allegedly sexually abused by" a "teacher while in the School's care"); *King-White*, 803 F.3d at 764–65 (holding that the plaintiff knew or reasonably should have known of the injury sufficient "to end any estoppel effect that would otherwise apply" from fraudulent concealment); *Anderson v. Fayette Cty.*, 616 F. Supp. 2d at 671 (similar).

b. *Plaintiff's fraudulent-concealment allegations are inadequate.*

Even if fraudulent concealment could apply here, Plaintiff failed to adequately plead it. Plaintiff's allegations of fraudulent concealment fall into four general categories: (1) allegations that lack the requisite specificity; (2) allegations of misrepresentations on which Plaintiff did not rely and that pre-date Plaintiff's abuse; (3) allegations of inaction; and (4) allegations of concealment by others. *See* Compl. ¶¶ 130–45. None of those allegations is sufficient to plead fraudulent concealment.

1. Plaintiff asserts—almost entirely without elaboration—that the University "made affirmative representations to Plaintiff" that purportedly fraudulently concealed his cause of action. Compl. ¶ 131. Allegations of fraud, however, must be pleaded with particularity. *See* Fed. R. Civ. P. 9(b); *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 851 (6th Cir. 2006). And with one exception discussed below, Plaintiff does not say *what* the supposed representations were—or who made them, when they were made, or how they were conveyed to Plaintiff. *See*,

e.g., Compl. ¶ 130.a-b (alleging that the University represented that Anderson's acts "were normal" without specifying who said that, when or where it was said, or how the alleged representation was made). Courts hold similar non-specific allegations insufficient under ordinary pleading standards, and all the more so under the heightened standard applicable to allegations sounding in fraud. *See, e.g.*, *Republic Bank*, 683 F.3d at 246–47; *see also Evans*, 434 F.3d at 851. Courts also disregard conclusory recitations of claim elements. *See* Compl. ¶¶ 131–36; *Iqbal*, 556 U.S. at 678. Plaintiff's fraudulent-concealment allegations fail to meet the applicable federal pleading standards.

2. The only affirmative act that Plaintiff pleads with any specificity is the issuance of a 1979–80 President's Report. *See* Compl. ¶¶ 130.a-b, 137.b. The statements in that Report do not to amount to fraudulent concealment for three reasons.

First, fraudulent concealment tolls a limitations period only if the plaintiff ***relies*** on the representations at issue. *See, e.g.*, *Archdiocese of Detroit,* 692 N.W.2d at 405. Plaintiff does not allege that he read the Report—which was issued years before he enrolled in the University—let alone how he relied on it. *See Johnson v. Johnson*, 2013 WL 2319473 at *2 (Mich. Ct. App. May 28, 2013) (It is "impossible for plaintiff to have acted in reliance upon defendant's representation" when plaintiff "was not even aware of the representation.").

Second, the 1979–80 Report predated Plaintiff's abuse. *Id.* ¶73 (alleging abuse between 1987 and 1991). But for a limitations period to be tolled, the concealing acts must take place "***after*** the alleged injury . . . because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist." *Archdiocese of Detroit*, 692 N.W.2d at 404; *see also Bishop Foley*, 2018 WL 2024589 at *6 ("We may only consider actions by defendants . . . that occurred after the alleged injury . . . ."); *accord, e.g., Irrer v. Milacron, Inc.*, 2006 WL 2669197, at *9 (E.D. Mich. Sep. 18, 2006); *Beck v. Park W. Galleries*, 2016 WL 3653955, at *3 (Mich. Ct. App. July 7, 2016).

Third, the statements in the Report cannot plausibly be read to "conceal" anything about Anderson's abuse as to Plaintiff or to "mislead or hinder acquirement of information disclosing a right of action." *Archdiocese of Detroit*, 692 N.W.2d at 405. Its statements generally "thank" Anderson. Compl. ¶¶ 51–52. But the Report does not make any representations that could plausibly be understood to comment on, conceal, or endorse any "odd," "weird," or "uncomfortable" conduct by Anderson during exams. *See id.* ¶¶ 86, 104.

3. The remaining acts that Plaintiff attributes to the University are not "affirmative." *See* Compl. ¶¶ 137.a, c-d, 140 (*e.g.*, "refused to terminate"; "ignored . . . and failed to inquire"; "did not create policy"). Fraudulent concealment requires affirmative acts of concealment; allegations of inaction are not enough.

See Archdiocese of Detroit, 692 N.W.2d at 405; *see also King-White*, 803 F.3d at 764 (rejecting fraudulent-concealment tolling because the "[p]laintiff's allegations focus[ed] on" the defendants' "failure to act"). Accordingly, Plaintiff's allegations regarding actions the University did *not* take cannot establish fraudulent concealment as a matter of law.

Plaintiff attempts to avoid the affirmative-act requirement by alleging that the University was his fiduciary. *See, e.g.*, Compl. ¶ 141. The University, to be sure, has an important and meaningful relationship with its students. But courts have concluded that for purposes of legal claims, "since the late 1970s, the general rule is that no special relationship exists between a college and its own students." *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003); *see also Bradshaw v. Rawlings*, 612 F.2d 135, 138–41 (3d Cir. 1979); *Valente v. Univ. of Dayton*, 438 F. App'x 381 (6th Cir. 2011); *Squeri v. Mount Ida Coll.*, 954 F.3d 56 (1st Cir. 2020). The University, accordingly, was not Plaintiff's fiduciary. Even if the law were otherwise, any fiduciary "relationship between the school[ ] and [its] students cease[s] at the very latest when the students le[ave] or graduate[ ]." *Twersky*, 993 F. Supp. 2d at 446; *see also, e.g.*, *Rotella v. Pederson*, 144 F.3d 892, 896–97 (5th Cir. 1998); *cf. Carpenter v. Mumby*, 273 N.W.2d 605, 611 (Mich. Ct. App. 1978) (limitations period begins to run on when the "fiduciary relationship ends"). As a result, any

fiduciary relationship between the University and Plaintiff—and, with it, any alleged concealment by inaction—would have ended in 1991.

4. Plaintiff's final category of allegations of fraudulent concealment concern actions that Anderson himself—not the University—took to conceal his abuse. Compl. ¶¶ 114–29. But "concealment by one other than the one sought to be charged is not within the prohibition of the statute." *Stoneman v. Collier*, 288 N.W.2d 405, 407 (Mich. Ct. App. 1979); *see also Chandler v. Wackenhut Corp.*, 465 F. App'x 425, 428 (6th Cir. 2012) (no imputation of concealment by employee to employer). Anderson's own actions therefore cannot toll the statute of limitations with respect to claims against the University.

* * *

Michigan's fraudulent-concealment exception to the ordinary operation of statutes of limitation must be "strictly construe[d] and narrowly appl[ied]." *B&P Process*, 2015 WL 13660565, at *3. Plaintiff's complaint fails to qualify for that exception as a matter of law. Counts I-IV should be dismissed.

B. Plaintiff's Section 1983 claim is also barred by sovereign immunity.

"The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). As a result, states and their instrumentalities are "immune from

suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974). As Plaintiff recognizes, the University is "a public university . . . under the laws of the State of Michigan." Compl. ¶ 19. The Eleventh Amendment's sovereign immunity thus applies. *See Estate of Ritter by Ritter v. Univ. of Mich.*, 851 F.2d 846, 850 (6th Cir. 1988) (holding that, "as an arm of the state," the University is "immune under the Eleventh Amendment from suit in federal district court to recover retroactive monetary relief"); *accord, e.g.*, *Thomas v. Noder-Love*, 621 F. App'x 825, 831 (6th Cir. 2015). Because Section 1983 does not abrogate Eleventh Amendment immunity, *Noder-Love*, 621 F. App'x at 831, Counts II–IV should be dismissed.

II. PLAINTIFF'S STATE-LAW CLAIMS SHOULD BE DISMISSED.

Plaintiff's state-law claims fail for the same reasons as his federal ones. Like his Section 1983 claims, the state-law claims are barred by sovereign immunity. They are also untimely—both by operation of the three-year statute of limitations and in light of the six-month notice period under the Court of Claims Act. Counts V–XVII should be dismissed.

A. The state-law claims are barred by sovereign immunity.

As explained above, the Eleventh Amendment prevents states and their instrumentalities from being sued in federal court without their consent. *See supra* Part I.B. That principle extends to state-law claims over which a federal court would

otherwise have supplemental jurisdiction. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 540 (2002) (citing *Pennhurst State Sch. & Hosp. v. Haldermann*, 465 U.S. 89, 120 (1984)). Indeed, "the States' constitutional immunity from suit prohibits ***all state-law claims*** filed against a State in federal court, whether those claims are monetary or injunctive in nature." *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (citing *Pennhurst*, 465 U.S. at 106); *see, e.g.*, *Estate of Ritter*, 851 F.2d at 847–48, 851. And a state's consent to be sued in its own courts does not waive its immunity to suit in federal court. *See Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149–50 (1981); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 578–80 (1946) (requiring a "clear declaration by a state of its consent to be sued in the federal courts" and holding that a statute authorizing suit "in any court of competent jurisdiction" does not suffice).

The State of Michigan, which for these purposes includes the University, has not waived immunity to suit in federal court. The Governmental Tort Liability Act ("GTLA") provides a limited waiver of sovereign immunity for claims "against the state" brought in the Michigan Court of Claims. *See* Mich. Comp. Laws § 691.1407(1); Mich. Comp. Laws § 600.6419; Mich. Comp. Laws § 691.1401(g). But that Act does not waive the University's Eleventh Amendment immunity in federal court.

To the contrary, the GTLA constitutes an independent source of sovereign immunity here. The GTLA "codified common-law sovereign immunity to liability" with limited "legislative exceptions." *Ballard v. Ypsilanti Twp.*, 577 N.W.2d 890, 893 (Mich. 1998). Because no such exception applies here, the GTLA constitutes an independent basis for dismissal. *See, e.g.*, *Harris v. Univ. of Mich. Bd. of Regents*, 558 N.W.2d 225, 228 (Mich. Ct. App. 1996).[4]

B. Even if the University were not immune, Plaintiff's state-law claims are untimely.

1. Plaintiff's state-law claims are barred by the statute of limitations.

Like their federal counterparts, Plaintiff's state-law claims accrued at the time of the alleged assaults. *See* Mich. Comp. Laws § 600.5827 ("claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results"); *Lemmerman v. Fealk*, 534 N.W.2d 695, 697–98 (Mich. 1995) (holding that claims premised on sexual abuse accrued at the time of the abuse); *see also supra* at I.A.2. Claims against the State are "forever barred" unless commenced "within 3 years after the claim first accrues." Mich. Comp. Laws § 600.6452(1), 1961 PA 236 (effective Jan. 1, 1963); *see* Mich. Comp. Laws

[4] Because "governmental immunity is not an affirmative defense, but is instead a characteristic of government," Plaintiff must plead around the presumption of immunity by demonstrating that his claims fall within a recognized exception. *Fairley v. Dep't of Corr.*, 871 N.W.2d 129, 133 (Mich. 2015); *see also Doe v. N. Mich. Univ.*, 2019 WL 2269721, at *10 (W.D. Mich. May 28, 2019).

§ 600.5869 (courts must look to the statute of limitations in place when Plaintiff's claim accrued).[5]

That limitations period was neither delayed by a discovery rule nor tolled by fraudulent concealment. First, Michigan's common-law discovery rule was abrogated by statute. *See Trentadue v. Buckler Lawn Sprinkler*, 738 N.W.2d 664, 672 (Mich. 2007) (holding that "courts may not employ an extrastatutory rule to toll accrual").[6] Second, and as explained above, Plaintiff's allegations of fraudulent concealment do not toll the statute of limitations. *See supra* Part I.A.3. Accordingly, Plaintiff's state-law claims are all time-barred.

2. Plaintiff failed to provide timely notice under the Court of Claims Act.

Separately, the Court of Claims Act provides that a claim for "personal injuries" "may not be maintained" against a state actor unless the claimant provides notice of his claim within "6 months after the event that [gave] rise to [it]." Mich. Comp. Laws § 600.6431(3);[7] *see Fairley v. Dep't of Corr.*, 871 N.W.2d 129, 130

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[5] The six-year statute of limitations generally applicable to fraud claims is shortened to three years in personal-injury actions. *See Smith v. Gilles*, 184 N.W.2d 271, 273 (Mich. Ct. App. 1970).

[6] Even before its abrogation, Michigan's discovery rule did not apply to "repressed memories" of sexual abuse. *Lemmerman*, 534 N.W.2d at 702–03; *Guerra v. Garratt*, 564 N.W.2d 121, 125 (Mich. Ct. App. 1997).

[7] Most courts in this District have held that this provision applies in federal court. *See Johnson v. Operation Get Down, Inc.*, 2013 WL 4041868, at *4 (E.D. Mich. Aug. 8, 2013); *Buckner v. Roy*, 2015 WL 4936694, at *2 (E.D. Mich. Aug. 18, 2015);

(Mich. 2015) (failure to provide notice is "a complete defense"). Plaintiff did not provide notice until March 12, 2020—decades after he last saw Anderson. This statutory notice period is not subject to tolling for fraudulent concealment. *See* Mich. Comp. Laws § 600.6452; *McCahan v. Brennan*, 822 N.W.2d 747, 756 (Mich. 2012); *but see Mays v. Snyder*, 916 N.W.2d 227 (Mich. Ct. App. 2018), *appeal granted*, 926 N.W.2d 803 (Mich. 2019). Even if it were, Plaintiff cannot establish fraudulent concealment. *See supra* Part I.A.3.

III. THE UNIVERSITY OF MICHIGAN SHOULD BE DISMISSED.

If any of Plaintiff's claims survive dismissal, the "University of Michigan" should be dismissed as an improper defendant. The Board of Regents of the University of Michigan is the body corporate with the capacity to be sued under law. *See* Mich. Comp. Laws § 390.4; *see Ali v. Univ. of Michigan Health Sys.-Risk Mgmt.*, 2012 WL 3112419, at *3 (E.D. Mich. May 4, 2012) (noting that "the proper party" is the Board of Regents); *cf. Kreipke v. Wayne State Univ.*, 807 F.3d 768, 777 (6th Cir. 2015) (applying Wayne State's equivalent statutory framework). Therefore, the "University of Michigan" is not a proper defendant and should be dismissed.

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cf. Bergmann v. Mich. State Transp. Comm'n, 665 F.3d 681, 683 (6th Cir. 2011) ("assuming" the provision applies and finding it not satisfied). *But see Steckloff v. Wayne State Univ.*, 2019 WL 2929185, at *2–*3 (E.D. Mich. July 8, 2019).

CONCLUSION

The University has great sympathy for what Plaintiff suffered. And the University is committed to developing a process to compensate him and other survivors of Anderson's abuse. But for the reasons stated above, Plaintiff cannot state a legal claim against the University. The University thus respectfully requests that the Court grant its motion and dismiss Plaintiff's complaint.

Respectfully submitted,

/s/ *Cheryl A. Bush*
Cheryl A. Bush (P37031)
Stephanie A. Douglas (P70272)
Derek J. Linkous (P82268)
Andrea S. Carone (P83995)
BUSH SEYFERTH PLLC
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
bush@bsplaw.com

Attorneys for the University

Dated: May 1, 2020

Exhibit A

2012 WL 3112419
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Carolyn Lee ALI, Plaintiff,
v.
UNIVERSITY OF MICHIGAN HEALTH SYSTEM–RISK MANAGEMENT, Defendant.

Civil Action No. 11–13913.
|
May 4, 2012.

Attorneys and Law Firms

Carolyn Lee Ali, Hedgesville, WV, pro se.

Nicole L. Proulx, Fraser, Trebilcock, Lansing, MI, for Defendant.

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS (DKT.4)

MARK A. RANDON, United States Magistrate Judge.

***1** Carolyn Lee Ali ("Plaintiff") acting *pro se,* brought this suit against the University of Michigan Health System—Risk Management ("Defendant"). Plaintiff alleges, generally, that Defendant unlawfully refused to provide her with continued medical care.

Defendant's motion to dismiss (Dkt.4) is pending. Judge George Caram Steeh referred the motion to this Magistrate Judge for a report and recommendation (Dkt.5). Plaintiff filed a timely response to the motion (Dkt.7); oral argument was held on April 12, 2012. For the reasons set forth below, it is **RECOMMENDED** that Defendant's motion to dismiss be **GRANTED** and that Plaintiff's case be **DISMISSED.**

I. *FACTUAL BACKGROUND*

For purposes of Defendant's motion to dismiss, it is assumed that Plaintiff's Complaint allegations are true. Plaintiff's Complaint (Dkt.1) consists of an eighteen page, single-spaced, letter to the Court; it does not list any counts or causes of action, nor does it state what relief Plaintiff seeks. The Complaint is a lengthy narrative discussing Plaintiff's medical aliments and her interactions with physicians and staff employed by the University of Michigan Health System.

During oral argument, Plaintiff attempted to clarify the nature of her claims against Defendant. Plaintiff said that University of Michigan Health System physicians misdiagnosed her as having "Myasthenia Gravis,"[1] when in fact she has "Neuromyotonia"[2] (Dkt. 1 at 1). As a result of this alleged misdiagnosis, Plaintiff said that University of Michigan Health System staff engaged in a cover-up and "black-listed" Plaintiff from receiving future medical care at the University. Plaintiff alleges that a nurse (Sandra Jones–Yapp) and a "risk-management" employee (Juliette Larsen) filed false police reports against Plaintiff. In these reports, Plaintiff was described as verbally abusive, threatening and disruptive to hospital staff. Plaintiff claims that these "trumped-up" police reports (Dkt. 1; Compl. at 17) are preventing her from receiving medical care.

In response to Defendant's motion to dismiss, Plaintiff filed a letter (Dkt.7) with the Court, in which she reiterates her medical travails. Like Plaintiff's Complaint, Plaintiff's response fails to identify any causes of action, or request any relief. Plaintiff did attach several exhibits to her response letter, including: (1) a letter (Dkt. 7 at 16; CM/ECF Pagination) from Ms. Larsen, an employee of Defendant's "risk-management" department, stating that Plaintiff could no longer receive medical care at the University of Michigan due to a "breakdown in the physician-patient relationship;" (2) medical records (Dkt. 7 at 22–29); and (3) the police reports that Plaintiff claims are "fraudulent" (Dkt. 7 at 31–46).

Defendant filed a supplemental brief (Dkt.8) in response to Plaintiff's March 12, 2012 "supplemental letter." However, no such supplemental letter appears on the Court's docket. The only filings from Plaintiff are the Complaint (Dkt.1), a certificate of service (Dkt.2) and a letter filed on February 14, 2012 (Dkt. 7, which is actually a response to Defendant's motion to dismiss). There is no letter from Plaintiff filed on March 12, 2012. In any event, according to Defendant's supplemental brief (Dkt.8), Plaintiff's un-docketed supplemental letter attempts to frame her claims as Americans With Disabilities Act ("ADA") violations.

II. *ANALYSIS*

A. Applicable Legal Standard

***2** The Court may dismiss a complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint-not to decide the merits of the case. It is well established that a complaint need not set forth in detail all of the particularities of the plaintiff's claim. Instead, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 does not, however, "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal,* 566 U.S. 662, 678–679 (2009). While legal conclusions can provide the framework for a complaint, all claims must be supported by factual allegations. *Id.* The Supreme Court has indicated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949; *see also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("[A] formulaic recitation of the elements of a cause of action" is insufficient).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must plead facts sufficient "to state a claim for relief that is plausible on its face." *Twombly,* 550 U.S. at 570. The requisite facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 566 U.S. at 678. The plausibility requirement is not the same as a "probability requirement" but instead "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Examining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

A *pro se* pleading must be liberally construed and be "held to less stringent standards than formal pleadings drafted by lawyers ." *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citing *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). However, *pro se* status does not exempt the plaintiff from the requirement that she comply with relevant rules of procedural and substantive law. *See Hulsey v. Texas,* 929 F.2d 168, 171 (5th Cir.1991); *Birl v. Estelle,* 660 F.2d 592, 593 (5th Cir.1981). *Pro se* plaintiffs must comply with Rule 8 of the Federal Rules of Civil Procedure which provides that a complaint must contain "a short and plain statement of the claim showing the pleader is entitled to relief ..." *LRL Properties v. Portage Metro Housing Authority,* 55 F.3d 1097, 1104 (6th Cir.1995). Although the standard is liberal, it does require more than the bare assertions of legal conclusion. *See Lillard v. Shelby Co. Bd. of Educ.,* 76 F.3d 716, 726 (6th Cir.1996).

B. Plaintiff Has Sued An Improper Party And Her Claims Are Barred By The Eleventh Amendment

***3** Defendant argues that Plaintiff's Complaint should be dismissed because she has sued an improper party ("University of Michigan Health System—Risk Management") and, even if Plaintiff had sued the proper party (the Board of Regents of the University of Michigan), her claims would be barred by Eleventh Amendment immunity. Defendant is correct on both counts.

The only named Defendant is the University of Michigan Health System—Risk Management. It goes without saying that a party not named in a lawsuit is not a party to the lawsuit; indeed, Fed.R.Civ.P. 4(a) requires a plaintiff to "identify ... the parties" to the suit. The University of Michigan hospitals are "an adjunct of the medical department of the University, which is a state educational instrumentality maintained by the public at public expense, controlled and operated by the Board of Regents." *Robinson v. Washtenaw Circuit Judge,* 228 Mich. 225, 230, 199 N.W. 618 (1924). Therefore, any suit intended to be brought against any part of the University of Michigan hospitals or health system must be brought against the Board of Regents of the University of Michigan. *Id.* at 227, 199 N.W. 618; *see also* Mich. Comp. Laws § 390.4 ("The board of regents shall constitute the body corporate, with the right, as such, of suing and being sued, of making and using a common seal, and altering the same."); Estate of Ritter v. University of Michigan, Board of Regents, 851 F.2d 846 (6th Cir.1988) (action against Board of Regents for failure to admit a potential patient into hospital emergency room). At no time did Plaintiff request leave to amend her Complaint to substitute the Board of Regents as Defendant in this matter. Since Plaintiff has filed suit against an entity that is not subject to suit, Plaintiff's case should be dismissed for this deficiency alone.

Assuming Plaintiff had sued the Board of Regents, this Court would then have to determine whether Eleventh Amendment immunity applied. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

State." U.S. Const. amend. XI. The Board of Regents of the University of Michigan is a state agency for purposes of the Eleventh Amendment. *See* Mich. Const. Art. 8 § 5; *see also Estate of Ritter by Ritter v. University of Michigan,* 851 F.2d 846, 848 (6th Cir.1988) ("the Board of Regents unquestionably is a state agency to which the [Eleventh] amendment applies...."). Thus, the Board of Regents is entitled to Eleventh Amendment immunity, unless some recognized exception applies.

"There are ... three qualified exceptions to Eleventh Amendment immunity [.]" *Lawson v. Shelby County, TN,* 211 F.3d 331, 334 (6th Cir.2000). "First, a state may waive the protection of the Amendment by consenting to the suit." *Lawson,* 211 F.3d at 334. "The second exception to the Eleventh Amendment bar is that Congress, under certain provisions of the Constitution, may abrogate the sovereign immunity of the states through statute." *Id.* "Under the third exception, a federal court may enjoin a 'state official' from violating federal law." *Id.* at 335 (citing *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Although Plaintiff's Complaint did not contain any prayer for relief, during oral argument on Defendant's motion to dismiss, Plaintiff stated that she is seeking money damages from Defendant, not injunctive relief. Thus, the third exception does not apply, and Plaintiff's only hope for salvaging the Court's jurisdiction over her claims is if the Board of Regents has consented to the suit or if Congress has abrogated the Board of Regent's immunity; neither event has occurred.

***4** Because of the overriding concern for the sanctity of the federalist system, federal courts will find that a state has expressly waived its immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Auth. Trans–Hudson Corp. v. Feeney,* 495 U.S. 299, 305–306, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990). In this case, Defendant's first responsive pleading was a motion to dismiss (Dkt.4) in which Defendant argued that Plaintiff's Complaint was squarely barred by the Eleventh Amendment. Clearly, Defendant has not consented to this lawsuit. Federal courts can find that a state has implicitly waived its immunity, but only in very narrow circumstances, such as when a state actor engages in extensive discovery or seeks judgment on the merits without raising the immunity issue. *See, e.g., Ku v. Tennessee,* 322 F.3d 431, 435 (6th Cir.2003) (holding that the defendant waived immunity when, "[i]nstead of asserting its Eleventh Amendment immunity defense, Tennessee engaged in extensive discovery and then invited the district court to enter judgment on the merits"). In this case, Defendant has raised, preserved, and reiterated the affirmative defense of Eleventh Amendment immunity by immediately filing a motion to dismiss. Therefore, Defendant has not waived its Eleventh Amendment immunity.

Concerning abrogation, " '[t]o temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure,' " federal courts apply a two-part test "to determine whether Congress has abrogated the States' sovereign immunity ...." *Seminole Tribe,* 517 U.S. at 55–56 (1995) (quoting *Dellmuth v. Muth,* 491 U.S. 223, 227–28, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)). A court must determine "first, whether Congress has 'unequivocally expressed its intent to abrogate the immunity,' ... and second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* (quoting *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985)). Plaintiff's Complaint (Dkt.1) and response letter (Dkt.7) do not provide any basis from which to conclude Congress intended to abrogate Michigan's Eleventh Amendment immunity. As such, Plaintiff has failed to demonstrate that immunity does not apply in this case.

C. Plaintiff Has Failed To State A Claim And This Court Does Not Have Jurisdiction Over Plaintiff's Lawsuit

Plaintiff also failed to properly invoke the jurisdiction of this Court. Where a plaintiff is proceeding without the assistance of counsel, this Court is required to liberally construe the complaint and hold it to a less stringent standard than a similar pleading drafted by an attorney. *See e.g. Simmons v. Caruso,* 2009 WL 2922046 (E.D.Mich.2009), citing, *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Hahn v. Star Bank,* 190 F.3d 708, 715 (6th Cir.1999). Thus, the Court must still read plaintiff's *pro se* complaint indulgently and accept plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez,* 504 U.S. 25, 33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (The Court of Appeals improperly departed "from the liberal pleading standards set forth by Rule 8(a)(2)" and failed to "liberally construe" the pro se complaint at issue.).

***5** At the outset, Plaintiff's Complaint in this case does not meet the pleading requirements of the Fed.R.Civ.P. 8 and does not provide Defendant with proper notice of the claims being asserted. Plaintiff's Complaint was filed in the form of

an eighteen-page letter. It contains no caption, is not titled as a Complaint pursuant to Fed.R.Civ.P. 7(a), and does not contain numbered paragraphs that are limited to a single set of circumstances which are capable of being answered. More importantly, Plaintiff's Complaint does not contain a short and plain statement of the grounds for the Court's jurisdiction, does not contain a short and plain statement of the claim(s) she is making pursuant to which she claims she is entitled to relief, and does not contain any demand for relief. In short, the Complaint completely fails to identify or state a claim upon which relief can be granted.

This Magistrate Judge is sensitive to the fact that *pro se* litigants should be given some latitude in presenting claims to the Court. However, Plaintiff's Complaint does not state a claim over which this Court has jurisdiction, even under a very permissive reading. Distilled to its essence, Plaintiff's Complaint alleges that she was wronged by Defendant because Defendant refuses to provide her with ongoing medical care. " 'Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute ... which is not to be expanded by judicial decree.' " *Freeland v. Liberty Mut. Life Ins. Co.*, 632 F.3d 250, 255 (6th Cir.2011) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). Pursuant to this authority, federal courts have the power to adjudicate claims "arising under the Constitution, laws, or treaties of the United States" or where there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. *See* 28 U.S.C. §§ 1331, 1332; *see also* U.S. Const. art. III, § 2. This Magistrate Judge is unaware of any federal statute providing a cause of action against a doctor or hospital system for refusal to provide medical care in non-emergency situations.[3] Thus, it does not appear that this Court has federal question jurisdiction over Plaintiff's claims.[4]

That leaves diversity jurisdiction. As far as this Magistrate Judge can ascertain, Plaintiff's claims sound in medical malpractice, or perhaps defamation (against Mss. Jones–Yopp and Larsen); these are state law claims. Although not pled by Plaintiff in the Complaint, the parties' citizenship may be diverse, but this is not certain. According to the docket, Plaintiff appears to currently live in Hedgesville, West Virginia; the University of Michigan is, of course, located in Ann Arbor, Michigan. However, at some point in time, Plaintiff was a Michigan resident (*see* Dkt. 7 at 16; CM/ECF Pagination) and it is unclear when Plaintiff moved from Michigan to West Virginia. This makes a difference, because "[t]he general rule is that diversity is determined at the time of the filing of a lawsuit." *Curry v. U.S. Bulk Transp., Inc.*, 462 F.3d 536, 540 (6th Cir.2006). Thus, if Plaintiff moved to West Virginia after she filed the Complaint, there would be no diversity of citizenship. More problematic, however, is that diversity jurisdiction requires the amount in controversy to "exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332. Plaintiff's Complaint does not allege what she is seeking in relief, thus it cannot be determined from the face of the pleadings if the amount in controversy is satisfied. In sum, Plaintiff's Complaint does not contain "a short and plain statement of the grounds for the court's jurisdiction," as required by Fed.R.Civ.P. 8(a)(1) and, in any event, it does not appear that this Court has jurisdiction over Plaintiff's claims even under an extremely permissive reading of Plaintiff's Complaint. Thus, Plaintiff's Complaint should be dismissed.

C. Plaintiff Has Not Properly Served Defendant

***6** Finally, Plaintiff filed this case on September 8, 2011 (Dkt.1). Under Rule 4, Plaintiff had until January 6, 2012 (120 days) to properly serve Defendant with a Summons and Complaint. A Return of Service (Dkt.2)—dated January 5, 2012—indicates that a Summons and Complaint was served upon University of Michigan Health System—Risk Management. Defendant argues in its motion to dismiss (Dkt. 4 at 7–8) that Plaintiff's Summons was deficient because it did not list Plaintiff's name and address (in violation of Fed.R.Civ.P. 4(a)(1)(c)) and because the Summons and Complaint was not served on a person with authority to accept service (such as the University of Michigan's General Counsel's office), but rather was merely dropped off at a University office. During oral argument on Defendant's motion to dismiss, Plaintiff conceded that the purported service on January 5, 2012 was improper.

Fed. R. Civ. P 4(m) provides, in relevant part:

> **(m) Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

At no time did Plaintiff request an extension of time to serve the Complaint. Defendant's motion to dismiss served as notice under Fed.R.Civ.P. 4(m) that Defendant was challenging

service. Plaintiff has agreed that service was improper in this matter and has not taken any steps to properly service Defendant. As such—even if Plaintiff named a proper defendant, Eleventh Amendment immunity did not apply and Plaintiff stated a legally viable claim which properly invoked this Court's jurisdiction—Plaintiff's claims should still be dismissed without prejudice because she has not properly served Defendant and the deadline for service has expired.

III. *CONCLUSION*

For the reasons set forth above, it is **RECOMMENDED** the Defendant's motion to dismiss be **GRANTED,** and that Plaintiff's case be **DISMISSED.**

The parties may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Secretary of HHS,* 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters,* 638 F.2d 947, 949–50 (6th Cir.1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *See Willis v. Secretary of HHS,* 931 F.2d 390, 401 (6th Cir.1991); *Smith v. Detroit Fed'n of Teachers Local 231,* 829 F.2d 1370, 1373 (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

***7** Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3112419

Footnotes

1 Mysthenia Gravis is "an autoimmune disease of neuromuscular function due to the presence of antibodies to acetylcholine receptors at the neuromuscular junction; characteristics include muscle fatigue and exhaustion that fluctuates in severity." *Dorland's Illustrated Medical Dictionary* (31st Ed.) 1233.

2 Neuromyotonia is a "myotonia [atonic condition of the musculature of the body] caused by electrical activity of a peripheral nerve; characterized by stiffness, delayed relaxation, fasciculations [muscle twitches] and myokymia [muscle quivering]." *Id.* at 71, 1286.

3 In emergency situations, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd ("EMTALA"), "requires emergency patients, treated in a hospital setting, to be screened and stabilized prior to their release." *Burd ex rel. Burd v. Lebanon HMA, Inc.,* 756 F.Supp.2d 896, 899 (M.D.Tenn.2010) (citations omitted). Plaintiff's claims do not, however, appear to revolve around emergency care. Rather, Plaintiff's claims appear to involve scheduled doctors' office visits. Furthermore, the letter from Defendant to Plaintiff informing Plaintiff that she could no longer receive care at the University of Michigan noted that the "University of Michigan remains available to you in an emergency situation" (Dkt. 7 at 16, CM/ECF pagination).

4 As noted earlier, Defendant filed a supplemental brief (Dkt.8), which counters a purported March 12, 2012 letter from Plaintiff in which she attempted to frame her claims as ADA claims. However, no filing from Plaintiff on the Court's docket (Dkts. 1 & 7) discusses an ADA claim or any other federal statutory claim. Furthermore, Plaintiff's Complaint fails to state a *prima facie* case of discrimination under Title II of the ADA. *See, Jones v. City of Monroe,* 341 F.3d 474,477 (6th Cir.2003) (to establish a *prima facie* case under Title II of the ADA, Plaintiff must allege that (1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability).

2015 WL 13660565
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Northern Division.

B&P PROCESS EQUIPMENT AND SYSTEMS, LLC, Plaintiff,
v.
APPLIED INDUSTRIAL TECHNOLOGIES, INC., Defendant and Third-Party Plaintiff,
v.
Global Bearings and P T Inc., Third-Party Defendant.

Case No. 14-cv-12672
|
Signed 02/03/2015

Attorneys and Law Firms

Jamie H. Nisidis, Craig W. Horn, Braun, Kendrick, Saginaw, MI, for Plaintiff.

Victor T. Van Camp, Martin, Bacon, Mt. Clemens, MI, Richard O. Milster, Lambert Leser, Attorneys at Law, Bay City, MI, for Defendant and Third-Party Plaintiff/Third-Party Defendant.

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS AND CANCELLING HEARING

THOMAS L. LUDINGTON, United States District Judge

***1** On July 8, 2014, Plaintiff B&P Process Equipment and Systems, LLC ("B&P"), filed suit against Defendant Applied Industrial Technologies, Inc., for breach of contract and indemnity. B&P claims that Applied Industrial sold counterfeit bearings in violation of the terms of the purchase order. [1]

On December 19, 2014, Applied Industrial filed a motion for judgment on the pleadings, asserting that the applicable statute of limitations had run on B&P's claim. Because B&P has sufficiently pleaded fraudulent concealment of its claim, the statute of limitations does not bar B&P's breach of contract claim. Therefore Applied Industrial's motion for judgment on the pleadings will be denied.

I

On January 9, 2008, B&P issued a purchase order to Applied Industrial for four bearings. Compl. Ex. 2, ECF No. 1. The purchase order requested four spherical roller thrust bearings and specified their size, load limits, and manufacturer identification—SKF part No. 29480. *Id.* The purchase order further stated: "ACCEPT NO SUBSTITUTIONS". *Id.*

Applied Industrial shipped two bearings on March 4, 2008, and two bearings on April 1, 2008. Mot. J. Pleadings Ex. 1, Ex. 2. Each invoice identified the bearings shipped as "Part Number 29480EM"—the part number requested in B&P's purchase order. *Id.* On April 30, 2008, B&P issued a check for $96,306.74 to Applied Technologies pursuant to the purchase order.

B&P incorporated the bearings into industrial mixers known as Ko-Kneaders and sold the mixers to a third party, Emirates Aluminum Company, Limited in Abu Dhabi, United Arab Emirates. Compl. ¶ 9.

In December 2013, B&P received a call from Emirates Aluminum Company seeking repairs to one of the Ko-Kneaders mixers. B&P determined that the Ko-Kneader had malfunctioned because of failed bearings. Emirates Aluminum Company paid B&P a total of $309,399.19 to replace the failed bearings and for B&P's service time and travel. Compl. Ex. B.

After repairing the Ko-Kneader, B&P forwarded the failed bearing to the supposed manufacturer, SFK, for analysis. Compl. ¶ 12. SFK determined that it did not manufacture the failed bearing and the bearing in question was counterfeit. *Id.* ¶ 13.

Emirates Aluminum Company has demanded a refund of the $309,399.19 it paid to B&P in the mistaken belief that the Ko-Kneader failure was attributable to ordinary wear and tear, rather than a counterfeit bearing. Compl. ¶ 14. Moreover, B&P is expected to replace the remaining bearing in Emirates Aluminum Company's other Ko-Kneader, which B&P estimates would cost $42,918.70. *Id.* ¶ 15.

On July 8, 2014, B&P filed this breach of contract action against Applied Industrial for selling the counterfeit bearings. B&P seeks to recover $352,317.89 to (1) reimburse Emirates what it paid to repair the Ko-Kneader mixer and (2) retrofit

the other machines that contain the counterfeit bearings that have not yet failed.

II

***2** Motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) are analyzed under the same standard as motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). As set forth in *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010), a district court must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and determine whether the complaint states a plausible claim for relief. "However, the plaintiff must provide the grounds for its entitlement to relief" and that "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A plaintiff must 'plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009)).

III

B&P alleges that Applied Industrial breached the terms of the purchase order when it provided counterfeit bearings. Applied Industrial claims that this breach of contract claim is barred by the applicable four-year statute of limitation, and therefore the breach of contract claim must be dismissed.

A

The warranty provisions of Michigan's version of the UCC are governed by the statute of limitations set out in Mich. Comp. Laws § 440.2725. Section 2725 provides that "[a]n action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." *Id.* § 2725(1). The section clarifies that a "cause of action accrues when the breach occurs," which "occurs when tender of delivery is made." *Id.* § 2725(2). Under Michigan law, tender of delivery occurs for purposes of the limitation period when the seller delivers the goods, even if they are defective when measured against the contract's requirements. *Id.* § 2725(2); *see Baker v. DEC Int'l*, 580 N.W.2d 894, 897 (Mich. 1998).

Here, the bearings at issue were shipped on March 4, 2008, and April 1, 2008. Neither party disputes that delivery was made more than four years before B&P filed its complaint on July 8, 2014. Therefore, the Michigan statute of limitations bars B&P's breach of contract claims unless some exception applies.

B

B&P asserts that its claims are not barred by the statute of limitations because it alleged fraudulent concealment of the breach, an exception to the four-year statute of limitations. Under Michigan law, a claim of fraudulent concealment may postpone the running of the statute of limitations:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim ... from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim....

Mich. Comp. Laws § 600.5855. This statute provides a plaintiff two additional years in which to bring a claim "when a party conceals the fact that the plaintiff has a cause of action." *Romeo Investment Ltd. v. Michigan Consolidated Gas Company*, 2007 WL 1264008, at *3 (Mich. Ct. App. May 1, 2007) (citing *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348, 352 (Mich. Ct. App. 1996)).

In cases which are brought in federal court pursuant to diversity jurisdiction, the Federal Rules of Civil Procedure control the procedural aspects of the matter. *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965). "While state law governs the burden of proving fraud at trial in a diversity action in federal court, the procedure for pleading fraud in all diversity suits in federal court is governed by the special pleading requirements of Federal Rule of Civil Procedure 9(b)." *Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001). Rule 9(b) requires that:

> ***3** [i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The Sixth Circuit has interpreted this to "require that the acts constituting fraudulent concealment of a claim be pled in the complaint." *Evans v. Pearson Enterprises*, 434 F.3d 839, 851 (6th Cir. 2006). "Three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by defendants; (2) failure of the plaintiff to discovery the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). However, B&P's "burden at this stage in the proceedings is not great." *Best*, 2013 WL 4766678, at *7.

For fraudulent concealment to postpone the running of a limitations period, the fraud "must be a concealment produced by affirmative acts or misrepresentations." *Draws v. Levin*, 52 N.W.2d 180, 183 (Mich. 1952). "The plaintiff must show some arrangement or contrivance on the part of the defendant, or an affirmative character, designed to prevent subsequent discovery." *Id.* "Mere silence is insufficient." *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348, 352 (1996). "Courts are to strictly construe and narrowly apply the fraudulent concealment exception." *Riverside Auto Sales, Inc. v. GE Capital Warranty Corp.*, 2004 WL 2106638, at *5 (W.D. Mich. Mar. 30, 2004).

Here, B&P identified the affirmative misrepresentation as the invoices that identified the bearings as "Part Number 29480EM"—the part number requested in B&P's purchase order (which in turn clarified that it would "accept no substitutions"). This affirmative act—the production of invoices claiming that the bearings were the parts ordered—fulfills the first element of fraudulent concealment. *See King v. Park West Galleries, Inc.*, 2014 WL 6804596, at *2 (Mich. Ct. App. Dec. 2, 2014) (In plaintiff's breach of warranty suit alleging fraudulent concealment, "Defendants' affirmative act was to provide plaintiff with a certificate of authenticity, as well as an appraisal for each piece of artwork.").

Having adequately alleged that Applied Industrial committed an affirmative act of misrepresentation, B&P must also allege that, even though it exercised reasonable diligence, it did not discover the claim within the statutory period. *McNaughton v. Rockford State Bank*, 246 N.W. 84, 86 (Mich. 1933). B&P appears to contend that it was not possible for it to discover the fraud—that the bearings were counterfeit—until they were sent to SFK's lab for analysis. B&P notes that each bearing was stamped with the marking "SKF Part No. 29480 EM", and that it was not possible for it to learn from visual inspection that the bearings were counterfeit.

Applied Industrial, however, contends that a visual inspection of the bearings would have revealed their counterfeit nature, and therefore B&P did not exercise reasonable diligence. But aside from this "belief", Reply 4, Applied Industrial does not explain how or why a visual inspection would have revealed the counterfeit nature to B&P. Indeed, as noted above, the bearings were stamped with an identifier, "SKF Part No. 29480 EM", that further hindered discovery of the counterfeit nature.[2] A jury could reasonably conclude that B&P exercised reasonable diligence in discovering the fraud. *See King*, 2014 WL 6804596 at *2 ("The issues of concealment and diligence are questions of fact reserved for the jury.") (citing *Int'l Union United Auto. Workers of Am. v. Wood*, 59 N.W.2d 60, 63 (Mich. 1953)).

***4** B&P has met the heightened pleading requirements for fraudulent concealment. First, B&P has adequately alleged that Applied Industrial affirmatively misrepresented the manufacturer of the counterfeited bearings when the invoices claimed that the bearings were "Part Number 29480EM". Second, B&P did not discover the claim within the statutory period; instead, it only discovered the claim when SFK's lab analysis indicated that the bearings were counterfeit. And third, B&P has adequately alleged that it exercised reasonable diligence. Therefore, B&P has adequately pleaded fraudulent concealment, and the statute of limitations does not bar this action at this stage.

Applied Industrial lastly contends that, even if the action is not barred, B&P cannot rely on fraudulent concealment because "Applied ... did not manufacture the bearing or participate in the concealment." Reply 5. But, as noted above, Applied made the affirmative misrepresentation of identifying the shipped bearings as "Part Number 29480EM" in the invoices. This is a sufficient affirmative act to allow B&P's claims against Applied to proceed.

IV

Accordingly, it is **ORDERED** that Defendant Applied Industrial Technologies's Motion for Judgment on the Pleadings (ECF No. 14) is **DENIED**.

It is further **ORDERED** that March 9, 2015 motion hearing is **CANCELLED**.

All Citations

Not Reported in Fed. Supp., 2015 WL 13660565

Footnotes

1 Defendant Applied Industrial then filed a third-party complaint against Global Bearings and P T INC, alleging that Global Bearings is "liable and responsible for the condition of the bearings at issue and for all damages allegedly sustained by Plaintiff B&P." Third-Party Compl. 3, ECF No. 7. Global Bearings did not join in or respond to Applied Industrial's motion for judgment on the pleadings.

2 B&P does not allege that Applied Industrial stamped the bearings, and therefore it cannot rely on the stamps as an affirmative act. But B&P *can* rely on the stamp to show that a visual inspection would not have revealed the bearings' counterfeit nature.

2016 WL 3653955
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Brian BECK, Guy Hanson, Karen Hanson, Raymond Favichia, Margaret Favichia, Judith Schlebecker, John Schlebecker, and Bernadett Steiner, Plaintiffs,
and
Audrey Mahoney, David Oppenheim, Felice Oppenheim, and Patty Brown,
Plaintiffs–Appellants/Cross–Appellees
v.
PARK WEST GALLERIES INC, Albert Scaglione, Morris Shapiro, Albert Molina, and Plymouth Auctioneering Services Ltd,
Defendants–Appellees/Cross–Appellants.

Docket No. 319463.
|
July 7, 2016.

Oakland Circuit Court; LC No.2011–122042–CZ.

Before: MURRAY, P.J., and HOEKSTRA and WILDER, JJ.

ON REMAND

PER CURIAM.

***1** We receive this case from the Supreme Court "for consideration of the issues raised in plaintiff's appeal that [we] did not address to the extent those issues relate to claims that are not subject to arbitration." *Beck v. Park West Galleries, Inc,* 449 Mich. 40, 51; 878 NW2d 804 (2016). Per the Supreme Court's directive, we have considered the remaining issues, and we affirm in part and reverse in part the trial court's order granting summary disposition to defendants.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs purchased artwork at auctions on various cruise ships from defendant, Park West Galleries, Inc. ("Park West"). Plaintiffs claimed that some of the works were fraudulently represented, that they were overcharged, or that they did not receive what defendants represented they were purchasing. Specifically, plaintiffs alleged (1) a violation of Michigan's Fine Art's Statute, (2) fraud, (3) conversion, (4) a violation of the Michigan Consumer Protection Act, (5) breach of contract, (6) a violation of the Michigan Art Multiple Sales Act, (7) negligent misrepresentation, (8) conspiracy, (9) negligence, and (10) breach of warranty of quality and fitness.

With each sale, Park West provided plaintiffs with a certificate of authenticity and a written appraisal. All the purchases made by plaintiffs were accompanied by an invoice under which the parties agreed to the terms of the transaction. By 2007, the invoices contained an arbitration clause.

This action was filed by 13 plaintiffs, but most plaintiffs agreed to dismiss their claims, leaving only plaintiffs Audrey Mahoney, David Oppenheim, Felice Oppenheim, and Patty Brown. Defendants filed a motion for summary disposition arguing that plaintiffs' claims were subject to arbitration. The trial court granted defendants' motion for summary disposition pursuant to MCR 2 .116(C)(7) and dismissed all claims brought by plaintiffs Mahoney and Brown, and some of the Oppenheims' claims, on the ground that the claims were subject to an arbitration agreement. The court refused to dismiss any of the Oppenheims' claims that involved invoices that did not contain an arbitration clause, concluding that the arbitration clauses in other invoices were not broad enough to subject all claims to arbitration.

Defendants later filed a second motion for summary disposition pursuant to MCR 2.116(C)(7), requesting dismissal of the Oppenheims' remaining claims on the ground that they were barred by the statute of limitations. The trial court agreed and dismissed the remaining claims. The court rejected the Oppenheims' argument that the limitations period could be tolled under MCL 600.5855 because of fraudulent concealment. Plaintiffs subsequently moved for reconsideration, arguing that the trial court erred by not following *Best v. Park West Galleries, Inc.,* unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos. 305317, 308085).

Plaintiffs appealed the trial court's order and defendants filed a cross-appeal, challenging the trial court's ruling that not all of the Oppenheims' claims were subject to arbitration. In an unpublished decision, our Court affirmed the trial

court's ruling that the arbitration agreements were enforceable despite the challenges to the invoices, but reversed the trial court's ruling that all of the Oppenheims' claims were not subject to arbitration. *Beck v. Park West Galleries,* unpublished opinion per curiam of the Court of Appeals, issued March 3, 2015 (Docket No. 319463).

***2** Plaintiffs filed an application for leave to appeal to our Supreme Court arguing that our Court erred by concluding that all of their claims were subject to arbitration. The Michigan Supreme Court agreed with plaintiffs, and held that the Oppenheims' claims that arose in 2003 and 2004 were not subject to arbitration because those purchases were not accompanied by an invoice that contained an arbitration clause. *Beck,* 499 Mich. at 50–51. The Michigan Supreme Court remanded the case to our Court for consideration of the remainder of the Oppenheims' issues that do not involve claims subject to arbitration. *Id.* at 43 n 3, 51.

II. ANALYSIS

A. STATUTE OF LIMITATIONS

The Oppenheims argue that the trial court erred when it granted summary disposition because their claims are not barred by the applicable statute of limitations. This Court reviews a grant of summary disposition de novo. *Kincaid v. Cardwell,* 300 Mich.App 513, 522; 834 NW2d 122 (2013). A party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id.* Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiffs' claim is barred under the applicable statute of limitations. *Id.* If there is no factual dispute, whether a plaintiffs' claim is barred under the applicable statute of limitations is a matter of law for this Court to determine. *Id.* at 523.

The Oppenheims do not dispute that their claims are untimely under the six-year limitations period, instead, they argue a genuine issue of fact exists regarding whether the limitations period was tolled by way of the fraudulent concealment statute. MCL 600.5855, the fraudulent concealment statute, reads as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

To take advantage of the fraudulent concealment statute, "[t]he plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery [of the cause of action.]" *Sillis v. Oakland General Hosp.,* 220 Mich.App 303, 310; 559 NW2d 348 (1996). "The fraud must be manifested by an affirmative act or misrepresentation," *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit,* 264 Mich.App 632, 642; 692 NW2d 398 (2004) (citation and quotation marks omitted), and mere silence on the part of the defendant is insufficient. *Sills,* 220 Mich.App at 310. Moreover, MCL 600.5855 requires reasonable diligence on the part of the plaintiff, and if the plaintiff should have discovered that liability existed, the statute does not operate to toll the limitations period. *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute,* 266 Mich.App 39, 48; 698 NW2d 900 (2005).

***3** Importantly, only actions that occur after the alleged injury can conceal plaintiff's causes of action against defendant because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist. *Doe,* 264 Mich.App at 641. In "focusing on the fraudulent-concealment claim, we focus on [a] defendant's alleged actions after the alleged abuse." *Id.*

In their complaint, the Oppenheims alleged that defendants affirmatively acted to prevent them from discovering their claims when defendants provided them with fraudulently created certificates of authenticity. However, these acts (providing faulty certificates of authenticity) form the basis

of many of plaintiff's causes of actions and are not an act that occurred *after* the alleged injury. *Id.* Particularly, plaintiff's causes of action for (1) a violation of the Michigan's Warranty in Fine Arts Statute, (2) fraud, (3) breach of contract, (4) negligent misrepresentation, and (5) conspiracy are based in part [1] on the certificates of authenticity issued by defendants. Because the concealing act must be distinct and *after* an act that forms the basis of a claim, the Oppenheims are unable to toll the statute of limitations by way of fraudulent concealment with regard to these claims.

With regard to the five other remaining claims, a genuine issue of material fact existed regarding whether the act of providing the Oppenheims with fraudulently created certificates of authenticity and appraisals was an affirmative act or misrepresentation designed to prevent subsequent discovery. Here, the Oppenheims alleged that the defendants issued false certificates of authenticity. Importantly, in Michigan, a certificate of authenticity warrants the "authenticity of the authorship [of the piece of art.]" MCL 442.322(a). Because it was alleged that defendants fraudulently warranted the authenticity of the artwork, plaintiffs have alleged an affirmative act or misrepresentation that prevented plaintiff's from discovering their causes of action. Evidence was also presented that the certificates of authenticity were issued after plaintiffs' made the purchases at issue.

Additionally, a question of material fact existed regarding whether the Oppenheims exercised reasonable diligence in discovering their claim. Nothing in the record indisputably establishes that the Oppenheims acted unreasonably by failing to discover their claims within the limitations period. As mentioned above, the Oppenheims received certificates of authenticity for the artwork, which warranted the artworks' authenticity. MCL 442.322(a). A reasonable juror could conclude that the Oppenheims reasonably relied on these certificates of authenticity, and that the Oppenheims had no basis to believe that the certificates of authenticity were disingenuous and that the artwork was not what it was purported to be. Nor does anything in the record indicate that the Oppenheims should have been prompted to investigate the genuineness of the artwork they purchased because they were provided with certificates of authenticity that warranted the authenticity of the artwork. On the other hand, a reasonable juror may conclude—as defendants argue—that the Oppenheims did not act reasonably when an Internet search may have provided information during the limitation period that a cause of action may exist. Consequently, a genuine issue of material fact existed regarding whether the Oppenheims should have discovered the existence of their claims. [2]

***4** Affirmed in part, reversed in part, and remanded for further proceedings. No taxable costs, neither party having prevailed in full. MCR 7.219(A). [3] We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2016 WL 3653955

Footnotes

1 The complaint is not entirely clear as to whether these causes of action are also based on acts other than the issuance of the certificate of authenticity, so to the extent these claims are also based on acts that occurred *before* the issuance of the certificates of authenticity, they may be tolled by the statute of limitations along with the Oppenheims' five other remaining claims.

2 This conclusion is similar to the one reached in *Best v. Park West Galleries,* unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos. 305317, 308085), and *King v. Park West Galleries,* unpublished opinion per curiam of the Court of Appeals, issued December 2, 2014 (Docket No. 314188), lv den 498 Mich. 896 (2015).

3 We do not address the Oppenheims' assertion that the trial court abused its discretion when it denied their motion for reconsideration as our holding makes that issue moot.

2015 WL 4936694
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

Lawrence Edward Buckner, Plaintiff,
v.
James Michael Roy, et al., Defendant.

CASE NO. 2:15–cv–10441
|
Signed August 18, 2015

Attorneys and Law Firms

Steven T. Budaj, Detroit, MI, for Plaintiff.

Katerina Marie Vujea, Thomas R. Wurst, Miller Johnson, Grand Rapids, MI, for Defendant.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

MARIANNE O. BATTANI, United States District Judge

I. INTRODUCTION

***1** This matter is before the Court on Defendants' Motion to Dismiss. (Dkt.14.) Plaintiff Lawrence Buckner has asserted the following federal claims arising under 42 U.S.C. § 1983: violation of Fourth, Eighth, and Fourteenth Amendment rights against the individual officers (Count I), as well as supervisor/municipal liability against County of Washtenaw and Sheriff Jerry L. Clayton for failure to enforce or train in proper procedure (Count II). (Dkt.6.) Plaintiff, however, has stipulated to dismiss his Eighth Amendment claims. (Doc. 16.) Additionally, the complaint asserts the following claims arising under state law: negligence on the parts of Deputy James Roy and the Charter Township of Ypsilanti (Count III); negligent entrustment of a motor vehicle on the part of the Charter Township of Ypsilanti (Count IV); statutory owner's liability against the Charter Township of Ypsilanti (Count V); gross negligence on the part of all Defendants (Count VI); assault and battery as to all Defendants (Count VII); and intentional infliction of emotional distress as to all Defendants (Count VIII). Defendants argue that the officers acted reasonably and in good faith and are entitled to qualified and governmental immunity. (Dkt.14.) For the reasons stated on the record at hearing, the individual officers, other than Deputy Roy, are hereby dismissed without prejudice. Further, based on the parties' briefs, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss.

II. STATEMENT OF FACTS

The following facts are as alleged by Plaintiff, which the Court adopts for the purposes of the Defendants' Motion to Dismiss. On or about April 4, 2013, Plaintiff was the subject of a sting operation in which an undercover officer sold Plaintiff a handgun which had been rendered inoperable. As Plaintiff left the motel after the transaction, he was confronted by the plain clothed officers with their guns drawn. Plaintiff did not know that these men were officers and began to run in fear for his life. The officers gave chase, with one officer a few steps behind him about to tackle him (this officer is unidentified). At this point, Defendant Deputy Roy drove his police vehicle, owned by Defendant Charter Township of Ypsilanti, at a high rate of speed and directly struck Plaintiff. Plaintiff suffered serious injuries that have left him in pain and unable to ambulate without the assistance of a wheelchair or walker. (Compl. ¶ 22A–H).

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) will fail if the complaint survives the heightened pleading standards set forth by the Supreme Court. Fed.R.Civ.P. 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." However, the complaint, when taken as true, must allege more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action...." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). *Ashcroft v. Iqbal* held that a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 556). The complaint must plead facts that allow a reasonable inference that the defendant is liable. *Id.*

IV. DISCUSSION

A. Mich. Comp. Laws § 600.6431

***2** The Court must first address Defendants' preliminary argument, namely, that the claims asserted against Defendants County of Washtenaw and Charter Township of Ypsilanti are barred because of Plaintiff's noncompliance with the

statutory notice requirement set forth by Mich. Comp. Laws § 600.6431. (*See* Doc. 20.) This statutory provision states:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies....

Mich. Comp. Laws § 600.6431. Plaintiff contends that the notice requirement applies only to suits brought against the state or its agencies and, consequently, not to the present claims because neither the County of Washtenaw nor the Charter Township of Ypsilanti are state actors.

Section 600.6431 does not provide a definition of "the state or any of its departments, commissions ...," nor does case law offer any clarification. However, a related statute conferring on the Michigan Court of Claims exclusive jurisdiction over claims brought against "the state or any of its departments or officers" provides a definition of that phrase. *See* Mich. Comp. Laws § 600.6419. Specifically, the statute provides:

> "[T]he state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

Mich. Comp. Laws § 600.6419(7). The Michigan Supreme Court has developed the following guidance for determining whether an entity is a state agency under Mich. Comp. Laws § 600.6419: (1) whether the entity was created by the state constitution, a state statute, or state agency action; (2) whether and to what extent the state government funds the entity; (3) whether and to what extent a state agency or official controls the actions of the entity at issue; and (4) whether and to what extent the entity serves local purposes or state purposes. This inquiry emphasizes an examination of the "totality of the circumstances" to determine "the core nature of an entity." *Manuel v. Gill,* 481 Mich. 637, 653 (2008).

Applying this standard to the present case results in the common-sense conclusion that neither the County of Washtenaw nor the Charter Township of Ypsilanti are state actors. These local entities are not traditional state departments, agencies, or commissions such as the Department of Corrections, Department of State, or Attorney General; indeed, they were not created by state statute or constitution, are not subject to state control, and serve local purposes. Defendants' reliance on *Fairley v. Dept. of Corrections,* No. 149722, 2015 Mich. LEXIS 1395, 2015 WL 3539731 (Mich. June 5, 2015) and *Johnson v. Operation Get Down, Inc.,* No. 11–15487, 2013 U.S. Dist. LEXIS 111533, 2013 WL 4041868 (E.D.Mich. Aug. 8, 2013), is unavailing. Fairley clearly concerned a suit against a state actor, the Michigan Department of Corrections, while *Johnson* involved a suit against a state contractor operating a diversion program. *See Johnson,* 2014 U.S. Dist. LEXIS 104147 at *3 (E.D. Mich. June 30, 2014). Accordingly, Plaintiff was not obligated to file notice of his intent to file the present suit with the Court of Claims.

B. Section 1983 Deprivation (Count I)

***3** Because the individual officers, other than Deputy Roy, have been dismissed, Count I now proceeds only against Roy. Plaintiff alleges that Deputy Roy violated 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

Plaintiff's claim against Deputy Roy is based on an alleged violation of his Fourth Amendment right to be free from unreasonable seizure. Plaintiff claims that Deputy Roy, acting under color of law, used excessive force when he hit Plaintiff with the police vehicle in order to apprehend him.

Regarding Plaintiff's Fourteenth Amendment claim, Count I is more appropriately analyzed under the Fourth Amendment because it deals explicitly with intrusive governmental conduct, rather than an analysis under the Fourteenth Amendment's substantive due process rights. *Graham v. Connor,* 490 U.S. 386, 394–395 (1989). "Where ... the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." *Id.* at 394. Therefore, this Court hereby dismisses Plaintiff's Fourteenth Amendment claim.

A claim for deprivation of rights guaranteed by the Constitution involves a two-part analysis looking first at whether there has been a violation of a constitutional right, and if so, whether the officer is personally liable for that violation. *Binay v. Bettendorf,* 601 F.3d 640, 647–50 (6th Cir.2010). To show violation of a constitutional right, Plaintiff must first show that the use of a vehicle against him was excessive force. The Fourth Amendment standard for determining excessive force is one of objective reasonableness. Determining whether the force used was objectively reasonable requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. *Id.* (citing *Tennessee v. Garner,* 471 U.S. 1, 8 (1985)). Factors to consider in determining the reasonableness of the conduct include the severity of the crime at issue, whether the suspect poses an immediate threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham,* 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

After determining that there is a constitutional violation, the Court must then analyze whether Deputy Roy was personally involved in the violation. *Binay,* 601 F.3d at 650. "To hold an officer liable for the use of excessive force, a plaintiff must prove that the officer '(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force.' " *Id.* (quoting *Turner v. Scott,* 119 F.3d 425, 429 (6th Cir.1997)).

***4** Deputy Roy raises the defense of qualified immunity available to government officials performing discretionary functions that have not violated a clearly established right. *Rich v. Mayfield Heights,* 955 F.2d 1092, 1094 (6th Cir.1992). Although the ultimate burden of proof is on Plaintiff, to be protected by qualified immunity Deputy Roy must "com[e] forward with facts to suggest that [he was] acting within the scope of [his] discretionary authority during the incident in question." *Id.* at 1095 (citing *Wegner v. Covington,* 933 F.2d 390, 392 (6th Cir.1991)). According to the Supreme Court's decision in *Saucier v. Katz,* after Deputy Roy shows he was performing a discretionary function, the Court must then determine whether he violated a clearly established right. 533 U.S. 194, 201 (2001). A clearly established right is violated if the "plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in the light of the clearly established constitutional precedent." *Floyd v. City of Detroit,* 581 F.3d 398, 405 (6th Cir.2008).

Plaintiff alleges that his Fourth Amendment rights were violated by Deputy Roy's use of excessive force against him. To show that the amount of force used was objectively reasonable, Deputy Roy analogizes Plaintiff's case with *Smith v. Freland,* in which a police officer shot and killed a suspect involved in a high-speed chase after the suspect rammed a police cruiser with his vehicle. 954 F.2d 343, 344 (6th Cir.1992). In *Smith,* the court determined that the officer's use of deadly force was objectively reasonable given that the officer acted on the scene in a rapidly progressing and uncertain situation. *Id.* at 346–47. The facts alleged in the present case do not indicate circumstances as volatile as those at issue in *Smith;* here, the situation had not been ongoing for an extended period, nor was Plaintiff driving a vehicle. Deputy Roy also analogizes *Lopez v. Gordon,* in which the suspect was fleeing by way of various vehicles and on foot. No. 08–0820 WDS/RLP, 2009 U.S. Dist. LEXIS 133607 at *2–3 (D.N.M. Dec. 23, 2009). The suspect was finally captured when an officer accidently struck the pedestrian suspect with his vehicle. *Id.* The *Smith* and *Lopez* courts each held that the use of force was reasonable because the officers could have reasonably believed the suspects to be armed and capable of doing harm to more people if they were allowed to escape. 954 F.2d at 347; 2009 U.S. Dist. LEXIS 133607 at *9. These facts contrast with the case at hand in that Plaintiff had only just begun fleeing on foot, without a working firearm, and had not assaulted or threatened anyone along the way.

Plaintiff relies on *Garner,* which held that a police officer cannot use deadly force against a fleeing suspect unless the

suspect is reasonably believed to pose a significant physical danger to the officers or others in the community. 471 U.S. at 11. Plaintiff relies on this case for the notion that a "physical danger" includes threatening the officer with a weapon or committing a crime involving infliction of serious bodily harm. (Pl.'s Br. at 5). In *Garner,* an officer shot and killed a fleeing suspect, believing the suspect to be unarmed, to prevent escape. 471 U.S. at 3–4. The Supreme Court held that where a suspect does not pose an immediate threat to the officer or others, it is unreasonable to use deadly force against the suspect. *Id.* at 11. This is similar to Plaintiff's case. Plaintiff was not known to be in possession of a functional gun and apparently posed no immediate threat of harm. Therefore, Deputy Roy's use of the vehicle was excessive, with the potential of becoming deadly force. (Pl.'s Br. at 4).

Taken as a whole, the factors set forth by *Graham* support Plaintiff's position. The crime at issue (purchasing a handgun rendered inoperable by the police) is an inherently severe crime. However, it is not clear from Plaintiff's Complaint that he posed a severe threat to the officers or others, as Plaintiff alleges that he never brandished a gun nor made any verbal or physical threats. Finally, Plaintiff alleges that while he was fleeing arrest, an officer on foot was very close to tackling and stopping him. Because the other officers were allegedly so close to tackling Plaintiff, and Plaintiff had not brandished a weapon, it was objectively unreasonable for Deputy Roy to strike Plaintiff with a vehicle to stop him.

***5** Furthermore, Deputy Roy is not protected by qualified immunity. He was performing a discretionary function while in pursuit of Plaintiff. However, for the reasons articulated above, Deputy Roy did violate a clearly established right when he took action that was objectively unreasonable and constituted excessive force. *See Saucier,* 533 U.S. at 201; *Rich,* 955 F.2d at 1094. Therefore, this Court hereby denies dismissal of Count I from Plaintiff's Complaint against Deputy Roy.

C. Municipal/ Supervisory Liability under 42 U.S.C. § 1983 (Count II)

Plaintiff claims that Defendants County of Washtenaw and Sheriff Clayton are liable for the deprivation of his Fourth and Fourteenth Amendment rights due to alleged failure to adequately train the officers involved, which created an unconstitutional policy or practice allowing officers to use a vehicle to stop a fleeing suspect. (Compl. at ¶¶ 8, 11, 12, 20, 34–41).

According to the Sixth Circuit, the County of Washtenaw will be liable under 42 U.S.C. § 1983 if Plaintiff can prove "that [its] training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city's deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir.1989) (citing *City of Canton v. Harris,* 489 U.S. 378, 388 (1989)). Inadequacy of police training may be a basis for § 1983 liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Harris,* 489 U.S. at 388. Failure to provide proper training can be considered a "policy" when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

In this matter, one cannot tell from a reading of the Complaint whether the County of Washtenaw and Sheriff Clayton were deliberately indifferent or consciously disregarded a need for more or different training. Showing that the plaintiff suffered a violation of a constitutional right will not alone be sufficient to show municipal liability. *Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 406–07 (1997). The Complaint is also deficient in showing that the alleged unconstitutional policy (failure to properly train the officers) was the direct cause of Plaintiff's injuries. *Stemler v. City of Florence,* 126 F.3d 856, 865 (6th Cir.1997). However, when civil rights are involved, a decision to dismiss the case should be made with care. *Cheriee Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). At this point in the case, it would be difficult for Plaintiff to have enough information about the training program implemented by County of Washtenaw and promulgated by Sheriff Clayton without an opportunity for adequate discovery. This perhaps explains why Plaintiff has not pled sufficient factual allegations to answer the first element of municipal liability, but this does not necessarily mean that his claim should fail at this early stage. *See Petty v. County of Franklin,* 478 F.3d 341, 348 (6th Cir.2007) (reversing dismissal of municipality because of the need for discovery to fully allege a claim of liability). Accordingly, Plaintiff should be permitted an opportunity to conduct discovery prior to dismissal of his claim.

***6** Additionally, this Court must determine whether Sheriff Clayton should be dismissed from Count II. Plaintiff asserts claims against Sheriff Clayton in both his personal and official capacities. A supervisory official is not liable in his personal

capacity unless it can be shown that he "encouraged the specific incident of misconduct or in some other way directly participated in it," or, at a minimum, "implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Bellamy v. Bradley,* 729 F.3d 416, 421 (6th Cir.1984). Although Plaintiff has not pleaded that Sheriff Clayton directly participated in the alleged misconduct, he has pleaded that Sheriff Clayton acquiesced in or encouraged the misconduct through his failure to supervise and train the deputies. In spite of the complaint's lack of factual development supporting the claim that Sheriff Clayton acquiesced to or encouraged the misconduct, it would be difficult for Plaintiff to have knowledge of this information prior to discovery. Therefore, Plaintiff should have an opportunity to conduct discovery regarding Sheriff Clayton's individual liability.

Regarding the claim against Sheriff Clayton in his official capacity as sheriff, suits against individuals in their official capacities have been recognized as simply another means of asserting claims against entities of which those individuals are agents. *Kentucky v. Graham,* 473 U.S. 159, 165 (1985). Consequently, "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* at 166. Relying on the Supreme Court's ruling, the Sixth Circuit has upheld dismissal of official-capacity actions against individuals where those claims overlap with those stated against the governmental entity. *See, e.g., Foster v. Michigan,* 573 Fed.Appx. 377, (6th Cir.2014) ("Where the entity is named as a defendant, an official-capacity claim is redundant."); *Petty,* 478 F.3d at 348–49 ("To the extent that Petty's suit is against [Sheriff] Karnes in his *official* capacity, it is nothing more than a suit against Franklin County itself."). Accordingly, because the County of Washtenaw is also a party to Plaintiff's Count II claims, the claim against Sheriff Clayton in his official capacity is superfluous and may be dismissed without injuring Plaintiff's opportunity to sue the municipality.

Therefore, the Count II claim against Sheriff Clayton in his official capacity is dismissed; however, the Court denies dismissal of Count II against County of Washtenaw and Sheriff Clayton in his individual capacity.

D. Governmental Immunity from State Law Claims

Individual officers and employees of governmental agencies are entitled to immunity from *negligent* tort liability for actions taken in the course of employment unless:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

Odom v. Wayne County, 482 Mich. 459, 480 (2008). *See also* Mich. Comp. Laws § 691.1407(2). Individual defendants also enjoy governmental immunity from *intentional* tort claims where:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

Odom, 482 Mich. at 480(relying on *Ross v. Consumers Power Co.,* 420 Mich. 567, 606 (1984)).

Likewise, a government agency is protected by governmental immunity for all tort liability if it "is engaged in the exercise or discharge of a governmental function." Mich. Comp. Laws § 691.1407(1). Nonetheless, suit against a governmental agency is permitted in five areas, including the "motor vehicle exception" to governmental immunity. *See* Mich. Comp. Laws § 691.1405. The exception provides that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner." *Id.* Additionally, a governmental agency may be vicariously liable for the tortious acts of its officers, employees, or agents, if the tort is committed during the course of employment and within the scope of authority, while the individual is engaged in an activity which is nongovernmental or proprietary. *Ross,* 420 Mich. at 625. "However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function *(i.e.*, the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act." *Id.* (citing

Hirych v. State Fair Comm., 376 Mich. 384, 391–93 (1965); *Sherbutte v. Marine City,* 374 Mich. 48, 50 (1964) (city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity)).

***7** The parties do not dispute that Deputy Roy was acting within the scope of his authority and was engaged in the discharge of a governmental function at the time Plaintiff was injured. Therefore, his liability for the negligent tort claims rests on whether he acted with gross negligence. "Gross negligence" is defined within the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." Mich. Comp. Laws § 691.1407(8)(a). Based on the facts alleged in the amended complaint, Deputy Roy could be construed to have acted without concern for whether he injured Plaintiff when he struck him with the police cruiser just as another officer on foot was about to apprehend him. Therefore, Deputy Roy is not entitled to immunity from the negligent tort claims.

Likewise, regarding the intentional tort claims, Deputy Roy's liability depends on whether he acted in bad faith. Lack of good faith has been defined as "malicious intent, capricious action or corrupt conduct or wilful and corrupt misconduct...." *Odom,* 482 Mich. at 474 (internal quotations omitted). Further, willful and wanton misconduct "is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Id.* at 475. Deputy Roy contends that Plaintiff's complaint fails to plead bad faith explicitly. A reading of the complaint, however, demonstrates that bad faith unquestionably has been pleaded. For example, with respect to the tortious assault and battery claim, Plaintiff alleges that Deputy Roy's actions in striking him with the police cruiser were "intentional, deliberately indifferent, grossly negligent, willful, wanton, reckless, malicious and/or oppressive, without regard to human dignity and resulting in unnecessary and wanton infliction of pain." (Compl., ¶ 65.) These pleadings comport with the definition of bad faith set forth above, and the Court therefore finds that Deputy Roy is not entitled to immunity from the intentional tort claims.

With respect to the County of Washtenaw and the Charter Township of Ypsilanti, the parties agree that they were engaged in the exercise or discharge of a governmental function. These governmental agencies are not subject to vicarious liability for the potential torts committed by Deputy Roy because he was discharging a governmental function at the time the alleged tort took place. *See Ross,* 420 Mich. at 625. Therefore, County of Washtenaw is entitled to governmental immunity from all tort claims. However, because Deputy Roy may be held liable for negligence, as discussed below, the Charter Township of Ypsilanti—as the owner of the cruiser—would not be immune from liability for negligent tort claims because the motor vehicle exception would apply. Though liable for negligent conduct, the Charter Township of Ypsilanti is entitled to government immunity from the intentional tort claims.

A. Negligent Tort Claims

1. Automobile Negligence (Count III)

Plaintiff alleges that Deputy Roy negligently operated a motor vehicle, with the permission of the Charter Township of Ypsilanti, in violation of Mich. Comp. Laws § 257.1 *et seq.* The elements of a negligence claim in Michigan are: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached that duty; (3) that the defendant's breach caused the plaintiff's harm; and (4) damages to the plaintiff. *Bradford v. Wurm,* 610 F.Supp.2d 835, 842 (E.D.Mich.2009).

Defendants' sole argument against this negligence claim is that a police officer who is pursuing a fleeing criminal owes no duty to that criminal during the pursuit. Defendants rely on *Robinson v. City of Detroit,* 462 Mich. 439 (2000), and *Jackson v. Oliver,* 204 Mich.App. 122 (Mich.Ct.App.1994), in support of this argument. *Jackson* involved a motorist who was killed during a high-speed chase when he fled from pursuing police officers. 204 Mich.App. at 123. Similarly, *Robinson* concerned injuries to criminal suspects who were passengers in a fleeing vehicle. 462 Mich. at 444. The facts of the present case, however, are most similar to those in *Bradford v. Wurm,* where the plaintiff alleged that he was injured during a police pursuit when he exited a vehicle in order to flee on foot. 610 F.Supp.2d 835, 837 (E.D.Mich.2009). The police maneuvered their cars to impede the plaintiff's escape, resulting in his being pinned between the bumpers of the two cars. *Id.* In *Bradford,* the court determined that *Jackson* and *Robinson* were distinguishable because the plaintiffs in those cases caused their own injuries by fleeing at high rates of speed in response to the police officers' pursuit. *Id.* at 843. In contrast, "[t]he case presented by Mr. Bradford is different because Bradford did not cause his injuries; the defendants' alleged

gross negligence in the operation of a motor vehicle was the cause. Bradford was on foot when he was impacted by the police vehicle." *Id.* at 843–44. The Court agrees that Plaintiff's culpability does not completely eviscerate the duty of care owed by the police officers to Plaintiff. As recognized in *Bradford,* to hold otherwise would be to "announce a categorical rule that the police may do whatever they like to a wrongdoer who is fleeing." *Id.* at 844. Accordingly, the Court finds that Deputy Roy owed Plaintiff a duty of care during the pursuit. Because the Court cannot determine as a matter of law that Roy was not negligent under the facts pleaded in the complaint, the negligence claim shall not be dismissed.

2. Gross Negligence (Count VI)

***8** The complaint asserts a gross negligence claim against all Defendants based on Deputy Roy's "[c]ausing a vehicle to intentionally or grossly negligently collide with Plaintiff while he was a pedestrian...." Defendants correctly contend that gross negligence is not an independent cause of action under Michigan law. Michigan case law has "rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous v. Burmeister,* 262 Mich.App. 467, 483–84 (Mich.Ct.App.2004). Where, as here, a claim for gross negligence is fully premised on the same facts or events as a claim for excessive force, courts have determined that the gross negligence claim must fail. *See id.* "Although establishing that a governmental official's conduct amounted to 'gross negligence' is a prerequisite to avoiding that official's statutory governmental immunity, it is not an independent cause of action." *Bletz v. Gribble,* 641 F.3d 743, 756 (6th Cir.2011). Accordingly, Plaintiff's gross negligence claim is hereby dismissed.

3. Statutory Owner's Liability (Count V)

Plaintiff alleges liability on the part of the Charter Township of Ypsilanti as the owner of a vehicle that was negligently operated with its express consent or knowledge, in accordance with Mich. Comp. Laws § 257.401. Defendant Charter Township of Ypsilanti's sole argument with respect to this claim is that it is not liable because Deputy Roy is not liable —since Roy owed no duty of care, Plaintiff's negligence claim must fail. As discussed above, Deputy Roy did owe a duty of care to Plaintiff, and the Court therefore cannot determine as a matter of law that he was not negligent. Given the motor vehicle exception to governmental immunity, the Charter Township of Ypsilanti is also liable for negligence pursuant to statute. This claim may not be dismissed.

4. Negligent Entrustment (Count IV)

Plaintiff alleges that the Charter Township of Ypsilanti was negligent in "entrust[ing] its motor vehicle to a person who was unfit to operate a motor vehicle on the highways ... by reason of his inexperience, and/or habitually negligent driving," which was known to the Charter Township of Ypsilanti or, in the exercise of reasonable care, should have been known to it. Although the complaint is devoid of any facts that would indicate that Deputy Roy was an unfit driver, that he was inexperienced, or that he was a habitually negligent driver, Plaintiff does not have access to any such information at this early stage of the litigation. For the same reasons articulated above in relation to his § 1983 failure to train claim, Plaintiff should be afforded the opportunity to conduct discovery regarding Deputy Roy's driving records and employment history. Therefore, this claim may not be dismissed at this stage.

B. Intentional Tort Claims

1. Assault & Battery (Count VII)

According to Michigan law, an assault is an "intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v. Thomas,* 189 Mich.App. 110, 119 (Mich.Ct.App.1991). A battery is defined as the willful and harmful or offensive touching of another person which results from an act intended to cause such a contact. *Id.* Because unlawfulness is an element of both assault and battery, police officers and other government actors may find it necessary—and are permitted—in the performance of their work duties to act in ways that would otherwise subject them to liability for intentional torts. *Van Vorous,* 262 Mich.App. 467, 483 (Mich.Ct.App.2004).

The complaint alleges sufficient facts to support claims of assault and battery as to Deputy Roy. It is possible that Plaintiff was placed in fear of imminent harm as he saw or heard the police cruiser speeding towards him.

Likewise, Deputy Roy made harmful contact with Plaintiff, and, according to the facts alleged by Plaintiff, this contact appears to have been intentional in order to apprehend him. Therefore, the assault and battery claims survive with respect to Deputy Roy.

2. Intentional Infliction of Emotional Distress (Count VIII)

***9** A claim for intentional infliction of emotional distress (IIED) requires that the plaintiff establish (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Id.* at 481. The standard for establishing IIED is very high, and liability will not be imposed unless a plaintiff can demonstrate that "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 482–83. Conduct rising to the level of IIED "shocks the conscience," *see Williams v. Payne,* 73 F.Supp.2d 785, 793 (E.D.Mich.1999), and does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," *see Roberts,* 135 Mich. at 603. Furthermore, it is initially a question of law for a court's consideration in determining whether defendant's conduct may be reasonably regarded as so extreme and outrageous as to permit recovery. *Roberts v. Auto Owners Ins. Co.,* 135 Mich.App. 595, 599 (Mich.Ct.App.1983), *rev'd on other grounds,* 422 Mich. 594 (Mich.1985).

The facts at issue in the present case might rise to the level of outrageousness that is utterly intolerable in a civilized community with respect to Deputy Roy's actions. If, for example, Plaintiff can show through discovery that Deputy Roy maliciously hit him with the vehicle with the intention of causing bodily harm, such conduct may rise to the level of outrageousness that could sustain a claim of IIED. Therefore, this claim also survives Defendants' Motion to Dismiss.

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss. Specifically, the Court **DISMISSES** Deputies Brian Kittle, Jeff Gontarski, Thomas Guynes, Sam Wallace, Paul Corrie, Sgt. Dave Archer, and Cpl. Jeff Carek from the entirety of the lawsuit. The Court also **DISMISSES** the Eighth and Fourteenth Amendment claims from Count I, the claim against Sheriff Clayton in his official capacity from Count II, the gross negligence claim (Count VI), all state law claims against the County of Washtenaw, and the assault and battery and IIED claims against the Charter Township of Ypsilanti. The surviving claims are therefore:

- The § 1983 Fourth Amendment claim against Deputy Roy (Count I);
- The § 1983 municipal/supervisory liability claim against Defendants County of Washtenaw and Sheriff Clayton in his individual capacity (Count II);
- The negligence claims against Defendants Deputy Roy and the Charter Township of Ypsilanti (Counts III and V);
- The negligent entrustment claim against the Charter Township of Ypsilanti (Count IV);
- The assault and battery claim against Deputy Roy (Count VII); and
- The IIED claim against Deputy Roy (Count VIII).

IT IS SO ORDERED.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jane DOE, Plaintiff–Appellant,
v.
BISHOP FOLEY CATHOLIC HIGH SCHOOL, Reverend Gerard J. LeBoeuf, Joanne Molnar, Nancy Hager, Archdiocese of Detroit, His Eminence Adam Joseph Maida, Sister Mary Gehringer, Roes 1–50, Defendants–Appellees,
and
Richard Fischer, Defendant.

No. 336795
|
May 1, 2018

Oakland Circuit Court, LC No. 2016–153573–CZ

Before: Borrello, P.J., and Shapiro and Tukel, JJ.

Opinion

Per Curiam.

***1** Plaintiff appeals as of right the trial court's order dismissing the case with prejudice after granting summary disposition pursuant to MCR 2.116(C)(7) and (8) in favor of defendants-appellants Bishop Foley Catholic High School, Reverend Gerard J. LeBoeuf, Joanne Molnar, Nancy Hager, the Archdiocese of Detroit, His Eminence Adam Joseph Maida, Sister Mary Gehringer, and Roes 1–50 (collectively referred to as defendants-appellants), and defendant Richard Fischer. Fischer is not a party to the instant appeal. [1] For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This action commenced when plaintiff filed a complaint on June 17, 2016, alleging that Fischer sexually abused her in 2008, when Fischer was an art teacher at Bishop Foley Catholic High School and plaintiff was a 17–year–old student of Fischer's at the school.

According to plaintiff's complaint, plaintiff was a student at Bishop Foley between September 2004 and June 2008, and she was under the age of 18 years old throughout this time. She turned 18 at some point in 2008. Fischer had been an art teacher at Bishop Foley since 2002 and continued in that capacity until 2012. He was also the coach for the girls cross-country team from 2004–2008. Bishop Foley was governed by the Archdiocese of Detroit. LeBoeuf was the president of Bishop Foley; Molnar was the principal of Bishop Foley; Hager was a guidance counselor at Bishop Foley; Maida was a member of the Archdiocese's Catholic School Council that functioned as the governing body for schools within the Archdiocese, including Bishop Foley; and Gehringer was the superintendent of the Archdiocese schools, as well as a member of the Archdiocese's Catholic School Council. Plaintiff alleged that she was unaware of the true nature and capacities of the Roe defendants but that they were also "liable in some manner for the events referred to in the complaint."

Plaintiff's complaint alleged that during the spring of 2008, she began spending her study hour in Fischer's classroom to study with her friends. The complaint further alleged that over the course of the spring months, Fischer gained her trust by acting as "listening ear," "mentor," and "concerned authority figure" for plaintiff. Plaintiff alleged that Fischer eventually turned their conversations to sex, telling her that he was sexually attracted to her. Plaintiff and Fischer also began exchanging emails that became increasingly sexual and explicit. Additionally, plaintiff alleged that during this same approximate time period, Fischer told her that he "had previously had a relationship with another student, prior to graduation, in 2006" and that Fischer and this former student had dated since the student's sophomore year in 2004. Plaintiff's complaint alleged that Fischer eventually began physically touching and kissing plaintiff in various locations on the school grounds in and near his classroom. Plaintiff alleged that eventually, she and Fischer met off school grounds and plaintiff refused Fischer's requests to have sexual intercourse. According to plaintiff's complaint, Fischer ended their "relationship" shortly thereafter.

***2** Plaintiff alleged that it was approximately June 2008, and before her graduation, that Fischer ended their "relationship." Plaintiff further alleged that Fischer told her that LeBoeuf and Molnar had discovered the relationship between Fischer and plaintiff and that LeBoeuf and Molnar had instructed

Fischer not to contact plaintiff again. Plaintiff did not have any further contact with Fischer until approximately November 2008, when she visited Bishop Foley during a college break. According to the complaint, while plaintiff was at Bishop Foley, Fischer "isolated" her and told her that he was "trying to get better" and still happily married. Plaintiff further alleged that Fischer told her again about his meeting with LeBoeuf and Molnar and that he had received a "slap on the wrist" for his conduct involving plaintiff.

The complaint also alleged that Bishop Foley officials had known in 2006 about Fischer's previous relationship with a different student, which was the relationship that Fischer had disclosed to plaintiff in 2008. Plaintiff alleged that she was unaware of this information in 2008 but that on November 7, 2015, she learned that a parent had reported Fischer's previous relationship with a student to defendant Hager, who had disregarded the complaint. The complaint further alleged that after learning of Fischer's inappropriate behavior in 2006, Bishop Foley officials failed to report Fischer's 2006 abuse of a student to Michigan authorities or the Archdiocese and that Bishop Foley officials "failed to take any meaningful investigatory, remedial or other disciplinary action against Fischer." After learning about the previous report, plaintiff notified the police, and a criminal investigation was initiated. Plaintiff alleged that during the course of this investigation, it was learned that "Fischer had a reputation for choosing an underage girl from each graduating class to be his 'girlfriend.' " Plaintiff also alleged that Bishop Foley officials had "continued their practice of indifference" upon learning of Fischer's inappropriate relationship with plaintiff, and they allowed Fischer to remain as a teacher. Plaintiff alleged that Bishop Foley officials could have prevented the abuse suffered by plaintiff but instead failed to act on the information they had about Fischer's previous misconduct. According to the complaint, plaintiff did not report at the time that she had been abused.

Based on the above factual allegations, plaintiff asserted claims of battery and violations of the Elliott–Larsen Civil Rights Act against Fischer. Plaintiff also asserted claims of negligence, negligence per se, negligent supervision and retention, negligent infliction of emotional distress, intentional infliction of emotional distress, fraudulent concealment, and conspiracy to commit fraud against all defendants.

With respect to the fraudulent concealment claim, plaintiff alleged that defendants "owed a heightened duty of care to Plaintiff because Plaintiff's parents were obligated to entrust Plaintiff to the Defendants' care" and that "each of the Defendants stood in an *in loco parentis* relationship with Plaintiff," which imposed an affirmative duty "to take any and all reasonable steps to protect Plaintiff and the other students entrusted to their care." Plaintiff alleged that this heightened duty included a "duty to disclose the fact—known only to Defendants—that Fischer had a propensity for sexually manipulating and abusing young girls," as well as an affirmative duty upon discovering Fischer's improper relationship with plaintiff to have disclosed to plaintiff, her mother, and the police that Fischer was suspected of previously sexually abusing another underage girl. Plaintiff further alleged that Hager's failure to disclose the prior incident constituted active concealment and suppression of those facts.

***3** With respect to the conspiracy count, plaintiff alleged that defendants came to a mutual agreement after discovering the 2006 abuse to avoid reporting the incident and to conceal and suppress evidence of the incident if there were future allegations of sexual misconduct by Fischer.

In response to the complaint, defendants-appellants moved for partial summary disposition under MCR 2.116(C)(7) and (8) on the ground that plaintiff's claims were barred by the statute of limitations. The motion was one for partial summary disposition because it was brought on behalf of all defendants other than Fischer. In support of the motion, defendants-appellants argued that plaintiff's claims were all subject to a three-year statute of limitations, with the exception of the conspiracy to commit fraud claim, which was subject to a six-year statute of limitations. Defendants-appellants argued the limitations periods had therefore expired in 2011 and 2014 respectively. Defendants-appellants further argued that since plaintiff turned 18 in 2008, the limitations periods were not materially altered in this case by MCL 600.5851(1), which permits a person who is under 18 at the time that a claim accrues to bring an action within one year after reaching the age of majority even if the limitations period has run. Additionally, defendants-appellants argued that plaintiff had failed to state a claim for fraudulent concealment that would permit her to circumvent the statute of limitations because plaintiff (1) did not plead acts or misrepresentations that constituted fraudulent concealment; (2) relied only on mere silence even though silence is not sufficient to show fraudulent concealment; and (3) could not maintain her fraudulent concealment claim as a matter of law because she knew or should have known all of the essential elements of

a potential cause of action against defendants-appellants and such causes of action could not have been concealed from her based on plaintiff's own knowledge at the time about her injury, Fischer's employment at Bishop Foley, and the identity of the officials named as defendants in this case. Finally, defendants-appellants argued that because plaintiff had failed to state a claim for fraudulent concealment, she had necessarily failed to state a claim for conspiracy to commit fraud because she had not sufficiently alleged an actionable underlying tort claim.

Fischer also subsequently moved for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). Fischer adopted the arguments advanced in the summary disposition motion filed by defendants-appellants and additionally argued plaintiff's claims of battery and violations of the Elliott–Larsen Civil Rights Act that were directed at Fischer were also barred by the statute of limitations.

In response to the summary disposition motion filed by defendants-appellants, plaintiff first argued that all of her claims were timely because she had properly pleaded fraudulent concealment and thus had two years from the time she discovered the existence of a claim or the identity of a potential defendant in which to bring an action.[2] Plaintiff argued that she had properly pleaded her underlying claims and her fraudulent concealment claim because defendants-appellants had breached their duty to her as a student to protect her from harm by ignoring the parent's complaint about Fischer and fraudulently concealed this act by discouraging the concerned parent from pursuing the matter, failing to disclose the information about Fischer to the school community, failing to report the matter to the proper authorities, hiding Hager's identity as a potential witness in a sexual abuse investigation, failing to disclose to plaintiff's mother that she had been sexually abused, and allowing plaintiff to believe that she was the only person Fischer had victimized.

***4** Plaintiff further argued that it was sufficient to rely on the silence of defendants-appellants to allege fraudulent concealment in this situation because schools and their administrators owe a special duty to students that amounts to a fiduciary duty, and defendants-appellants breached their fiduciary duty to plaintiff by doing nothing about Fischer's abusive conduct. Plaintiff argued that defendants-appellants also had an affirmative duty under Michigan's Child Protection Law, MCL 722.621 *et seq.*, to report Fischer's conduct in 2006, and defendants-appellants failed to do so. Nonetheless, plaintiff additionally argued, defendants-appellants still took affirmative action to fraudulently conceal the existence of plaintiff's claims because they discouraged the parent who complained in 2006 from further involvement and retained Fischer in a position of authority without disciplining him. Plaintiff also argued that she only became aware in 2015 that defendants-appellants knew about Fischer's 2006 conduct and that plaintiff had no duty to discover the fraud or the identity of the actors through an independent investigation because her lack of awareness was the result of defendants-appellants concealing the information in violation of their fiduciary duty.

Finally, plaintiff additionally argued that her conspiracy to commit fraud claim was properly pleaded because the underlying torts were not barred by the statute of limitations, that defendants-appellants were precluded from relying on the statute of limitations under the doctrine of equitable estoppel due to their "fraudulent actions and concealments over the last 8 years," and that the trial court should permit plaintiff to either complete discovery or conduct limited discovery on the statute of limitations and fraudulent concealment issues before ruling on the summary disposition motion. Plaintiffs essentially reiterated the above arguments in response to Fischer's motion for partial summary disposition.

Defendants-appellants argued in their reply brief that Michigan courts had not recognized the existence of a fiduciary relationship between students and teachers or other school officials.

In a written opinion and order, the trial court granted the motion for partial summary disposition filed by defendants-appellants. The trial court first concluded that plaintiff's claim of a fiduciary relationship between a student and a school or school officials was not supported by Michigan law and that plaintiff therefore could not rely on the silence of defendants-appellants to establish fraudulent concealment. The trial court further concluded that a contrary result was not required by plaintiff's allegations that defendants-appellants violated their statutory duty to report Fischer's abuse of another student in 2006 because such a claim cannot be brought by someone other than the abused child about whom no report was made. Next, the trial court concluded that the fraudulent concealment statute did not toll the limitations periods in this case because "Plaintiff's allegations, accepted as true, demonstrate that she knew or, with due diligence, should have known of a 'possible cause of action' regarding all of her claims against the Defendants within the limitations period."

The trial court further determined that plaintiff had failed to allege any affirmative act or misrepresentation by defendants-appellants concealing a potential defendant or the existence of a cause of action that plaintiff was entitled to bring. Next, the trial court rejected plaintiff's equitable estoppel argument because the acts alleged by plaintiff did not show conduct designed to induce plaintiff to refrain from bringing the action or that plaintiff refrained from timely filing her lawsuit due to the actions of defendants-appellants. Finally, the trial court concluded that plaintiff's conspiracy claim was time-barred and also failed because there was no viable underlying tort claim to support the conspiracy claim. The trial court granted summary disposition pursuant to MCR 2.116(C)(7) and (8).

In a subsequent opinion and order, the trial court granted Fischer's motion for partial summary disposition as well. The trial court concluded that plaintiff's fraudulent concealment claim failed for the same reasons expressed in the trial court's previous opinion and order related to the motion filed by defendants-appellants. With respect to equitable estoppel, the trial court concluded that Fischer's statements in November 2008 to plaintiff, on which plaintiff relied for her equitable estoppel argument, did not constitute a promise to refrain from asserting the statute of limitations as an affirmative defense or the other "traditional type of conduct which would work an estoppel in the statute of limitations context under Michigan jurisprudence—e.g., an offer to compromise or settle the Plaintiff's claim, a representation that the limitations period was of much greater duration than it actually was, or part payment of the Plaintiff's claim." The trial court further concluded that the statements allegedly made by Fischer could not reasonably be understood to have fraudulently concealed plaintiff's cause of action because the allegations in the complaint showed that plaintiff knew that she was sexually abused by Fischer within the limitations period. The trial court granted summary disposition pursuant to MCR 2.116(C)(7) and (8) because plaintiff had failed to state a fraudulent concealment claim that would avoid the applicable limitations periods and her claims were all time-barred.

***5** An order was entered dismissing plaintiff's case with prejudice. This appeal followed.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). The trial court granted summary disposition under MCR 2.116(C)(7) and (8).

With respect to MCR 2.116(C)(7), our Supreme Court has explained the applicable legal principles as follows:

> Pursuant to MCR 2.116(C)(7), a party may move to dismiss a claim on the grounds that the claim is barred by the applicable statute of limitations. The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo.... In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it. [*Frank v. Linkner*, 500 Mich. 133, 140; 894 N.W.2d 574 (2017) (quotation marks and citations omitted).]

With respect to MCR 2.116(C)(8), our Supreme Court has explained the applicable legal principles as follows:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden*, 461 Mich. at 119–

> 120 (quotation marks and citations omitted).]

Additionally, "[t]his Court reviews de novo the trial court's application of legal and equitable doctrines, including the doctrine[ ] of ... equitable estoppel." *Sylvan Twp. v. City Of Chelsea*, 313 Mich. App. 305, 315–316; 882 N.W.2d 545 (2015). Issues involving the interpretation and application of statutes present questions of law that are also reviewed de novo. *Eggleston v. Bio–Med Applications of Detroit, Inc.*, 468 Mich. 29, 32; 658 N.W.2d 139 (2003).

III. ANALYSIS

On appeal as in the trial court, plaintiff concedes that her claims against defendants-appellants would generally be time barred if not for the fraudulent concealment that plaintiff alleges defendants-appellants committed. Plaintiff argues that because defendants-appellants failed to disclose to plaintiff the previous 2006 abuse committed by Fischer, defendants-appellants fraudulently concealed the existence of her claim or the identity of liable individuals, making plaintiff's causes of action timely under the fraudulent concealment statute, MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

***6** Plaintiff argues that the fraudulent concealment statute operated to toll the applicable statutes of limitations until she discovered the wrongdoing of defendants-appellants in 2015. Thus, plaintiff's primary issue on appeal is whether the fraudulent concealment statute is applicable such that plaintiff is not time barred from bringing her claims.

On appeal, plaintiff argues that defendants-appellants owed her a fiduciary duty to disclose their knowledge related to the previous 2006 incident involving Fischer and that as a result of this fiduciary duty, plaintiff could rely on the silence of defendants-appellants—i.e. their failure to disclose this information—to demonstrate fraudulent concealment. However, plaintiff's argument crucially ignores the fact that the undisputed factual allegations in her complaint demonstrate that she knew or should have known all of the essential elements of her claim within the limitations period, and thus there could have been no fraudulent concealment for purposes of MCL 600.5855. See, *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich. App. 632, 642; 692 N.W.2d 398 (2004). Plaintiff incorrectly focuses on whether she can properly plead fraudulent concealment in a certain way while neglecting the fact that it is impossible for her to demonstrate fraudulent concealment at all because of the knowledge that she claims in her complaint to have personally possessed.

The fraudulent concealment statute, MCL 600.5855, is a legislatively created exception to statutes of limitations. *Doe*, 264 Mich. App. at 642. "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Id.* (quotation marks and citation omitted). Generally, "[t]he fraud must be manifested by an affirmative act or misrepresentation." *Id.* (quotation marks and citation omitted). We may only consider actions by defendants-appellants that occurred after the alleged injury "because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist." *Id.* at 641.

However, and as is crucially important in the instant case, "[i]f there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know ...." *Id.* at 643 (quotation marks and citation omitted). "For a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a 'possible cause of action.' " *Id.* (citation omitted). In making this determination, we consider "the entire constellation of facts that were known or should have been known to plaintiff at the time the abuse occurred." *Id.* at 644. Furthermore, in *Archdiocese of Detroit*, this Court explained:

For a cause of action to accrue, the entire theory of the case need not be apparent, nor is certitude required:

> The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know, pursuant to the rule hereinbefore stated (i.e., by the exercise of ordinary diligence).
>
> ***7** *It is not necessary that a party should know the details of the evidence by which to establish his cause of action*. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim. [*Id.* at 646–647 (quotation marks and citation omitted).]

In this case, all of plaintiff's underlying causes of action against defendants-appellants were founded on the basic allegation that defendants-appellants failed to protect her from the sexual abuse committed by Fischer because defendants-appellants did not take reasonable or sufficient actions in response to allegations of sexual abuse occurring at Bishop Foley that were made to defendants-appellants, including allegations specifically involving Fischer. Plaintiff's cause of action for intentional infliction of emotional distress additionally relies on her claim that defendants-appellants intentionally concealed Fischer's harassment and abuse. However, according to plaintiff's complaint, she also knew all of the following facts within a matter of months of the abuse she alleges was committed by Fischer: plaintiff knew that Fischer was a teacher at Bishop Foley when he allegedly sexually assaulted her on school property, that Fischer had a previous relationship with a Bishop Foley student in 2006 while that individual was still a student, that Fischer was still a teacher at Bishop Foley in 2008, that plaintiff's own "relationship" with Fischer had been discovered by Bishop Foley officials, and that Fischer had only received a "slap on the wrist" as punishment for the incidents involving plaintiff and continued teaching at Bishop Foley.

Thus, plaintiff was well aware of facts that would show that Bishop Foley may have handled issues involving sexual misconduct committed by teachers in a negligent manner. Based on these facts, plaintiff knew or should have known about her causes of action predicated on the way defendants-appellants treated allegations of sexual misconduct committed by teachers against students and the failure of defendants-appellants to protect students from such harm. Plaintiff also should have been able to discover the identities of these various parties and their affiliation with Bishop Foley through ordinary diligence. Furthermore, to the extent that plaintiff's theories relied on showing that defendants-appellants knew about Fischer's proclivity for sexually abusing female students before the incident with plaintiff occurred in 2008, plaintiff should have been able to discover this information within the applicable limitations periods had she exercised ordinary diligence. It is difficult for plaintiff to argue otherwise, considering that she knew at the time how Bishop Foley officials had responded to learning of Fischer's misconduct directed at plaintiff, that Fischer had maintained a relationship with a previous Bishop Foley student from 2004 to 2006, and that Fischer continued to serve as a teacher at the school throughout this time period. It is not necessary that a plaintiff be aware of all of the details of the evidence that would support a cause of action, and a plaintiff has an obligation to exercise ordinary diligence to discover evidence relevant to a claim. *Id.* Here, based on "the entire constellation of facts that were known or should have been known to plaintiff at the time the abuse occurred," plaintiff knew or should have known that her causes of action against defendants-appellants existed, and therefore, no fraudulent concealment could exist. *Id.* at 643, 644, 646–647. Accordingly, the trial court did not err by concluding that plaintiff had failed to allege a claim for fraudulent concealment that would toll the applicable statutes of limitations.

***8** Nonetheless, plaintiff argues that this Court essentially should either (1) find for the first time in Michigan that a fiduciary relationship exists between students and schools, school officials, and teachers; or (2) judicially create another exception to the general requirement that plead an affirmative action or misrepresentation to allege a claim of fraudulent concealment, with the exception to be applied in situations where educators know of a school employee's prior abuse of children and fail to disclose it. Plaintiff advances these arguments on the theory that either would allow her to rely on the silence of defendants-appellants—i.e. their failure to disclose the 2006 abuse allegedly committed by Fischer—to make her claim of fraudulent concealment. However, we need not address these issues in this case because we have concluded that regardless of whether plaintiff relied

on affirmative acts or the silence of defendants-appellants in alleging fraudulent concealment, she cannot state a meritorious claim for fraudulent concealment in this case because she knew or should have known of her causes of action against defendants-appellants. We express no opinion on the merits of these particular additional arguments.

Next, plaintiff argues that defendants-appellants should not be permitted to rely on the statute of limitations pursuant to the doctrine of equitable estoppel.

The doctrine of equitable estoppel, as applied to statutes of limitation, was outlined in *Doe v. Racette*, 313 Mich. App. 105, 108–109; 880 N.W.2d 332 (2015):

> Equitable estoppel is a judicially created exception to the general rule which provides that statutes of limitation run without interruption[.] It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar. [A]bsent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action, Michigan courts have been reluctant to recognize an estoppel[.] Such equitable power has traditionally been reserved for unusual circumstances such as fraud or mutual mistake because a court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking[.] In the past, we have typically applied equitable estoppel in cases in which the defendant induced the plaintiff to believe the limitations period would not be enforced. [Citations and quotation marks omitted; alterations in original.]

In general, a plaintiff attempting to invoke the doctrine of equitable estoppel "must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced." *McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 204–205; 747 N.W.2d 811 (2008). Additionally, "a threat to murder a plaintiff and harm his family should he or she disclose instances of sexual abuse can establish the first element of equitable estoppel," because the threat necessarily encompasses all forms of disclosure, including disclosure in the form of a timely filed lawsuit." *Racette*, 313 Mich. App. at 110. Estoppel may also arise when one "by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 613; 254 N.W. 221 (1934). Our Supreme Court "has been reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute" and has explained that the usual sort of conduct justifying application of the estoppel doctrine consists of "an offer to compromise or settle plaintiff's claim, a representation that the limitations period was of much greater duration than it actually was, or part payment of plaintiff's claim." *Lothian v. City of Detroit*, 414 Mich. 160, 177, 178; 324 N.W.2d 9 (1982) (quotation marks and citation omitted).

***9** In this case, plaintiff has not alleged any actions taken by defendants-appellants that were meant to induce an erroneous belief that the relevant periods of limitation would go unenforced. None of plaintiff's allegations that she discusses in arguing for the application of equitable estoppel have anything to do with the applicable statutes of limitations, and there are no allegations that plaintiff was threatened with any type of harm to her or her family by any of the defendants-appellants. There is also no allegation of conduct suggesting an offer to compromise or settle plaintiff's claim, partial payment of plaintiff's claim, or a representation that the limitations period was greater than it was. *Id.* at 178. In short, there is no indication that defendants-appellants *induced* plaintiff to believe that the statutes of limitations would not be enforced, and plaintiff has therefore failed to demonstrate that equitable estoppel should apply in this case. *McDonald*, 480 Mich. at 204–205; *Lothian*, 414 Mich. at 177; *Racette*, 313 Mich. App. at 109–110.

Furthermore, the essence of plaintiff's claim is really that equitable estoppel is warranted in this situation because defendants-appellants concealed certain facts related to Fischer's sexual misconduct. However, to the extent that this

could be understood to somehow have induced plaintiff into believing that she could not timely file her lawsuit because she did not believe that she had any causes of action, such reliance on the alleged actions and inactions of defendants-appellants by plaintiff would not be *justified* because of the knowledge of the events and circumstances that plaintiff possessed at the time, which we previously discussed in regard to plaintiff's fraudulent concealment claim. Therefore, because plaintiff could not have justifiably relied on any of the actions or inactions of defendants-appellants as reasons for delaying the filing of her lawsuit, the equitable estoppel doctrine may not be applied in this case. *McDonald*, 480 Mich. at 204–205.

Finally, plaintiff argues that she should have been permitted to complete discovery before the trial court ruled on her motion. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc. v. City of Berkley*, 259 Mich. App. 1, 24–25; 672 N.W.2d 351 (2003) (citations omitted).

In this case, although summary disposition was granted before plaintiff could complete discovery on this point, the allegations of the complaint clearly indicate that plaintiff knew or should have known of her claims against defendants-appellants within the applicable limitations periods based on the knowledge she possessed in 2008. As previously stated, the fraudulent concealment exception does not apply if liability was already apparent to the plaintiff. *Archdiocese of Detroit*, 264 Mich. App. at 643. Accordingly, no further discovery could possibly lead to additional facts that would grant plaintiff relief under the fraudulent concealment exception. Summary disposition was not, therefore, premature. See *Peterson Novelties, Inc.*, 259 Mich. App. at 24–25.

The trial court did not err by granting summary disposition in favor of defendants-appellants on the ground that all of plaintiff's causes of action were barred by the applicable statutes of limitations.

Affirmed. No costs are awarded. MCR 7.219(A).

All Citations

Not Reported in N.W. Rptr., 2018 WL 2024589

Footnotes

1 Fischer was dismissed as a party by stipulation. *Doe v. Bishop Foley Catholic High School*, unpublished order of the Court of Appeals, entered May 2, 2017.

2 We note that in making this argument, plaintiff misconstrues the language of the applicable statute because the limitations period is actually based on the time when an individual discovers or *should have discovered* the existence of the claim of the identity of the liable party. MCL 600.5855 provides as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action *discovers, or should have discovered*, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations. [Emphasis added.]

393 F.Supp.3d 683
United States District Court, W.D. Michigan, Northern Division.

John DOE, Plaintiff,
v.
NORTHERN MICHIGAN UNIVERSITY, Janet Koski, Donna Beauchaine, in their individual and official capacities, and Christine Greer, in her official capacity only, jointly and severally, Defendants.

Case No. 2:18-CV-196
|
Signed May 28, 2019

Synopsis

Background: Male public university student brought action against university and its employees, alleging violation of Title IX, his Fourteenth Amendment right to due process, and breach of contract, arising out of his expulsion as a disciplinary sanction for sexual misconduct. University and employees moved to dismiss for failure to state a claim.

Holdings: The District Court, Gordon J. Quist, J., held that:

[1] student sufficiently alleged he was entitled to live hearing with opportunity to cross-examine classmate, as required to support procedural due process official capacity claims;

[2] student's right to live hearing was not clearly established, so university employees were entitled to qualified immunity on § 1983 individual capacity claims;

[3] student's right to cross-examine classmate was not clearly established, so university employees were entitled to qualified immunity on § 1983 individual capacity claim;

[4] student failed to sufficiently allege causal connection between gender bias and his expulsion, as required to support Title IX claim;

[5] student sufficiently alleged breach of contract claim based on university's alleged failure to inform him he was entitled to an adviser during proceedings; and

[6] university was entitled to governmental immunity on tort claims.

Motion granted in part and denied in part.

West Headnotes (35)

[1] **Federal Courts** Higher education; colleges and universities

Sovereign immunity did not preclude claims by male public university student against university employees in their official capacities under *Ex parte Young*, to the extent he sought reinstatement at university, in action arising out of his expulsion as a disciplinary sanction for sexual misconduct against female classmate; while neither state nor university employees were persons within meaning of § 1983, student was entitled to pursue claim for prospective injunctive and declaratory relief requiring state officials to comply with federal law. U.S. Const. Amend. 11; 42 U.S.C.A. § 1983.

[2] **States** What are suits against state or state officers

A suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.

[3] **Civil Rights** States and territories and their agencies and instrumentalities, in general

Civil Rights Liability of Public Employees and Officials

Generally, neither a state nor its officials acting in their official capacities are persons under § 1983, and thus states and their officials acting in their official capacities are not subject to suit under § 1983. 42 U.S.C.A. § 1983.

[4] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Agencies, officers, and public employees

A limited exception to sovereign immunity exists under *Ex parte Young*, in which a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law. U.S. Const. Amend. 11.

[5] **Federal Courts** Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal Courts Higher education; colleges and universities

Claims for reinstatement at a public university are prospective in nature and appropriate subjects for *Ex parte Young* actions that are not precluded by sovereign immunity. U.S. Const. Amend. 11.

[6] **Constitutional Law** Rights, Interests, Benefits, or Privileges Involved in General

To determine whether a plaintiff has stated a due process claim, a court has to decide whether plaintiff had a liberty or property interest that entitled him to due process protection, and, if so, what level of process was due. U.S. Const. Amend. 14.

[7] **Constitutional Law** Disciplinary proceedings

A court's review of a student disciplinary decision to determine whether the student received procedural due process is limited to determining whether the procedures used by the university were constitutional. U.S. Const. Amend. 14.

[8] **Constitutional Law** Discipline, suspension, or expulsion

A court's review of a student disciplinary decision to determine whether the student received procedural due process consists of considering the additional procedures requested, any error-reducing benefit those procedures might have, and the burden on the university of adding those additional procedures. U.S. Const. Amend. 14.

[9] **Constitutional Law** Disciplinary proceedings

There are two basic due process requirements for student disciplinary proceedings: (1) notice, and (2) an opportunity to be heard. U.S. Const. Amend. 14.

[10] **Constitutional Law** Disciplinary proceedings

Education Proceedings and review

Male public university student sufficiently alleged that he was entitled to a live hearing with opportunity to cross-examine female classmate that accused him of sexual misconduct, as required to support student's procedural due process claim against university employees in their official capacities, arising out of his expulsion; while student was permitted to present his version of facts to university's investigator and Title IX coordinator, he was not able to testify directly to board that was ultimately responsible for his expulsion, and some form of cross-examination of classmate would have allowed board to choose between competing narratives in making its findings. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[11] **Constitutional Law** Disciplinary proceedings

With respect to a procedural due process claim based on a university's student disciplinary decision, evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness to stand face to face with the fact finder in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. U.S. Const. Amend. 14.

[12] **Constitutional Law** Disciplinary proceedings

An accused student is entitled to an opportunity to explain his version of the facts to the disciplinarian or decisionmaker, which means the official responsible for the discharge in order to satisfy procedural due process. U.S. Const. Amend. 14.

[13] **Constitutional Law** Disciplinary proceedings

Universities are not required to facilitate witness questioning at every nonacademic misconduct hearing in order to provide procedural due process. U.S. Const. Amend. 14.

[14] **Constitutional Law** Disciplinary proceedings

Cross-examination is essential to procedural due process in the student disciplinary context only where the finder of fact must choose between believing an accuser and an accused, but a disciplinary panel need not make this choice if the accused student admits the critical facts against him. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[15] **Constitutional Law** Disciplinary proceedings

If a public university has to choose between competing narratives to resolve a case in a disciplinary proceeding, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder in order to provide procedural due process. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[16] **Constitutional Law** Disciplinary proceedings

Education Proceedings and review

Male public university student failed to sufficiently allege that he was entitled to legal representation in university disciplinary proceeding against him, or that such proceeding should have used a higher standard than a preponderance of the evidence, in support of procedural due process claim arising out of his expulsion after he was found to have committed sexual misconduct; full-scale adversarial hearings were not required, any violation of university's rules arising from failure to inform student of his right to counsel did not rise to level of procedural due process violation, and preponderance of evidence was appropriate standard of evidence in disciplinary proceedings alleging sexual assault. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[17] **Constitutional Law** Disciplinary proceedings

An accused student does not automatically have a right to legal representation in student disciplinary proceedings in order to satisfy procedural due process. U.S. Const. Amend. 14.

[18] **Constitutional Law** Disciplinary proceedings

Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Fourteenth Amendment Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity. U.S. Const. Amend. 14.

[19] **Civil Rights** Schools

Male public university student's right to a live hearing with respect to sexual misconduct allegations against him was not clearly established at time of disciplinary proceeding against student, and thus university employees conducting proceeding were entitled to qualified immunity on student's § 1983 due process claim against them in their individual capacities, arising out of student's expulsion after he was

found to have committed sexual misconduct against female classmate; student was notified of charges against him on multiple occasions, was able to see all evidence against him, and was given opportunity to present his side of story through a statement submitted to disciplinary board. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[20] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Government officials are immune from civil liability under § 1983 when performing discretionary duties, provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 42 U.S.C.A. § 1983.

[21] **Civil Rights** Defenses; immunity and good faith

Once a defendant raises qualified immunity in response to a § 1983 claim, the burden is on the plaintiff to demonstrate that the official is not entitled to qualified immunity by alleging facts sufficient to indicate that the government official's act in question violated clearly established law at the time the act was committed. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[22] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity is meant to prevent government officials from being held liable for reasonable mistakes of law, fact, or mixed questions of law and fact made while acting within their scope of authority. 42 U.S.C.A. § 1983.

[23] **Civil Rights** Government Agencies and Officers

First prong of the qualified immunity analysis in a § 1983 action asks whether a constitutional violation has occurred, that is, whether a violation could be made out on a favorable view of the parties' submissions. 42 U.S.C.A. § 1983.

[24] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

If a constitutional violation can be found in the parties' submissions in a § 1983 action, the second prong of a qualified immunity analysis examines whether the right was clearly established at the time of the deprivation of the constitutional right. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[25] **Civil Rights** Schools

Male public university student's right to cross-examine female classmate that accused him of sexual misconduct was not clearly established at time of disciplinary proceeding against him, and thus university employees that conducted investigation that led to student's expulsion were entitled to qualified immunity on his § 1983 due process claim; law in place at time indicated that disciplinary panel was not required to choose between believing student or classmate if student admitted critical facts against him, and employees accepted student's affirmations in response to allegations indicating he undressed classmate without her consent, had sexual intercourse with her, and knew or should have known that she could not have consented due to her level of intoxication as admissions. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[26] **Civil Rights** Discrimination against males

Male public university student failed to sufficiently allege a causal connection between gender bias and his expulsion, as required to support his Title IX erroneous outcome claim against university, arising out of disciplinary finding that student had committed sexual

misconduct against female classmate; while university employees had made statements that reflected a bias favoring complainants over respondents, this did not constitute bias in favor of females over males. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[27] **Civil Rights** Sex Discrimination

To survive a motion to dismiss a Title IX claim under the erroneous-outcome theory, a plaintiff must plead facts sufficient to (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a particularized causal connection between the flawed outcome and gender bias. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[28] **Civil Rights** Education

Allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome, combined with a conclusory allegation of gender discrimination, is not sufficient to survive a motion to dismiss a Title IX claim. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

[29] **Civil Rights** Sex Discrimination

Civil Rights Discrimination against males

A claim that a disciplinary system is biased in favor of alleged victims and against those accused of misconduct does not equate to gender bias required to support a Title IX erroneous outcome claim because sexual-assault victims can be both male and female. Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[30] **Education** Proceedings and review

Male public university student sufficiently alleged that university failed to inform him that he was entitled to legal representation during disciplinary proceedings against him, in violation of university's policies, as required to support student's breach of contract claim against university arising out of his expulsion following disciplinary finding that he had engaged in sexual misconduct against female classmate; university's sexual misconduct policy required university to inform student he was entitled to have an adviser attend meetings and interviews with him, which could have been an attorney, and student alleged that university and its employees failed to inform him of this.

[31] **Education** Proceedings and review

A student may raise breach of contract claims arising from a university's alleged failure to comply with its rules governing disciplinary proceedings.

[32] **Education** Proceedings and review

Appropriate question in the context of a student's breach of contract claim against a university that has allegedly failed to comply with its rules governing disciplinary proceedings is whether the proceedings fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard.

[33] **Education** Proceedings and review

Public university was entitled to governmental immunity under Michigan Governmental Tort Liability Act (GTLA) on male student's claims of negligence, negligence per se, and gross negligence under Michigan law, arising out of university's alleged failure to follow its own policies when conducting investigation, hearing, and appeal processes that resulted in student's expulsion based on finding that he had committed sexual misconduct against female classmate; student's claim did not fall within scope of exceptions to statutory presumption of immunity for university. Mich. Comp. Laws Ann. § 691.1407(1).

[34] **Education** Duties and Liabilities

Public Employment Particular torts

Public university employees were entitled to tort immunity under Michigan's Governmental Tort Liability Act (GTLA) on claims of negligence and negligence per se by male student, alleging employees acted negligently in investigating sexual misconduct complaint against him that led to his expulsion; student's allegations against employees fell within scope of employees' authority in their employment. Mich. Comp. Laws Ann. § 691.1407(2).

[35] **Education** Duties and Liabilities

Public Employment Particular torts

Male public university student failed to sufficiently allege claims of gross negligence under Michigan law against university employees, arising out of investigation and disciplinary process that led to his expulsion after he was found to have committed sexual misconduct against female classmate; while student alleged employee failed to give him a live hearing, an opportunity to cross-examine classmate, and a warning that he was entitled to counsel during disciplinary process, university policy did not provide for live hearing or cross-examination, and employees' failure to comply with policy requiring that student be advised he was permitted to have an adviser did not constitute grossly negligent behavior. Mich. Comp. Laws Ann. § 691.1407(8)(a).

Attorneys and Law Firms

***688** Adam Michael Taub, Miller Cohen PLC, Detroit, MI, David A. Nacht, NachtLaw, PC, Ann Arbor, MI, for Plaintiff.

Kurt P. McCamman, Sarah J. Hartman, Miller Canfield Paddock & Stone PLC, Kalamazoo, MI, for Defendants.

OPINION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

GORDON J. QUIST, UNITED STATES DISTRICT JUDGE

Plaintiff, John Doe, filed the instant case alleging that Defendants violated his constitutional and federal statutory rights, breached a contract that Plaintiff had with Defendant Northern Michigan University (NMU), and were negligent when Defendants expelled him from the university as a disciplinary sanction for sexual misconduct. Plaintiff argues that the sexual activity with his accuser, Jane Roe, was consensual. Plaintiff seeks both monetary damages and equitable relief.

Specifically, Plaintiff claims that Defendants Janet Koski and Donna Beauchaine, ***689** in their official and individual capacities, and Defendant Christine Greer in her official capacity only, violated Plaintiff's constitutional right to procedural due process (Count I). Plaintiff further claims that Defendant NMU violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, by discriminating against him as a male during the disciplinary process (Count II). Plaintiff also claims that Defendant NMU breached its contract with Plaintiff when Defendant NMU allegedly failed to follow its own policies, constructed policies that were unfair, and gave no rationale for its decision (Counts III, IV, and V). Finally, Plaintiff claims that Defendants NMU, Koski, and Beauchaine were negligent, negligent per se, and/or grossly negligent in their handling of Plaintiff's disciplinary action (Counts VI and VII [1]).

Defendants filed a motion to dismiss, stating that Plaintiff received all the process that was due in the context of a student disciplinary investigation; that Plaintiff cannot establish that Defendant NMU discriminated against him based on his gender when it concluded that he violated the Student Code; and that Defendants are entitled to governmental immunity. (ECF No. 6.) For the following reasons, the Court will grant in part and deny in part Defendants' motion to dismiss.

I. Background

The allegations in the Complaint, which the Court must accept as true, are as follows:

Plaintiff first met Roe in September 2016 when they both started working in a cafeteria on campus. The first day they met they started talking at work, continued talking after work, and eventually engaged in consensual sex that night. From that time until late October 2016, Plaintiff and Roe engaged in consensual sexual activity once or twice a week.

On October 30, 2016, Roe attended a pre-Halloween party without Plaintiff. When she was ready to leave the party, she texted Plaintiff to meet her at the party and walk her home. Plaintiff went to the party and walked Roe back to his dorm room. Roe did not seem drunk to Plaintiff; she was not slurring her words; and she could walk on her own. Plaintiff did not witness Roe consume alcohol or provide her with alcohol that night. When Plaintiff and Roe returned to Plaintiff's room, they engaged in oral and vaginal sex. Roe actively participated and at no point told Plaintiff "no" or to stop. Plaintiff asked Roe if he could take a video of Roe performing fellatio on him, and Roe agreed on the condition that Plaintiff not publicly post the video. So, Roe voluntarily performed fellatio on Doe knowing that it was being videoed. At all times during the sexual encounter, Roe was awake, coherent, alert, and fully functional, and even initiated the oral sex with Plaintiff.

After that night, Plaintiff and Roe continued communicating with each other via text message, having text conversations once to twice a month. At some point, Roe came to Plaintiff's room and told him that she had not wanted to have sex with him on October 30, 2016, and was too drunk to say anything. Plaintiff recalled the events differently but apologized. The two agreed to remain friends and laughed about the incident. They continued having text conversations after this conversation. During one text conversation, Roe asked Plaintiff to delete the video he had taken of Roe performing fellatio, and Plaintiff complied. Roe again confronted Plaintiff about what ***690** happened on October 30, 2016, via text message. In that text conversation, Roe admitted that Plaintiff had told her that he was unaware that she was drunk that night. Roe also stated that she saw Plaintiff as a friend.

During the summer or fall of 2017, Plaintiff invited Roe to see his new off-campus housing. Roe came over and, after talking for a couple of hours, Roe and Plaintiff again engaged in consensual sex. Plaintiff texted Roe two to three times over the following month or two, but Roe did not respond.

More than a year after the October 30, 2016, incident, on March 16, 2018, Roe initiated a formal investigation by NMU into the October 30, 2016, incident. Specifically, she alleged that, without her consent, Plaintiff undressed her, forced her to perform oral sex on him, and had penile/vaginal intercourse with her.

Associate Dean of Students Mary Brundage presented Plaintiff with the allegations against him. Plaintiff was shocked because he thought that he and Roe were still friends, they had engaged in consensual sexual activity after October 30, 2016, and he had not even attempted to contact Roe since December 2017 or January 2018. Brundage presented Plaintiff with a document giving him the option to affirm, deny, or state "no comment" for each allegation against him:

a. Undressed her without her consent;

b. Forced her to perform oral sex on him, knowing or that he should have known that she could not consent due to her level of intoxication; and

c. Had penile/vaginal intercourse with her without her consent, knowing or that he should have known that she could not consent due to her level of intoxication.

(Complaint ¶ 64, ECF No. 1 at PageID.10.)

Ms. Brundage also informed Plaintiff that his punishment could range from a verbal warning to expulsion. Plaintiff affirmed the first and third allegations but denied the second allegation of forcing Roe to perform oral sex on him. (*Id.* ¶ 81, PageID.16.) Plaintiff thought that affirming the allegations would lead to a lesser punishment and that, once he explained his side of the story, he may not receive any punishment at all. During the exchange between Plaintiff and Ms. Brundage, Plaintiff attempted to tell Brundage his version of events, but she interrupted Plaintiff and told him that he would be able to tell his side of the story to the investigator at a later time.

On March 19, 2018, Defendant Beauchaine, who was assigned as the investigator, interviewed Roe. Roe stated that on October 30, 2016, she was drinking vodka screwdrivers and Smirnoff Ice but could not recall how much she drank. She contacted Plaintiff to come and get her. She recalled going to Plaintiff's room and going to the futon.

According to Plaintiff, the remainder of Roe's statement contained several inconsistencies:

- Roe alleged that she told Plaintiff that she did not want to do anything, but she also claimed that she was unable to move, form words, or talk.

- She stated that she did not recall having oral or penetrative sex with Plaintiff, but she also alleged that she never gave Plaintiff permission for either act and recalled Plaintiff being on and in her.

- She claimed that she did not recall being naked until she ran to the bathroom to pee, but she later stated ***691** that she "stumbled" to the bathroom naked to pee and could not recall if that was before, during, or after the assault.

- She alleged that she did not know about the video of her performing oral sex on Plaintiff until almost a year later when Plaintiff informed her that he had it. She claimed that the video showed that her eyes were glazed over.

- She admitted to staying in touch with Plaintiff after the alleged assault and that they had been physically intimate on one occasion after the incident. On March 21, 2018, Plaintiff met with Defendant Beauchaine for his interview. Defendant

Beauchaine again presented Plaintiff with the charges against him. Plaintiff explained his actions on the night of October 30, 2016, as described above. According to Plaintiff, his interview testimony was inconsistent with his prior affirmation of two of the allegations against him. Defendant Beauchaine did not ask Plaintiff why he had affirmed two of the allegations against him if he disputed that Roe was too drunk to consent and claimed that Roe had actively participated in the sexual activity. Plaintiff alleges that Defendant Beauchaine was hostile throughout the interview, used a very aggressive tone, and used language suggesting that she presumed his guilt.

On March 28, 2018, Plaintiff met with the Title IX Coordinator, Defendant Koski, to review the investigator's draft report, which contained Roe's statement, Plaintiff's statement, and text messages between Plaintiff and Roe. The text messages included a conversation regarding the October 30, 2016, incident, in which Plaintiff denied knowing that Roe was drunk that night, Roe admitted to still thinking of Plaintiff as a friend, and Plaintiff stated that Roe came on to him and that Roe did not tell him "no." Defendant Koski instructed Plaintiff to comment on any errors in the report. Two days later, Roe reviewed the draft report. She commented that she recalled bits and pieces of vaginal intercourse and peed afterward to avoid a urinary tract infection.

Plaintiff was not given the opportunity to respond to Roe's statement; he could only review it and comment on the accuracy of his own statement. He was not given a live hearing. He was not given an opportunity to question Roe or present witnesses. Defendant Beauchaine interviewed no witness other than Plaintiff and Roe.

On April 2, 2018, Defendant Beauchaine finalized her report. On April 6, 2018, Defendant Koski informed Plaintiff that the Sexual Misconduct Review Board (SMRB) had met the previous day to review the final investigation report. Based on a preponderance of the evidence standard, the SMRB determined that there was insufficient evidence to indicate use of force related to Roe performing oral sex on Plaintiff. The SMRB, however, found that Plaintiff had affirmed the other two charges, and based on those findings, Plaintiff would be expelled effective May 5, 2018. The SMRB provided no further rationale for its findings or level of sanction.

On April 27, 2018, Defendant Koski informed Plaintiff that the SMRB had reconvened to review the video of Roe performing oral sex on Plaintiff. Based on the video, the SMRB revised its findings and found Plaintiff not responsible for the charge related to oral sex. The SMRB reasoned that Plaintiff had not forced Roe to perform oral sex on him but still found that Plaintiff should have known that Roe could not consent due to being intoxicated. In addition, the SMRB stated that it did not find any evidence, including the video, to change Plaintiff's affirmation of the other ***692** charges. The SMRB also upheld the expulsion.

Under NMU's Sexual Misconduct Policy, the university only considers appeals based on new information sufficient to alter a decision or other relevant facts not brought up in the initial investigation because the individual appealing did not know such information or facts at the time of the investigation. On May 9, 2018, Plaintiff sent two appeal letters to Defendant Koski. The first letter stated that the disciplinary procedures violated his due process rights and Title IX and that the great weight of the evidence demonstrated that Plaintiff did not sexually assault Roe despite his initial affirmation of the allegations. The second letter argued that the punishment imposed was too severe. Both appeals were denied.

II. Standard of Review

Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not required, but "a plaintiff's obligation to

provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957)). The court must accept all of the plaintiff's factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). Courts may also consider various documents without converting the motion to a motion for summary judgment. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir.2008) (citation omitted).

The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Although the plausibility standard is not equivalent to a " 'probability requirement,' ... it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

III. Procedural Due Process

[1] Plaintiff brings his procedural due process claims pursuant to 42 U.S.C. § 1983 against Defendants Beauchaine and Koski, in their individual and official capacities, and against Defendant Greer, in her official capacity only. For the reasons stated below, Plaintiff's official capacity claims may proceed, but the Court will dismiss Plaintiff's individual capacity claims because Defendants are entitled to qualified immunity.

Official Capacity Claims

[2] **[3]** **[4]** **[5]** "[A] suit against a state official in his or her official capacity is not a suit ***693** against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). Thus, generally, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," and are not subject to suit under 42 U.S.C § 1983. *Id.* That being said, *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), creates a limited exception to sovereign immunity in which "a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law," *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008), and "claims for reinstatement are prospective in nature and appropriate subjects for *Ex parte Young* actions." *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002). Accordingly, Plaintiff can pursue a claim against Defendants Beauchaine, Koski, and Greer in their official capacities that would grant Plaintiff reinstatement[2] if his factual assertions, accepted as true, establish a plausible violation of his procedural due process rights. *See Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974 (stating that a plaintiff has to allege "enough facts to state a claim for relief that is plausible on its face" to avoid dismissal).

[6] The Court finds that Plaintiff has alleged a plausible violation of his procedural due process rights to move forward on his official capacity claims. To determine whether a favorable view of Plaintiff's submissions would indicate a procedural due process claim, the Court has to decide whether Plaintiff had a liberty or "property interest that entitled h[im] to due process protection," and, if so, "what level of process was due." *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 765 (6th Cir. 2010).

The Sixth Circuit has stated that "significant disciplinary decisions," such as suspension or expulsion, "clearly implicate[ ] a protected property interest, and allegations of sexual assault may impugn a student's reputation and integrity, thus implicating a protected liberty interest." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) (internal quotation marks and alterations omitted). "Because the Due Process Clause applies, 'the question remains what process is due.' " *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

[7] **[8]** **[9]** In 2005, the Sixth Circuit said that—despite the significant private interest that derives from "the lifelong impact that expulsion can have on a young person"—a federal court's review of a student disciplinary decision is "circumscribed." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005). The Court is "limited to determining whether the procedures used by [the university] were constitutional." *Id.* Therefore, the review consists of "consider[ing] the additional procedures requested, any error-reducing benefit those procedures might have, and the burden on [the university] of adding those additional procedures." *Id.* In any event, "there are two basic due process requirements: (1) notice, and (2) an opportunity to be heard." *Id.* at 634.

[10] Here, Plaintiff claims that he was entitled to the following additional procedures: (1) a live hearing; (2) an opportunity to cross-examine his accuser, Roe; (3) legal ***694** representation; and (4) a higher standard than preponderance of the evidence.

The Supreme Court found that, in the context of student disciplinary actions, students are entitled to "some kind of notice" and "some kind of hearing." *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738, 42 L.Ed.2d 725 (1975). In *Goss*, the Supreme Court analyzed the process due when a student was subjected to a 10-day suspension. In that context, the Supreme Court stated that the student was entitled to "oral or written notice of the charges against him and, if he denie[d] them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581, 95 S. Ct. at 740. The Supreme Court also noted that harsher sanctions, such as expulsions, "may require more formal procedures." *Id.* at 584, 95 S. Ct. at 741. The Sixth Circuit has further stated: "While the exact outlines of process may vary, universities must at least provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker." *Univ. of Cincinnati*, 872 F.3d at 399–400.

[11] **[12]** "Evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness 'to stand face to face with the [fact finder] in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " *Id.* at 402 (quoting *Mattox v. United States*, 156 U.S. 237, 242–43, 15 S. Ct. 337, 339, 39 L.Ed. 409 (1895)). An accused student is entitled to "an opportunity to explain his version of the facts" to the "disciplinarian" or "decisionmaker, which means the official responsible for the discharge." *Duchesne v. Williams*, 849 F.2d 1004, 1007 (6th Cir. 1988) (internal quotation marks and citations omitted).

[13] **[14]** **[15]** Yet, "defendants are not required to facilitate witness questioning at every nonacademic misconduct hearing." *Univ. of Cincinnati*, 872 F.3d at 405. Cross-examination is " 'essential to due process' only where the finder of fact must choose 'between believing an accuser and an accused,' " but the "panel need not make this choice if the accused student admits the 'critical fact[s]' against him." *Id.* (quoting *Flaim*, 418 F.3d at 641). "[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

Plaintiff has made out a plausible claim that he was entitled to a live hearing with an opportunity to cross-examine his accuser. Although he was able to present his version of the facts to Defendants Beauchaine and Koski, he was not able to testify directly to the SMRB, which was the body that was ultimately responsible for his discharge. Moreover, although still unclear that Plaintiff would prevail on this question in later proceedings, Plaintiff has plausibly argued that he was entitled to some form of cross-examination of Roe. While Plaintiff's case differs from the line of cases he cites, in that, during his first interview, he affirmed two of the allegations against him, Plaintiff's attempt to explain his affirmations to Ms. Brundage was rebutted, and Plaintiff later contradicted Roe's version of events in his interview. Some form of witness questioning before the decision-maker would have allowed the SMRB to "choose between competing narratives" in making its findings. *Id.*

***695** **[16]** **[17]** **[18]** Plaintiff's other proposed alternative procedures have not reached the same level of plausibility. An accused student does not automatically have a right to legal representation in student disciplinary proceedings. The Sixth Circuit has recognized only two scenarios in which an accused student *may* have a constitutional right to counsel in an academic disciplinary proceeding: (1) if the hearing is unusually complex or (2) when the university uses an attorney in the investigation or decision-making process. *Flaim*, 418 F.3d at 640. Neither scenario is present here. "Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and

conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity." *Id.* at 640-41.

Plaintiff appears to argue not just that he was entitled to have representation of counsel but also that he was entitled to have Defendants inform him that he had a right to counsel. Plaintiff has pointed to no case that holds that a school has a constitutional duty to inform a student of a right to counsel even if such a right exists. To the extent Plaintiff argues that Defendants were required to inform him as a matter of school policy, violation of school policy does not rise to the level of a procedural due process violation.

> It is not every disregard of its regulations or assurances by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules or assurances results in a procedure which itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

Id. at 640 (internal quotation marks, citation, and alterations omitted).

Plaintiff also contends that Defendants should use a higher standard than preponderance of the evidence in student disciplinary proceedings alleging sexual assault. However, the Sixth Circuit has approved of the use of the preponderance of the evidence standard in student disciplinary proceedings alleging sexual assault. *Doe v. Univ. of Kentucky*, 860 F.3d 365, 368 n.2 (6th Cir. 2017).

Individual Capacity Claims

[19] **[20]** **[21]** **[22]** Plaintiff alleges the same violations of procedural due process against Defendants Beauchaine and Koski in their individual capacities. [3] Defendants argue that they are entitled to qualified immunity. "Government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties, provided 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Simmonds v. Genesee Cty.*, 682 F.3d 438, 443 (6th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). "Once a defendant raises qualified immunity, the burden is on the plaintiff to demonstrate that the official is not entitled to qualified immunity by alleging facts sufficient to indicate that the ***696** government official's act in question violated clearly established law at the time the act was committed." *Id.* at 444 (internal quotation marks, citations, and alterations omitted). In all, qualified immunity is meant to prevent government officials from being held liable for "reasonable mistakes of law, fact, or mixed questions of law and fact made while acting within their scope of authority." *Id.* at 443.

[23] **[24]** "The first prong of the qualified immunity analysis asks whether a constitutional violation has occurred, that is, whether 'a violation could be made out on a favorable view of the parties' submissions.' " *Pucci*, 628 F.3d at 765 (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L.Ed.2d 272 (2001)). "If a constitutional violation can be found, the second prong of a qualified immunity analysis examines whether the right was clearly established at the time of the deprivation." *Id.* at 767 (internal quotation marks omitted). The Supreme Court has held that, in determining whether a right was clearly established, liability attaches "only if the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *United States v. Lanier*, 520 U.S. 259, 270, 117 S. Ct. 1219, 1227, 137 L.Ed.2d 432 (1997) (internal quotation marks, citation, and alterations omitted). Here, Plaintiff has plausibly claimed that due process dictates a live hearing and cross-examination of Roe, but the Court finds that Defendants did not violate Plaintiff's *clearly established* rights, and are therefore entitled to qualified immunity.

In terms of a live hearing, the Supreme Court has simply stated that students in disciplinary proceedings are entitled to "some kind of notice" and "some kind of hearing." *Goss*, 419 U.S. at 579, 95 S. Ct. at 738. However, in *Goss*, the Supreme Court specifically stated that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, *if he denies them*, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 565, 95 S. Ct. at 740 (emphasis added). While *Goss* only addressed a short suspension of less than 10 days, in

that context, the Supreme Court concluded that it is only upon denial of charges that a student is entitled to an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Since *Goss*, the Sixth Circuit has stated that "universities must at least provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker." *Univ. of Cincinnati*, 872 F.3d at 399–400 (internal quotation marks omitted). However, in March to April 2018, it was not entirely clear that a student was entitled to a live hearing. [4] In this case, Plaintiff was notified of the charges on multiple occasions, he was able to see all of the evidence against him (Roe's interview and the text messages), and he was given the opportunity to present his side of the story through a statement submitted to the SMRB. Furthermore, the Sixth Circuit in *University of Cincinnati* required that the student be given an "opportunity to share his version ***697** of events ... at 'some kind of hearing,' " *id.* at 400 (quoting *Goss* 419 U.S. at 579, 95 S. Ct. at 738), only after the student had denied responsibility for the allegations. *Id.* at 397. Plaintiff in this case, at least initially, did not deny the charges when presented with the allegations. Although a witness should appear in front of the fact-finder when credibility is an issue, *id.* at 402, after Plaintiff affirmed the charges, university employees may have believed that credibility was not an issue.

[25] Turning to the question whether Plaintiff was entitled to cross-examine his accuser, the law in place at the time Defendants investigated and disciplined Plaintiff's actions was that cross-examination was needed only "where the finder of fact must choose 'between believing an accuser and an accused,' " but the "panel need not make this choice if the accused student admits the 'critical fact[s]' against him." *Univ. of Cincinnati*, 872 F.3d at 405 (quoting *Flaim*, 418 F.3d at 641). While there may be some distinction in the legal context between affirming charges and admitting critical facts, Defendants' mistake in accepting the affirmations despite other contrary evidence was reasonable under the circumstances. In particular, the first and third allegations charged that Plaintiff "[u]ndressed [Roe] without her consent" and "[h]ad penile/vaginal intercourse with [Roe] without her consent, knowing or that he should have known that she could not consent due to her level of intoxication." (Compl. ¶ 64, ECF No. 1 at PageID.10.) An affirmation of those allegations could have reasonably indicated to Defendants that Plaintiff acknowledged that: (1) Plaintiff undressed Roe without her consent; (2) Plaintiff had penile/vaginal intercourse with Roe; and (3) Plaintiff knew or should have known that Roe could not consent due to her level of intoxication. Importantly, Defendants found Plaintiff responsible only for the charges that he affirmed.

Plaintiff later gave a statement inconsistent with his affirmations. However, it was only after the disciplinary proceedings of this case that the Sixth Circuit stated in *Baum*, 903 F.3d at 578, that cross-examination is required if the fact-finder must "choose between competing narratives," and even in *Baum*, the plaintiff had not affirmed any of the allegations. Thus, the right to cross-examine an accuser after the accused affirmed the allegations was not a right that was clearly established at the time Defendants sanctioned Plaintiff.

IV. Title IX

[26] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. Plaintiff alleges that Defendant NMU violated Title IX because its investigation and punishment were motivated by gender bias against Plaintiff as a male. However, Plaintiff has not presented a viable claim under Title IX.

The Sixth Circuit has "recognized at least four theories of Title IX liability in cases alleging gender bias in university disciplinary proceedings: (1) erroneous outcome, (2) selective enforcement, (3) deliberate indifference, and (4) archaic assumptions." *Doe v. Univ. of Dayton*, 766 Fed.Appx. 275, 280 (6th Cir. 2019). Plaintiff proceeds only under an "erroneous outcome" theory, and "[b]ecause Doe's core argument is that he was subject to unfair procedures that were biased against men, this is the Title IX theory that most naturally fits his allegations." *Id.*

[27] **[28]** "To survive a motion to dismiss under the erroneous-outcome theory, ***698** a plaintiff must plead facts sufficient to (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a particularized causal connection between the flawed outcome and gender bias." *Baum*, 903 F.3d at 585 (internal quotation marks and ellipses omitted). "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to

dismiss." *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016) (internal quotation marks omitted).

[29] Here, although the Plaintiff has plausibly alleged that his proceeding was procedurally flawed, Plaintiff has failed to show a particularized causal connection between the allegedly flawed outcome and gender bias. Plaintiff's complaint merely alleges that Defendants showed a bias in favor of alleged victims of sexual assault who are often female, and against alleged perpetrators of sexual assault who are often male. (*See* Pl.'s Resp., ECF No. 10 at PageID.216-17; Compl. ¶¶ 187, 190-93.) But a claim that a disciplinary system "is biased in favor of alleged victims and against those accused of misconduct ... does not equate to gender bias because sexual-assault victims can be both male and female." *Id.* at 453.

Plaintiff cites *Baum*, 903 F.3d at 586-87, to argue that a Title IX claim survives a motion to dismiss if a plaintiff alleges that (1) a defendant credited all female testimony over all male testimony and (2) the defendant faced pressure to punish accused males. However, the facts of *Baum* differed substantially from the facts of this case. In *Baum*, the investigation included testimony from several witnesses (more than twenty), instead of just the complainant and accused. The decision to expel the accused student was made by an appeal board, which credited testimony only from female witnesses, despite making all of its "credibility findings on a cold record." *Id.* at 586. The university was facing specific pressure to punish accused males because the federal government was investigating whether the university's process for responding to allegations of sexual misconduct discriminated against women, and the media sharply criticized the university for its response to female complainants. *Id.*

These different facts make *Baum* inapposite to this case. Here, Plaintiff has not shown that females in general are found credible, just that his female accuser was found credible. Moreover, Plaintiff points to general pressure that Defendants faced from campus victims' rights advocates (Compl. ¶ 196), but that is not the same as pressure to punish males because the federal government is investigating the university for discrimination against females.

In fact, Plaintiff's allegations are akin to those in the recent Sixth Circuit case, *Doe v. University of Dayton*, 766 Fed.Appx. 275 (6th Cir. 2019). In that case, the Sixth Circuit found that "generalized, conclusory statements" that accusers, who are often female, are treated more favorably than accused, who are often male, "do not suffice to allege a *particularized* causal connection between gender bias and Doe's suspension." *Id.* at 281 (emphasis in original).

Plaintiff argues that he has demonstrated a particularized causal connection because he pointed to specific statements by Defendant Beauchaine that indicated that she credited Roe over Plaintiff, and that allegations of gender bias sufficient to survive a motion to dismiss may include "statements by pertinent university officials." *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018). The flaw in Plaintiff's argument is that all of his specific factual allegations point to a bias in favor of a ***699** complainant over a respondent, rather than a bias in favor of females over males. And again, even if the majority of respondents are male, that is not enough to show gender bias. *Univ. of Dayton*, 766 Fed.Appx. at 281 (stating that "it is not enough to allege that in all of one university's sexual assault investigations during the relevant period, 'the accused was male and was ultimately found responsible' ") (quoting *Cummins*, 662 F. App'x at 453).

V. Breach of Contract, Promissory Estoppel

[30] Plaintiff's breach of contract, breach of implied contract, and promissory estoppel claims center around his general claim that Defendant NMU failed to follow its policies in the Student Handbook, in particular its Sexual Misconduct policies.

[31] **[32]** "[A] student may raise breach of contract claims arising from a university's alleged failure to comply with its rules governing disciplinary proceedings." *Anderson v. Vanderbilt Univ.*, 450 F. App'x 500, 502 (6th Cir. 2011). However, the appropriate question in the context of these breach of contract claims is "whether the proceedings fell within the range of reasonable expectations of one reading the relevant rules, an objective reasonableness standard." *Faparusi v. Case W. Reserve Univ.*, 711 F. App'x 269, 277 (6th Cir. 2017) (internal quotation marks omitted).

Here, Plaintiff argues generally that his proceedings were unfair, in violation of Defendants "duty ... to ensure that the proceedings against Plaintiff were conducted with basic fairness." (Compl. ¶ 218, ECF No. 1 at PageID.41.) But, "[i]n light of the governing objective standard, we may not accept as sufficient Doe's subjective claim of an unfair proceeding that reached the wrong conclusion. Nor may we derive an ideal of fairness by analogy to the procedural protections

applicable in courts of law." *Univ. of Dayton*, 766 Fed.Appx. at 285.

Thus, the Court will look only to Plaintiff's specific allegations of breach in comparison to applicable NMU policies. Plaintiff has alleged that Defendant NMU failed to follow its policies in three ways: (1) by not actually using a preponderance of the evidence standard;[5] (2) by not advising him of his right to legal representation; and (3) by failing to provide rationale for its decision. However, according to Plaintiff's own allegations, the SMRB found Plaintiff responsible under a preponderance of the evidence standard (correct standard) for the charges that he had affirmed (rationale), thus Defendant NMU provided procedures consistent with its policies. (Compl. ¶ 118.)

The only arguable breach of contract was the failure to inform Plaintiff that he could have legal representation in connection with the proceedings. Plaintiff alleged that Defendants failed to inform him that he had a right to have an advisor or attorney present during the investigation, contrary to NMU policy. In support of this allegation, Plaintiff attached NMU's Sexual Misconduct Policy from the relevant time frame. (ECF No. 17-2.) According to the Sexual Misconduct Policy at section 8.8:

> The Respondent will be informed of the right to:
>
> • have one adviser of their choosing attend meetings and interviews with ***700** them, which may include an attorney (at their own expense), colleague, or other person they identify; the adviser may not be a witness or a material party in the investigation; the adviser is limited to advising the complainant or respondent, and may not speak for the party they are advising; their role is to provide support and assistance[.]

(*Id.* at PageID.255.)

Considering the policy cited by Plaintiff, the Court finds that Plaintiff has alleged a plausible breach of contract based on Defendants failure to inform him that he could have an adviser, which could be an attorney, present for meetings and interviews in connection with his disciplinary proceedings.

VI. Negligence, Negligence Per Se, Gross Negligence

[33] Plaintiff alleges that Defendants were negligent, negligent per se, and grossly negligent in failing to follow NMU policy and in conducting the investigation, hearing, and appeal processes in a way that was indifferent to the truth of the allegations. However, Plaintiff fails to address the effect of the Governmental Tort Liability Act (GTLA) on his negligence-based claims.

Under the GTLA, Defendant NMU "is immune from tort liability" so long as it was "engaged in the exercise or discharge of a governmental function." Mich. Comp. Laws § 691.1407(1); *see also* § 691.1401(g) (defining the entities entitled to governmental immunity as including public universities and colleges). Defendant NMU enjoys a presumption of immunity unless Plaintiff establishes that his claim falls into one of the few statutory exceptions, which Plaintiff has not done here. *Mack v. City of Detroit*, 467 Mich. 186, 201, 649 N.W.2d 47, 55–56 (2002).

[34] Likewise, Defendants Beauchaine, Koski, and Greer are entitled to tort immunity under GTLA as employees of Defendant NMU as long as they were acting within the scope of their authority. Mich. Comp. Laws § 691.1407(2). Here, Plaintiff alleges that Defendants were negligent in their investigation and disposition of the sexual misconduct allegations against Plaintiff. Defendants' conduct falls within the scope of their authority, and therefore, Defendants are immune from Plaintiff's negligence and negligence per se claims.

[35] As individual employees, Defendants Beauchaine, Koski, and Greer are not protected from liability for grossly negligent behavior. Mich. Comp. Laws § 691.1407(2)(c). However, Plaintiff's conclusory allegations of gross negligence (Compl. ¶¶ 235-36) are not sufficient to survive a motion to dismiss. As discussed at length above, Defendants' only arguably violative conduct included: (1) failure to give Plaintiff a live hearing; (2) failure to afford Plaintiff the opportunity to cross-examine his accuser; and (3) failure to inform Plaintiff of the right to counsel during the disciplinary process. NMU policy did not provide for a live hearing or cross-examination, and the Court finds that operating within school policy does not demonstrate grossly negligent behavior. Additionally, the Court finds that Defendants' failure to inform Plaintiff of a right to have an adviser present, who may be an attorney, is not grossly negligent behavior. Defendants did not deny Plaintiff the opportunity to have an adviser present but rather failed to inform Plaintiff of that opportunity. *See* Mich. Comp. Laws § 691.1407(8)(a) (defining "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an

injury results"). Thus, Plaintiff's gross negligence claim will also be dismissed.

*701 VII. Conclusion

For the foregoing reasons, Defendants' motion to dismiss (ECF No. 6) will be granted in part and denied in part.

A separate order will follow.

All Citations

393 F.Supp.3d 683, 369 Ed. Law Rep. 790

Footnotes

1 The Complaint refers to two separate counts as Count VI, but in this Opinion, the Court will refer to the final count alleging gross negligence as Count VII.

2 In his Relief Requested, Plaintiff also asks this Court to order Defendants to remove the Complaint, Investigative Report, and sanctions from Plaintiff's academic file, and enter an injunction prohibiting any further acts by Defendants that would violate Plaintiff's rights. (ECF No. 1 at PageID.46.)

3 Plaintiff additionally claims in his response to Defendants' motion to dismiss that Defendants violated his procedural due process rights because his admissions to the charges were not knowing and voluntary when he affirmed the allegations in a state of nervousness and hoping for lesser punishment. This claim does not appear in the Complaint. Nevertheless, the claim fails on the merits because Plaintiff has pointed to no caselaw to support his contention that admissions must be knowing and voluntary in the context of a student disciplinary proceeding; all of his citations refer to criminal law standards, which are inapplicable in this context.

4 While the Sixth Circuit requires a university to give an accused student "an opportunity to present his side of the story *before* an unbiased decision maker," *Univ. of Cincinnati*, 872 F.3d at 399–400 (emphasis added), "before" can mean "in the presence of" or "[u]nder the consideration or jurisdiction of." American Heritage Dictionary of the English Language (5th ed. 2011).

5 Plaintiff argues that if Defendants had used a preponderance of the evidence standard, they would have reached a different result. However, that allegation is merely "Doe's subjective claim of an unfair proceeding that reached the wrong conclusion," which is not sufficient to establish a breach of contract claim under the prevailing objective standard. *Univ. of Dayton*, 766 Fed.Appx. at 285.

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United States District Court, C.D. California.

Jane DOE, Plaintiff,
v.
PASADENA HOSPITAL
ASSOCIATION, LTD. et al., Defendants.

Case No. 2:18-cv-09648-ODW (MAAx)
|
Signed 03/31/2020

Attorneys and Law Firms

Kevin T. Barnes, Gregg Lander, Law Offices of Kevin T. Barnes, Joseph Tojarieh, Tojarieh Law Firm PC, Los Angeles, CA, for Plaintiff.

Cherie L. Lieurance, N. Denise Taylor, Taylor DeMarco LLP, Los Angeles, CA, for Defendant Pasadena Hospital Association, Ltd.

Zachary Schwake, Law and Brandmeyer LLP, Pasadena, CA, for Defendant Patrick Sutton.

Katherine T. Weadock, Marilyn R. Moriarty, Matthew K. Izu, Lewis Brisbois Bisgaard and Smith LLP, San Diego, CA, for Defendant the Medical Staff of Huntington Memorial Hospital.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND STRIKE FIRST AMENDED COMPLAINT [34] [46] [47] [50]

OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Defendants the Pasadena Hospital Association, LTD. d/b/a Huntington Memorial Hospital ("Hospital"), Doctor Patrick Sutton ("Sutton"), and the Medical Staff of Huntington Memorial Hospital ("Medical Staff") (collectively "Defendants") move to dismiss and strike Plaintiff's First Amended Class Action Complaint ("Motions"). (ECF Nos. 34, 46, 47, 50.) For the reasons discussed below, the Court **GRANTS** Defendants' Motions. [1]

II. BACKGROUND

On January 10, 2019, Plaintiff Jane Doe ("Plaintiff"), on behalf of herself and all others similarly situated, filed a First Amended Class Action Complaint ("FAC") against Defendants. (FAC, ECF No. 21.) She brings this nationwide class action on behalf of individuals who were sexually abused, harassed, and molested by Sutton while they were patients in the care of Sutton, Hospital, and Medical Staff. (FAC ¶¶ 3, 72.) As part of her nationwide class action suit, Plaintiff alleges that there are thousands of class members. (FAC ¶ 75(c).)

Since 1989, Sutton has worked as an obstetrician-gynecologist for Hospital and Medical Staff. (FAC ¶ 24.) Hospital is a California corporation and owner of the Huntington Memorial Hospital ("HMH"). (FAC ¶ 52.) Medical Staff is responsible for the quality of medical care at HMH, and subject to the authority of Hospital's Board of Directors. (FAC ¶ 54.)

Plaintiff alleges that, between 2008 and 2010, Sutton examined her approximately six times and she "immediately got the impression that [Sutton] was aggressively flirting with her, and that impression never ceased." (FAC ¶¶ 1–2, 7.) During each medical examination: Sutton made an aggressive and intense inspection of Plaintiff's body; Sutton would touch Plaintiff's breasts; Sutton would make grossly inappropriate remarks while his fingers were inserted in Plaintiff's vagina; a chaperone was never present; and Sutton never wore gloves. (FAC ¶¶ 4–8.)

During Plaintiff's first examination in 2008, Sutton did not wear gloves, fingered her vagina aggressively and inappropriately, squeezed her breasts extremely hard, and told her he wanted "to make sure milk comes out." (FAC ¶ 9.) Sutton also told her that "[i]f you were not my patient, I would fuck you," and asked "[i]f you were not my patient, would you fuck me?" (FAC ¶ 10.) On the same day, Plaintiff called Hospital "and asked with whom she could file a claim regarding Dr. Sutton's behavior." (FAC ¶ 11.) Plaintiff was told to visit Sutton the next day, and again, she endured much of the same conduct but this time the exam was so "aggressive and prolonged" that Plaintiff said "[w]hat the hell was THAT!?" (FAC ¶¶ 12–13.)

Two years later, Sutton again examined Plaintiff and repeated much of the same conduct, Plaintiff states that during an examination, Sutton made "her feel like he was 'banging' her vagina with his fingers," told her that she had "a nice vagina and asshole," and a few days later, he again asked "if she would fuck him." (FAC ¶¶ 15–16.) At another visit, Sutton squeezed Plaintiff's breasts and nipples so hard that she said, "I have never been to an OB and been felt up like this," to which Sutton replied, "[o]h, this just part of the exam." (FAC 18.) Plaintiff further alleges that Sutton misrepresented that his conduct was for a legitimate medical purpose and/or conformed to accepted medical practice, thereby concealing that Plaintiff's had a cause of action against him. (FAC ¶ 65). Plaintiff alleges that she placed trust in Sutton as a physician working for a credible hospital, but nevertheless "suspected that his behavior was strange." (FAC ¶ 22.)

***2** Plaintiff's suspicions were later confirmed. For example, a patient named Amanda told Plaintiff that Sutton was always inappropriate with her and even attempted to kiss her. (FAC ¶ 20.) In 2014, an unnamed gynecologist at Hospital told Plaintiff that "everyone knows that he is a sick bastard and the hospital has not done anything." (FAC ¶ 21.) However, Plaintiff alleges that she only became of aware of her causes of actions in October 2018, when the L.A. Times published a report about Sutton's misconduct. (FAC ¶ 70.)

Plaintiff further alleges that Hospital and Medical Staff not only failed to take appropriate steps to protect Plaintiff from Sutton's misconduct, worse, they affirmatively concealed Sutton's sexual abuse for decades. (FAC ¶¶ 43–44, 68.) For example, Hospital and Medical Staff "implemented various measures to conceal Sutton's actions," which included: permitting him to remain in a position of authority and trust, scheduling patients for gynecological examinations with him, and granting him unfettered and unsupervised access to patients. (FAC ¶ 68.)

Defendants now move to dismiss the FAC and strike Plaintiff's class action claims. As Defendants' arguments overlap substantially, the Court addresses the Motions together.

III. LEGAL STANDARD

Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). "To survive a motion to dismiss ... under Rule 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)"—a short and plain statement of the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *see also* Fed. R. Civ. P. 8(a)(2). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (citing *Twombly*, 550 U.S. at 555).

Whether a complaint satisfies the plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. A court is generally limited to the pleadings and must construe "[a]ll factual allegations set forth in the complaint ... as true and ... in the light most favorable to [the plaintiff]." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

IV. DISCUSSION

Parties move and oppose on various grounds; however, the Court limits the discussion to whether tolling saves Plaintiff's claims and whether Plaintiff has standing to assert class actions claims, as the Court finds these issues dispositive. Accordingly, the Court now turns to these two legal disputes.

A. Statute of Limitations and Tolling

Defendants assert that all of Plaintiff's claims are time-barred and no tolling theory applies. (*See* Hospital's Mot. to Dismiss ("Hospital's Mot."), ECF No. 46; Medical Staff's Mot. to Dismiss ("Medical Staff's Mot."), ECF No. 34; Sutton's Mot. to Dismiss ("Sutton's Mot."), ECF No. 50.) However, Plaintiff argues that the doctrines of fraudulent concealment and delayed discovery toll all her claims. (*See* Pl.'s Opp'n to Hospital's Mot. ("Opp'n Hospital"), ECF No. 53; Pl.'s Opp'n to Medical Staff's Mot. ("Opp'n Medical Staff") ECF No. 56; Pl.'s Opp'n to Sutton's Mot. ("Opp'n Sutton") ECF No. 55.)

***3** Generally, a statute of limitations does not begin to run until a cause of action accrues, which occurs at "the time when the cause of action is complete with all of its elements." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005). The discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Id.* at 807. Whereas, fraudulent concealment tolls the applicable statute of limitations for the period during which the plaintiff does not discover and could not reasonably discover her claim due to "the defendant's fraud in concealing a cause of action against him." *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931 (1994).

The majority of Plaintiff's claims are subject to a three-year limitations period, except for her "unfair competition or business practices" claim, which is subject to a four-year limitations period. [2] Here, Plaintiff alleges Sutton sexually molested her from 2008 to 2010, accordingly, without the benefit of tolling the accrual date for her claims is 2010. *Fox*, 35 Cal. 4th at 806 (a cause of action accrues at "the time when the cause of action is complete with all of its elements.") Therefore, Plaintiff was required to assert her claims between 2013 and 2014. However, Plaintiff argues that both fraudulent concealment and the delayed discovery rule tolls the statute of limitations.

1. Fraudulent Concealment

Plaintiff asserts the doctrine of fraudulent concealment tolls the statute of limitation on her claims for two reasons. First, Sutton concealed the existence of Plaintiff's claims against all Defendants by misrepresenting that his conduct was for a legitimate medical purpose and/or conformed to accepted medical practice. (Opp'n Sutton 10.) Second, Hospital and Medical Staff took affirmative action to conceal Sutton's propensity to sexually abuse female patients and his past sexual abuses. (Opp'n Medical Staff 6–10; Opp'n Hospital 9–12; Opp'n Sutton 12.) Accordingly, Plaintiff asserts that the doctrine of fraudulent concealment tolls all of her claims. (Opp'n Sutton 11.) However, Defendants argue that fraudulent concealment does not toll Plaintiff's claims because she had actual or presumptive knowledge of facts sufficient to place her on inquiry notice. (Hospital's Mot. 28–29; Medical Staff's Reply 1–2, ECF No. 60; Sutton's Reply 5, ECF No. 57.)

"It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations." *Bernson*, 7 Cal. 4th at 931. To plead fraudulent concealment, a plaintiff must allege: (1) "when the fraud was discovered;" (2) "the circumstances under which it was discovered;" (3) "that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts to put [her] on inquiry;" and (4) that, "in the exercise of reasonable diligence, the facts could not have been discovered at an earlier date." *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 321 (1974).

***4** However, the doctrine "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Rita M. v. Roman Catholic Archbishop*, 187 Cal. App. 3d 1453, 1460 (1986). Thus, concealment will not toll the period if discovery has occurred. *Young v. Haines*, 41 Cal. 3d 883, 901 (1986). Accordingly, "the question is not whether a plaintiff was on notice of some wrongdoing." *Migliori v. Boeing N. Am., Inc.*, 114 F. Supp. 2d 976, 984 (C.D. Cal. 2000). "Instead, the question is whether the plaintiff had knowledge of facts, or should have known about facts, that placed him or her on notice of the specific cause of action." *Id.* (collecting cases).

Thus, "when a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, [and may be] properly decided as a matter of law only if the evidence (or ... the allegations in the complaint ...) can support only one reasonable conclusion." *Stella v. Asset Mgmt. Consultants, Inc.*, 8 Cal. App. 5th 181, 193 (2017).

Here, at issue is whether Plaintiff "had [ ] actual or presumptive knowledge of facts sufficient to put [her] on inquiry." *Baker*, 39 Cal. App. 3d at 321. The allegations in the complaint support only one reasonable conclusion—Plaintiff knew the necessary facts to place her on notice of Sutton's tortious conduct. For instance, at Plaintiff's first examination in 2008, Sutton did not wear gloves, fingered her vagina aggressively and inappropriately, squeezed her breasts extremely hard, and told her that "[i]f you were not my patient, I would fuck you," and asked "[i]f you were not my patient, would you fuck me?" (FAC ¶¶ 9–10.) Then, Sutton misrepresented to Plaintiff that his conduct was legitimate and conformed to accepted medical practice. (FAC ¶ 65.) Nevertheless, Plaintiff still called Hospital "and asked with whom she could file a claim regarding Dr. Sutton's behavior." (FAC ¶ 11.) These facts as alleged support only one conclusion, that Plaintiff had knowledge of facts necessary to

put her on notice of her sexual assault, battery, and harassment claims. *See generally Rita M.*, 187 Cal. App. 3d at 1460.

Regardless, subsequent instances alleged in the FAC further demonstrate that Plaintiff knew of the necessary facts to acquire notice for the remainder of her claims. For example, Plaintiff alleges that a subsequent examination was so "aggressive and prolonged" that she exclaimed "[w]hat the hell was THAT!?" (FAC ¶¶ 12–13.) Two years later in 2010, during an examination, Sutton made "her feel like he was 'banging' her vagina with his fingers." (FAC ¶¶ 15–16.) At another visit, Plaintiff asserted that she had "never been to an OB and been felt up like this." (FAC ¶ 18.) Although Plaintiff alleges that she placed trust in Sutton, she also alleges "that she ... suspected that his behavior was strange." (FAC ¶ 22.)

Moreover, another patient told Plaintiff that Sutton was always inappropriate with her and even attempted to kiss her. (FAC ¶ 20.) In 2014, an unnamed gynecologist at Hospital told her that "everyone knows that he is a sick bastard and the hospital has not done anything." (FAC ¶ 21.) Accordingly, there is only one reasonable conclusion that the Court may reach based on Plaintiff's allegations: as of at least 2014, Plaintiff not only knew of Sutton's sexual misconduct but also that Hospital and Medical Staff had done nothing to address it. *See generally Bernson*, 7 Cal. 4th at 932–35 (once a plaintiff is aware of her injury, the applicable limitations period normally affords sufficient opportunity to identify all wrongdoers).

***5** While disturbing, these allegations taken as true demonstrate that as a matter of law Plaintiff knew the necessary facts to place her on notice of each of her claims. Thus, the Court need not blindly accept Plaintiff's allegation that she only became aware of Sutton's misconduct in 2018 because the factual allegations directly contradict such an assertion. *See Sprewell*, 266 F.3d at 988 (a court need not blindly accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences). Therefore, fraudulent concealment is inapplicable.

2. Delayed Discovery Rule

In the alternative, Plaintiff argues that the delayed discovery rule tolls her claims. However, for many of the same reasons as discussed above, Plaintiff's argument fails and the discovery rule does not toll the statute of limitations on Plaintiff's claims.

The discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox*, 35 Cal. 4th at 807. To benefit from the discovery rule, a plaintiff "must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." *Id.* at 808. To determine when the limitations period begins to run under the discovery rule, courts "look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." *Id.* at 807. Accordingly, "[a] plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for' " its " 'generic' elements of wrongdoing, causation, and harm." *Id.*

Although Plaintiff sufficiently alleges both of the discovery rule prongs, Defendants assert that the facts as alleged in the FAC impute an awareness of wrongfulness and, therefore, the delayed discovery rule is inapplicable. (Hospital's Mot. 25–28; Medical Staff's Mot. 12–16; Sutton's Mot. 11–14.) Accordingly, at issue is whether Plaintiff's allegations demonstrate she was aware or had reason to suspect Sutton of wrongdoing, causation, and harm.

The FAC is rich with factual allegations which demonstrate Plaintiff had reason to suspect a factual basis for all of her claims. For instance, after her first examination with Sutton, Plaintiff called Hospital "and asked with whom she could file a claim regarding Dr. Sutton's behavior." (FAC ¶ 11.) Such an allegation demonstrates that Plaintiff suspected a type of wrongdoing committed against her by Sutton sufficient to lodge a complaint. Another instance indicating Plaintiff's suspicions is Plaintiff's allegation that a subsequent examination was so "aggressive and prolonged" that she exclaimed "[w]hat the hell was THAT!?" (FAC ¶¶ 12–13.) Lastly, an unnamed gynecologist at Hospital told Plaintiff that "everyone knows that he is a sick bastard and the hospital has not done anything." (FAC ¶ 21.) Accordingly, the alleged facts confirm that Plaintiff should have suspected wrongdoing, causation, and harm; therefore, the discovery rule does not toll the statute of limitations. *Young*, 41 Cal. 3d at 901 (concealment by a physician will not toll the limitations period if discovery has occurred).

As neither fraudulent concealment nor the discovery rule tolls Plaintiff's claims, consequently, Plaintiff's claims are time-barred. Accordingly, there are simply no additional facts consistent with the FAC that Plaintiff may allege to cure her tolling allegations. Therefore, Defendants' Motion are **GRANTED**, and Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

B. Class Action Claims

***6** Medical Staff and Hospital also move to dismiss Plaintiff's class claims. (*See* Hospital's Mot. to Strike, ECF No. 47.) Defendants argue Plaintiff lacks standing to seek relief on behalf of herself or any other member of the class. (Hospital's Mot. to Strike 16; Medical Staff's Mot. 25–26). In opposition, Plaintiff does not offer a meaningful response to Defendants standing argument. (*See* Opp'n to Hospital's Mot. to Strike, ECF No. 54; Opp'n Medical Staff.)

Our law makes clear, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [herself] or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Accordingly, Ninth Circuit precedent holds that "standing is the threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (quoting *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003)).

Here, Plaintiff lacks standing to bring this class action because all of Plaintiff's claims are time-barred by the applicable statute of limitations. Therefore, Plaintiff may not seek relief on behalf of herself or any other member of the class and the court need not reach the class action issue. *See O'Shea*, 414 U.S. at 494; *NEI Contracting & Eng'g, Inc.*, 926 F.3d at 532. Accordingly, the Court **GRANTS** Defendants' Motions to Dismiss and to Strike Plaintiff's class claims.

C. Leave to Amend

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). The Court has dismissed all of Plaintiff's claims with prejudice, either because the claims are time-barred or because the Court finds there are simply no additional facts consistent with the FAC that Plaintiff may allege to cure the deficiency. *Lopez*, 203 F.3d at 1127. Accordingly, leave to amend is **DENIED**.

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Defendants' Motions to Dismiss Plaintiff's First Amended Class Action Complaint (ECF Nos. 34, 46, 50.) and **GRANTS** Defendant's Motion to Strike Plaintiff's class action claims (ECF No. 47.) Plaintiff's claims are **DISMISSED with prejudice**. The Court will concurrently issue Judgment.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1529313

Footnotes

1 After considering the papers filed in connection with the Motions, the Court deemed the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

2 The statute of limitations for each claim against Defendants is as follows: (1) Unruh Act, 2 years from the alleged wrongful act, (Cal. Code Civ. Proc. § 335.1.) (3) Sexual Harassment, 2 years from the alleged wrongful act; (Cal. Code Civ. Proc. § 335.1.) (4) Violation of the Bane Act, 1 year. (*West Shield Investigations & Security Consultants v. Superior Court* 82 Cal. App. 4th 935, 951–954.) (4) Gender Violence, 3 years. (Cal. Civ. Code § 52.4(b).) (8) Constructive Fraud, 3 years. (Cal. Civ. Code § 1573, Cal. Civ. Proc. § 338(d).) (9) Negligence, 1 year. (Cal. Civ. Proc. § 340.5.) (11) Negligent Failure to Warn, Train, and/or Educate, 1 year. (Cal. Civ. Proc. § 340.5.) (12) Intentional Infliction of Emotional Distress, 1 year. (Cal. Civ. Proc. § 340.5.) (13) Unfair Business Practices, 4 years. (Cal. Bus. & Prof. § 17208.)

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United States District Court, C.D. California.

Jane DOE
v.
UNIVERSITY OF SOUTHERN CALIFORNIA, et al.

Case No. 2:18-cv-09530-SVW-GJS
|
Filed 04/18/2019

Attorneys and Law Firms

Kevin T. Barnes, Gregg Lander, Law Offices of Kevin T. Barnes, Joseph Tojarieh, Tojarieh Law Firm, Los Angeles, CA, for Jane Doe.

Alexander M. Watson, Stephen C. Fraser, Fraser Watson and Croutch LLP, Glendale, CA, John B. Quinn, Michael E. Williams, Tara Melissa Lee, Shon Morgan, Quinn Emanuel Urquhart and Sullivan LLP, Cherie L. Lieurance, N. Denise Taylor, Taylor DeMarco LLP, Los Angeles, CA, for University of Southern California, et al.

Proceedings: ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS [43][44]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

***1** On February 27, 2019, Plaintiff Jane Doe filed a First Amended Complaint in this action. *See* Dkt. 38 (the "FAC"). On March 8, 2019, Defendants University of Southern California and the Board of Trustees of the University of California (collectively, "USC") filed a motion to dismiss the FAC, arguing that Plaintiff failed to state a plausible claim for relief and that Plaintiff's claims are barred by the applicable statute of limitations. Dkt. 43. On March 11, 2019, Defendant George Tyndall, M.D. ("Dr. Tyndall") filed a motion to dismiss on similar grounds. Dkt. 44. For the reasons set forth below, the Court GRANTS Defendants' motions to dismiss.

I. Factual Allegations

Plaintiff attended USC from 1990 to 1993, and Plaintiff saw Dr. Tyndall for a gynecological examination at USC's student health center in or around March of 1991. FAC ¶¶ 1-2. Plaintiff alleges that Dr. Tyndall performed an "unnecessarily aggressive inspection of Ms. Doe's private parts," including the touching of breasts and digital penetration of the vagina and anus, and "made grossly inappropriate remarks during his examination" of Plaintiff, criticizing Plaintiff for her apparent lack of sexual experience. *Id.* ¶¶ 3, 5-6. Plaintiff avers that she sensed Dr. Tyndall was extracting personal enjoyment from the examination, rather than conducting the examination for medical purposes in a professional manner. *Id.* ¶ 5. Plaintiff states that she had never received a gynecological examination prior to seeing Dr. Tyndall and was misled into believing that Dr. Tyndall's actions were medically necessary and appropriate. *Id.* ¶¶ 4-5.

Plaintiff then recites many of the allegations against Dr. Tyndall revealed by a news article in the Los Angeles Times on May 16, 2018,[1] which purported to establish that Dr. Tyndall had been acting in a similarly inappropriate manner when conducting gynecological examinations of many other USC students for over two decades. *See id.* ¶¶ 7-24. The news article was critical of USC for allegedly failing to respond appropriately to numerous student complaints, both formal and informal, lodged with health professionals or other officials at USC over the course of Dr. Tyndall's tenure at USC. *See id.* ¶¶ 15-16, 27-31.

In the FAC, Plaintiff brings the following causes of action:

(1) Violation of Title IX, 201 U.S.C. §§ 1681(a) *et seq.*, against USC;

(2) Violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51, against all Defendants;

(3) Sexual harassment in violation of Cal. Civ. Code § 51.9 against USC;[2]

(4) Violation of the Bane Act, Cal. Civ. Code § 52.1, against all Defendants;

(5) Gender violence in violation of Cal. Civ. Code § 52.4 against Dr. Tyndall;[3]

(6) Sexual assault against Dr. Tyndall;

(7) Sexual battery in violation of Cal. Civ. Code § 1708.5 against Dr. Tyndall;

(8) Constructive fraud against all Defendants;

(9) Violation of the California Equity in Higher Education Act, Cal. Educ. Code § 66270, against all Defendants;

***2** (10) Negligence against USC;

(11) Negligence per se against USC;

(12) Negligent hiring, supervision, and/or retention against USC;

(13) Negligent failure to warn, train, and/or educate against USC;

(14) Intentional infliction of emotional distress against all Defendants;

(15) Negligent infliction of emotional distress against all Defendants; and

(16) Unfair business practices in violation of Cal. Bus. & Prof. Code § 17200 against all Defendants.

See id. ¶¶ 60-225.

II. Standard of Review

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" without more. *Id.* (internal quotation marks omitted). "Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion." *Odom v. Microsoft Corp*, 486 F.3d 541, 545 (9th Cir. 2007).

Where a complaint is dismissed, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.' " *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' " *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Sharkey v. O'Neal*, 778 F.3d 767, 774 (9th Cir. 2015) (holding that the trial court abused its discretion by not applying *Foman* factors). Under Rule 15(a) there is a presumption in favor of granting leave to amend absent prejudice or a strong showing of any *Foman* factors. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

III. Analysis

A. Title IX

***3** The scope of Plaintiff's Title IX claim is that USC failed to investigate allegations of molestation, sexual abuse, and/or sexual harassment filed against Dr. Tyndall via student complaints over the course of his tenure at USC's student health center. *See* FAC ¶¶ 65-66. Plaintiff alleges that, as a result of USC's inaction, Plaintiff suffered physical and emotional harm. *Id.* ¶ 68.

Plaintiff's allegations are deficient to set forth a plausible claim of gender discrimination under Title IX.[4] Plaintiff does not allege that USC was on notice of any of Dr. Tyndall's improper conduct in 1991, at the time of Plaintiff's alleged abuse, which would be necessary to establish that USC had "actual notice" of the abuse and was "deliberately indifferent" toward Dr. Tyndall's mistreatment of female patients at the time of Plaintiff's injury. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that damages are available under Title IX only if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond," and the inadequate response "must amount to deliberate indifference to discrimination"). Plaintiff's allegations about USC's notice of Dr. Tyndall's actions are conclusory and lack the requisite factual specificity necessary under Rule 12(b)(6).

Moreover, regarding the timing of USC's alleged notice, the FAC alleges that nurses or other members of USC's student health center became concerned with Dr. Tyndall's behavior as early as "[i]n the 1990s," see FAC ¶ 11, but Plaintiff adds nothing more to substantiate those allegations as conferring upon USC sufficient notice of sexual discrimination specifically at the time of Plaintiff's visit

with Dr. Tyndall in March 1991. Without establishing USC's deliberate indifference prior to Plaintiff's examination by Dr. Tyndall, Plaintiff would be unable to establish that USC's alleged discrimination was the legal cause for Plaintiff's examination by Dr. Tyndall, which allegedly injured Plaintiff. It is unclear how Plaintiff would be entitled to assert a claim under Title IX predicated upon alleged discrimination by USC in failing to respond to student complaints about Dr. Tyndall *after* Plaintiff was allegedly harmed by Dr. Tyndall in the same way as subsequent students. Without a proper basis to conclude that Plaintiff's injuries were caused specifically by USC's discrimination in failing to take action against Dr. Tyndall, in response to complaints already filed against Dr. Tyndall *prior* to Plaintiff's examination, Plaintiff cannot maintain a claim under Title IX.

Plaintiff may be able to remedy the above pleading defects via amendment to the FAC. Therefore, the Court DISMISSES Plaintiff's first cause of action without prejudice.

B. Statute of Limitations

The primary argument advanced by Defendants in their motions to dismiss is that Plaintiff's state law claims fail to satisfy the statutes of limitations that apply to Plaintiff's various claims, given that the alleged conduct giving rise to Plaintiff's causes of action occurred almost 30 years ago. USC attached to a declaration in support of its motion to dismiss a chart indicating the various limitations periods applicable to each of Plaintiff's claims. *See* Dkt. 43-2. The Court finds USC's analysis of the applicable limitations periods legally correct based on the authority cited in the chart, and Plaintiff has not rebutted any of the limitations periods included in USC's chart. Therefore, the Court adopts the chart as the legal standards setting forth the applicable statutes of limitations for Plaintiff's claims. And, when doing so, it is clear that each of Plaintiff's state law claims is barred by the limitations periods therein. [5]

***4** Plaintiff's rebuttal to the application of the statute of limitations periods to bar Plaintiff's state law claims is twofold: (1) Plaintiff alleges that, pursuant to California's "delayed discovery" rule, she did not discover the existence of her claims against USC and Dr. Tyndall until 2018, when the Los Angeles Times article was published; and (2) Plaintiff asserts that Defendants fraudulently concealed their wrongdoing for years, which tolls the statute of limitations under California law.

1. *Delayed Discovery Rule*

Generally, a statute of limitations does not begin to run until a cause of action accrues, which occurs "at the time when the cause of action is complete with all of its elements." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005) (internal quotation marks and citation omitted). California recognizes an exception to the rule of accrual called the "discovery rule," which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discovery, the cause of action." *Id.* at 807 (citations omitted). "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' " *Id.* (quoting *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 398 (1999)). The reference to "elements" does not mean the elements of the particular cause of action at issue, but instead "the 'generic' elements of wrongdoing, causation, and harm." *Id.* (citation omitted). Thus, to determine when the limitations period begins to run under the discovery rule, courts "look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." *Id.*

To benefit from the discovery rule, "the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Id.* at 808. Stated differently, " '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' " *Id.* (quoting *McKelvey v. Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999)). The plaintiff bears the burden to show that she engaged in a reasonable investigation into the wrongdoing inflicted upon her; "conclusory allegations [of diligence] will not withstand" a dismissal of the complaint. *Id.* (internal quotation marks and citations omitted).

The FAC does not contain sufficient allegations to support a theory of delayed discovery. Although Plaintiff notes that the first date she became aware of all of her causes of action was the release of the Los Angeles Times article in May of 2018, the FAC merely states in a conclusory manner that Plaintiff engaged in "reasonable diligence" to discover the conduct at issue in Plaintiff's claims. *See* FAC ¶ 58. Such an empty statement is insufficient to establish that Plaintiff could not

have reasonably discovered the facts supporting her causes of action within the applicable limitations period.

Plaintiff's allegations in the FAC reveal that she was aware of the existence of her causes of action against Dr. Tyndall at the time of her examination in 1991. Plaintiff admits in the FAC that she "sensed that Dr. Tyndall's examination was more about his own personal enjoyment than anything helpful for her." FAC ¶ 5. This allegation establishes that Plaintiff had a suspicion of wrongdoing on the day of her examination by Dr. Tyndall in 1991. The relevant facts pertaining to Plaintiff's claims against Dr. Tyndall were known to Plaintiff on the date that Plaintiff was examined by Dr. Tyndall, and Plaintiff has not alleged that she was reasonably diligent in her attempt to pursue a timely claim against Dr. Tyndall based upon those known facts. Plaintiff's argument that she could not have discovered Dr. Tyndall's examination constituted sexual misconduct until 2018 is implausible, since Plaintiff undoubtedly had further gynecological examinations by other medical professionals after Dr. Tyndall over the 27 years since and would have had a basis to conclude that Dr. Tyndall's conduct fell outside of medically acceptable standards. At the very least, Plaintiff did not plead facts suggesting otherwise.

***5** The fact that Plaintiff only learned that she was not the only female patient abused by Dr. Tyndall does not affect Plaintiff's knowledge of the abuse she received back in 1991. Indeed, Plaintiff acknowledges, in the allegations supporting her claim of constructive fraud, that Plaintiff "experienced recurrences of the above-described injuries" upon reading the 2018 article, FAC ¶ 151, indicating that Plaintiff experienced the alleged injuries contemporaneously with her examination by Dr. Tyndall in 1991. In other words, "recurrence" of Plaintiff's injury necessarily means that Plaintiff was emotionally harmed at the time of her examination by Dr. Tyndall and was aware of that emotional harm following the examination. Therefore, Plaintiff has not plausibly alleged that Plaintiff was unaware of her injury until 2018. And, to the extent that Plaintiff invokes the discovery rule on the ground that she did not know of the existence of a viable cause of action against Dr. Tyndall for his misconduct, "[t]he statute of limitations is not tolled by belated discovery of legal theories, as distinguished from belated discovery of facts." *Graham v. Hansen*, 128 Cal. App. 3d 965, 972 (1982) (emphasis removed) (quoting another source).

As for Plaintiff's claims against USC for failing to respond appropriately to complaints about Dr. Tyndall, it is true that Plaintiff did not discover USC's knowledge and inaction regarding Dr. Tyndall's misconduct until the news article in 2018. But, as with Plaintiff's Title IX claim, Plaintiff does not allege that USC had the requisite knowledge and failed to take appropriate action during the relevant timeframe pertaining to Plaintiff's abuse—which occurred in 1991. To the extent that Plaintiff can allege that USC was aware of Dr. Tyndall's misconduct prior to 1991 but failed to act, Plaintiff will need to allege sufficient facts to support the conclusion that Plaintiff was unaware of and could not discover those facts within the limitations periods through reasonable diligence.

For these reasons, Plaintiff has not properly alleged that her claims are timely due to the delayed discovery rule.

2. *Fraudulent Concealment*

Fraudulent concealment, a "close cousin" of the discovery rule, tolls the applicable statute of limitations for the period during which the plaintiff does not discover and could not reasonably discover her claim due to "the defendant's fraud in concealing a cause of action against him." *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931 (1994) (internal quotation marks and citations omitted). However, if the plaintiff discovers the existence of the claim independently, the limitations period begins to run on that date, irrespective of the defendant's continuing efforts to conceal the cause of action. *Sanchez v. S. Hoover Hosp.*, 18 Cal. 3d 93, 99 (citing *Pashley v. Pac. Elec. Ry. Co.*, 25 Cal. 2d 226, 229 (1944)). Therefore, the plaintiff must show that, due to the defendant's concealment, the plaintiff "was not at fault for failing to discover the cause of action and had no actual or presumptive knowledge of the facts sufficient to put him on inquiry." *Snyder v. Boy Scouts of Am., Inc.*, 205 Cal App. 3d 1318, 1323 (1988). Because allegations of fraudulent concealment pertain to fraudulent conduct, "a claim that fraudulent concealment tolls an applicable state statute of limitations must be pled with particularity under Rule 9(b) of the Federal Rules of Civil Procedure." *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1132-33 (C.D. Cal. 2010) (collecting cases); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Pleading fraud under 9(b) requires the plaintiff to include allegations about the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting another source).

To repeat from above, the allegations in the FAC reveal that Plaintiff had reasonable suspicion of her claims against Dr. Tyndall following her examination in 1991. Even if USC attempted to conceal Dr. Tyndall's improper behavior for years following Plaintiff's examination, Plaintiff's own allegations show that she independently had reason to believe that Dr. Tyndall did not conduct the examination of Plaintiff according to accepted medical standards, based on Plaintiff's observations during the examination. Because Plaintiff knew of the factual basis for her causes of action against Dr. Tyndall by herself, regardless of any efforts to conceal those facts, Plaintiff has not sufficiently alleged that her claims against Dr. Tyndall were concealed from reasonable detection by any fraudulent conduct by Defendants from 1991 until 2018. Thus, Plaintiff has not properly alleged entitlement to a theory of fraudulent concealment to toll the applicable statute of limitations for her claims against Dr. Tyndall.

***6** Plaintiff's reliance on Dr. Tyndall's "duty of disclosure" is unavailing. California recognizes that physicians have a "fiduciary duty of disclosure" to their patients. *Sanchez*, 18 Cal. 3d at 98. However, courts have "rejected any notion that nondisclosure by [a physician] would toll the statute [of limitations] despite discovery by plaintiff." *Id.* (citations omitted). Because Plaintiff was aware in 1991 of the relevant facts at issue that created a suspicion of wrongdoing on the part of Dr. Tyndall, Plaintiff cannot rely on Dr. Tyndall's failure to disclose his own alleged wrongdoing to Plaintiff as a basis to toll the limitations period.

Regarding Plaintiff's claims against USC for failing to respond meaningfully to complaints about Dr. Tyndall, Plaintiff's allegations are plainly deficient in meeting the standard for pleading fraud under Rule 9(b). Plaintiff's allegations of USC's actions to conceal Dr. Tyndall's conduct are general, vague, and conclusory, seemingly originating entirely from the Los Angeles Times article upon which Plaintiff relies as the basis for a vast portion of her substantive knowledge about the allegations against Dr. Tyndall. Plaintiff has not provided any specificity about what actions USC took to conceal Dr. Tyndall's conduct, which particular actors were involved in the misrepresentations or omissions constituting fraudulent concealment, or when those actions occurred. In the absence of any allegations of fraud pled in particularity, Plaintiff cannot benefit from fraudulent concealment as a basis to overcome the clear application of the statutes of limitations that would otherwise bar Plaintiff's claims.

Moreover, to the extent that Plaintiff's claims against Defendants are based in the same allegedly fraudulent actions that Plaintiff relies upon for purposes of tolling the statute of limitations, the Ninth Circuit has noted that fraudulent concealment is available when there is "active conduct by a defendant, *above and beyond* the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Guererro v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006) (emphasis added) (quoting another source). Plaintiff cannot rely on USC's inaction in response to allegations of abuse against Dr. Tyndall both as the basis for substantive claims against USC and for purposes of tolling the applicable statute of limitations period; neither can Plaintiff rely on Dr. Tyndall's failure to disclose his misconduct to Plaintiff both as a basis to toll the statute of limitations and as a basis to hold Dr. Tyndall liable for fraud.

The California Court of Appeal addressed this issue squarely in an analogous case where a plaintiff alleged that a church failed to take action in response to allegations of molestation against a priest. *See Mark K. v. Roman Catholic Archbishop*, 67 Cal. App. 4th 603, 613 (1998). In rejecting the application of the doctrine of fraudulent concealment to allow the plaintiff to overcome the statute of limitations, the court noted:

> The wrongful conduct alleged against the church was its inaction in the face of the accusations against Father Llanos. Thus, what the church failed to disclose was merely evidence that the wrong had been committed. If plaintiff's approach were to prevail, then any time a tortfeasor failed to disclose evidence that would demonstrate its liability in tort, the statute of limitations would be tolled under the doctrine of concealment. Regardless of whether the issue is characterized as fraud by concealment or equitable estoppel, this is not the law.

Id. Similarly here, for any claims Plaintiff alleges against Dr. Tyndall or USC that depend upon the same factual allegations as Plaintiff asserts for purposes of fraudulent concealment to toll the statute of limitations, Plaintiff failed to include

any allegations of wrongdoing above and beyond those that encompass the affirmative claim for relief.

***7** Accordingly, Plaintiff has not adequately alleged that Defendants fraudulently concealed Plaintiff's causes of action against Defendants. [6]

* * * * *

Based on the analysis above, Plaintiff has not alleged a basis to toll the statutes of limitations that apply to Plaintiff's various state law claims. However, Plaintiff may be able to allege further facts to support a theory of delayed discovery and/or fraudulent concealment. Therefore, the Court DISMISSES Plaintiff's state law claims without prejudice.

Because there is a sufficient basis to dismiss Plaintiff's claims on statute of limitations grounds, the Court declines to address Defendants' arguments about the substantive deficiencies in Plaintiff's allegations supporting each of Plaintiff's state law claims. For the same reasons, the Court declines to address Defendants' arguments regarding Plaintiff's request for punitive damages at the present time.

IV. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motions to dismiss the FAC without prejudice. Plaintiff is ordered to file an amended complaint within 21 days of this Order; the failure to do so will result in the dismissal of Plaintiff's case with prejudice.

After Plaintiff files an amended complaint, the Court will allow arguments on subsequent motions to dismiss only pertaining to Plaintiff's Title IX claim, the only federal claim asserted by Plaintiff in this action. If the Court determines that no federal cause of action can be maintained as a matter of law, then the Court intends to decline to exercise supplemental jurisdiction over Plaintiff's remaining state law claims. If Plaintiff can reassert a Title IX claim that satisfies federal pleading standards, then at that time the Court would invite further motions to dismiss from Defendants about the sufficiency of Plaintiff's state law claims.

IT IS SO ORDERED.

All Citations

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Footnotes

1 The Los Angeles Times is available at https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html.

2 Plaintiff acknowledges that Section 51.9 had not been enacted at the time Dr. Tyndall allegedly violated Plaintiff's rights, and Plaintiff agrees to the dismissal of this cause of action. *See* Dkt. 45 at 13. Therefore, Plaintiff's third cause of action is DISMISSED without prejudice.

3 Plaintiff acknowledges that Section 52.4 had not been enacted at the time Dr. Tyndall allegedly violated Plaintiff's rights, and Plaintiff agrees to the dismissal of this cause of action. *See* Dkt. 45 at 13. Therefore, Plaintiff's fifth cause of action is DISMISSED without prejudice.

4 While it seems self-evident and inherent in Plaintiff's Title IX claim, Plaintiff does not even affirmatively allege that any actions by USC in failing to respond to complaints against Dr. Tyndall constitute discrimination on the basis of sex, as required for a claim under 20 U.S.C. § 1681(a).

5 While the parties in their briefing primarily address the standards governing statutes of limitations under California law, the parties do not appear to assert that the analysis of when the statute of limitations period begins to run would be different for Plaintiff's claim under Title IX, which does not originate under state law. As the Ninth Circuit noted, "[a]lthough Title IX borrows a state statute of limitations period, federal law governs the 'determination of the point at which the limitations period begins to run.' " *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006) (quoting *Hoesterey v. City of Cathedral City*, 945 F.2d 317, 319 (9th Cir. 1991)). Under federal law, "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis for the action," which, for a Title IX claim, focuses on the time of the alleged discriminatory acts, not the "time at which the consequences of the acts became most painful." *Id.* (internal quotation marks and citations omitted).
As stated above, Plaintiff has not alleged that USC had knowledge of Dr. Tyndall's conduct in 1991 and therefore was deliberately indifferent toward Plaintiff, causing her injury. If Plaintiff can re-allege sufficient facts to establish a basis for a Title IX claim for Plaintiff's personal injury resulting from USC's discrimination, then at that point the Court would consider

arguments regarding whether Plaintiff's Title IX claim is timely pursuant to the applicable federal standards governing that cause of action, which focus on when Plaintiff knew or had reason to know of USC's deliberate indifference toward female patients of Dr. Tyndall.

6 The Court rejects USC's argument that common law doctrines of delayed discovery and fraudulent concealment do not apply to the four-year statute of limitations applicable to California's unfair competition law, Cal. Bus. & Prof. Code § 17200. The California Supreme Court held that Section 17200 "is governed by common law accrual rules to the same extent as any other statute," *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1196 (2013), overruling USC's outdated authority to the contrary. *See* Dkt. 43 at 13 (citing *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185 n. 17 (C.D. Cal. 2005); *Karl Storz Endoscopy Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002)).

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United States District Court, D. Connecticut.

Ramsay R. GOURD, Plaintiff,
v.
INDIAN MOUNTAIN SCHOOL, INC., Defendant.

Civil No. 3:18-cv-582 (JBA)
|
Signed 03/16/2020

Attorneys and Law Firms

Antonio Ponvert, III, Koskoff, Koskoff & Bieder, P.C., Bridgeport, CT, for Plaintiff.

Bradford S. Babbitt, Jeffrey J. White, Kathleen Elizabeth Dion, Robinson & Cole, LLP, Hartford, CT, for Defendant.

RULING GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Janet Bond Arterton, U.S.D.J.

***1** Plaintiff Ramsey R. Gourd brings this diversity action against Defendant Indian Mountain School, seeking damages for alleged sexual abuse that he suffered while enrolled there as a boarding student from 1977 to 1980. Defendant contends that this action is untimely, and so moves for summary judgment on Plaintiff's various Connecticut tort claims. For the reasons that follow, Defendant's Motion for Summary Judgment is granted.

I. Background

A. Plaintiff's Experience

Plaintiff Ramsay R. Gourd was born in 1965. (*See* Parties' L.R. Stmts. [Docs. ## 76, 92] ¶ 1.) In September 1977, when he was 12 years old, Plaintiff enrolled at Indian Mountain School ("IMS") as a boarding student. (*See id.* ¶¶ 2, 9; Am. Compl. [Doc. # 70] ¶ 6.) Plaintiff attended IMS until he was 15 years old, leaving the school in June 1980. (*See* Parties' L.R. Stmts. ¶ 2; Am. Compl. ¶ 6.)

Plaintiff alleges that IMS teacher Christopher Simonds sexually abused him during his time at the school. (Parties' L.R. Stmts. ¶ 3.) While still a student, Plaintiff once attempted to tell another IMS teacher about Mr. Simonds's actions. (*Id.* ¶ 4.) Plaintiff understood at the time that the faculty "were adults and [he] was in their care." (Ex. 1 (Ramsay Gourd 2018 Dep.) to Dion Aff. [Doc. # 64-1] at 13.)

Plaintiff has not repressed the memory of the alleged sexual abuse. (Parties' L.R. Stmts. ¶ 5.) Plaintiff has been able to recall the alleged abuse since it occurred, and he has discussed the alleged abuse with various individuals since reaching adulthood. (*Id.*)

The first of these adult disclosures occurred in 1990, after Plaintiff moved to Boston subsequent to his college graduation. (*Id.* ¶¶ 8, 9.) That year, Plaintiff began a relationship with his future wife, Mary Jo Gourd, and he told her on their second date "that he had been sexually abused while in boarding school." (*Id.* ¶ 9.) Plaintiff also disclosed the alleged abuse to John Truslow, a friend and former IMS student, around this same time period. (*Id.* ¶ 10.)

In or around 1997, the Gourd marital household received a letter from IMS that "had to do with Christopher Simonds," and Plaintiff's wife's response was to say, "Ramsay ..., [n]ow's your time to speak up." (Ex. 2 (Mary Jo Gourd Dep.) to Dion Aff. [Doc. # 64-2] at 52.) Mrs. Gourd recalled that Plaintiff stated, "When my mom is alive, I can't speak up about my abuse" because "it would kill her." (*Id.* at 53.) [1] For his part, Plaintiff "recalled that the contents of the letter Validated that, in fact, I was abused' and 'that was enough for me at the time.' " (Parties L.R. Stmts. ¶ 14.)

Around that same time period, in or around 1996 or 1997, Plaintiff's brother, Jeremiah Gourd, considered enrolling his son at IMS. (*Id.* ¶¶ 16, 17.) Plaintiff tried to dissuade his brother from doing so, because "[Plaintiff] knew that there was public knowledge that there had been a scandal there." (Ex. 7 (Ramsay Gourd 2017 Dep.) to Dion Aff. [Doc. # 64-1] at 65; *see also* Parties' L.R. Stmts. ¶ 17.) Plaintiff also did not "know if Simonds was there [at IMS] or not at the time, which is why [he] made the comment to [his] brother." (Ramsay Gourd 2018 Dep. at 27.)

***2** The record also indicates that Plaintiff contacted IMS's attorney, Mark Altermatt, sometime after Jeremiah Gourd enrolled his son at the school. (*See* Ex. U (Undated Altermatt Notes) to Ponvert Aff. [Doc. # 75-2] at 1.) According to Mr.

Altermatt's notes, Plaintiff expressed that he had "favorable feelings towards the school" and "sa[id] he has no interest in suing." (*Id.*)

Sometime between 2003 and 2005, Plaintiff "told his best friend David Bryan that he had been abused as a child while enrolled at IMS." (Parties' L.R. Stmts. ¶ 23.) Plaintiff explained to Mr. Bryan "that the abuse occurred in the School's basement," "that drugs were used as a 'carrot[,]' " and "that 'there were other kids that were impacted." (*Id.* ¶¶ 24, 25.) Mr. Bryan responded, "Well, you know, aren't you going to do something?," to which Plaintiff replied "that he 'couldn't face it.' " (*Id.* ¶ 26.)

Between 2005 and 2006, Plaintiff also told Mr. Bryan's wife, Brenda, of the alleged abuse. (*Id.* ¶ 27.) She testified that Plaintiff "revealed to her that the abuse had occurred when he was in sixth or seventh grade and that there were 'other boys who had also been abused.' " (*Id.* ¶ 28.) She recalled "having a discussion with Plaintiff about 'what could be done at this point.' " (*Id.* ¶ 29.)

On March 25, 2009, Plaintiff sent an e-mail with the subject "Doe Vs. Indian Mountain School" to Susan Smith, an attorney "who had represented other former students in actions against [IMS] involving claims of sexual abuse by Simonds." (*Id.* ¶ 32; *see* Ex. 10 (Gourd 2009 E-mails) to Dion Aff. [Doc. # 64-10] at 1.) Plaintiff wrote to Ms. Smith:

> I am a former student of Indian Mountain School, (1978-1981). While I was approached to participate in the legal actions taken against IMS, I was not in a state to do so at the time. While I still believe that legal action is not the course for me, I am interested in learning the outcome of the case, where Christopher Simonds currently resides, and if there is a support network of former students.
>
> Any information you could pass on would be greatly appreciated. And thank you for your advocacy. Yours is an important and heartbreaking job.

(Gourd 2009 E-mails at 1.)

On April 8, 2009, Plaintiff "had a conversation with the attorney who represented five victims from IMS." (*Id.* at 3.) Plaintiff informed two friends, Lou Midura and Leonard Stephens, of this conversation regarding his "trauma," noting that "[the attorney] really didn't tell me much more than I already knew" and that "[e]ssentially, [Mr. Simonds] got a slap on the wrist and was relocated to NY state." (*Id.*) Plaintiff also informed his friends that he had "decided to contact his abuser, Christopher Simonds, with the hope of gaining closure and peace related to his experiences." (Parties' L.R. Stmts. ¶ 31; *see also* Gourd 2009 E-mails at 3.) That same year, Plaintiff also told his brother Henri Gourd that an IMS teacher had abused him. (Parties' L.R. Stmts. ¶ 34.)

Prior to 2013, Plaintiff was "aware that people could bring lawsuits against institutions involving people that had worked there and abused kids" and was "aware of lawsuits involving the Catholic church." (Ramsay Gourd 2018 Dep. at 110.) Plaintiff has testified that his "understanding of the ... difference" from the situation with IMS "was that the Roman Catholic church knew what was going on" and that he "didn't believe that Indian Mountain knew." (*Id.*)

***3** On October 27, 2014, Plaintiff was among the intended recipients of a message from IMS regarding the "allegations brought forth by alumni who attended the school in the 1970s and '80s." (Ex. RR (IMS Message) to Ponvert Aff. [Doc. # 75-3] at 1.) The message relayed that the "Board of Trustees has retained independent legal counsel to conduct a complete investigation and to report back to the Board regarding what happened, and how best to respect and support any alumni who may have been harmed." (*Id.*) The message also stated that IMS "hope[d] to hear directly from any alumni affected by these allegations ... and to offer any other direct support you may need." (*Id.*) The School's headmaster also wrote a similar letter to the IMS community that same day, stating that the School "reaffirm[s] [its] pledge to protecting the health, safety, and well-being of [its] students past and present." (Ex. QQ (Headmaster Message) to Ponvert Aff. [Doc. # 75-3] at 1.)

On December 9, 2014, Plaintiff e-mailed all three of his brothers about "Chris Simonds, the perpetrator of [his] childhood abuse." (Ex. 12 (Gourd 2014 E-mail) to Dion Aff. [Doc. # 64-12] at 1.) Plaintiff shared a link to a 2014 article published in *The Hartford Courant*, which reported that a "former student at the Indian Mountain boarding school in Salisbury has filed a federal lawsuit alleging that the school's former headmaster ordered him to live in the basement of his home so that he could sexually assault him at will in the 1980s." (*Id.* at 2.) The article also summarized its earlier coverage of IMS, stating that "[i]n 1996, The Courant exposed a string of sexual abuse allegations against Christopher Simonds, a teacher at the school. The allegations against Simonds surfaced after the criminal statute of limitations had expired, and he was never

charged." (*Id.*) The article notes that five lawsuits alleging abuse at IMS had been "settled out of court." (*Id.* at 3.)

In 2017, Plaintiff received a letter from Antonio Ponvert III, who now represents him in this matter, that was sent to IMS alumni who may have "information about sexual abuse occurring at the school." (Ex. 13 (Ponvert Letter) to Dion Aff. [Doc. # 64-13] at 1.) Plaintiff met with Mr. Ponvert and now represents that he learned, among other things, that "IMS administrators, faculty and staff knew that Simonds had and continued every year to have inappropriately close relationships" with students. (Ex. B (Gourd Aff.) to Ponvert Aff. [Doc. # 75-1] at 1.)

On April 6, 2018, Plaintiff brought this action, claiming that IMS is liable for negligence, recklessness, and negligent infliction of emotional distress. Plaintiff was fifty-three years old at the time of filing. (*See* Parties' L.R. Stmts. ¶ 1.) He asserts that he was "ignorant of the facts necessary to establish his causes of action within the limitations period" and that he "did not discover, and in the exercise of reasonable case [c]ould not have discovered, sufficient facts to bring a cause of action against the school." (Pl.'s L.R. Stmt. [Doc. # 76] Additional Material Facts ¶¶ 1, 2.)

B. Other Litigation Against IMS

IMS has also been a defendant to other sexual abuse lawsuits brought by former students.

In 1993, three former IMS students filed a lawsuit in Connecticut superior court alleging that Mr. Simonds "sexually abused, assaulted, and exploited numerous IMS students" and that "there [we]re forty two (42) known victims." *Longley v. Indian Mountain Sch., Inc.*, No. CV 93-0063378, 1994 WL 395269, at *1 (Conn. Super. Ct. July 25, 1994).[2] This lawsuit received coverage in the *New York Times*, in an article headlined "School Sued on Sex Abuse." (Ex. 19 (1993 N.Y. Times Article) to Dion Aff. [Doc. # 64-16] at 1.) The *Hartford Courant* also ran a story about the lawsuit, quoting the *Longley* plaintiffs' counsel as commenting that "the school's administrators knew, or should have known, that sexual misconduct was occurring" and that they "were negligent in not firing Simonds." (Ex. 17 (1993 Courant Article) to Dion Aff. [Doc. # 64-17] at 1.) The Connecticut newspaper *Register Citizen* also interviewed a former IMS Board of Trustees President, Paul Levin, about the litigation, and reported that Mr. Levin was "pleased the story is coming to light[,] ... 'thinks the lawsuits will draw out unbelievable numbers of others who have been abused[,]" and "believes the coverup may be over." (Ex. 18 (1993 Register Citizen Article) to Dion Aff. [Doc. # 64-18] at 1-2.)

***4** That same year, another student, proceeding pseudonymously, brought a diversity action in the District of Connecticut against IMS, Mr. Simonds, and other school officials. *Doe v. Indian Mountain Sch., Inc.*, No. 93-cv-1611 (RNC) (D. Conn. filed Aug. 13, 1993). Attorney Susan Smith was lead counsel on that case. *See id.* The lawsuit received coverage in the *Hartford Advocate*, which reported that "there are allegations of an administrative conspiracy to cover up the initial sexual [abuse] allegation which resulted in Simonds' resignation." (Ex. 20 (1993 Hartford Advocate Article) to Dion Aff. [Doc. # 64-20] at 2.) The *Hartford Courant* also discussed this lawsuit—as well as a "state police investigation in 1992 and 1993 [that] corroborated many of the claims"—in an editorial headlined, "A School's Conspiracy of Silence." (Ex. 26 (1995 Hartford Courant Editorial) to Dion Aff. [Doc. # 64-26] at 1.) This federal case ultimately settled in 1997. *See id.*, ECF No. 137.

In 1994, a similar lawsuit was filed against IMS in state court. *See Roe v. Indian Mountain Sch., Inc.*, No. CV 94-0066132-S (Conn. Super. Ct. filed 1994). The *Hartford Courant* reported on the lawsuit in an article headlined, "Sex Abuse Lawsuit Heads to Court Date; Salisbury School Named." (Ex. 29 (1997 Hartford Courant Article) to Dion Aff. [Doc. # 64-29] at 1.) The *Courant* reported that, in 1977, several staff members and an assistant administrator told the headmaster that "they believed Simonds was behaving inappropriately with students." (*Id.* at 2.) The *Courant* also reported that, in 1985, another former student complained about Simonds to the IMS Board of Trustees. (*Id.*) Mr. Levin, the board's chair, "said [that] trustees tried to keep ... [the] complaint quiet" and that he expected to testify "about the alleged attempt at a coverup." (*Id.*)

Similar lawsuits against IMS were filed in the years that followed. On October 19, 2018, IMS sent a letter to "Members of the Indian Mountain School Community," announcing that it had settled "17 claims from former students relating to sexual abuse by Simonds." (Ex. W (2018 IMS Letter) to Ponvert Aff. [Doc. # 75-1] at 1.) This letter also addressed the finding of its internal investigation and "offer[ed] a sincere apology to survivors of abuse," with hope that such an apology would "provide some opportunity for healing to members of our community." (*Id.* at 1, 3.)

II. Legal Standard

Summary judgment is appropriate where, "resolv[ing] all ambiguities and draw[ing] all permissible factual inferences in favor of the party against whom summary judgment is sought," *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008), "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.' " *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When considering a motion for summary judgment, the Court may consider depositions, documents, affidavits, interrogatory answers, and other exhibits in the record. Fed. R. Civ. P. 56(c).

"The moving party bears the initial burden of showing why it is entitled to summary judgment." *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Where, as here, the nonmovant bears the burden of proof at trial, the movant may show prima facie entitlement to summary judgment in one of two ways: (1) the movant may point to evidence that negates its opponent's claims or (2) the movant may identify those portions of its opponent's evidence that demonstrate the absence of a genuine issue of material fact, a tactic that requires identifying evidentiary insufficiency and not simply denying the opponent's pleadings." *Id.* at 272–73 (citing *Celotex*, 477 U.S. at 323). "If the movant makes this showing in either manner, the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Id.* (citing Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "Like the movant, the nonmovant cannot rest on allegations in the pleadings and must point to specific evidence in the record to carry its burden on summary judgment." *Id.* (citing *Celotex*, 477 U.S. at 324; *Matsushita*, 475 U.S. at 586).

III. Discussion

***5** At the time Plaintiff brought this action in 2018, Connecticut law required that "no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years from the date such person attains the age of majority." Conn. Gen. Stat. Ann. § 52-577d (2002).[3] Under this statute of limitations, Plaintiff was required to bring his tort claims by 2013, when he reached the age of 48. Thus, unless the limitations period is tolled, Plaintiff's claims of negligence, recklessness, and negligent infliction of emotional distress are time-barred.

Plaintiff asserts two bases for tolling the statute of limitations. He contends that the statute of limitations should be tolled under the doctrine of fraudulent concealment. (*See* Pl.'s Opp. to Def.'s Mot. for Summ. J. [Doc. # 74] at 3.) In the alternative, Plaintiff contends that the statute of limitations should be tolled under the continuing course of conduct doctrine. (*Id.* at 31.) Defendant argues that neither doctrine applies and that Plaintiff's action is thus untimely. (*See* Def.'s Mem. Supp. Mot. Summ. J. [Doc. # 91] at 10, 33.) The Court will consider these arguments in turn.

A. Fraudulent Concealment

Under Connecticut law, "[i]f any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence." Conn. Gen. Stat. § 52-595. "When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." *Iacurci v. Sax*, 313 Conn. 786, 799 (2014) (internal quotation marks omitted).

A plaintiff's ignorance of the facts that the defendant has sought to conceal is "a necessary element of tolling." *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 427 (2d Cir. 1999).[4] As Connecticut courts have explained:

> Fraudulent concealment can exist only if the plaintiff lacked the requisite knowledge pertinent to its cause

> of action until the time that the applicable limitations period expired. Thus, a court will not toll the statute of limitations to the extent the plaintiff had actual knowledge of the defendant's wrongdoing and [his] own injury when they happened, and yet failed to file suit before the limitations period expired. Nor may the plaintiff rely on the doctrine of fraudulent concealment simply because [his] knowledge was somewhat delayed or incomplete. On the contrary, the statutory limitations period begins running as soon as the plaintiff has sufficient actual knowledge to be aware of its claim, even though [he] lacks some of the details of [his] cause of action and does not discover the full enormity of the defendant's wrongdoing until later.

Maslak v. Maslak, 2013 WL 5663798, at *5 (Conn. Super. Ct. Sept. 27, 2013) (emphasis omitted) (quoting *Holliday v. Ludgin*, 2009 WL 3838915, at *3 (Conn. Super. Ct. Oct. 16, 2009)); *accord Deutsche Bank v. Lichtenfels*, 2009 WL 2230937, at *23 (Conn. Super. Ct. June 17, 2009). The Connecticut Supreme Court has also clarified that the "injury"—or "actionable harm"—may "occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another," and that "the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run." *Lagassey v. State*, 268 Conn. 723, 749 (2004); *see also Hodges v. Glenholme Sch.*, No. 3:15-CV-1161 (SRU), 2016 WL 4792184, at *7 (D. Conn. Sept. 13, 2016), *aff'd*, 713 F. App'x 49 (2d Cir. 2017) ("A plaintiff need not have an understanding of the full extent of her harm, nor its legal import, in order to have sufficient knowledge to bring a claim.").

***6** Defendant contends that Plaintiff cannot establish "he was ignorant of the facts sufficient to file a claim against IMS," (Def.'s Mem. at 19), because he has admitted "that he has always known that (1) he was abused by Simonds, (2) he suffered multiple injuries as a result of the abuse, (3) the abuse occurred while he was under the School's care and protection, and (4) Simonds was employed by IMS." (*Id.* at 13-14.) Defendant also notes that Plaintiff has a "long history of disclosing that he had been abused," telling "at least eight different people before the statute of limitations expired that he had been abused, including ... Susan Smith, an attorney who asserted claims against IMS on behalf of several former student alleging abuse by Simonds." (*Id.* at 14-15.)

Plaintiff responds that "the contention that Ramsay knew that 'the abuse occurred while he was under the school's care and protection' is not supported by the record." (Pl.'s Opp. at 4 n.2. (quoting Def.'s Mem. at 13-14.)) Plaintiff contends that the fact that "prior to January 2017, Ramsay heard 'there had been some claims' and that 'others had filed suit against the school about what Chris Simonds had done' ... is meaningless unless he also learned, within the limitations period, that the claims and suits had revealed or were based on the school's complicity in Simonds' abuse." (*Id.* (citing Def.'s Mem. at 7 n.6).)

Here, Plaintiff brings a claim of negligence, alleging that Defendant "employed a known pedophile," "failed and refused to supervise, discipline, report or fire a school teacher whom it knew and should have known was a serial child molester," and "failed to warn Ramsay and his mother of the risk of harm and of the actual harm to which he was subjected while attending Indian Mountain School." (Am. Compl. ¶ 130.) Plaintiff also brings claims of recklessness and negligent infliction of emotional distress premised on the same injuries. (*See id.* §§ IV, V.) In essence, the "actionable harm" in this case is that Plaintiff was allegedly sexually abused by an IMS teacher while in the School's care, and the School's "negligent conduct" is that it allegedly created the circumstances for his abuse, did not warn him or his mother of the potential for abuse, and did not protect him from this abuse or intervene to stop this abuse.

As to the actionable harm, it is undisputed that Plaintiff knew prior to 2013 that Mr. Simonds subjected him to the alleged abuse and that Plaintiff disclosed this abuse to multiple individuals prior to 2013. (*See* Parties' L.R. Stmts. ¶¶ 4, 8-10, 23-29, 31, 34.) It is also undisputed that Plaintiff had knowledge prior to 2013 that he "was in [Defendant's] care" while enrolled as a student, (Ramsay Gourd 2018 Dep. at 13), and that he was "aware that people could bring lawsuits against institutions involving people that had worked there and abused kids" and was "aware of lawsuits involving the Catholic church," (*id.* at 110). Although Plaintiff may not have been aware of the School's full complicity in his alleged

abuse, he certainly had enough knowledge to bring a claim. *See Rosenfield v. I. David Marder & Assocs., LLC*, 110 Conn. App. 679, 686 (2008) ("[T]he occurrence of an act or omission ... that causes a direct injury, however slight, may start the statute of limitations running against the right to maintain an action even if the plaintiff is not aware of the injury, and even if all resulting damages have not yet occurred; it is sufficient if nominal damages are recoverable for the breach or for the wrong, and where that is the case, it is unimportant that the actual or substantial damage is not discovered or does not occur until later. The fact that the extent of the damages cannot be determined at the time of the wrongful act does not postpone the running of the statute of limitations." (quoting 51 Am. Jur. 2d 548–49, Limitation of Actions § 151 (2000)). [5]

***7** As in *Dignan v. McGee*, Plaintiff was "[n]ot only ... aware of the abuse, but he was clearly aware of his ability to bring a lawsuit against the defendant," as demonstrated by e-mails that Plaintiff wrote in 2009. 2009 WL 973495, at *5. On March 25, 2009, Plaintiff sent Attorney Susan Smith an e-mail headed "Doe Vs. Indian Mountain School," in which he wrote that he "was approached to participate in the legal actions taken against IMS, [but] was not in a state to do so at the time" and that he "still believe[d] that legal action is not the course for [him]." (Gourd 2009 E-mails at 1.) The e-mail to Attorney Susan Smith makes a specific reference to alleged abuser Christopher Simonds, and, in the same sentence, requests information about "a support network of former students." (*Id.*) Additionally, on April 8, 2009, Plaintiff documented in his e-mail to Lou Midura and Leonard Stephens that he "had a conversation with the attorney who represented five victims from IMS." (*Id.* at 3.) Even making all reasonable inferences in Plaintiff's favor, the Court can only conclude from these e-mails that Plaintiff had at least some knowledge that a former student could sue IMS for sexual abuse allegedly perpetrated by Mr. Simonds.

Plaintiff's efforts to liken this case to *Horner v. Hartford Roman Catholic Diocesan Corporation* are unavailing. In that case, the Connecticut Superior Court concluded that plaintiff was ignorant of his cause of action because plaintiff "testified that notwithstanding this awareness [of his abuse], he did not think he 'had any kind of recourse' against the diocese, specifically that he had 'no idea that the Archdiocese would be responsible for actions' " perpetrated by his abuser and because plaintiff "aver[red] that he was unaware of the possibility of holding the diocese responsible for the sexual abuse ... until he was told about the 1970 report in May 2016 and realized that the diocese knew that [his abuser] was a child molester" before his abuser harmed him. *Horner v. Hartford Roman Catholic Diocesan Corp.*, No. X10CV176034898S, 2018 WL 5797810, at *4 (Conn. Super. Ct. Oct. 24, 2018). Plaintiff contends that "[t]his case is on all fours with *Horner*," as Plaintiff has averred that he "[u]ntil he met with [his] counsel in 2017, [he] had no idea that, prior to his attendance at the school, IMS knew Simonds possessed child pornography and was considered a likely pedophile," (Pl.'s Opp. at 6 (generally citing Gourd Aff.)), and has further testified that "prior to 2013, [he] was not aware of any claims that the school was culpable for what Mr. Simonds did to the kids at the school" and "didn't believe that IMS knew that Simonds was abusing [him]." (*Id.* at 7 (quoting Ramsay Gourd 2018 Dep. at 34, 110)). But *Horner* is distinct insofar as the plaintiff in that case alleged that the defendant owed him a fiduciary duty. *See Horner*, 2018 WL 5797810, at *2. And as Defendant notes, "the plaintiff in *Horner* did not believe that the diocese could be responsible for his harm and did not communicate with an attorney until after the expiration of the limitations period." (Def.'s Reply [Doc. # 80] at 5 (citing *Horner*, 2018 WL 5797810, at *2, *4 n.7).) Here, Plaintiff explicitly stated that he was "approached to participate in the legal actions taken against IMS" within the limitations period but declined to do so. (Gourd 2009 E-mails at 1.) [6] Thus there is no genuine issue of material fact that Plaintiff timely knew that he had a potential cause of action against Defendant.

***8** Because it is undisputed that Plaintiff was aware that he had a potential cause of action against Defendant, Plaintiff cannot, as a matter of law, rely on the fraudulent concealment doctrine to toll the timing of his claims. [7]

B. Continuing Course of Conduct

The Connecticut Supreme Court has, "[i]n certain circumstances, ... recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place." *Flannery v. Singer Asset Fin. Co., LLC*, 312 Conn. 286, 311 (2014). This doctrine "reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied." *Id.* at 312 (internal quotation marks omitted.)

However, "the continuing course of conduct doctrine has no application after the plaintiff has discovered the harm." *Rosato v. Mascardo*, 82 Conn. App. 396, 405 (2004). In the event that the plaintiff has not discovered the harm, a court must ask "whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." *Flannery*, 312 Conn. at 312. (internal quotation marks omitted). "In the absence of a continuing special relationship, there must be a subsequent wrongful act that is related to the prior negligence." *Id.* at 321 (internal quotation marks and alteration omitted).

In his Complaint, Plaintiff alleges that "defendant owed a continuing duty to the plaintiff to inform him of the truth and to take all other steps within its power to assist the plaintiff with his recovery and treatment, and to reduce the plaintiff's pain and suffering." (Am. Compl. ¶ 145.) Plaintiff asserts that the continuing course of conduct doctrine applies here because the school has "concede[d] a continuing course of conduct and continuing duty of care to its alumni who were sexually abused by Christopher Simonds while in the school's custody." (Pl.'s Opp. at 31.) In support of that contention, Plaintiff points to two messages sent by IMS officials in 2014, stating that IMS "reaffirm[s] [its] pledge to protecting the health, safety and well-being of our students past and present," (Headmaster Message at 1), and that IMS is "committed to [its] alumni from decades ago" and is seeking information as to "how best to respect and support any alumni who may have been harmed," (IMS Message at 1). Plaintiff also points to various depositions with School officials, in which these officials express a commitment to helping alumni who had suffered abuse. (*See, e.g.*, Ex. V (IMS Chief Financial Officer Cheryl Sleboda Dep.) to Ponvert Aff. [Doc. # 75-2] at 97 (testifying that the school's "first priority is to protect the health, safety, and well-being of our students").)

***9** Defendant responds that "Plaintiff's knowledge of the factual predicate for his causes of action precludes tolling," because he "cannot establish that IMS owed him a duty that continued uninterrupted from 1980 until 2013." (Def.'s Mem. at 34-35.) Additionally, Defendant asserts that the School's 2014 messages are irrelevant to a continuing course of duty analysis because the messages were sent a year after Plaintiff's claims expired. (*Id.* at 36.)

Because the record establishes that Plaintiff possessed sufficient knowledge to file his claims against IMS prior to 2013, the continuing course of conduct doctrine is inapplicable to toll Plaintiff's claim. *See Rosato*, 82 Conn. App. at 405; *Rivera v. Fairbank Mgmt. Properties, Inc.*, 45 Conn. Supp. 154, 160 (Conn. Super. Ct. 1997) ("Upon discovery of actionable harm, the policy behind the continuing course of conduct doctrine, to preserve the ongoing relationship with the hope that any potential harm from a negligent act or omission may yet be remedied, no longer has any force.").

Even if Plaintiff were ignorant of the actionable harm here, this doctrine would still be of no use to him. As the Connecticut Supreme Court has explained, the "scope of the duty imposed by the student-school relationship is not limitless. The duty is tied to expected activities within the relationship. Therefore, in the student-school relationship, the duty of care is bounded by geography and time, encompassing risks such as those that occur while the student is at school or otherwise under the school's control." *Munn v. Hotchkiss Sch.*, 326 Conn. 540, 552 (2017) (cleaned up). Plaintiff has not offered any evidence that he was in any way under the Defendant's control after his graduation from the school in 1980 until the expiration of the limitations period in 2013. Assuming *arguendo* that the 2014 messages are relevant to this inquiry, these messages appear only to express concern for the well-being of IMS alumni and do not otherwise indicate that Plaintiff remained in the School's control or that the School was otherwise assuming a legal duty toward him.

Because the continuing course of conduct doctrine does not apply, the Court lacks any basis to toll Plaintiff's undisputedly untimely claim. [8]

IV. Conclusion

Accordingly, Defendant's Motion for Summary Judgment [Doc. # 59] is GRANTED. Judgment shall enter for Defendant. The Clerk is directed to close this case.

***10** IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1244920

Footnotes

1 Plaintiff's mother died on January 7, 2000. (Ex. 4 (Pl.'s Resp. to Interrog.) to Dion Aff. [Doc. # 64-4] at 10.)

2 Docket sheets are public records of which a court may take judicial notice, *see* *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006), not for the truth of the matters asserted, but "to establish the fact of such litigation and related filings," *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992).

3 Section 52-577d was subsequently amended in 2019 to provide that no such action "may be brought by such person later than thirty years from the date such person attains the age of twenty-one"—that is to say, once that person turns fifty-one years old. As the Court notes above, Plaintiff was fifty-three years old when he filed this lawsuit. Because Plaintiff's lawsuit falls outside of the limitations period under either version of the statute, the Court need not determine whether the 2019 amendment has a prospective or retroactive effect.

4 Section 52-595 also requires a plaintiff to demonstrate that a defendant:

> (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiff's cause of action; (2) intentionally concealed these facts from the plaintiff; and (3) concealed the facts for the purpose of obtaining delay on the plaintiff's part in filing a complaint on their cause of action.

Iacurci, 313 Conn. at 799–800 (alterations omitted).

5 Plaintiff contends that the "only conceivable cause of action supported by the 'four facts' identified by the [D]efendant is one for *respondeat superior*, a claim not asserted in the Complaint," and that he otherwise did not know all of the facts necessary to assert his claims. (Pl.'s Opp. at 4.) But as other courts have held, a plaintiff has sufficient information to file a tort claim if he knows that he was abused and that this abuse occurred under a defendant's supervision. *See* *Dennany v. Knights of Columbus*, No. 3:10-CV-1961 (SRU), 2011 WL 3490039, at *6 (D. Conn. Aug. 10, 2011) ("[S]ince 1979, [plaintiff] has known that [the perpetrator] abused him, that [the perpetrator] was associated with Knights and was trusted with supervising members of [a Knights youth organization], and that Knights owed [plaintiff] a fiduciary duty. The sum of those facts was sufficient for [plaintiff] to file his negligence claim [against the Knights], based on information and belief, when he turned 18 and his injury accrued."); *Hodges*, 2016 WL 4792184, at *7 (dismissing complaint as untimely where plaintiff "fail[ed] to adequately allege her own lack of knowledge of the abuse" while a student at defendant-school); *see also* *Dignan v. McGee*, No. 3:07-CV-1307 (JCH), 2009 WL 973495, at *5 (D. Conn. Apr. 9, 2009) (granting summary judgment where plaintiff had unambiguously demonstrated his knowledge that he had been abused).

6 Plaintiff attempts to minimize the import of his communications with Ms. Smith, suggesting that his comments about being "approached to participate in the legal actions taken against IMS" may "refer, not to a previous solicitation by Smith or another plaintiff's lawyer, but rather to [IMS] Attorney Altermatt's letter and phone call, where he appears to have asked Ramsay if he'd be willing to testify in one or more of the abuse cases on behalf of the school." (Pl.'s Opp. at 19 n.10.) But even if this were the correct interpretation of Plaintiff's 2009 e-mail, the statement would still indicate that he had direct knowledge that similarly situated former students were bringing sexual abuse claims against IMS.

7 As a result, the Court need not reach Defendant's argument that, "[e]ven if Plaintiff could offer evidence that supported his claim that he did not know facts sufficient to file suit against IMS, that would still not be sufficient to avoid summary judgment on his fraudulent concealment claim," (Def.'s Mem. at 22), because he cannot prove that he "exercised reasonable diligence to discover the cause of action under the circumstances," *OBG Tech. Servs., Inc. v. Northrop Grumman Space & Mission Sys. Corp.*, 503 F. Supp. 2d 490, 507 (D. Conn. 2007), in light of the fact that the news media widely reported on "allegations of an administrative conspiracy to cover up the initial sexual allegation which resulted in Simonds' resignation," (1993 Hartford Advocate Article at 2). Nor need the Court consider Defendant's related argument that the record cannot support a finding that IMS "intentionally concealed these facts from the plaintiff," *Iacurci*, 313 Conn. at 800 (alteration omitted), because the School "did not control the information allegedly concealed as these facts were widely and extensively covered by the media," (Def.'s Mem. at 31).

8 Because Plaintiff's own knowledge of his injury precludes tolling under both the fraudulent concealment doctrine and the continuing course of conduct doctrine, the Court need not address the arguments that Plaintiff raised following briefing that IMS "admitted that it possesses evidence that is 'highly relevant to the outstanding issues of fact' in this case" in a related state court action. (Pl.'s Supplemental Submission Supp. Opp. to Mot. for Summ. J. [Doc. # 84] at 1 (quoting Def.'s Mot. to Stay, *Arrowood Indemnity Co. v. Indian Mountain Sch.*, No. HHD-CV-18-6102983-S (Conn. Super. Ct. Oct. 24, 2019) Entry No. 118.00).) Leaving aside the fact that Defendant has represented that it has "complied with all discovery in this case and there are no material issues of fact warranting denial of the School's Motion for Summary Judgment," (Def.'s Resp. to Pl.'s Supplemental Submission [Doc. # 85] at 1), further discovery on Defendant by Plaintiff would not create

a dispute as to whether Plaintiff had sufficient knowledge to bring his claim, as demonstrated by Plaintiff's March 25, 2009 e-mail to Attorney Susan Smith.

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United States District Court,
E.D. Michigan, Southern Division.

Arnold IRRER, et al, Plaintiffs,
v.
MILACRON, INC., Defendant.

No. 04–72898.
|
Sept. 18, 2006.

Attorneys and Law Firms

Gary L. Shockey, Gerald L. Spence, Roy A. Jacobson, Jr., Spence Law Firm, Jackson, WY, Neal J. Wilensky, Kaechele & Wilensky, Grand Blanc, MI, for Plaintiffs.

John G. Mitchell, Secrest, Wardle, Farmington Hills, MI, Lee D. Thames, Robert A. Miller, Butler, Snow, Jackson, MS, Sean S. Cleland, Martin, Bacon, Mount Clemens, MI, for Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS GREEN AND GARLAND [70]

EDMUNDS, J.

***1** This product liability case comes before the Court on Defendant's motion for summary judgment as to Plaintiffs Green and Garland [1] arguing that their product liability claims against Milacron are time-barred. Defendant's motion is GRANTED. Plaintiffs' tolling and equitable estoppel arguments are rejected.

I. Facts

This Court has diversity jurisdiction over Plaintiffs' product liability action [2] brought by 256 current or former General Motors employees claiming to have been injured by exposure to Defendant Milacron, Inc.'s metalworking fluids used in fabricating metal parts at GM's Buick plant. Plaintiffs' complaint was filed on June 21, 2004.

This matter is currently before the Court on Milacron's motion for summary judgment arguing that Plaintiffs Valerie Green and Regional Garland knew or should have known of their alleged injury and possible cause of action more than three years before this suit was filed. Accordingly, Milacron argues, their claims are time-barred under the applicable statute of limitations.

II. Standard for Summary Judgment

Summary judgment is appropriate only when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. Once the moving party meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The non-moving party may not rest upon its mere allegations, however, but rather "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The mere existence of a scintilla of evidence in support of the non-moving party's position will not suffice. Rather, there must be evidence on which the jury could reasonably find for the non-moving party. *Hopson v. DaimlerChrysler Corp.,* 306 F.3d 427, 432 (6th Cir.2002).

III. Analysis

A. General Principles

Under Michigan law, a claim for personal injury from a product must be brought within three years of when the claim first accrues. Mich. Comp. Laws § 600.5805(13). The Michigan courts apply a discovery rule to product liability claims, thus affecting the date they accrue for statute of

limitations purposes. *See Moll v. Abbott Labs.,* 444 Mich. 1, 506 N.W.2d 816, 823 (Mich.1993); *Mascarenas v. Union Carbide Corp.,* 196 Mich.App. 240, 492 N.W.2d 512, 514 (Mich.Ct.App.1992) (observing that "[t]he 'discovery rule' measures the accrual date of latent occupational diseases in products liability cases"); *Stinnett v. Tool Chem. Co.,* 161 Mich.App. 467, 411 N.W.2d 740, 743 (Mich.Ct.App.1987).

***2** The Michigan Supreme Court adopted "the 'possible cause of action' standard for determining when the discovery rule period begins to run in *Moll." Solowy v. Oakwood Hosp. Corp.,* 454 Mich. 214, 561 N.W.2d 843, 846 (Mich.1997). It reasoned that "[t]his standard advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause, yet ... also protects the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action." *Moll,* 506 N.W.2d at 827. Thus, "[o]nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Id.* at 828. The statute of limitations begins to run at that point, giving the plaintiff three years to investigate and file his complaint. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy,* 561 N.W.2d at 847.

Additional general principles apply to Michigan's discovery rule. It "applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll,* 506 N.W.2d at 825. Moreover, a plaintiff need not know "the details of the evidence by which to establish his cause of action." *Id.* at 828 (internal quotations and citation omitted).

B. Application to Undisputed Facts as to Plaintiff Green's and Garland's Causes of Action Against Defendant Milacron, Inc.

Defendant Milacron argues that the undisputed facts presented here show that Plaintiffs Green and Garland each knew or should have known of their injury and its possible cause for more than three years before this lawsuit was filed because: (1) each had a documented lung-related condition no later than 1995 and 1996, respectively; and (2) each believed that exposure to metalworking fluids or mists was a possible cause of that condition more than three years before filing this suit.

1. Valerie Green

Valerie Green claims that she was exposed to metalworking fluids from 1985 through 1995. (Def.'s Ex. B, Green Fact Sheet at 2.) She last worked at GM's Buick Plant on February 10, 1995. (Green Dep. at 78.) On that last day of work, Ms. Green had pneumonia. (Green Dep. at 43.) She was told by her physician, Dr. Filos, that her pneumonia was triggered by the air in the GM plant where she worked. (Green Dep. at 44.) In 1995, she understood that, based on comments from Dr. Filos, that something at work was causing her breathing problems and that it could have been triggered by some unknown chemicals in the work environment. (Green Dep. at 45–46.) [3]

On February 10, 1995, Ms. Green submitted an application for disability benefits. (Def.'s Ex. D.) In that application, she identified one of her disabling conditions as asthma, a condition she believed was a work-related condition. (Green Dep. at 107.) Her physician, Dr. Musson, submitted a Statement of Disability on April 14, 1995, declaring that Ms. Green was totally disabled and listing shortness of breath, asthmatic type, pneumonia, and obstructive air diseases, among other things, as her present condition. (Def.'s Ex. E.)

***3** Ms. Green subsequently applied for workers' compensation benefits. In her June 15, 1995 application, she stated that her employment had caused and significantly aggravated her breathing condition. (Def.'s Ex. F.) She also testified that, as of that date, that was her opinion. (Green Dep. at 105.) She further testified that, on June 19, 1995, another of her physicians, Dr. Musson, had told her that whatever was in the environment at her work was not good for her lungs. (Green Dep. at 108.) On that date, Dr. Musson put Ms. Green on work restrictions that included avoiding smoke, vapors, or fumes because of her lung disease. (Def.'s Ex. H, 6/19/95 work restriction note.)

In light of the above, Defendant argues that, no later than June 1995, Ms. Green knew that (1) she was injured, and (2) a possible cause was the vapors or fumes in her work environment. Thus, as of June 19, 1995, Ms. Green had discovered sufficient information about her injury and a possible cause to trigger the three-year statute of limitations on her product liability claims. This Court agrees with Defendant.

By June 1995, Plaintiff Green knew that: (1) she had lung problems, (2) she was exposed to chemical fumes and mists at the GM plant where she worked (Green Dep. at 49), and (3) her physician had told her exposure to "different elements in the air" at the GM Plant where she worked was causing her

breathing problems. (Green Dep. at 44–46.) Thus, similar to the plaintiff in *Stinnett,* she knew she had a lung problem and believed that "the problem was caused by chemicals [s]he had been exposed to at work" and yet failed to bring this action until nine years later, on June 21, 2004. *Stinnett,* 411 N.W.2d at 743. *Accord, Mascarenas,* 492 N.W.2d at 515 (affirming the trial court's decision that the plaintiff's product liability claim was time-barred because "[p]laintiff himself had associated his neurological symptoms with exposure to toxic fumes as early as 1982 or 1983 .... [and thus] knew no later than 1983 that he was suffering damages associated with defendants' products.")

2. Regional Garland

Mr. Garland has a long work history at General Motors, most of it marked by respiratory and sinus problems that he attributes to products used at the plant. These begin in 1966–67 when Mr. Garland was diagnosed with sinusitis and severe chronic sinus headaches and was advised by physicians to avoid contact at work with paint, primer or thinner spray and other paint fumes. (Garland Dep. at 136–40.) He also suffered a pneumothorax (collapsed lung) in 1975. Its cause was not diagnosed, but Mr. Garland told another doctor in March of 1986 that he believed it might have been caused by his workplace exposure to methylene chloride because that product's label stated that it "causes lung damage and can cause death." (Garland Dep. at 65–66, 115–18; Def.'s Ex. Q, 3/18/96 medical record of Dr. Rotblatt.)

Mr. Garland claims here that he was exposed to metalworking fluids beginning in 1984 or 1985 and ending on August 13, 1997, and that this exposure caused chronic sinusitis, reoccurring pneumonia, and in part a collapsed lung. (Def.'s Ex. O, Factual Information Sheet at 4; Garland Dep. at 75–76, 104–112.) Mr. Garland testified that, while working at the GM Plant, he saw "Milacron" on product barrels and saw Milacron representatives wearing Milacron hats. (Garland Dep. at 94–102.)

***4** Mr. Garland also testified that he was exposed to a product called "Chemkleen 338," which he believes to be a Milacron product. There was a specific incident, in either 1984 or 1985, where his exposure to that product took his breath away and left him with a lingering cough. (Garland Dep. at 104–112.) Mr. Garland claims that he was washing cars with other workers and then this chemical product "came in on us, and everybody just lost their breath. And I wanted to know what it was...." (Garland Dep. at 108.) Mr. Garland was very upset and let others at the Plant know about it. He eventually got the label off a barrel of Chemkleen 338 because he believed that was the product being used when "we almost—all of us guys in there, we almost suffocated. They put too much of it into the system that they were washing the cars and stuff with." (Garland Dep. at 107–108.)

In July 1986, Mr. Garland was given a work restriction related to his lungs, calling for no exposure to fumes, vapors, or smoke. [4] (Garland Dep. at 152–54; Def.'s Ex. R, 7/2/86 entry Buick Medical Treatment Record.)

In March 1987, Mr. Garland had a chest x-ray in response to complaints of chest pain and in light of his history of pneumothorax. The report indicates that his lungs were "negative for active disease" but "emphysematous configuration of the chest noted. Blunting along both lateral costo phrenic sulci most likely related to old pleural fibrosis." (Def.'s Ex. S, 3/30/87 report from B–O–C Flint Medical Department.)

About a decade later, Mr. Garland applied for worker's compensation benefits, listing three injury dates in 1996: February 1, March 13, and October 25, 1996, and claiming that he "has suffered disabling pulmonary injuries as a result of exposure to various chemicals, dusts, fumes and other pollutants in the plant." (Def.'s Ex. T, Bureau of Workers' Disability Compensation, Application for Mediation or Hearing—Form A.) [5]

Mr. Garland testified that, throughout 1994, 1995, and 1996, he had heard coworkers talk about lawsuits similar to this action, and it was his belief that the metalworking fluids he was exposed to were "dangerous stuff." (Garland Dep. at 30–35.)

> Q: Have you ever been made aware of other lawsuits involving metal working fluid exposure?
>
> A: I've heard different guys in the shop talk about stuff like that.
>
> Q: What did you hear?
>
> A: That this is some dangerous stuff we're working here. And it was like what are we working here. And it was, I don't know, I just go to work.

(Garland Dep. at 30.)

Q: Well, tell me when you first started to have these conversations with these people.

A: I'd say '94, '95, '96, all the way through there. Because, see, I left out of the shop in '97.

Q: So sometime between '94 and '97 you would have had these conversations?

A: Yes.

(Garland Dep. at 35.)

Mr. Garland last worked at the GM Plant on August 13, 1997, when he went out on compensable sick leave. (Garland Dep. at 47–48, 158.)

***5** Defendant argues that, based on Mr. Garland's own testimony and the dates he claimed he was disabled from lung-related injuries as a result of exposure to chemicals at the GM Plant, Mr. Garland knew or should have known, by October 25, 1996 at the latest, that (1) he was injured, and (2) a possible cause was his exposure to metalworking fluids in his work environment. Thus, as of October 25, 1996, Mr. Garland had discovered sufficient information about his injury and a possible cause to trigger the three-year statute of limitations on his product liability claims. This Court agrees with Defendant.

Despite Plaintiffs' claims to the contrary, it is not necessary for Plaintiff to "know of a definitive cause" of his injury; rather, it is "sufficient" that he is "aware of a possible cause" thus triggering his duty to diligently pursue that possible causal connection and file his product liability lawsuit within the three-year statute of limitations. *Ciborowski v. Pella Window and Door Co.,* No. 257091, 2005 WL 3478159 (Mich.Ct.App. Dec.20, 2005). Michigan courts strictly adhere "to the general rule that subsequent damages do not give rise to a new cause of action." *Moll,* 506 N.W.2d at 825 (internal quote and citation omitted).

Michigan's appellate courts have likewise rejected the argument that the statute of limitations on such claims does not begin to run until the plaintiff receives a definitive diagnosis. *Kullman v. Owens–Corning Fiberglas Corp.,* 943 F.2d 613, 616 (6th Cir.1991) (citing *Stinnett,* 411 N.W.2d at 742–43). For example, in *Stinnett,* the trial court denied the defendants' motion for summary judgment on statute of limitation grounds. It held that, for an action to accrue, the plaintiff "has to be informed by a physician that there is a diagnosis of a work-related injury and not something speculative." *Stinnett,* 411 N.W.2d at 472. The Michigan Court of Appeals reversed. It reasoned that, "given plaintiff's own unequivocal deposition testimony, plaintiff knew that he had a lung problem and he believed that the problem was caused by the chemicals he had been exposed to at work." *Id.* at 473 (citing cases). This was enough to trigger the statute of limitations. *Id.*

The same reasoning and result apply here. Mr. Garland knew of his respiratory problems and, like the plaintiff in *Stinnett,* believed, since at least 1984 or 1985, that these problems were caused by the chemicals in the air that he had been exposed to at work. Moreover, by 1996 he believed that the metalworking fluids he was exposed to at work were "dangerous stuff" and he had suffered pulmonary injuries as a result of exposure to chemicals in the GM plant where he worked. This was enough to start the statute of limitations running on his claims. That statute gave him three years to investigate and pursue his product liability claims and to file his lawsuit. He failed to do so, and thus those claims are time-barred.

***6** Accordingly, unless other tolling rules apply, these Plaintiffs' product liability claims against Defendant are time-barred. The Court now addresses Plaintiffs' tolling arguments.

4. Plaintiffs' Tolling and Equitable Estoppel Arguments

Plaintiffs argue that tolling is required because (1) class certification issues were pending in a separate Michigan state court action filed in November 1999; (2) Defendant actively and fraudulently concealed the existence of these Plaintiffs' product liability claims and thus the three-year statute of limitations period is tolled for an additional two years under Mich. Comp. Laws § 600.5855; and (3) Defendant Milacron allegedly made false representations to General Motors about the safety of its products and thus the doctrine of equitable estoppel should be invoked to preclude Milacron from arguing the statute of limitations bars Plaintiffs' lawsuit. The Court considers and rejects each of these arguments.

a. Pending Michigan State Court Action With Class Allegations

Plaintiffs first argue, without supporting authority, that the statute of limitations on their product liability claims were tolled while class certification issues were pending in a separate Michigan state action, *Gibson v. General Motors Corporation, et. al.,* Genesee County Circuit Court, Case No. 99–66596–NO. Plaintiffs are mistaken.

The three-year statute of limitations period for these Plaintiffs' product liability claims expired before the November 5, 1999 filing date of the putative class action *Gibson* lawsuit in state court: Ms. Green's expired, at the latest, on June 19, 1998, and Mr. Garland's expired, at the latest, on October 25, 1999. Moreover, Plaintiffs' tolling argument ignores the fact that, while the *Gibson* action was pending, they filed a separate action against Defendant Milacron. *Irrer, et al. v. Milacron, Inc. ("Irrer I"),* Genesee County Circuit Court, Case No. 02–75196–NO, was filed in state court on December 10, 2002. *Irrer I* was subsequently removed to this Court and voluntarily dismissed without prejudice on June 6, 2003. (*Irrer, et. al. v. Milacron, Inc.,* United States District Court, Eastern District of Michigan, Case No. 02–75092, Docket Nos. 15–16.) Thus, for about six months, these Plaintiffs had their own separate product liability action pending against Defendant Milacron despite the fact that the *Gibson* action was still pending in state court and that court had not yet denied the *Gibson* plaintiffs' motion for class certification. Moreover, this action (*Irrer II)* was not filed until June 21, 2004, even though the motion for class certification was denied on April 23, 2004. Defendant argued at the hearing on this matter that, at the very least, the statute of limitations on Plaintiffs' claims ran during the six months that the separate *Irrer I* lawsuit was pending and for the two months between the *Gibson* court's denial of the plaintiffs' motion for class certification and the filing of the *Irrer II* lawsuit. Defendant's argument is persuasive.

***7** Putative class members like Plaintiffs, who choose to file individual actions before there is a decision on class certification, are not entitled to the benefit of the class action tolling rule. *Fezzani v. Bear, Stearns & Co.,* 384 F.Supp.2d 618, 632–33 (S.D.N.Y.2004) (citing decisions reaching the same conclusion). To allow tolling under these circumstances " 'would create the very inefficiency" ' that the rule announced in *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), was created to prevent. *Id.* at 633 (quoting *In re WorldCom, Inc. Secs. Litig.,* 294 F.Supp.2d 431, 450–51 (S.D.N.Y.2003)). Accordingly, even if the three-year statute of limitations period on Ms. Green's and Mr. Garland's product liability claims had not expired, they would not be entitled to the benefit of the class action tolling rule for the time periods discussed above.

b. Fraudulent Concealment

Plaintiffs next argue that under Mich. Comp. Laws § 600.5855,[6] the three-year statute of limitations on their product liability claims is tolled because Defendant Milacron fraudulently concealed the existence of their cause of action against it. In support, Plaintiffs proffer:

> (1) an affidavit from John Truchan, health and safety representative for UAW Local 599 in early 1987, averring that during that time period Milacron representatives told the committee members that its metal working fluids were "safe enough to drink" and did not "mention that breathing the mist from metal working fluids could cause any type of breathing problems" (Pls.' Ex. 1, 1/17/05 Aff.);
>
> (2) on May 31, 1996, an industry group known as the Independent Lubricant Manufacturers Association ("ILMA") published comments regarding the National Institute for Occupational Safety and Health's ("NIOSHA") February 23, 1996 draft "Criteria for a Recommended Standard: Occupational Exposures to Metalworking Fluids" expressing its opinion that "NIOSHA has not adequately supported its Recommended Exposure Limit ("REL") for occupational exposures to metal removal fluids—either on a technical or a legal basis" (Pls.' Ex. 2 at 4);
>
> (3) deposition testimony showing that Milacron employee, John Steigerwald, was an officer of ILMA and supported that industry group's positions (Pls.' Resp. at 5);
>
> (4) Milacron's Toxicity Advisory Committee minutes from an October 23, 1980 meeting stating the "belief that the area of inhalation toxicology and its far-reaching potentially long-term effects is probably the major area in metalworking fluid occupational health to be concerned about" (Pls.' Ex. 7);
>
> (5) an October 17, 1998 internal memo detailing a number of workers "reportedly out on sick leave due to coolant related illness ranging from breathing problems to loss of speech", observing that "all related records from May 98 to date" have been summoned", that "[t]he V8 scare has taken over V6", and there is a "need to take actions to keep it from getting out of hand" (Pls.' Ex. 8);
>
> ***8** (6) a November 14, 2000 letter from Milacron to an Environmental Engineer at GM's V6 Flint—Plant # 36 enclosing confidential documents concerning the

OSHA MSDS for certain Milacron metalworking fluid concentrate (Pls.' Ex. 9);

(7) deposition testimony from Ann Ball, a Milacron technical services representative, that she went out to GM's V6 Plant in response to its concerns about dermatitis and respiratory issues (Ball Dep. at 35–36);

(8) Ball's November 2, 1998 Trip Report revealing that "Many V6 employees have developed a lack of trust surrounding the use of metal removal fluids (MRF's) in the workplace" because "[i]nformation surrounding concerns in the V8 plant have filtered into the V6 plant" and observing that "V6 employees are in need of awareness training so that they have a better understanding of MRF's and their safe use" and further observing, among other things, that "Caution signs found hanging out of reach in various areas through the plant ... need updating" (Pls.' Ex. 11);

(9) a December 8, 1999 internal Milacron memo discussing a December 2, 1999 request from the GMPTG Flint Components facility "for Milacron to bring in an expert to discuss the possible health affects [sic] of metal working fluids", observing that "in a recent e-mail response from Greg Foltz, Milacron has been advised not to discuss any health and safety issues concerning our products at any GM facility", objecting that the advice is unwise and contrary to prior practice and suggesting that Milacron "conduct the meeting with guidelines" that Milacron not reference the pending lawsuit (presumably the November 1999 Michigan state action) and "will only provide information on the health and safety of metal working fluids that is publicly available" (Pls.' Ex. 12);

(10) deposition testimony from a GM worker, Robert Holt, who worked at Buick, in Plant 10, that at a 2000 meeting plant employees were told that dermatitis complaints were caused by overwashing and not Milacron's coolants and that he was led to believe these Milacron products were perfectly safe (Holt Dep. at 20);

(11) an undated section from an internal Milacron handbook entitled "Questions and Answers: Health & Safety of Metalworking Fluids" with a "Tech Response" for eye, nose, throat and/or bronchial irritation recommending that (in addition to evaluating operating conditions, ventilation, checking out concentration, filling out required forms, eliminating other causes, notifying Regulatory Affairs for a letter, citing OSHA General Duty Clause, not promising to solve the problem, and issuing closure letter) that tech "Listen to complaint—deny ownership of the problem—ventilation or shielding are solutions" (Pls.Ex. 20); and

(12) deposition testimony from another GM employee, Deborah Dantzler–Harris, that she had a conversation in April of 1998 with an unnamed chemical management person about the safety of chemicals used in her department and was told that "system 7 was safe" and she did not ask him to elaborate (Dantzler–Harris Dep. at 228–230).

***9** The evidence Plaintiffs proffer does not support application of the tolling statute.

First, Michigan courts make the common sense observation that "only actions *after* the alleged injury could have concealed plaintiff's cause of action against defendant because actions taken before the alleged injury would not have been capable of concealing causes of action that did not yet exist." *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit,* 264 Mich.App. 632, 692 N.W.2d 398, 404 (Mich.Ct.App.2004) (emphasis added). Because Ms. Green and Mr. Garland allege that they suffered work-related lung injuries in 1995 and 1996 respectively, the Court does not consider items 1 and 4 listed above.

Second, Michigan courts have further observed that "[f]raudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Id.* at 405 (internal quotes and citations omitted). "Thus, the plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Id.* (internal quotes and citation omitted).

Even when viewed in a light most favorable to Plaintiffs, items 2, 3, 5–12 and Plaintiffs' proffered evidence on its failure to warn claims cannot be considered affirmative acts by Milacron designed to prevent these Plaintiffs from discovering the cause of action they allege here. Similar to the plaintiff in *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit,* Plaintiffs here fail to distinguish between "plaintiff's knowledge of the evidence that could prove [his or her] claims and plaintiff's knowledge of the possible causes of action against defendant." 692 N.W.2d at 407.

Finally, much of the evidence Plaintiffs proffer refutes the argument that they could not, with reasonable diligence, have known that they had a possible cause of action thus requiring them to investigate and file their action within three years of that date. For example, items 5, 7, and 8 acknowledge that by 1998 GM employees from both the V8 and V6 plants had health concerns about working around Milacron's metalworking fluids. In fact, a lawsuit had been filed in Michigan state court in March 1996 by a group of plaintiff employees at GM's V8 engine plant against General Motors and Cincinnati Milacron alleging respiratory injuries from exposure to metalworking fluids. *Brock v. General Motors, et. al.,* Genesee County Circuit Court, Case No. 96–46048–NO. (Def.'s Ex. V.) Moreover, as Defendant points out, Plaintiffs' complaint alleges that "metal working fluids have been the focus of extensive scientific studies over the past fifteen to twenty years." (Compl.¶ 6.) Defendant also submits evidence that Plaintiffs' union informed its members of the possible health risks associated with working around metalworking fluids since 1984. (Def.'s Ex. U at M9, M10, M15.) Thus, despite Plaintiffs' arguments to the contrary, this Court concludes that Plaintiffs are not entitled to the benefit of Michigan's two-year tolling statute for fraudulent concealment.

c. Equitable Estoppel

***10** Plaintiffs' final argument is that Defendant Milacron should be estopped from raising the three-year statute of limitations as a bar to this action because it allegedly made false misrepresentations to its customer, General Motors, about the safety of its metalworking products. (Pls.' Resp. at 11–12.) This Court rejects Plaintiffs' argument that the facts presented here warrant application of the doctrine of equitable estoppel to preclude Defendant from raising the statute of limitations as a bar to Plaintiffs' action.

"[T]he doctrine of equitable estoppel" is a "judicially created exception to the general rule that statutes of limitation run without interruption. It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Cincinnati Ins. Co. v. Citizens Ins. Co.,* 454 Mich. 263, 562 N.W.2d 648, 651 (Mich.1997) (citing *Lothian v. Detroit,* 414 Mich. 160, 324 N.W.2d 9 (Mich.1982)). Michigan courts have been "reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute." *Lothian,* 324 N.W.2d at 18 (internal quotation and citation omitted). The doctrine is generally invoked only when "it can be fairly said that [the defendant] is responsible for deceiving the plaintiff, and inducing [plaintiff] to postpone action upon some reasonably well grounded belief that [plaintiff's] claim will be adjusted if he does not sue." *Id.* (internal quotation and citation omitted). For example, "the usual sort of conduct which may work an estoppel in the statute of limitations context" includes "an offer to compromise or settle plaintiff's claim, a representation that the limitations period was of much greater duration than it actually was, or part payment of plaintiff's claim." *Id.* There is no evidence of this sort of conduct here.

IV. Conclusion

For the above-stated reasons, Defendant's motion for summary judgment as to Plaintiffs Green and Garland is GRANTED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2669197

Footnotes

1 Defendant's motion addressed another Plaintiff, Harriett Betts, but her claims were dismissed with prejudice immediately before the hearing on this matter by a stipulation and order.

2 Although Plaintiffs assert three theories of recovery (negligence, strict liability and intentional tort), all three arise out of Defendant Milacron's alleged negligence and allege personal injury from Defendant's product.

3 She was diagnosed with "probable hyperactive airways disease" by Dr. Filos on May 11, 1995. (Def.'s Ex. K.)

4 In fact, Mr. Garland testified that virtually the entire time he worked at GM, he was under work restrictions precluding exposure to fumes, vapors and mists. (Garland Dep. at 159.)

5 Mr. Garland also claimed a March 1993 wrist injury and a 1996 hernia injury. (Def.'s Ex. T.)

6 Michigan's tolling statute for fraudulent concealment provides that:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be

commenced at any time within 2 years after the person who is entitled to bring the action discovers or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Mich. Comp. Laws § 600.5855.

End of Document

2013 WL 2319473
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Lillian Rose JOHNSON, Plaintiff–Appellee,
v.
Randy Louis JOHNSON, Defendant–Appellant,
and
Randy Roderick Johnson, Defendant.

Docket No. 307572.
|
May 28, 2013.

Delta Circuit Court; LC No. 10–020594–CH.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

Opinion

PER CURIAM.

***1** Defendant [1] appeals as of right the trial court's order, following a bench trial, quieting title to a 100–acre farm. For the reasons set forth below, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case involves a dispute between plaintiff and defendant regarding a 100–acre family farm. Plaintiff is the elderly widowed mother of defendant. In April 2004, plaintiff mortgaged five acres of the farm as collateral for a loan so that defendant could build a barn on the five acres. Once the barn was constructed, the property value of the farm increased, and plaintiff became dissatisfied with her increased tax liability. On January 31, 2005, plaintiff and defendant drove to a law firm, without a prior appointment, to consult with an attorney to prepare a deed. Plaintiff testified that the purpose of the consultation was to have a deed prepared transferring the five mortgaged acres to defendant so she would no longer be liable for the increased property tax. On the other hand, defendant testified that the purpose of the consultation was to have a deed prepared transferring the entire farm to him while retaining legal protections for plaintiff during the remainder of her lifetime. Because plaintiff was elderly and suffering from health complications, she waited in the car while defendant entered the law firm alone to speak with the attorney. On the basis of his consultation with defendant, the attorney prepared a deed transferring the entire farm to defendant and retaining a life estate in the farm for plaintiff. After the "life-estate deed" was prepared, the law firm's legal secretary went outside to the car to obtain plaintiff's notarized signature on the deed. The drafting attorney's notes indicated, and defendant acknowledged, that he advised defendant that plaintiff would retain the greatest flexibility if the deed was not recorded until after her death.

Despite this advice, the life-estate deed was recorded by defendant on March 14, 2006. The trial court found that plaintiff intended, after leaving the law office, to retain possession of the deed pursuant to the drafting attorney's instructions, that the unrecorded deed "ended up" in plaintiff's safe, and that defendant had removed the life-estate deed from the safe without plaintiff's knowledge or permission. In 2009, plaintiff learned that she only held a life-estate interest in the farm. Defendant apparently refused to convey the farm back to plaintiff. Plaintiff filed suit with the trial court to quiet title to the property. The trial court concluded that the life-estate deed should be set aside on the alternative grounds of fraud, unconscionability, and lack of delivery. The trial court determined that defendant committed two acts of fraud: (1) misrepresenting plaintiff's intent to the attorney on January 31, 2005; and (2) removing the life-estate deed from plaintiff's safe on or before March 14, 2006 without plaintiff's knowledge or permission. The trial court also found that the deed had never been delivered to defendant, and that the deed was obtained by unconscionable acts.

II. STANDARD OF REVIEW

***2** We review the trial court's legal holdings in an equitable action de novo. *Killips v. Mannisto,* 244 Mich.App 256, 258; 624 NW2d 224 (2001). We review the trial court's findings of fact for clear error. *Id.*

III. FRAUD

Defendant first argues that the trial court erroneously granted plaintiff relief on the basis of fraud. We agree. Fraud in the inducement occurs when a party knows the contents of an instrument but was induced by fraud to execute the instrument. *Stefanac v. Cranbrook Ed Community,* 435 Mich. 155, 165–166; 458 NW2d 56 (1990). Fraud in the execution occurs when a party does not know the contents of the instrument. *Id.* Because the trial court did not specify whether it was basing its finding on fraud in the inducement or fraud in the execution, we will address each type of fraud in turn.

To prove a claim of fraud in the inducement, a plaintiff must establish the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,* 276 Mich.App 146, 161; 742 NW2d 409 (2007) (citations and quotation marks omitted).]

Defendant's alleged misrepresentation to the attorney cannot support a conclusion of fraud in the inducement. The fifth element requires that the plaintiff act in reliance upon the defendant's representation. However, it is impossible for plaintiff to have acted in reliance upon defendant's representation to the attorney; because she was not even aware of the representation, she logically could not have acted in reliance upon it. In other words, defendant's misrepresentation was made to and relied upon by a third party; it was not made to and relied upon by plaintiff.

Further, a claim of fraudulent misrepresentation "requires reasonable reliance on a false representation." *Nieves v. Bell Indus, Inc,* 204 Mich.App 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id.* Moreover, this Court has held that "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v. Christensen,* 126 Mich.App 640, 645; 337 NW2d 611, lv den 417 Mich. 1100.45 (1983). Here, plaintiff clearly had an opportunity to inquire whether the life-estate deed only transferred five acres before she executed the deed. Plaintiff could have simply read the life-estate deed, consulted with an attorney before signing the deed, or asked the drafting attorney or his staff about the contents of the deed. Although plaintiff did testify that she asked the legal secretary about the contents of the deed, the legal secretary testified to the contrary; the trial court never made a factual finding regarding their conversation. Based on the element of reasonable reliance, we cannot conclude on the record before us that defendant fraudulently induced his mother to sign the deed, despite evidence of his intent to do so.

***3** If defendant in fact removed the life-estate deed from the safe, such removal also cannot support plaintiff's claim of fraud in the inducement, because the act of stealing a deed does not relate to fraud in the inducement. Rather, stealing a deed and recording it without permission relates to the issue of delivery, as discussed in Section V, *infra.* There is no misrepresentation involved when a person steals a deed without the owner's knowledge. Thus, the record shows that plaintiff did not establish the elements of fraud in the inducement. [2]

" 'Fraud in the execution' or factum means the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the signatory relied on this fraud to his detriment." *Paul v. Rotman,* 50 Mich.App 459, 463–464; 213 NW2d 588 (1973). In this case, the trial court found that plaintiff did not understand the contents of the life-estate deed. But this finding is insufficient to support a claim of fraud in the execution. The trial court did not find that plaintiff was told that the life-estate deed transferred only five acres. Instead, the trial court found that plaintiff did not understand the nature and legal effect of the life-estate deed. This finding may indicate mental incompetency or procedural unconscionability, but it does not indicate fraud in the execution. The trial court's findings of fact are insufficient to affirm its decision on the basis of fraud in the execution.

IV. UNCONSCIONABILITY

Next, defendant argues that the trial court erroneously granted plaintiff relief on the basis of unconscionability. We agree. To grant relief from a contract on the basis of unconscionability, there must be a showing of both "procedural unconscionability" and "substantive unconscionability." *Clark v. DaimlerChrysler Corp,* 268 Mich.App 138, 143; 706 NW2d 471 (2005). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* at 144. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.*

The trial court did not explicitly address procedural and substantive unconscionability. However, the opinion suggests a finding that the life-estate deed was procedurally unconscionable on the basis of the circumstances surrounding execution of the life-estate deed in January 2005. The trial court noted that plaintiff was elderly and on pain medication, and that defendant did not return to the vehicle to bring plaintiff inside to speak with the attorney. The trial court reasoned that these facts suggested that defendant deliberately isolated plaintiff from the attorney so that plaintiff would not have an opportunity to explain her true intent or understand the contents of the life-estate deed. In light of plaintiff's age and limited education, the trial court's finding that plaintiff did not have the capacity to understand or critique the life-estate deed was supported by the record. A party's advanced age and lack of education are factors in favor of a finding of procedural unconscionability. See *Johnson v. Mobil Oil Corp,* 415 F Supp 264, 268 (ED Mich.1976) (explaining that procedural unconscionability involves such factors as "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party ..."). The trial court's implicit finding of procedural unconscionability was reasonable and supported by the record.

***4** However, we conclude that the life-estate deed was not substantively unconscionable. The transaction appeared to be an unremarkable gift of real property from an elderly parent to a child. In other words, the transaction at issue is more of a "gift," not a business transaction. Moreover, we note that certain facts weigh against a finding of substantive unconscionability: plaintiff retained a life estate in the farm, defendant worked on the farm for several years, and defendant was told by his parents that he would eventually receive the farm. Accordingly, we conclude that the terms of the life-estate deed were not substantively unconscionable. Indeed, "a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other." *Clark,* 268 Mich.App at 144.

IV. DELIVERY

Defendant also argues that the trial court clearly erred by finding that there was no delivery of the life-estate deed, because its finding that defendant removed the deed from plaintiff's safe is unsupported by the record. We agree in part.

Insofar as the trial court's finding may be premised on defendant's removal of the deed from the safe, we do not find record evidence supporting that particular finding. Rather, the evidence is wanting as to the whereabouts of the deed after its preparation and prior to its recordation.

Here, the trial court found that the unrecorded deed was placed in plaintiff's safe on the farm, and that plaintiff intended to follow the "strong suggestion" of the drafting attorney to "retain the deed in a safe place and not allow its recording, perhaps not until after her death." The trial court further found that defendant removed the deed from the safe without plaintiff's knowledge or permission and took it to the register of deeds to be recorded, and that although plaintiff may or may not have accompanied him on that trip, she lacked the knowledge that defendant intended to, and did, record the deed. The court found credible plaintiff's testimony that she was never aware that defendant had recorded the deed. Finally, the court accepted the testimony of plaintiff's attorney that plaintiff was "genuinely surprised" to learn that the deed had been recorded.

Plaintiff's testimony was somewhat confused regarding what happened to the deed after she signed it. She testified that she never saw the deed again after she signed it and the legal secretary returned it to the office. However, she later testified that the deed was in her safe. It appears from the record that plaintiff had some difficulty distinguishing between the "deed" at issue and other deeds or the "mortgage" that she had signed earlier to allow defendant to borrow money to build a barn. No clear testimony was ever directly elicited from plaintiff regarding whether she placed the deed in the safe, whether defendant did so, or whether in fact defendant retained the deed after they left the lawyer's office. Plaintiff did testify that "the deed is gone" from her safe, and that the deed was not in her safe when she last looked in the safe "four or five years ago." However, plaintiff *also* testified that she never saw the original deed, and that she may not have

asked defendant about the whereabouts of the original deed. Plaintiff testified that as soon as she became aware that her property was referred to on tax forms as "Lillian Johnson Life Estate," she questioned defendant about it. Finally, plaintiff testified that she continued to attempt to pay her property taxes, only to have the money returned because defendant had already paid them. Plaintiff testified that while she may have gone to the courthouse with defendant at some point, possibly when defendant recorded the deed, [3] she testified that she was unaware of why they went there and was not aware the deed was being recorded.

***5** On defendant's part, he testified that his mother agreed to have a quit-claim deed to the property prepared. Defendant also claimed that he gave the life-estate deed to plaintiff when he returned to the car and that when they arrived back at the farm, plaintiff said, "Here's your piece of paper you wanted" and that defendant "held onto it a long time" before finally recording it notwithstanding the drafting attorney's instructions because various people had told him to record it. Defendant testified that plaintiff was aware that the deed was being recorded when she accompanied him to the courthouse.

We are unable to conclude, on the record before this Court, that the trial court's factual finding regarding the removal of the deed from plaintiff's safe has the requisite evidentiary support. *Hill v. City of Warren,* 276 Mich.App 299, 310; 740 NW2d 706 (2007). Plaintiff's testimony, as it appears on the record, is contradictory; however plaintiff did clearly state that she never saw the deed again after the visit to the attorney's office, whereas her testimony concerning the deed's placement in the safe was vague and quite possibly referred to another deed or to a mortgage document, rather than the deed in question. We conclude that the record evidence before the trial court appeared to support at least three possible conclusions with respect to delivery: (1) the trial court could have credited plaintiff's testimony and found that defendant kept the life-estate deed himself, never returning it to plaintiff; (2) the trial court could have credited defendant's testimony and found that plaintiff gave defendant the life-estate deed once they returned home; or (3) the trial court could have declined to make any finding of fact on this issue. However, the record does not support the trial court's finding that defendant removed the deed from the safe without permission. We hold that this factual finding was clear error.

This is not, however, dispositive of the issue before us. Rather, the issue before us is whether, irrespective of who possessed the life-estate deed between its preparation and its recordation, or where it was kept, plaintiff ever "delivered" the deed to defendant.

Defendant misperceives the meaning of this "delivery" requirement, suggesting that all that is required is that he "received" the deed. But as the trial court correctly concluded, "delivery" requires more than mere "receipt."

A deed transfers an interest at the time of delivery, not at the time of recording. *Ligon v. Detroit,* 276 Mich.App 120, 128; 739 NW2d 900 (2007). "The purpose of the delivery requirement is to show the grantor's intent to convey the property described in the deed." *Energetics, Ltd v. Whitmill,* 442 Mich. 38, 53; 497 NW2d 497 (1993). Delivery does not necessarily require a physical transfer of the deed; instead, delivery simply requires "acts or words" of the grantor that show "an intention on [the grantor's] part to perfect the transaction...." *Schmidt v. Jennings,* 359 Mich. 376, 381; 102 NW2d 589 (1960). Manual delivery of a deed to a grantee is not conclusively dispositive on the issue of delivery. *Resh v. Fox,* 365 Mich. 288, 290–292; 112 NW2d 486 (1961). "[I]n considering whether there was a present intent to pass title, courts may look to the subsequent acts of the grantor." *Havens v. Schoen,* 108 Mich.App 758, 762; 310 NW2d 870 (1981). When a grantee obtains a deed without the grantor's knowledge or permission, there is no delivery. *Id.* at 765.

***6** The issue, therefore, is not whether defendant "received" the deed, but rather whether plaintiff intended "to convey the property described in the deed." *Energetics,* 442 Mich. at 53. There was some evidence presented to the trial court of plaintiff's lack of intent to convey the property. Evidence showed that plaintiff continued to manage the property and pay all expenses for it, as well as attempted to provide for the devise of her property in her will—all evidence of her *lack* of intent to convey it presently. See *Havens,* 108 Mich.App at 761; see also *Resh,* 365 Mich. at 290–292.

Resh is instructive as a case where, despite possession of the deed by the grantee, the court found that the grantor lacked the requisite intent to constitute delivery. *Resh,* the grantor, at the time unmarried, prepared two quitclaim deeds for properties he owned, conveying his entire interest to his sister, and gave them to his sister with instructions not to record the deed during his lifetime. *Id.* at 290. Seventeen years later, the grantor married and executed a quitclaim deed to both parcels, giving interests to his wife, sister, and brothers. He gave the deed to his wife and instructed her not to record it during his lifetime. *Id.* During his lifetime, the grantor

maintained the property as his own and paid all taxes and upkeep on the property. *Id.* at 290–291. The trial court found that, although there was manual delivery of the first two deeds to the defendant, at the time of delivery there was no intent to pass title. The trial court thus vacated the two deeds. *Id.* at 291.

Our Supreme Court affirmed, finding that the record "amply" sustained the conclusion that there was no intent to pass *present* title at the time of delivery of the deeds to defendant. *Id.* at 292. The Court noted the deferential standard of review a reviewing court gives to findings of fact by the trial court, especially in regard to witness credibility. *Id.* The Court thus affirmed the trial court's vacation of the deeds. *Id.* at 293.

The trial court may ultimately be correct that the evidence shows a lack of intent to effect "delivery." However, (and unlike in *Resh)* the trial court here erred in its assessment of the evidence in the context of the applicable burden of proof. The trial court correctly noted that defendant bears the ultimate burden of proof regarding delivery. However, the trial court failed to recognize that recording a deed gives rise to a presumption of delivery. *Energetics,* 442 Mich. at 53. This presumption is "but a rule of procedure used to supply the want of facts." *Hooker v. Tucker,* 335 Mich. 429, 434; 56 NW2d 246 (1953). While it "merely shifts the burden of proof onto the party questioning the delivery," *Havens,* 108 Mich.App at 761, the burden so shifted is "the burden of moving forward with the evidence[;]" the burden of persuasion, i.e., the burden of proving delivery by a preponderance of the evidence, remains with the party relying on the deed. *Id.* When the party burdened by the presumption presents sufficient evidence to dispel the presumption, the opposing party must still carry the "burden of proving delivery and requisite intent." *Id.*

***7** On remand, the trial court should assess the evidence in the context of the burden of proof. It should first determine if plaintiff has presented sufficient evidence to rebut the presumption of delivery. *Havens,* 108 Mich.App at 761. Then, if plaintiff has done so, it should determine if defendant has carried his ultimate burden of proving delivery and requisite intent. *Id.*

We therefore reverse the trial court's conclusion on the issue of delivery, and remand for the trial court to reconsider the record evidence relating to delivery of the life-estate deed in light of the applicable presumption and shifting burdens of proof, and to make new findings of fact on this issue as it may deem appropriate. MCR 7.216(A)(7).

V. UNDUE INFLUENCE

Further, we note that plaintiff's complaint identified several equitable grounds for relief, including undue influence. Our review of the record suggests a justiciable issue with respect to undue influence, specifically whether plaintiff was functioning at a relatively low physical and mental capacity at the time she executed the life-estate deed, see *In re Cox Estate,* 383 Mich. 108, 113–114; 174 NW2d 558 (1970) ("weakened physical and mental condition" suggests undue influence), and whether plaintiff trusted defendant as her son to properly inform the attorney of her intent, *Daane v. Lovell,* 83 Mich.App 282, 290; 268 NW2d 377 (1978), lv den 405 Mich. 846 (1979) (close personal relationship is a factor that may indicate undue influence). This issue was raised by plaintiff's complaint but was not addressed by the trial court. Accordingly, on remand the trial court should also consider the record evidence and make findings of fact and conclusions of law on the issue of undue influence. MCR 7.216(A)(7).

Reversed and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

ORDER

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to determine whether plaintiff has presented sufficient evidence to dispel the presumption of delivery, and if so, to determine if defendant carried his ultimate burden of proving delivery. Additionally, the trial court should consider whether the record evidence supports plaintiffs claim of undue influence.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

All Citations

Not Reported in N.W.2d, 2013 WL 2319473

Footnotes

1 Randy L. Johnson is the father of Randy R. Johnson. It is unclear as to why Randy R. Johnson was named as a defendant in this case. Virtually no evidence was presented to show Randy R. Johnson's relationship to this case. The trial court found that Randy R. Johnson had resided with defendant for some time, and that "there has been no showing that he directly damaged any of Plaintiff's property nor occupied any place other than his father's residence." We will therefore refer to Randy L. Johnson as "defendant."

2 Plaintiff does not argue, and the trial court did not find, either that (a) defendant misrepresented to plaintiff that he would tell the attorney to prepare a deed to transfer five acres, and that plaintiff relied on that representation in signing the deed; or (b) the deed should be invalidated under the doctrine of undue influence. See, e.g., *In re Karney Estate,* 468 Mich. 68; 658 NW2d 796 (2003). Because those issues are not before us, we decline to address them. See *MEA v. SOS,* 280 Mich.App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich. 194; 801 NW2d 35 (2011).

3 There was some testimony to the effect that this trip to the courthouse may have concerned a utility easement for defendant's barn, although this was never definitely established in the record.

2013 WL 4041868
Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

Daniel JOHNSON, Plaintiff,
v.
OPERATION GET DOWN, INC., Defendant.

Civil Action No. 11–15487.
|
Aug. 8, 2013.

Attorneys and Law Firms

Paul M. Hughes, Detroit, MI, for Plaintiff.

Erika Lorraine Davis, Butler Davis, PLLC, Detroit, MI, for Defendant.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT [22]

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on Plaintiff's Motion to Amend His Complaint. (Docket no. 22.) Defendant filed a Brief in Opposition to Plaintiff's Motion to Amend (docket no. 23), and Plaintiff filed a Reply to Defendant's Opposition (docket no. 24). This motion was referred to the undersigned for decision. (Docket no. 28.) The Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(e). The Motion is now ready for ruling.

I. Background

Plaintiff Daniel Johnson filed his original complaint pro se while a prisoner under 42 U.S.C. § 1983 against Defendant Operation Get Down, Inc. (OGD), alleging that while in the care and custody of Defendant, Plaintiff contracted Methicillin-resistant Staphylococcus aureus ("MRSA"), a severe skin infection. (Docket no. 1.) Plaintiff alleges that Defendant is responsible for the unsanitary conditions that caused Plaintiff's MRSA. Plaintiff seeks monetary damages for all of Plaintiff's medical bills relating to his condition, including all visits to the doctors, urgent care, hospitalization, and personal expenses. (Docket no. 1.) On November 6, 2012, Plaintiff obtained legal counsel. (Docket no. 23.) Defendant filed an Answer to Plaintiff's Complaint on December 21, 2012. (Docket no. 19.)

On January 25, 2012, Plaintiff's case was partially dismissed by the Court because a portion of Plaintiff's claims were conclusory and amounted to nothing more than a billing dispute. (Docket no. 5.) The court did find, however, that Plaintiff had set forth sufficient factual allegations to support his claim that he was subjected to unsanitary conditions at OGD and that he acquired MRSA. (Docket no. 5.) Therefore, to the extent that Plaintiff's Complaint alleged an Eight Amendment claim, the Court concluded that his complaint was not subject to summary dismissal. (Docket no. 5.)

Before the Court is Plaintiff's Motion to Amend his Complaint. Plaintiff now alleges three different counts, which Plaintiff titles as follows:

I. Violation of Civil Rights 8th Amendment Cruel and Unusual Punishment and the 14th Amendment Due Process Clause Deliberate Indifference

II. 42 USC § 1983 Deprivation

III. Negligence (State Law Claim)

Plaintiff claims that Defendant was negligent and owed Plaintiff a duty to keep its facility in a sanitary state, that Defendant should have taken reasonable measures to minimize against the risk of infectious diseases, and that this negligence was the proximate and direct cause of Plaintiff's injury. (Docket no. 22–1.)

On June 26, 2013, this Court issued an order for supplemental briefing, directing the parties to brief the issue of whether Defendant OGD was a state agency. (Docket no. 27.) Defendant filed a Supplemental Brief in Opposition to Plaintiff's Motion for Leave to File Amended Complaint arguing that OGD was not a state agency. (Docket no. 28.) Plaintiff filed a Supplemental Brief Regarding Plaintiff's Motion to Amend Complaint arguing that OGD was, in fact, a state agency. (Docket no. 30.)

II. Governing Law

***2** A court is to allow parties to amend their pleadings freely "when justice so requires." Fed.R.Civ.P. 15(a)(2). "A party seeking to amend an answer must act with due diligence if it intends to take advantage of [Rule 15's] liberality." *Saginaw Chippewa Indian Tribe of Michigan v. Granholm,* 05–10296, 2008 WL 4808823, at *8 (E.D.Mich. Oct.22, 2008) (Ludington, J.) (internal quotation omitted). "A court may deny leave to amend when a party unnecessarily delayed in seeking amendment, thereby [ ]causning prejudice to the other party or unduly delaying the litigation." *Id.* (citation omitted). And a court may also deny leave to amend when the proposed amendment would be futile. *See Yuhasz v. Brush Wellman, Inc.,* 341 F.3d 559, 569 (6th Cir.2003). To determine whether an amendment would be futile, the Court determines whether the amendment could survive a motion to dismiss pursuant to Rule 12(b)(6). *Keely v. Department of Veterans Affairs,* 10–11059, 2011 WL 824493, at *1 (E.D.Mich. Mar.3, 2011) (Majzoub, M.J.) (citation omitted).

When deciding a Motion under Rule 12(b)(6), the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir.2007); *Inge v. Rock Fin. Corp.,* 281 F.3d 613, 619 (6th Cir.2002). The plaintiff must provide " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (quoting Fed.R.Civ.P. 8(a)(2)). But this statement "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The plaintiff cannot rely on "legal conclusions" or "[threadbare] recitals of the elements of a cause of action;" instead, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

III. Analysis

Plaintiff filed the instant Motion less than three months after Defendant filed its Answer to Plaintiff's Complaint and after Plaintiff obtained Counsel. (Docket no. 24) No discovery has taken place, and Plaintiff has been diligent in filing his Motion to Amend since obtaining counsel; Defendant would suffer no prejudice or undue burden by the filing of an amended complaint at this time. However, the Court must still determine whether the proposed amendment would be futile.

A. COUNT I—Plaintiff's 8th Amendment and 14th Amendment Claims

Plaintiff argues that he has both an 8th Amendment claim and a 14th Amendment claim. (Docket no. 22–1.) But it is well-settled that the 8th Amendment prohibition against cruel and unusual punishment does not apply to pre-trial detainees. *See, e.g., Griffin v. Wontack,* No. 12–P 195–R, 2013 WL 28669 (W.D. Ky. Jan. 2, 2013. Pre-trial detainees are shielded from cruel and unusual punishment by the Due Process clause of the 14th Amendment, which provides similar protection. *Id.* Thus, Plaintiff cannot sustain both an 8th Amendment and a 14th Amendment claim because it is impossible for Plaintiff to have been both a pre-trial detainee and an inmate. In response to Defendant's argument, however, Plaintiff agreed to withdraw his 14th Amendment claim and proceed only with his 8th Amendment claim. (Docket no. 24).

***3** Defendant further argues that Plaintiff's § 1983 claim was previously raised and summarily dismissed by this Court. (Docket no. 23 at 5.) The Court specifically stated that

> [Plaintiff's] claims are conclusory in nature, in that he does not specifically state how each Defendant is involved in this particular billing claim. It is well-established that conclusory allegations are insufficient to state a claim under § 1983 ... [thus,] the Court finds that Plaintiff's claims amount to nothing more than a billing dispute."

Therefore, Defendant argues, Plaintiff is barred from re-litigating his § 1983 claim.

The Court disagrees with Defendant that Plaintiff's constitutional claim is precluded by this Court's earlier dismissal of Plaintiff's § 1983 claim. The opinion and order of partial summary dismissal only dismissed Plaintiff's "Medical–Bill Claim," which is not the subject of Plaintiff's amended complaint. (Docket no. 5 at 3.) Plaintiff raises an "Unsanitary–Condition Claim," which was explicitly allowed to proceed. Thus, Plaintiff's § 1983 claim was previously dismissed on a different substantive claim.

Eight Amendment claims can only be brought against a state actor. *See Robinson v. California,* 370 U.S. 660, 82 S.Ct.

1417, 8 L.Ed.2d 758 (1962). Defendant OGD is a private agency, but the United States Supreme Court has found that, while every case must be examined on a case by case basis, where a close relationship exists between the state and the private agency to the point where the private agency enforces the power of the state, the private entity becomes a state actor. *See Brentwood Acad. v. Tenn. Secondary Athletic Ass'n,* 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). Such a relationship exists when: (1) a private actor assumes a traditional public function; (2) private discrimination has been commanded or compelled by the state; (3) a state has jointly participated in a private actor's conduct; or (4) a private actor and the state have shared a symbiotic relationship. *See e.g., Brentwood,* 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807.

Defendant OGD argues that it is not a state actor because there is not a sufficiently close nexus between the State and Defendant. (Docket no. 28.) Defendant contends that it has not assumed a traditional public function; that Wayne County has not commanded or compelled private discrimination; that Wayne County has not jointly participated in Defendant's conduct; and that there is no symbiotic relationship between Defendant and Wayne County. (Docket no. 28.) Plaintiff argues that Defendant is a state actor because a symbiotic relationship exists between the state and Defendant to the point where Defendant enforces the power of the state, thus becoming a state actor. (Docket no. 30.) Plaintiff noted that Defendant is primarily financed by the State of Michigan, the County of Wayne, and the City of Detroit, receiving only about 2% of its funds from private donations. (Docket no. 30.) Plaintiff further noted that non-compliance with the rules by residents is reported back to the residents' probation or parole agents, and that Defendant's decision making concerning whether a resident has complied with the rules of their programs can determine whether an individual is sent back into a traditional incarceration setting. (Docket no. 30.) Therefore, for purposes of the present Motion to Amend, the Court concludes that Defendant has a strong nexus to the state sufficient to raise it to the level of a state actor, and therefore, Plaintiff may bring an 8th Amendment claim against Defendant.[1] Thus, the Court will grant Plaintiffs motion with respect to Count I.

B. Count II—Plaintiff's § 1983 Claim

***4** Plaintiff brings his second count as an independent claim under 42 U.S.C. § 1983, but Section 1983 is merely a vehicle used to allow victims of constitutional violations to obtain redress in federal court. *See, e.g., Braleyv. City of Pontiac,* 906 F.2d 220, 223 (6th Cir.1990) ("Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere."). Thus, Plaintiff 8th Amendment Claim and his § 1983 claim are a single claim because Plaintiff 8th Amendment Claim is, necessarily, brought under § 1983. For this reason, and because Plaintiff's Count II consists only of conclusory statements of law, the Court will deny Plaintiff's motion to amend his complaint with regard to Count II but will allow Plaintiff to bring Count I under § 1983.

C. COUNT III—Plaintiff's Negligence Claim

Plaintiff argues that Defendant owed him a duty to keep its facility in a sanitary and reasonable state and to take reasonable measures to minimize against the risk of infectious diseases, such as MRSA. (Docket no. 22–1.) Defendant argues that, as a result of Defendant's negligence, he suffered the MRSA infection, which has caused physical pain and suffering, mental torment, humiliation, and the liability for medical bills (Docket no. 22–1). Defendant argues that Plaintiff's negligence claim is time barred because Plaintiff did not file either a notarized written claim or a written notice of intention to file a claim within one year of his diagnosis. *See* MCL 600.6431.

Having found that Defendant is a state agency, the Court agrees. MCL 600.6431(1) states:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files with the clerk of court of claims either a notarized written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms, or agencies, stating the time and the place where such a claim arose and in detail the nature of the claim and the damage claimed to have been sustained. MCL 600.6431(1).

Plaintiff was diagnosed as having MRSA on December 16, 2009. (Docket no. 22–1.) There is no record of Plaintiff

having filed either a notarized written claim or a written notice of intention to file a claim before filing his original complaint on December 15, 2011. (Docket no. 1.) Therefore, the Court finds that Plaintiff's Negligence claim fails under MCL 600.643. Thus, the Court will deny Plaintiff's Motion with regard Count III.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Amend his complaint (docket no. 22) is **GRANTED IN PART.** The Court grants Plaintiff's Motion to Amend as to Count I and denies Plaintiff's Motion as to Counts II and III. Plaintiff is, therefore, ordered to file his Amended Complaint in accordance with this Opinion and Order within 14 days.

NOTICE TO THE PARTIES

***5** Pursuant to Federal Rule of Civil Procedure 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

All Citations

Not Reported in F.Supp.2d, 2013 WL 4041868

Footnotes

1 In support of his argument, Plaintiff relies on the recent deposition testimony of Sandra Bomar Parker, Director of Defendant OGD. The transcript of Ms. Parker's deposition, however, was not provided to the Court as it is currently unavailable. Therefore, the Court finds that Plaintiff has met the burden necessary to support his Motion to Amend, but the Court's conclusion that Defendant OGD is a state actor for the purposes of this Motion does not preclude the parties from re-raising this issue at a later date.

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2019 WL 2929185
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Samantha STECKLOFF, Plaintiff,
v.
WAYNE STATE UNIVERSITY, Defendant.

Case No. 18-13230
|
Signed 07/08/2019

Attorneys and Law Firms

Jonathan R. Marko, Marko Law, PLC, Detroit, MI, for Plaintiff.

Brett J. Miller, Butzel Long, Detroit, MI, Daniel B. Tukel, Butzel Long, Bloomfield Hills, MI, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL DISMISSAL [6]

Arthur J. Tarnow, Senior United States District Judge

***1** Before the Court is Defendant Wayne State University's Motion for Partial Dismissal Pursuant to Fed. R. Civ. P. 12(c) [6] filed on November 13, 2018. The Motion is fully briefed. The Court held a hearing on the Motion on June 10, 2019.

For the reasons explained below, the Court **DENIES** Defendant's Motion for Partial Dismissal [6].

FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 2011, Defendant Wayne State University ("WSU") hired Plaintiff Samantha Steckloff as a Student Service Center Specialist. In September 2013, WSU promoted Steckloff to Enrollment Management Coordinator.

On June 9, 2015, Steckloff was diagnosed with breast cancer for which she underwent a double mastectomy. WSU authorized Steckloff to take a period of leave in accordance with the Family and Medical Leave Act ("FMLA"). She returned to work on August 20, 2015.

On September 1, 2015, Steckloff asked her supervisor at the time, LaJoyce Brown, for approval to occasionally work from home while she received chemotherapy treatments. Brown denied her request.

In early February 2016, Steckloff had a second surgery which required her to take some time off. On February 22, 2016, she returned to work under the supervision of the Director of Undergraduate Admissions, Erica Jackson. She asked Jackson about the possibility of working from home when she felt sick from chemotherapy, but, like Brown, Jackson denied her request. Although she was denied approval to work from home, Steckloff continued to receive intermittent FMLA leave for the remainder of the calendar year.

Given the frequency of Steckloff's absences, WSU notified her that she would need to use her sick-bank hours, which were unpaid, before should could use her paid vacation hours. In effect, this would reduce Steckloff's salary by the number of sick bank hours she used to cover her absences. In February 2017, Steckloff started to feel the consequences of this policy when she began to receive a significant pay-cut.

In June 2017, Steckloff again asked Jackson if she could work from home when she felt ill. Both Jackson and an HR representative told Steckloff that she was ineligible. This prompted her to file a complaint with the Equal Employment Opportunity Commission ("EEOC") on June 29, 2017.

In late August 2017, Steckloff was admitted to the hospital for two weeks. She returned to work on September 15, 2017. On October 4, 2017, she was fired for excessive absenteeism.

On October 2, 2018, Steckloff, through counsel, commenced this action in Wayne County Circuit Court. On October 18, 2018, WSU removed the action to this Court. She alleges a claim under § 504 of the Rehabilitation Act (Count I) and state law claims for disparate treatment, retaliation, and failure to accommodate under the Persons with Disabilities Civil Rights Act ("PWDCRA") (Counts II-IV).

On November 13, 2018, WSU filed this Motion for Partial Dismissal [6] pursuant to Fed. R. Civ. P. 12(c). Steckloff filed a Response [9] on December 4, 2018. WSU filed a Reply [10] on December 17, 2018. On June 10, 2018, the Court held a hearing on the Motion.

ANALYSIS

***2** Defendant moves to dismiss Plaintiff's state law claims on the ground that she failed to comply with M.C.L. § 600.6431(1) which requires that a claimant file a notice of intent with the Court of Claims prior to filing suit against the State.

Section 600. 6431(1) provides:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained....

It is undisputed Plaintiff filed neither a verified complaint nor a notice of intent to file a claim with the office of the clerk of the Court of Claims. It is also undisputed that WSU may be considered an arm of the state for purposes of this Section.

Defendant argues that Plaintiff's failure to comply with the notice provision set forth in § 600.6431(1) is fatal to her state law claims. Defendant relies on *Hawthorne-Burdine v. Oakland Univ.*, No. 338605, 2018 WL 1832336, at *1 (Mich. Ct. App. Apr. 17, 2018), *appeal denied,* 503 Mich. 888, 919 N.W.2d 74 (2018), in which the Court of Appeals affirmed the dismissal of a plaintiff's PWDCRA claims pursuant to § 600.6431(1).

In *Hawthorne-Burdine*, the plaintiff filed a complaint in the Oakland County Circuit Court alleging violations under the PWDCRA. *Id.* The complaint was transferred to the Court of Claims where Oakland University moved for dismissal based on plaintiff's failure to file a notice of intent. *Id.* The plaintiff conceded that she failed to comply with § 600.6431 but argued that the statute should not apply to civil rights violations under the PWDCRA. *Id.* at *3.

In an unpublished opinion, the Court of Appeals rejected the plaintiff's argument, noting that § 600.6431(1) does not "distinguish between claims that are subject to its notice requirements, [and] provides broadly that '[*n*]*o claim* may be maintained against the state unless' the claimant complies with the provision." *Id.* at *3.

In Defendant's view, *Hawthorne-Burdine* stands for the proposition that a claimant may not sue an arm of the State in any court in Michigan, including federal district and state circuit courts, where she has failed to comply with § 600.6431(1).

Defendant's position overlooks the critical fact that *Hawthorne-Burdine* was litigated in the Court of Claims, where the Court of Claims Act, and § 600.6431(1) therein, are applicable. This case, on the other hand, which was originally filed in the Wayne County Circuit Court, does not involve the Court of Claims. Defendant even concedes that this action could not have been brought in the Court of Claims. As Plaintiff appropriately noted at the hearing, the instant case has never been, and never will be, litigated in the Court of Claims.

Plaintiff argues that *Doe v. Dep't of Transp.*, 324 Mich. App. 226, 238, 919 N.W.2d 670, 677, *appeal denied,* 503 Mich. 876, 917 N.W.2d 637 (2018) is more persuasive than *Hawthorne-Burdine*. In *Doe*, the plaintiff filed an Elliot-Larsen Civil Rights Act ("ELCRA") claim in the Ingham County Circuit Court. *Id.* at 228. Thereafter, the Department of Transportation ("DOT") filed a notice of transfer to the Court of Claims claiming the Court had exclusive jurisdiction. *Id.*

***3** After transferring the case to the Court of Claims, the DOT moved for dismissal, in part, based on the plaintiff's failure to comply with § 600.6431(1). *Id.* The plaintiff moved for transfer back to the Circuit Court. *Id.* at 229. The Court of Claims granted the plaintiff's motion to transfer the case back to the Circuit Court. *Id.*

On appeal, the DOT argued that the Court of Claims had exclusive jurisdiction over the action and therefore erred by transferring the case back to the Circuit Court. *Id.* The Court of Appeals, in a published opinion, rejected this argument finding that the Court of Claims had concurrent jurisdiction

with the Circuit Court. *Id.* at 238. The Court declined to rule on the issue of whether the plaintiff was required to comply with the notice requirement in § 600.6431(1). *Id.* at 239 fn.4. ("Because the Court of Claims properly transferred the case back to the circuit court, defendant's argument that plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot and this Court need not address it.").

Because she did not file her complaint in the Court of Claims, but rather in a circuit court with concurrent jurisdiction, Plaintiff contends that she is not subject to the procedures set forth in § 600.6431(1).

Neither *Doe* nor *Hawthorne-Burdine* is directly on point. The issue of whether § 600.6431(1) applies to cases litigated outside of the Court of Claims appears to be a matter of first impression in this District.

The fact that nearly every case which cites to § 600.6431(1) has been litigated in the Court of Claims undercuts Defendant's argument for its broad-sweeping application. Defendant improperly construes § 600.6431(1) in a vacuum. Section 600.6431 is a specific provision within the Court of Claims Act set forth in Chapter 64 of the Revised Judicature Act of 1961. The Court need only its common sense to deduce that the *Court of Claims Act* sets forth the applicable procedures for cases litigated in the *Court of Claims*, not in every other court across the state of Michigan. *See Ranch Rheaume, LLC v. Dep't of Agric.*, No. 317631, 2015 WL 1227566, at *2 (Mich. Ct. App. Mar. 17, 2015) ("All suits brought before the Court of Claims are subject to the procedural rules specified in the broader Court of Claims Act[.]").

Plaintiff's failure to comply with § 600.6431(1) of the Michigan Court of Claims Act does not prohibit her from filing suit against an arm of the State in this Court.

Accordingly, **IT IS ORDERED** that Defendant's Motion for Partial Dismissal [6] is **DENIED**.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 2929185

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