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## STATEMENT OF FACTS

On January 2, 2002, Franklin County Children Services, ("FCCS") accompanied by the Columbus Police Department, gained entrance to Appellee's home and found her minor son, M.M., locked in the basement with a cot, a bucket, and M.M. locked to a chain which was attached to a pole. (Trial Court Record 52, Exhibit A, hereinafter "Tr. R. , Ex." ) FCCS had conducted this investigatory visit to Appellee's home after receiving two different referrals concerning the mistreatment of M.M. (Tr. R. 52, Ex. A) When Appellee was questioned, she did not deny the forms of punishment she inflicted on her son, M.M. (Tr. R. 52, Ex. A, pg. 2; Tr. R. 52, Ex. B, pg. 3)

On January, 3, 2002, as a result of the FCCS preliminary investigation, Appellant Grote, an FCCS case worker, and Appellant Mbah, an FCCS intake worker, filed a complaint in the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch under Case No. 02JU01-97. (Tr. R.52, Ex. A) The complaint alleged Appellee's son, M.M., was an abused child, as defined by R.C. § 2151.031(D), a neglected child, as defined by R.C. § 2151.03(A)(2) and (A)(6), and a dependent child, as defined by R.C. § 2151.04(C). (Tr. R. 52, Ex. A) The complaint alleged that Appellee punished M.M. in a variety of ways. Appellee locked him in the basement, withheld food from him routinely, required that he use a bucket as a toilet, and made him sleep on a cot. (Tr. R. 52, Ex. A; Tr. R. 52, Ex. B, pgs. 3-4) The complaint contained statements from M.M. and his 17-year-old sibling that corroborated the mistreatment M.M. received in Appellee's home (Tr. R. 52, Ex. A; Tr. R. 52, Ex. B, pgs. 3-4) Appellee did not deny the punishments she inflicted on M.M. (Tr. R. 52, Ex. A, pg. 2; Tr. R. 52, Ex. B, pgs. 3-4 ) The juvenile court initially granted temporary custody of M.M. to FCCS. On August 20,

2002, the court terminated FCCS' temporary custody of M.M., and awarded legal custody of M.M. to his father. (Tr. R. 73, Ex. A)

On February 25, 2005, Appellee commenced the underlying action by filing a civil complaint in the Franklin County Court of Common Pleas, Civil Division. (Tr. R. 2) Despite Appellee's admission to police and children services workers that she did lock her son in the basement and chain him to a pole as punishment, she alleged that the juvenile complaint was filed falsely. Although inartfully pleaded, Appellee's complaint could liberally be construed as alleging various state law claims and a civil rights action under 42 U.S.C §1983. (Tr. R. 2) As a result of the alleged false charges brought against her, Appellee alleged FCCS caused her:

“to loose (sic) her minor child [M.M.], monetary support from the Social Security Benefits, their family dwelling, and subsidies from the Franklin County Public Housing Program, a decline in her health as a result of 5 ½ months incarceration, denial of her right to family obligation, and her moral standing in the community as a law abiding citizen to lose custody of her child, her house, a decline in health, her right to have a family, and her moral standing in the community.”

(Tr. R. 2, pg. 4)

Appellee further delineates the bodily injuries she sustained as a result of the juvenile complaint in her “Plaintiff's Rebuttal to the Defendants' Answer and Motion For Stay of Complaint,” filed on April 29, 2005<sup>1</sup>. (Tr. R. 17) She stated, in relevant part:

“[Due to Appellants' actions she suffered] loss of quality of health as a result of Defendants' actions \*\*\* Plaintiff went from walking with a cane, diabetes under control, normal weight of 138 lbs. and TMJ under control—to being in a wheel chair, diabetes in life-threatening-neuropathy status, loss of weight by HALF with atrophy.”

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<sup>1</sup> The Common Pleas Court denied this motion in a “Decision and Entry,” filed on August 26, 2005. (Tr. R. 44)

(emphasis in original)(Tr. R. 17, pg. 3)

The Franklin County Court of Common Pleas granted partial summary judgment in favor of Appellants on March 30, 2006. (Appx. pg. 31) The trial court held that the statute of limitations had run as to the Appellee's claims alleging misconduct that occurred when Appellee's child was originally removed from her home on January 3, 2002. (Appx. pg. 31) The trial court allowed Appellee's case to proceed on the claims that alleged ongoing violations. The trial court dismissed Appellee's potential 42 U.S.C. § 1983 claims as being time-barred by the two-year statute of limitations set forth in R.C. § 2305.10. (Appx. pg. 31) The court additionally gave the parties leave to file additional dispositive motions, if appropriate. (Appx. pg. 32)

Appellants filed a second motion for summary judgment. The common pleas court rendered its decision and final judgment on Appellants' second motion on July 20, 2006. (Appx. pg. 33) The common pleas court granted Appellants' motion and dismissed all claims. The court reasoned that because FCCS' custody of M.M. terminated on August 20, 2002, Appellant could not prove the existence of ongoing violations. (Appx. pg. 35) Appellee filed her notice of appeal of the trial court's judgment to the Tenth District Court of Appeals on August 16, 2006. (Appellate Record, 7)

On February 6, 2007, the Tenth District Court of Appeals affirmed in part and reversed in part the judgment of the common pleas court. (Appx. pg. 30). The Tenth District Court affirmed the trial court's decision that Appellee's state law claims were barred by the two-year statute of limitations contained in R.C. § 2744.04(A). (Appx. pgs. 15-17) However, the court of appeals concluded the trial court erred when it relied on *Browning v. Pendleton* (C.A. 6, 1989), 869 F.2d 989 (en banc), for the proposition that

the two-year statute of limitations contained in R.C. 2305.10 governs § 1983 claims filed in Ohio. (Appx. pg. 25) The court held the four-year statute of limitations contained in R.C. § 2305.09(D) was Ohio's general or residual personal injury statute for purposes of § 1983 claims, and, thus, Appellee's claims were timely filed<sup>2</sup>. (Appx. pgs. 25-26) The court of appeals remanded the case for further proceedings consistent with its Opinion. (Appx. pg. 29)

Appellants filed their notice of appeal to the Supreme Court of Ohio on March 27, 2007. (Appx. pg. 1) On June 20, 2007, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

## ARGUMENT

### Proposition of Law No. I:

**R.C. 2305.10 is Ohio's general or residual statute of limitations applicable to §1983 claims.**

#### A. The Framework Established by the United States Supreme Court

The United States Congress, in enacting 42 U.S.C. § 1983, failed to provide for an explicit statute of limitations. As a result, the United States Supreme Court was faced with establishing the analytical framework for determining the applicable statute of limitations. The Court, in *Wilson v. Garcia* (1985), 471 U.S. 261, 268-269, 109 S. Ct. 573, held that the characterization of § 1983 claims for statute of limitations purposes is a matter of federal law. The *Wilson* Court determined that federal interests in "uniformity, certainty, and the minimization of unnecessary litigation" supported characterizing all § 1983 claims in the same way for statute of limitations purposes. *Id.* at 271-275. The *Wilson* Court stated that because § 1983 is silent regarding the applicable statute of

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<sup>2</sup> The court of appeals expressed no opinion on the merits of Appellee's § 1983 claims as the common pleas court had not yet considered the merits of this claim.

limitations, the courts must look to the state law in which the cause of action arose. *Id.* at 266.

Upon an exhaustive review of the legislative history and purpose behind § 1983, the Court concluded that all § 1983 claims are to be characterized as personal injury actions for statute of limitations purposes. *Id.* at 276-280. This characterization was predicated upon the Court's interpretation of Congressional intent. The Court reasoned that when Congress established § 1983 in 1871 to combat civil rights atrocities occurring in the South, Congress "unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* at 277.

In its analysis, the *Wilson* Court thought the reasoning of the Court of Appeals for the Fourth Circuit in *Almond v. Kent* (C.A. 2, 1972), 459 F.2d 200, was persuasive. The *Almond* court stated,

"In essence, Section 1983 creates a cause of action where there has been an injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under Section 1983 which is well-founded results from 'personal injuries.'"

*Almond*, 459 F.2d at 204.

The *Wilson* Court, in holding the remedy provided for in § 1983 is akin to a personal injury claim, recognized, "[h]ad the 42d Congress expressly focused on the issue today, we believe it would have characterized Section 1983 as conferring a general remedy for injuries to personal rights." *Wilson*, 471 U.S. at 278. Further, the *Wilson* Court concluded the length of the limitations period and accompanying tolling provisions are to be governed by state law. *Id.* at paragraph (a) of the syllabus; see also, *Kerper v.*

*Wood* (1891), 48 Ohio St. 613, 622, 29 N.E. 501 (statutes of limitations are exclusively matters of state law.); Accord, *Prohazka v. Ohio State Univ. Bd. Of Trs.*, Franklin App. No. 99AP-2, 1999 Ohio App. LEXIS 6475, unreported (attached)(the question of which Ohio statute of limitations constitutes the state's general or residual statute of limitations is a question of state law.)

The holding in *Wilson*, however, provided only limited guidance in § 1983 cases arising in states that have multiple statutes of limitations applicable to personal injury actions. In *Owens v. Okure* (1989) 488 U.S. 235, 109 S. Ct. 573, the United States Supreme Court attempted to resolve this problem, holding "where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the State's general or residual statute for *personal injury* actions." *Id.* at 249-250. (emphasis added). The Supreme Court's holdings in *Wilson* and *Owens* make clear that the general or residual statute to be borrowed by the courts must be a personal injury statute.

B. Conflict among the various Appellate Districts in Ohio

This Court has not has not addressed the issue of the applicable statute of limitations which governs § 1983 claims, although there has been considerable debate among various Ohio Courts of Appeal who have addressed this exact issue. Specifically, in *Bojac Corp. v. Kutevac* (1990), 64 Ohio App. 3d 368, 581 N.E.2d 625, and *Martin v. Adult Parole Auth.* (March 4, 1994), Marion App. No. 9-93-45, unreported (attached), the Eleventh and Third Ohio Appellate Districts, respectively, determined that R.C. § 2305.09(D) is Ohio's general or residual personal injury statute of limitations. See also, *Prohazka v. Ohio State Univ. Body. Of Trustees* (Dec. 16, 1999), Franklin App. No.

99AP-2, 1999, unreported (attached). However, the First, Fifth, Seventh, Eighth, and Twelfth Ohio Appellate Districts have held that R.C. § 2305.10 provides Ohio's general or residual statute of limitations for personal injury actions. *State ex rel. Eckstein v. Midwest Pride IV* (1998), 128 Ohio App.3d 1, 713 N.E.2d 1055; *Francis v. Cleveland* (1992), 78 Ohio App.3d. 593, 605 N.E.2d 966; *Archer v. Payne* (Sept. 17, 1999), Muskingum App. No. CT-98-0043, unreported (attached); *Erkins v. Cincinnati Municipal Police Dept.*(Oct. 23, 1998), Hamilton App. No. C-970836, unreported (attached); *Harman v. Gessner* (Sept. 9, 1997), Mahoning App. No. 96 C.A. 123, unreported (attached).

In holding § 1983 claims filed in Ohio shall be governed by the four-year statute of limitations in R.C. § 2305.09(D), The Tenth District Court in *Prohazka* recognized, "only *Eckstein* reached its result [that § 1983 claims shall be governed by R.C. § 2305.10] based upon an independent comparison of R.C. 2305.10 and 2305.09(D). *Francis, Erkins, Archer, and Harman* simply relied upon the Sixth Circuit's determination that R.C. 2305.10(A) is Ohio's general or residual statute of limitations." *Prohazka*, (Appx. pg. 75) As will be explained below, the *Prohazka* Court misinterpreted the plain language and import of R.C. §§ 2305.09(D) and 2305.10 and the overall statutory scheme of R.C. Chapter 2305. Conversely, the appellate courts that relied on *Browning* correctly decided R.C. § 2305.10 is Ohio's general or residual statute of limitations for personal injury actions.

#### C. The Ohio Statutes

The two sections of the Ohio Revised Code on which the court of appeals focused in this case are § 2305.09(D) and § 2305.10. R.C. 2305.09(D) provides:

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

\*\*\*

(D) For an injury to the rights of the Plaintiff not arising on contract **nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35** of the Revised Code.

(emphasis added)

R.C. § 2305.10 provides in pertinent part, “\*\*\* an action for bodily injury or injuring personal property shall be brought within two-years after the cause of action accrues.”<sup>3</sup>

In addition, there are several different sections within the Revised Code which specify the limitations periods for personal injury claims. See, e.g., R.C. § 2125.02 (wrongful death); R.C. § 2305.11 (libel, slander, malicious prosecution, false imprisonment, and abortion-related claims); R.C. § 2305.111 (childhood sexual abuse); R.C. § 2305.113 (time limitations for bringing medical, dental, optometric, or chiropractic claims); R.C. § 2305.115 (time limitation of action for assault or battery against mental health professional based on sexual conduct or contact); R.C. Chapter 2743 (civil action against state officer or employee and wrongful imprisonment); R.C. Chapter 2744 (civil action against political subdivision). Plainly, then, Ohio has multiple statutes of limitations addressing various types of claims for personal injury. Accordingly, this Court must decide which, among Ohio’s personal injury sections, is most analogous to the *Owens* Court’s definition of a “general” or “residual” personal injury statute.

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<sup>3</sup> R.C. 2305.10 was amended effective August 3, 2006. The August, 2006, amendments do not apply to civil actions pending prior to April 7, 2005. R.C. 2305.10(G). This case was filed on February 25, 2005, and, thus, the August 3, 2006, amendments do not apply to this case. However, the August 3, 2006, amendments are inconsequential to the determination of whether R.C. 2305.10 is the appropriate general or residual personal injury statute of limitations as the operative language “an action for bodily injury shall be brought within 2 years,” still remains in R.C. 2305.10.

The *Owens* Court described a “general provision” as one “which applies to all personal injury actions with certain specific exceptions,” and a “residual provision” as one “which applies to all actions not specifically provided for, **including personal injury actions.**” (emphasis added). *Owens*, 488 U.S. at 246-247. R.C. § 2305.10 accurately depicts a “general” statute of limitations of the type to which *Owens* referred.

The Tenth District Court in this case ruled that the four-year statute of limitations contained in R.C. § 2305.09(D), rather than R.C. § 2305.10, is Ohio’s general or residual personal injury statute of limitations. Specifically, the Tenth District Court stated “Section 1983 claims arising in Ohio are subject to the four-year limitations period set forth in R.C. 2305.09(D).” (Appx. pg. 25) As a result of this conclusion, the court held Appellee’s § 1983 claims were timely filed. (Appx. pgs. 25-26) Contrary to the Tenth District Court’s decision, R.C. § 2305.09(D) is not a “general” or “residual” statute described by *Owens*, because it does not apply to personal injury actions. Rather, R.C. § 2305.09 “applies to certain enumerated causes of action. It specifically excepts those claims governed by R.C. § 2305.10, which include actions ‘for bodily injury.’ Thus the general personal injury limitations period is two years, as included in R.C. § 2305.10.” *Peoples Rights Org., Inc. v. Montgomery* (2001), 142 Ohio App.3d 443, 756 N.E.2d 127. The Tenth District Court incorrectly selected a limitations period that was not in accord with the United States Supreme Court’s views regarding general or residual personal injury statutes by selecting a statute that specifically excludes personal injury actions from the face of its text.

The court of appeals in this case relied solely on its own decision in *Prohazka*, wherein the court held the limitations period set forth in R.C. § 2305.09(D) is the proper

general or residual statute of limitations for personal injury actions for § 1983 claims filed in Ohio. (Appx. pg. 25) The *Prohazka* decision, however, misinterprets the holdings in *Wilson* and *Owens* that § 1983 claims are characterized as personal injury actions inasmuch as R.C. § 2305.09(D) is not applicable to personal injury actions. *Prohazka*, therefore, ignored the plain meaning of R.C. § 2305.09(D) by incorrectly broadening the statute's specific and exceptionally drafted exclusionary language.

*Prohazka* also ignored the basic tenets of statutory construction. The court incorrectly focused on R.C. § 2305.09(D)'s inclusion of the talismanic words, "not specifically provided for," and ignored the rest of the text of the subsection. A thorough reading of the entire subsection reveals it specifically excludes personal injury actions which are governed by R.C. § 2305.10. Thus, the Tenth District Court's decision in this case is entirely inconsistent not only with the United States Supreme Court's instruction to apply the general or residual personal injury statute, but also misinterpreted the statutory scheme of R.C. Chapter 2305.

*Owens* described a "general provision" as one which "applies to all personal injury actions with certain exceptions." *Owens*, 488 U.S. at 246. R.C. § 2305.10 mirrors the *Owens* Court's definition of a "general provision" for personal injury actions by declaring all actions for bodily injury must be brought within two years with certain delineated exceptions. Moreover, the August 3, 2006, amendments include more certain delineated exceptions to the general two-year limitations period for bodily injury, and, thus, R.C. § 2305.10 as it is currently written more closely mirrors a "general provision" described in *Owens* than its predecessor effective at the time this case was filed.

The *Owens* Court specifically rejected endorsing the choice of the state statute of limitations for intentional torts. *Id.* at 242-243. The *Wilson* Court specifically rejected characterizing a § 1983 claim as providing a cause of action analogous to state remedies for wrongs committed by public officials. *Wilson*, 471 U.S. at 279. R.C. § 2305.10 does not distinguish between negligent or intentional torts nor does it provide a limitations period within which to bring suit against a governmental entity. Thus, the limitations periods provided for in the aforementioned Revised Code sections, such as R.C. § 2305.11 (one year statute governing certain intentional torts), and R.C. § 2744 (two-year statute governing civil action against political subdivision), merely specify exceptions to the general two-year statute of limitations for personal injury actions contained in R.C. § 2305.10. Therefore, unless there is a specific Revised Code section governing an action, all personal injury claims should be governed by the general limitations period set forth in R.C. § 2305.10.

R.C. § 2305.10 also follows the contours of the “residual” provision set out in *Owens*. As previously mentioned, *Owens* described a “residual provision” as one “which applies to all actions not specifically provided for, including personal injury actions.” *Owens*, 488 U.S. at 246-247. R.C. § 2305.10 governs personal injury actions. The statutory scheme of R.C. Chapter 2305 is set up such that R.C. § 2305.10 is the residual statute even though it does not contain the language “not specifically provided for.” R.C. Chapter 2305 provides for many different limitations periods which govern various specific causes of action. Therefore, by virtue of the varying sections provided for in the Revised Code which apply to distinct causes of action such as intentional torts or suits against governmental entities, the statutory scheme is set up such that R.C. § 2305.10

provides the residual statute of limitations for personal injury actions not specifically provided for in other sections of R.C. Chapter 2305 or elsewhere in the Revised Code.

This Court's precedents aptly demonstrates R.C. § 2305.10 is "expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace," *Ownes*, 488 U.S. at 238, (internal citation omitted) and is applicable to all claims alleging personal injury. In *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 12 OBR 246, 465 N.E.2d 1298, this Court stated that:

"in determining which limitations period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial."

*Hambleton*, 12 Ohio St.3d at 183.

This Court has repeatedly utilized the "essential character" analysis from *Hambleton* to apply the two-year general bodily injury limitations period set forth in R.C. § 2305.10 to a variety of claims. See e.g., *Lawyers Cooperative Publishing Company v. Muething* (1992), 65 Ohio St.3d 273, 603 N.E.2d 969 (claim asserting emotional distress, pain and suffering, humiliation, and loss of reputation); *Browning v. Burt* (1993), 66 Ohio St.3d 544, 613 N.E.2d 993 (negligent credentialing of physician); *Doe v. First United Methodist Church et al.*, (1994), 68 Ohio St.3d 531, 629 N.E.2d 402 (failure of church to protect boy from sexual conduct of priest).

In the present case, Appellee claimed she sustained "damage to her physical, mental, and spiritual person," and a "decline in her health, denial of her right to family obligation, and her moral standing in the community as a law abiding citizen," as a result of the Appellants' act of filing the complaint in juvenile court. (Tr. R. 2, pg. 4)

Construing the inartfully plead pro se complaint in a light most favorable to Appellee, the essential character of Appellee's allegations against Appellants entailed claims for personal injury grounded in tort. There is no doubt Appellant's alleged injuries such as pain and suffering, emotional pain, and loss in reputation are personal injuries within the ambit of R.C. § 2305.10. *Muething*, 65 Ohio St.3d at 279. Appellee alleged her cause of action commenced on January 3, 2002, the date on which Appellants filed the juvenile complaint. (Tr. R. 2, pg. 4) Accordingly, Appellee's § 1983 claim is time-barred by the applicable statute of limitations set forth in R.C. § 2305.10 since Appellee filed this action on February 25, 2005.

**Proposition of Law No. II:**

**Public policy dictates that § 1983 claims filed in Ohio should be governed by the two-year statute of limitations set forth in R.C. § 2305.10.**

The two-year statute of limitations set forth in R.C. § 2305.10 strikes the appropriate balance between the plaintiff's duty to exercise reasonable diligence in presenting a claim and the defendant's interest in avoiding having to defend against a stale claim. The *Wilson* Court surmised that potential plaintiffs should bring their actions as soon as practicable. Memories fade, records are lost or destroyed or not properly kept in the first instance, and witnesses lost. *Wilson*, 471 U.S. at 271. Specifically, the Court stated:

A federal cause of action brought at any distance of time would be utterly repugnant to the genius of our laws. Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.

*Wilson*, 471 U.S. at 271. (internal citations omitted).

Similarly, this Court shares the *Wilson* Court's disdain for stale claims. See *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247 (it has long been the policy of the law to require that actions involving allegations of tortuous conduct be asserted promptly). Repose, therefore, is a paramount concern behind a statute of limitation. Additionally, statutes of limitation "serve a gate-keeping function for courts by (1) ensuring fairness to the defendant; (2) encouraging prompt prosecution of causes of action; (3) suppressing stale and fraudulent claims; and (4) avoiding the inconveniences engendered by delay - specifically, the difficulties of proof present in older cases." *Doe v. Archdiocese of Cincinnati* (2006), 109 Ohio St.3d 491, 493, 2006 Ohio 2625, 849 N.E.2d 268.

In almost all cases, it is nearly impossible to defend against a stale claim. This is especially true in § 1983 cases where the typical § 1983 defendants are governmental entities (and their respective employees being sued in their official or individual capacities) such as law enforcement and county children service agencies. These governmental agencies, and their respective employees, are in constant contact with the general public. The very nature of government service dictates this reality. Such constant contact with a voluminous number of people on such a frequent basis certainly can lead to faded memories. This situation facing governmental entities is exactly the type of evidentiary concern envisioned by *Wilson*. Should this Court decide the four-year statute of limitations set forth in R.C. § 2305.09(D) governs § 1983 claims filed in Ohio, governmental entities and their employees could potentially find themselves in the unenviable position of being named in increasing numbers of legal actions whose defense

is hampered by lost or destroyed information, and employees who have quit, retired, or changed jobs.

The turnover rate among those persons employed by county children service agencies in this State most certainly will lead to lost witnesses. According to the 2006 Public Children Services Agency Survey, the overall turnover rate of persons employed by Franklin County Children Services was eleven (11) percent. The turnover rate for caseworkers in 2006 was fourteen (14) percent (See Affidavit of Heather Saling, Appx. pg. 36, Exhibit A) Further, the average caseworker turnover rate for all 88 Ohio counties was sixteen (16) percent. (Id.) The three major metropolitan counties (Cuyahoga, Hamilton, Franklin) experienced a seventeen (17) percent turnover rate in 2006. (Id) County children service agencies, on average, can thus expect to see a major overhaul among their caseworkers in an extremely short amount of time. Many potential witnesses could possibly be lost and never be found since the triggering event in this case occurred over five years ago. To require Appellants to defend this stale action frustrates the "gate-keeping" purpose behind enacting statutes of limitations in the first instance.

Similarly, FCCS Intake Investigators, such as Appellant Mbah, handle tremendous caseloads which make it nearly impossible to remember events from many years prior. FCCS' referral hotline is open 24 hours a day, 7 days a week, 365 days of the year. (See Affidavit of Gil Ashbridge, Appx. pg. 38) In 2005, the hotline received 37,822 calls; in 2006 the hotline received 38,091; and through July 31, 2007, the hotline has received 21, 315 calls. (Id.) Faded memories are a foregone conclusion for Intake Investigators who handle such a heavy caseload. A four-year statute of limitations is unnecessarily long for § 1983 claims.

Additionally, Franklin County Children Services ("FCCS") caseworkers have an astonishing number of children to supervise. In 2004, the average monthly number of children under on open cases under FCCS supervision was 6,455; in 2005, the average monthly number of children on open cases under FCCS supervision was 6,275; and in 2006, the average monthly number of children on open cases under FCCS supervision was 6,101. (See Affidavit of Harry Griggs, Appx. pg. 40) On average, each FCCS caseworker has seventeen (17) active cases, with many cases consisting of multiple children from the same family. (Id., Appx. pg. 41) The overwhelming amount of contact FCCS caseworkers have with the public would certainly make it difficult to remember particular facts and events which transpire more than two years prior.

This Court's decision will have a profound impact on the courts in Ohio, both on the state and federal level. The federal courts in Ohio have been applying the two-year statute of limitations since the en banc decision of *Browning* was issued in 1989. Various courts of appeals in Ohio have relied on the *Browning* decision. A contrary decision could possibly have a retroactive effect and permit the refilling of innumerable, previously time-barred actions.

A four-year statute of limitations for § 1983 claims will not ensure fairness to the governmental defendants, it will not encourage prompt prosecution of causes of action, it would not suppress fraudulent or stale claims, and it will foster proof issues that are prevalent among older cases. Public policy requires § 1983 claims should be governed by the two-year of limitations set forth in R.C. § 2305.10.

**CONCLUSION**

The decision below is fundamentally flawed and must be reversed. The decision ignores or misinterprets the statutory scheme set forth in R.C. Chapter 2305. Further, the decision also ignores the holdings of the United States Supreme Court that § 1983 claims are to be characterized as personal injury actions. A reversal by this Court would promote the ends of justice by not only ensuring § 1983 claims filed in the State of Ohio are filed as expeditiously as possible thereby preventing stale claims, but would also provide a limitations period within which plaintiffs have ample time to file their claims.

Respectfully submitted,

**RON O'BRIEN  
PROSECUTING ATTORNEY  
FRANKLIN COUNTY, OHIO**

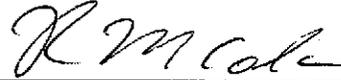


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Counsel for Appellants Susan Mbah  
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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing *Merit Brief* was sent via ordinary mail, postage prepaid to Rev. Iyabo Nadra's last known address, P.O. Box 6965, Columbus, Ohio 43205, this 21 day of August, 2007.



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R. Matthew Colon  
Assistant Prosecuting Attorney  
Counsel for Appellants Susan Mbah  
and Mindy Grote

## APPENDIX

IN THE SUPREME COURT OF OHIO  
2007

Rev. Iyabo Nadra,

Plaintiff-Appellee,

-vs-

Susan Mbah and Mindy Grote,

Defendants-Appellants.

Case No.

**07-0525**

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case Nos. 06AP-829

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS SUSAN MBAH AND  
MINDY GROTE**

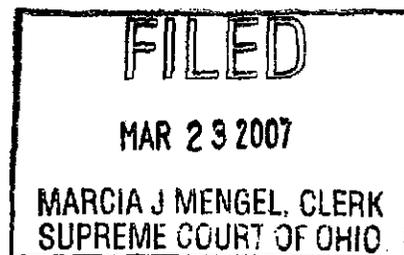
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And

R. Matthew Colon 0080230  
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COUNSEL FOR DEFENDANT-  
APPELLANTS

Rev. Iyabo Nadra  
*Pro Se*  
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**NOTICE OF APPEAL OF DEFENDANT-APPELLANTS SUSAN MBAH AND  
MINDY GROTE**

Defendant-Appellants, Susan Mbah and Mindy Grote, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *Rev. Iyabo Nadra v. Susan Mbah and Mindy Grote*, Court of Appeals No. 06AP-829, on February 6, 2006.

Susan Mbah and Mindy Grote invokes the jurisdiction of the Supreme Court on the ground that this is a civil case presenting a substantial statute of limitations question governing the applicable statute of limitations for Section 1983 cases in Ohio. There is a conflict among the various Courts of Appeal in Ohio as to the applicable statute of limitations, thus warranting the grant of leave to file the appeal. Rev. Nadra's Section 1983 claim would be time-barred if the applicable statute of limitations period was two years. Based on the foregoing conflict, Defendant-Appellees Mbah and Grote respectfully request this Court accept this appeal as this case is one of public or great general interest.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



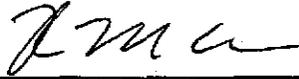
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**R. Matthew Colon 0080230**  
(Counsel of Record)  
Assistant Prosecuting Attorney

Counsel for Defendants-Appellants

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this 23<sup>RD</sup> day of March 2007, to Rev. Iyabo Nadra, *Pro Se*, PO Box 6965, Columbus, OH 43205.



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**R. Matthew Colon 0080230**  
Assistant Prosecuting Attorney



IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY

2007 FEB -6 PM 1:48

CLERK OF COURTS

Rev. Iyabo Nadra, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 06AP-829  
 : (C.P.C. No. 05CVH02-2202)  
 Susan Mbah and Mindy Grote, : (REGULAR CALENDAR)  
 :  
 Defendants-Appellees. :

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O P I N I O N

Rendered on February 6, 2007

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*Rev. Iyabo Nadra, pro se.*

*Ron O'Brien, Prosecuting Attorney, and R. Matthew Colon,  
for appellees.*

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Rev. Iyabo Nadra ("appellant"), appeals from the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendants-appellees, Susan Mbah ("Mbah") and Mindy Grote ("Grote") (collectively "appellees"). For the following reasons, we affirm in part and reverse in part.

{¶2} On February 25, 2005, appellant filed a civil complaint in the Franklin County Court of Common Pleas, purporting to allege claims of fraud against Mbah, a

Franklin County Children Services ("FCCS") caseworker, and Grote, an FCCS intake worker. Appellant's claims arise from the removal of her minor son, M.M., from her custody on January 2, 2002, and the subsequent filing of a complaint in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, alleging that M.M. was an abused, neglected, and dependent child ("juvenile complaint").

{¶3} The juvenile complaint, signed by Grote, was filed on January 3, 2002, in case No. 02JU01-97, and lists appellees, in their capacities as FCCS caseworker and intake worker, as the complainants. In addition to allegations that M.M. was an abused child, as defined by R.C. 2151.031(D), a neglected child, as defined by R.C. 2151.03(A)(2) and (A)(6), and a dependent child, as defined by R.C. 2151.04(C), the juvenile complaint set forth particular facts upon which such allegations were based. The juvenile complaint alleges that FCCS received referrals on or about December 19, 2001 and January 2, 2002, reporting that appellant was locking M.M. in the basement as punishment, with a cot for sleeping and a bucket to use as a toilet. The second referral reported that M.M. was being chained to a pole in the basement and that appellant fed M.M. once a day and withheld food depending on M.M.'s behavior. As a result of such referrals, FCCS, accompanied by the Columbus Police Department, obtained entrance to appellant's home on January 2, 2002, where they found M.M. locked in the basement with a cot, a bucket, and a chain attached to a pole. The home's electricity had been off for a week. According to the complaint, M.M. stated that he had to stay in the basement all day, that he sometimes had to sleep in the basement, and that he was sometimes chained to a pole by his wrist. M.M.'s 17-year-old sibling

confirmed M.M.'s report, and appellant did not deny the form of punishment she inflicted on M.M. Columbus Police Department personnel removed M.M. from the home. The juvenile complaint prayed for disposition, including, but not limited to, an order of temporary custody or permanent commitment.

{¶4} The juvenile court initially granted temporary custody of M.M. to FCCS. However, on August 20, 2002, the juvenile court entered judgment, terminating FCCS's temporary custody of M.M., maintaining a wardship over M.M., and awarding legal custody of M.M. to his father.

{¶5} Appellant was arrested on June 13, 2002, and was indicted on charges of child endangering, abduction, and kidnapping. On November 12, 2003, a jury returned a verdict of not guilty on the abduction and kidnapping charges but could not reach a verdict on the child endangering charge. On March 22, 2004, the trial court, in appellant's criminal case, granted a Crim.R. 29 motion for acquittal on the charge of child endangering and entered judgment acquitting appellant of all indicted charges.

{¶6} In her civil complaint, appellant alleges that the allegations in the juvenile complaint were false and that appellees violated R.C. 2151.44<sup>1</sup> by filing it. Appellant

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<sup>1</sup> R.C. 2151.44 provides:

"If it appears at the hearing of a child that any person has abused or has aided, induced, caused, encouraged, or contributed to the dependency, neglect, or delinquency of a child or acted in a way tending to cause delinquency in such child, or that a person charged with the care, support, education, or maintenance of any child has failed to support or sufficiently contribute toward the support, education, and maintenance of such child, the juvenile judge may order a complaint filed against such person and proceed to hear and dispose of the case as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code.

"On the request of the judge, the prosecuting attorney shall prosecute all adults charged with violating such sections."

also alleges that appellees violated R.C. 2151.419<sup>2</sup> by failing to return M.M. to her custody after the dismissal of criminal charges against her. Appellant alleges that appellees' actions:

\*\*\* [C]aused [her] to [lose] her minor child [M.M.], monetary support from the Social Security benefits, their family dwelling, and subsidies from the Franklin County Public Housing Program, a decline in her health as a result of 5 ½ months incarceration, denial of her right to family obligation, and her moral standing in the community as a law abiding citizen.

{¶7} Appellees filed an answer to appellant's complaint on April 7, 2005, admitting:

\*\*\* [T]hat law enforcement transported [M.M.] to Franklin County Children Services Intake Center on January 2, 2002 and that an investigation began at that time. Defendants further admit that an emergency court order was granted on January 3, 2002, that a temporary order of the court was granted on January 4, 2002, and that a temporary court commitment was eventually granted. Defendants further admit that Susan Mbah was the intake worker who handled the [M.M.] referral, that a NetCare assessment was performed, and that [M.M.'s] father was granted supervised visitation on April 2, 2002.

Appellees denied the remaining allegations in appellant's complaint for lack of sufficient knowledge and information. Appellees also asserted various affirmative defenses, including failure to state a claim upon which relief could be granted and immunity. On August 26, 2005, the trial court granted appellees leave to amend their answer to raise the statute of limitations as an additional affirmative defense.

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<sup>2</sup> In part, R.C. 2151.419(A)(1) requires a court to determine, before continuing the removal of a child from the child's home, "whether the public children services agency or private child placing agency \*\*\* has made reasonable efforts \*\*\* to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home."

{¶8} On November 28, 2005, appellees filed a motion for summary judgment, in response to which appellant filed a memorandum contra on December 27, 2005. Appellees argued that appellant's claims were barred by the two-year statute of limitations applicable to actions for damages against a political subdivision, as set forth in R.C. 2744.04(A). Appellees also argued that, if the trial court deemed appellant's complaint to assert claims pursuant to Section 1983, Title 42, U.S.Code ("Section 1983"), such claims were likewise subject to a two-year statute of limitations and time-barred. Additionally, appellees argued that they were immune from liability, pursuant to R.C. 2151.421(G), as persons who participated in good faith in a judicial proceeding resulting from a report of child abuse or neglect, and that they were entitled to qualified immunity for the exercise of discretionary functions as FCCS employees.

{¶9} On March 30, 2006, the trial court partially granted appellees' motion for summary judgment. After noting the R.C. 2744.04(A) two-year statute of limitations and agreeing with appellees' assertion that any Section 1983 claims were also subject to a two-year statute of limitations, the trial court concluded that appellant's claims, arising from the removal of M.M. and the filing of the juvenile complaint in January 2002, were time-barred. However, the trial court found that the evidence did not demonstrate that appellant's claim alleging appellees' ongoing failure to return M.M. to her custody was time-barred. Lastly, the trial court stated that the record contained insufficient evidence to evaluate appellees' entitlement to immunity. Accordingly, the trial court granted appellees' motion for summary judgment with respect to appellant's claims arising out of appellees' conduct in January 2002, and denied appellees' motion for summary

judgment with respect to appellant's claims arising out of appellees' alleged failure to restore appellant's custody of M.M.

{¶10} On May 4, 2006, the trial court granted appellees leave to file a second motion for summary judgment, which appellees filed on May 10, 2006. In their second motion for summary judgment, appellees argued that appellant's claim based on the failure to return M.M. was time-barred because FCCS's temporary custody of M.M. terminated on August 20, 2002, when the juvenile court awarded legal custody of M.M. to his father. In support of their motion, appellees submitted a certified copy of the juvenile court's judgment entry. Appellant filed a memorandum contra appellees' second motion for summary judgment on May 30, 2006. While appellant did not dispute that FCCS's temporary custody of M.M. terminated on August 20, 2002, she argued that the limitations period on her claims should have been tolled based on her continuing harm.

{¶11} On June 27, 2006, before the trial court ruled on appellees' second motion for summary judgment, appellant filed a motion for default judgment. Appellant argued that she was entitled to default judgment, pursuant to Civ.R. 55, based on appellees' failure to file a reply memorandum in support of their second motion for summary judgment.

{¶12} The trial court denied appellant's motion for default judgment and granted appellees' second motion for summary judgment on July 20, 2006. The trial court concluded that any conduct that might serve as the basis of a claim regarding FCCS's failure to return M.M. ceased no later than August 20, 2002, upon the termination of FCCS's temporary custody. The trial court also rejected appellant's tolling argument,

stating that "the statute of limitations is not tolled by continued suffering, but only by continuing conduct." Accordingly, the trial court concluded that appellant's complaint was time-barred in its entirety and entered final judgment in favor of appellees.

{¶13} Appellant filed a timely notice of appeal and assigns the following as error:

The trial court erred by partially granting defendants' motion for summary judgment, granting final judgment for motion for summary judgment in favor of defendants, overlooking Pro Se Standard of Review and various genuine issues of material fact entered by Plaintiff throughout the Court Record, and denial of the Plaintiff's Motion for Default Judgment, when the record presents genuine issues of material fact that demand resolution by the trier of fact.

Appellant contends that the trial court erred by granting summary judgment in favor of appellees and by denying her motion for default judgment. Appellant also contends that the trial court erred by not applying a "Pro Se Standard of Review[.]" Before reviewing the propriety of the trial court's entry of summary judgment, we briefly address appellant's arguments concerning the standard of review and her motion for default judgment.

{¶14} At the outset, we reject appellant's contention that she was entitled to a different standard of review based on her status as a pro se litigant. In her appellate brief, appellant cites a litany of federal cases suggesting that, when considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, federal courts hold pro se complaints to less stringent standards than formal pleadings drafted by lawyers. See *Haines v. Kerner* (1972), 404 U.S. 519, 520-521. Even if such case law were applicable to this court, the cited cases are distinguishable. Here, the trial court did not dismiss appellant's complaint for failure to state a claim. Rather, the trial court granted appellees' motion for summary judgment. Unlike a motion

to dismiss for failure to state a claim upon which relief can be granted, where the court's review is limited to the allegations in the complaint, a motion for summary judgment provides the plaintiff the opportunity to present evidence in support of the allegations in her complaint.

{¶15} This court has routinely rejected the notion that pro se litigants are entitled to lenient treatment with respect to procedural law and court rules. In *Justice v. Lutheran Social Servs. of Cent. Ohio* (Apr. 8, 1993), Franklin App. No. 92AP-1153, this court succinctly stated:

\* \* \* While one has the right to represent himself or herself and one may proceed into litigation as a *pro se* litigant, the *pro se* litigant is to be treated the same as one trained in the law as far as the requirement to follow procedural law and the adherence to court rules. If the courts treat *pro se* litigants differently, the court begins to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.

See, also, *McNeil v. United States* (1993), 508 U.S. 106, 113 ("we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel"). Thus, the fact that appellant is acting pro se "is immaterial because a pro se person 'is held to the same rules, procedures and standards as those litigants represented by counsel and must accept the results of her own mistakes and errors.'" *Dailey v. R & J Commercial Contracting*, Franklin App. No. 01AP-1464, 2002-Ohio-4724, at ¶17, quoting *Dornbirer v. Paul* (Aug. 19, 1997), Franklin App. No. 96APE11-1560. The trial court aptly cautioned appellant of the risks presented by representing herself, warning her that "[f]ailure to follow proper procedures or to inform this Court of relevant legal authority can result in judgment being entered against a party. Unrepresented parties are not given special

consideration because of their lack of counsel." Accordingly, we find no error based on the trial court's purported failure to apply a "pro se standard of review."

{¶16} We next turn to appellant's contention that the trial court erred in denying her motion for default judgment, premised on appellees' failure to file a reply memorandum in support of their second motion for summary judgment. Appellant's motion demonstrates a basic misunderstanding of the concept of default, which the Ohio Supreme Court has discussed at length:

\*\*\* Default \*\*\* is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. *McCabe v. Tom* (1929), 35 Ohio App. 73. As stated by the court in *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105, "[a] default by a defendant \*\*\* arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render a default judgment against the defendant as liability has been admitted or 'confessed' by the omission of statements refuting the plaintiff's claims. \*\*\*" It is only when the party against whom a claim is sought fails to contest the opposing party's allegations by either pleading or "otherwise defend[ing]" that a default arises. This rule \*\*\* is logically consistent with the general rule of pleading contained in Civ.R. 8(D), which reads in part that "[a]verments in a pleading to which a responsive pleading is required \*\*\* are admitted when not denied in the responsive pleading."

*Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 121. The Ohio Supreme Court subsequently clarified that, "when a case is at issue because a defendant has filed an answer, there can be no default judgment." *Disciplinary Counsel v. Jackson* (1998), 81 Ohio St.3d 308, 311. Here, appellees contested the allegations in appellant's complaint in their answer and defended by filing two motions for summary judgment. Appellees were clearly not in default, and the trial court appropriately denied appellant's motion for default judgment.

{¶17} Finally, we turn to appellant's contention that the trial court erred by granting summary judgment in favor of appellees. Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711.

{¶18} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶19} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record \* \* \* which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once the moving party meets its initial burden, the non-movant must then produce competent

evidence of the types listed in Civ.R. 56(C) showing that there is a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

{¶20} In their first motion for summary judgment, appellees argued that appellant's claims were time-barred by the two-year statute of limitations contained in R.C. 2744.04(A), which provides, in part, as follows:

An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function \* \* \* shall be brought within two years after the cause of action arose, or within any applicable shorter period of time for bringing the action provided by the Revised Code. \* \* \*

The limitations period in R.C. 2744.04(A) also applies to actions against employees of political subdivisions. *Bojac Corp. v. Kutevac* (1990), 64 Ohio App.3d 368; *Strahler v. Roby* (Jan. 27, 1992), Washington App. No. 90 CA 25, citing *Bojac*; *Read v. Fairview Park* (2001), 146 Ohio App.3d 15.

{¶21} To the extent that appellant brings state law claims against appellees, as employees of FCCS, her claims are subject to the two-year statute of limitations contained in R.C. 2744.04(A). In her memorandum in opposition to appellees' first motion for summary judgment, appellant did not dispute that the R.C. 2744.04(A) statute of limitations applied to her claims. However, on appeal, appellant argues that her claims are subject to the four-year statute of limitations for fraud claims, as set forth in R.C. 2305.09(C). We reject that argument.

{¶22} R.C. 1.51 provides the applicable rule of construction for dealing with conflicts between general and specific statutory provisions:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Because the conflict between the statutes of limitations in R.C. 2305.09(C) and 2744.04(A) is irreconcilable, the special statute of limitations for actions against political subdivisions and their employees, as set forth in R.C. 2744.04(A), prevails over the general statute of limitations for fraud actions. See *Abdalla v. Olexia* (1996), 113 Ohio App.3d 756. Thus, the R.C. 2744.04(A) two-year statute of limitations applies to appellant's state law claims against appellees.

{¶23} To determine whether appellant's claims were time-barred when she filed her complaint in February 2005, we must establish when appellant's claims accrued. "A cause of action ordinarily accrues, and the limitations period begins to run, when the violation giving rise to liability occurs." *Lane v. Grange Mut. Cos.* (1989), 45 Ohio St.3d 63, 65. Despite allegations regarding proceedings in juvenile court, proceedings in appellant's criminal prosecution, and the alleged harm she suffered, appellant's complaint contains only limited allegations of conduct by appellees.

{¶24} First, appellant premises at least part of her claims on appellees' filing of the juvenile complaint on January 2, 2002, at which time appellant's claims, based on such conduct, would have accrued. Appellant filed her complaint on February 25, 2005. Because more than two years had elapsed after appellant's claims, based on the filing

of the juvenile complaint, accrued, reasonable minds could only conclude that such claims were time-barred. Accordingly, the trial court did not err in granting summary judgment on appellant's state law claims based on appellees' filing of the juvenile complaint.

{¶25} Second, the trial court also found that appellant's complaint contained a claim based on appellees' failure to restore her custody of M.M. after the dismissal of the criminal charges against her. The trial court initially denied appellees' motion for summary judgment on such claim, stating that appellees failed to point to any evidence that the claim was time-barred. When appellees filed their second motion for summary judgment, they submitted a certified copy of a juvenile court judgment entry divesting FCCS of its temporary custody of M.M. and granting legal custody to M.M.'s father on August 20, 2002. Appellant did not dispute that FCCS's temporary custody of M.M. terminated in August 2002. Thus, any claim based on FCCS's failure to return custody to appellant would have accrued, at the latest, in August 2002, more than two years prior to appellant filing her complaint. Consequently, any claim based on such conduct was barred by the two-year statute of limitations contained in R.C. 2744.04(A).

{¶26} In an attempt to save her claims from the bar of the statute of limitations, appellant argued in her memorandum in opposition to appellees' second motion for summary judgment, and argues again on appeal, that the limitations period on her claims was tolled. Appellant specifically argues that the limitations period on her claims was statutorily tolled, pursuant to R.C. 2305.15 and 2305.16, each of which we will consider in turn.

{¶27} R.C. 2305.15(B) provides:

When a person is imprisoned for the commission of any offense, the time of his imprisonment shall not be computed as any part of any period of limitation, as provided in section 2305.09, 2305.10, 2305.11, or 2305.14 of the Revised Code, within which any person must bring any action against the imprisoned person.

Appellant argues that the limitations period on her claims was tolled during the time she was incarcerated due to her criminal charges. We conclude, however, that, by its express terms, R.C. 2305.15(B) is inapplicable to this action. R.C. 2305.15(B) only extends the time for bringing an action against an imprisoned person and has no application to actions brought by an imprisoned person against someone else. *Karlen v. Steele* (Sept. 15, 2000), Trumbull App. No. 99-T-0076. Consequently, appellant was not entitled to tolling under R.C. 2305.15(B).

{¶28} Appellant also argues that the time for bringing her action was tolled, pursuant to R.C. 2305.16, which provides as follows:

Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, \* \* \* of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. \* \* \*

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

R.C. 1.02(C) defines "of unsound mind" to include "all forms of mental retardation or derangement." Although not defined in the Ohio Revised Code, "derangement" has been equated with insanity. *Fisher v. Ohio University* (1992), 63 Ohio St.3d 484, 488, citing Webster's Third International Dictionary (1986) 607.

{¶29} Where, like here, a defendant meets her initial burden on summary judgment of proving that the statute of limitations is a valid affirmative defense, the plaintiff "ha[s] a burden of proof regarding [her] claim that the tolling statute applied to render the statute of limitation's defense invalid." *Heskett v. Roberts* (Apr. 27, 1995), Franklin App. No. 94APE09-1411, citing *Wright v. Univ. Hosp. of Cleveland* (1989), 55 Ohio App.3d 227. It is unclear from appellant's arguments whether she relies on the first paragraph of R.C. 2305.16, claiming that she was of unsound mind at the time her cause of action accrued, or whether she relies on the second paragraph of R.C. 2305.16, claiming that she became of unsound mind after her cause of action accrued. Regardless, to avoid summary judgment, appellant was required to submit evidence demonstrating a genuine issue of material fact regarding her claim that R.C. 2305.16 applied to toll the limitations period. See *Casey v. Casey* (1996), 109 Ohio App.3d 830, 835.

{¶30} Appellees contend that R.C. 2305.16 is inapplicable because appellant did not present evidence substantiating her assertion that she was of unsound mind. In *Bowman v. Lemon* (1926), 115 Ohio St. 326, 329-330, the Ohio Supreme Court stated that, when a plaintiff alleged that he was "of unsound mind" such that the limitations period should be tolled, a court should consider "whether there is any evidence tending to show any species of mental deficiency or derangement from which the plaintiff was

suffering which would prevent him from properly consulting with counsel, preparing and presenting his case, and attending to his affairs, and preclude him from asserting his rights in a court of justice[.]”

{¶31} Appellant first argues that records filed in juvenile court and in the criminal case against her contain evidence that she was of unsound mind as a result of “pre-existing mental illness conditions, including but not limited to dementia, debilitating major depression, memory loss, dyslexia, traumatic brain injury, bi-polar disorder and post traumatic stress disorder[.]” The only records from the juvenile case or appellant’s criminal case included in the record here are the juvenile complaint, the certified judgment entry from juvenile court awarding legal custody of M.M. to his father, and the trial court’s final judgment entry in the criminal case. Despite appellant’s assertions, no records from either the juvenile or criminal cases, containing evidence relating to appellant’s mental soundness, were filed in this action. Accordingly, the trial court could not consider any such alleged evidence when ruling on appellees’ motions for summary judgment, and this court may not consider any such alleged evidence on appeal. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, syllabus (“[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter”).

{¶32} In addition to her vague references to documents in other cases, appellant also identifies certain documents in the record below in support of her R.C. 2305.16 tolling argument. Specifically, appellant references documents attached to her affidavit of indigency and to her memorandum contra to appellees’ second motion for summary judgment.

{¶33} Among the documents attached to appellant's affidavit of indigency is a document from the Franklin County Department of Job and Family Services, dated October 20, 2004, notifying appellant of the termination of her food stamps and Medicaid, based on her failure to provide required documentation of eligibility. An undated document, on letterhead of Southeast, Inc. Recovery and Mental Health Care Services ("Southeast"), states that appellant has no income. The next document is appellant's application for the Central Ohio Transit Authority reduced fare program, dated September 29, 2004. A Southeast case manager completed a portion of the application form to be completed by a licensed medical professional and checked a box indicating that the nature of appellant's disability is physical and explaining that her disability consisted of brain, spine and hip injury, and diabetes. The case manager did not check the pre-printed box to indicate that appellant had a psychological disability. The final document attached to appellant's affidavit of indigency is a Supplemental Security Income Notice from the Department of Health and Human Services, Social Security Administration, dated October 23, 2003, denying appellant's claim for Supplemental Security Income payments. Additionally, appellant submitted, as an attachment to her memorandum contra appellees' second motion for summary judgment, a copy of a Brain Injury Association of Ohio membership card, which states that appellant sustained, suffered, and survived a brain injury.

{¶34} To the extent that appellant relies on the first paragraph of R.C. 2305.16, claiming that she was of unsound mind at the time her causes of action accrued, appellant failed to demonstrate a genuine issue of material fact. Even were we to conclude that the documents appellant references generally created a genuine issue of

material fact as to whether she was ever of unsound mind, the documents do not create an issue of fact as to whether she was of unsound mind in 2002, when her causes of action accrued. Accordingly, we conclude that the first paragraph of R.C. 2305.16 does not toll the limitations period on appellant's claims.

{¶35} We likewise conclude that appellant failed to demonstrate an issue of fact regarding her entitlement to tolling under the second paragraph of R.C. 2305.16. To take advantage of the tolling provisions of the second paragraph of R.C. 2305.16, appellant was required to present evidence that she became of unsound mind after the accrual of her causes of action and that she was either adjudicated of unsound mind by a court or was confined in an institution or hospital under a diagnosed condition or disease which rendered her of unsound mind. The record contains no evidence that a court of competent jurisdiction adjudicated appellant as being of unsound mind. In the absence of a court adjudication, the second paragraph of R.C. 2305.16 applies:

\*\*\* [O]nly when the claimant presents evidence substantiating he or she was of unsound mind and the disease or condition (1) was determined by a psychiatrist or licensed physician who treated the claimant during his confinement to have rendered him of unsound mind, or (2) is generally accepted by the medical community as one causing unsound mind.

*Fisher* at syllabus. None of the documents attached to either appellant's affidavit of indigency or memorandum contra appellees' second motion for summary judgment reveal that appellant was institutionally confined under a diagnosed condition or disease that rendered her of unsound mind.

{¶36} Appellant's own conclusory allegations that she was of unsound mind at an unspecified time during the limitations period are insufficient to overcome appellees'

motion for summary judgment. *Kotyk v. Rebovich* (1993), 87 Ohio App.3d 116, 120 ("[a] general claim of disability, absent specific details, will not toll the time for the running of an applicable statute of limitations"). Moreover, appellant is not competent to render a psychological diagnosis. See *Moore v. Schiano* (1997), 117 Ohio App.3d 326, 330-331. Upon review, and viewing the evidence in a light most favorable to appellant, we conclude that appellant did not meet her burden on summary judgment of presenting evidence substantiating her claim that R.C. 2305.16 tolled the time in which she was required to bring her claims against appellees. Therefore, the trial court did not err in entering summary judgment in favor of appellees on appellant's state law claims.

{¶37} In addition to arguing that appellant's state law claims were time-barred under R.C. 2744.04(A), appellees argued on summary judgment that, to the extent appellant's complaint alleged federal Section 1983 claims, such claims were likewise subject to a two-year statute of limitations and time-barred. "Section 1983 provides a remedy for violations of substantive rights created by the United States Constitution or federal statute."<sup>3</sup> *Prohazka v. Ohio State Univ. Bd. of Trustees* (Dec. 16, 1999), Franklin App. No. 99AP-2, citing *Barnier v. Szentmiklosi* (E.D.Mich.1983), 565 F.Supp. 869, 871, reversed in part on other grounds (C.A.6, 1987), 810 F.2d 594, 597. To state a claim under Section 1983, a "plaintiff must establish that: (1) the conduct in controversy was committed by a person acting under color of state law, and (2) the conduct deprived plaintiff of a federal right, either constitutional or statutory." *Prohazka*.

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<sup>3</sup> In pertinent part, Section 1983 provides that "[e]very 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 or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress[.]"

Although the trial court did not expressly determine whether appellant's complaint contained Section 1983 claims, it concluded that any Section 1983 claims would be barred by a two-year statute of limitations.

{¶38} For statute of limitations purposes, Section 1983 claims are characterized as personal injury actions. *Owens v. Okure* (1989), 488 U.S. 235, 240-241, citing *Wilson v. Garcia* (1985), 471 U.S. 261, 280. Because federal law does not provide a statute of limitations for Section 1983 claims, courts must borrow the applicable statute of limitations from the state in which the cause of action arose. *Owens* at 240; *Wilson* at 266. Where a state has multiple statutes of limitations for personal injury actions, the general or residual statute of limitations for personal injury actions applies to Section 1983 claims. *Owens* at 249-250.

{¶39} In support of their argument that a two-year statute of limitations applies to Section 1983 claims arising in Ohio, appellees rely on *Browning v. Pendleton* (C.A.6, 1989), 869 F.2d 989, 992, in which the Sixth Circuit Court of Appeals, sitting en banc, applied *Owens* and determined that the two-year statute of limitations for bodily injury actions set forth in R.C. 2305.10 was the appropriate statute of limitations for Section 1983 claims arising in Ohio. Based on *Browning*, appellees contend that a two-year statute of limitations applies to appellant's Section 1983 claims and that such claims are time-barred because appellant did not file her complaint within two years of the accrual of her claims, as determined above.

{¶40} While appellees correctly state the Sixth Circuit's holding in *Browning*, this court has repeatedly refused to follow *Browning*, concluding that the Sixth Circuit was

incorrect in its determination that former R.C. 2305.10 set forth Ohio's general or residual statute of limitations for personal injury actions. In *Prohazka*, we stated:

\* \* \* [A]lthough the question of how to characterize section 1983 claims for statute of limitation purposes, and the question of whether Ohio's general or residual statute of limitations should be applied to section 1983 claims are questions of federal law, the question of which Ohio statute of limitations constitutes the state's general or residual statute of limitations is a question of state law. \* \* \*

There, we acknowledged a split among the Ohio appellate districts as to which statute represents Ohio's general or residual statute of limitations for personal injury actions. After reviewing the positions of the Sixth Circuit and various Ohio appellate districts, as well as the statutory language of Ohio's statutes of limitations for personal injury actions, this court concluded, contrary to the holding in *Browning*, that the four-year statute of limitations contained in R.C. 2305.09(D) is Ohio's general or residual personal injury statute of limitations and, thus, applied to Section 1983 claims arising in Ohio.<sup>4</sup> *Id.*; see, also, *Fowler v. Coleman* (Dec. 28, 1999), Franklin App. No. 99AP-319.

{¶41} In its decision and entry granting appellees' first motion for summary judgment, the trial court stated, without citation to any legal authority, that "Section 1983 actions are also subject to a two-year statute of limitations." This conclusion is contrary to our holding in *Prohazka* and constitutes error. Rather, as stated in *Prohazka*, Section 1983 claims arising in Ohio are subject to a four-year limitations period set forth in R.C. 2305.09(D). Appellant filed her complaint within four years of the conduct alleged in her complaint. Thus, to the extent appellant alleged Section 1983 claims based on such

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<sup>4</sup> In *Luckey v. Butler Cty.* (S.D. Ohio 2006), Case No. 1:06CV123, the United States District Court for the Southern District of Ohio recognized the conflicting opinions of the Sixth Circuit and various Ohio appellate districts and certified to the Ohio Supreme Court the question: "Which Ohio statute of limitations applies to a claim brought under 42 U.S.C. § 1983 in the State of Ohio?"

conduct, her claims are timely, and appellees were not entitled to summary judgment based on the statute of limitations.

{¶42} Appellees did not argue before the trial court that appellant's complaint failed to state Section 1983 claims, and, in fact, at oral argument before this court, appellees' counsel conceded that appellant's complaint did allege Section 1983 claims. Additionally, appellees did not argue before the trial court that appellant could present no evidence to prove her Section 1983 claims, relying instead on their statute of limitations argument. Consequently, we express no opinion on the merits of appellant's Section 1983 claims, which the trial court has not yet considered.

{¶43} Appellees' final argument to the trial court in support of their motion for summary judgment was that they were immune from liability. Appellees first argued that they were entitled to immunity, pursuant to R.C. 2151.421(G), which provides immunity from civil or criminal liability to one participating in making a report of child abuse or neglect or participating in good faith in a judicial proceeding resulting from such a report. While R.C. 2151.421(G) may arguably have provided immunity to appellees with respect to appellant's state law claims, the immunity provided therein does not control a federal Section 1983 action, even when that federal cause of action is brought in state court. *Cudlin v. Cudlin* (1990), 64 Ohio App.3d 249, 256, citing *Martinez v. California* (1980), 444 U.S. 277, 282.

{¶44} Appellees also argue that they are entitled to qualified immunity. Under the doctrine of qualified immunity:

\* \* \* [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory

or constitutional rights of which a reasonable person would have known. \* \* \*

*Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818; *Wegener v. City of Covington* (C.A.6, 1991), 933 F.2d 390, 392. The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. *Id.* However, the Sixth Circuit Court of Appeals has explained the procedure for analyzing claims of qualified immunity as follows:

"Defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question. \* \* \* Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have clearly understood that they were under an affirmative duty to refrain from such conduct."

*Gratsch v. Hamilton Cty.* (C.A.6, 2001), 12 Fed.Appx. 193, 201, quoting *Rich v. City of Mayfield Heights* (C.A.6, 1992), 955 F.2d 1092, 1095.

{¶45} The trial court determined that the record contained insufficient evidence for the court to evaluate appellees' claims of immunity. We agree. Although appellees argued that, as employees of FCCS, their filing of the juvenile complaint was a discretionary act within the scope of their employment, appellees offered no evidence in support of that argument. Appellees attached to their first motion for summary judgment an uncertified copy of the juvenile complaint, a document entitled "Client Record of Activity," and a document entitled "Arrest Information," none of which demonstrates that appellees' acts, as set forth in appellant's complaint, were discretionary acts or within

the scope of their employment by FCCS.<sup>5</sup> Because appellees failed to meet their initial burden of coming forward with facts to suggest that they were entitled to qualified immunity, the burden did not shift to appellant to refute appellees' entitlement to qualified immunity. Accordingly, appellees were not entitled to summary judgment on the basis of qualified immunity. Of course, we express no opinion on whether appellees will ultimately prevail on their claim of qualified immunity on remand to the trial court.

{¶46} In conclusion, we find that the trial court properly granted summary judgment in favor of appellees on appellant's state law claims, as such claims are barred by the two-year statute of limitations set forth in R.C. 2744.04(A). Accordingly, we overrule appellant's assignment of error and affirm the judgment of Franklin County Court of Common Pleas with respect to such claims. However, we further find that the trial court erred in granting summary judgment in favor of appellees on appellant's Section 1983 claims, because appellant filed such claims within the applicable four-year statute of limitations and because appellees failed to demonstrate their entitlement to qualified immunity. Thus, with respect to appellant's Section 1983 claims, we sustain appellant's assignment of error, reverse the judgment of the Franklin County Court of

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<sup>5</sup> Additionally, we note that the evidence attached to appellees' first motion for summary judgment is not proper summary judgment evidence. Pursuant to Civ.R. 56(C), a court may consider only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action" when considering a motion for summary judgment. The proper procedure for introducing evidentiary matter of a type not listed in Civ.R. 56(C) is to incorporate the material by reference into a properly framed affidavit. *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, citing *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220. The documents attached to appellees' first motion for summary judgment do not fall within the exhaustive categories of evidence listed in Civ.R. 56(C), and appellees failed to incorporate such documents into a properly framed affidavit.

Common Pleas, and remand this action for further proceedings consistent with this opinion and the law.

*Judgment affirmed in part,  
reversed in part, and cause remanded.*

BROWN and McGRATH, JJ., concur.

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FILED  
COURT OF APPEALS  
FRANKLIN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2007 FEB -8 AM 9:33

CLERK OF COURTS

Rev. Iyabo Nadra,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 06AP-829
v.	:	(C.P.C. No. 05CVH02-2202)
	:	
Susan Mbah and Mindy Grote,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 6, 2007, appellant's assignment of error is sustained in part and overruled in part, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed equally between the parties.

FRENCH, BROWN, and McGRATH, JJ.

By Judith L. French  
Judge Judith L. French

RAYMOND M. COLON  
ASST FRANKLIN CO PROS  
373 S HIGH STREET  
13TH FLOOR  
COLUMBUS, OH 43215-6316

FILED  
COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO  
06 MAR 30 PM 2:00  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

REV. IYABO NADRA,  
Plaintiff(s),

v.

Case No. 05CVH02-2202 (Hogan, J.)

SUSAN MBAH, et al.,

Defendant(s).

DECISION AND ENTRY DENYING PLAINTIFF'S REQUEST FOR COURT  
APPOINTED BACK-UP ATTORNEY FILED 12-27-2005  
AND  
DECISION AND ENTRY PARTIALLY GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT FILED 11-28-2005

Plaintiff's 12-27-2005 motion for Court appointed attorney is DENIED. This Court does not appoint attorneys for civil cases.

Defendant's 11-28-2005 Motion for Summary Judgment is PARTIALLY GRANTED.

R.C. 2744.04 provides a two-year statute of limitations against political subdivisions and their employees. Section 1983 actions are also subject to a two-year statute of limitations.

Summary Judgment must be granted as to those of Plaintiff's claims which are limited to alleging misconduct that allegedly occurred when her child was originally removed from her home in the early part of 2002, since reasonable minds can reach but one conclusion that the statute of limitations has run.

Those claims that allege an ongoing violation, such as a failure to return the child after Plaintiff was acquitted in the child endangering case, cannot be the subject of a summary judgment based on the statute of limitations since the conduct is alleged to be

continuing, and Defendants have not put on any evidence to meet their initial burden of pointing to evidence showing the absence of any genuine issue of material fact.

Summary judgment cannot be granted on the immunity argument at this time because of the paucity of evidence which Defendants have offered to show the absence of genuine issues of material fact.

To the extent that Plaintiff alleges violations of R.C. 2151.419 and R.C. 2151.44, summary judgment is granted as to the those claims since those statutes define the obligations of courts, judges, and prosecutors rather than the obligations of defendants.

Accordingly, it would appear that the only claims that remain for trial are those which pertain to Defendants' alleged failure to return the child to Plaintiff's custody to the extent that those actions are alleged to violate R.C. 2307.50 and §1983.

Since the legal basis of the remaining claims is only now beginning to be articulated, it may make sense to consider whether Defendants should be allowed to file another summary judgment motion. If Defendants wish to do so, they may raise that issue at the pretrial.

  
3-29-06  
\_\_\_\_\_  
DANIEL T. HOGAN, JUDGE

Copies to:

Rev. Iyabo Nadra  
Plaintiff Pro Se

Victor N. Magary  
Counsel for Defendant(s)

FILED  
COMMON PLEAS COURT  
IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

REV. IYABO NADRA  
JUL 20 AM 10:08

Plaintiff(s)  
CLERK OF COURTS

TERMINATION NO. 12  
BY [Signature] 7-19-06

v.

Case No. 05CVH02-2202 (Hogan, J.)

SUSAN MBAH, et al.,

Defendant(s).

**FINAL APPEALABLE ORDER**

DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR DEFAULT  
JUDGMENT FILED 6-27-2006

AND

DECISION AND FINAL JUDGMENT ENTRY GRANTING DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT FILED 5-10-2006

Plaintiff's 6-27-2006 Motion for Default Judgment is DENIED. Plaintiff points to the fact that Defendants did not file a timely reply in support of their second motion for summary judgment. Plaintiff then argues that it is appropriate to grant default judgment pursuant to Civil Rule 55. However, Civil Rule 55 applies to "pleadings" rather than to motions. Specifically, Civil Rule 55 applies where an appropriate responsive pleading has not been filed in response to a complaint, cross-claim, or counterclaim. Since Civil Rule 55 is not applicable in the current situation, Plaintiff's motion for default judgment must be denied.

Defendants' 5-10-2006 Motion for Summary Judgment is GRANTED. All of Plaintiff's claims are hereby DISMISSED. This decision and entry resolves all of the remaining issues in this case. This entry is a final judgment entry.

**Standard of Review upon Motion for Summary Judgment**

Summary judgment may be awarded only if (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and

(3) it appears from the evidence that reasonable minds, construing the evidence most strongly in favor of the nonmoving party, can come to but one conclusion which is adverse to the nonmoving party. *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298. Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. *Id.* Doubts must be resolved in favor of the nonmoving party. *Id.*

The Ohio Supreme Court has ruled that " \* \* \* the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. *State ex rel. Leigh v. State Emp. Relations Board* (1996), 76 Ohio St.3d 143, 146. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.*

#### **Analysis of Defendants' Second Summary Judgment Motion**

This Court determined in its 3-30-2006 Summary Judgment Motion that two-year statutes of limitations apply to all of Plaintiff's claims. This Court also determined that some of plaintiff's claims were based wholly on conduct that occurred in 2002 when Plaintiff's child was removed from her home. The complaint had been filed in 2005. Accordingly, this Court found that all of the claims based solely on the 2002 conduct were barred by the statute of limitations. However, the Court noted that claims alleging

ongoing violations such as a failure to return the child after Plaintiff was acquitted in the child endangering case, might not be barred by the statute of limitations.

Defendants have now filed a second summary judgment motion. Defendants attached a certified copy of a judgment entry adopting an attached magistrate's decision in which the Franklin County Child Services' custody over Plaintiff's child was terminated as of 8-20-2002.

Reasonable minds can reach but one conclusion that Defendants could not have returned the child to Plaintiff after that date. Accordingly, any conduct which might serve as the basis of Plaintiff's 2005 complaint ceased no later than of 8-20-2002, more than two years prior to the filing of that complaint. Consequently, the complaint is barred by the applicable statutes of limitations.

Plaintiff argues that she continues to suffer as a result of Defendants' conduct. However, the statute of limitations is not tolled by continued suffering, but only by continuing conduct.

For all of the reasons stated above, Defendants' motion for summary judgment must be granted, and Plaintiff's claims must be dismissed since the complaint was not filed during the two years permitted by the statute of limitations.

  
DANIEL T. HOGAN, JUDGE

Copies to:

Rev. Iyabo Nadra  
Plaintiff Pro Se

Victor N. Magary  
Counsel for Defendant(s)

**IN THE SUPREME COURT OF OHIO  
2007**

Rev. Iyabo Nadra,

Plaintiff-Appellee,

-vs-

Susan Mbah and Mindy Grote,

Defendants-Appellants.

Case No.

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case Nos. 06AP-829

**AFFIDAVIT OF HEATHER SALING**

STATE OF OHIO,  
COUNTY OF FRANKLIN, SS:

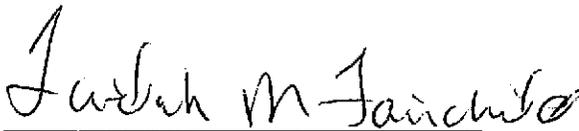
I, Heather Saling, being duly cautioned and **SWORN**, hereby state the following:

- 1.) I am more than 18 years of age and have personal knowledge of all the facts contained in this Affidavit and I am competent to testify to the matters contained herein.
- 2.) I am the Director of Employee Relations at FCCS, and have been employed in this capacity since January 12, 2004.
- 3.) In this capacity I have personal knowledge of the records kept in the ordinary course of business for Franklin County Children Services.
- 4.) Attached as Exhibit A is a document prepared to reflect truly and accurately data contained in the 2006 Public Children Services Association of Ohio turnover survey. This document was prepared and kept in the ordinary course of business at Franklin County Children Services.

FURTHER AFFIANT SAITH NAUGHT.

  
\_\_\_\_\_  
Heather Saling

SWORN to before me and subscribed in my presence this 20<sup>th</sup> day of August,  
2007.

  
\_\_\_\_\_  
NOTARY PUBLIC

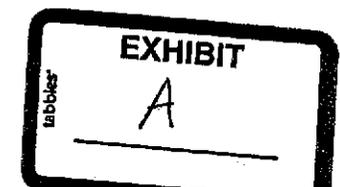


**TWILAH M. FAIRCHILD**  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES OCTOBER 1, 2010

**2006 PCSAO TURNOVER SURVEY  
SUMMARY DATA FOR MAJOR METROPOLITAN AND METROPOLITAN COUNTIES**

<b>County</b>	<b>Total # of positions</b>	<b># of Direct Service CW positions</b>	<b>Separations from all positions in 2006</b>	<b>Separations from Direct Service CW positions in 2006</b>	<b>Overall turnover rate in 2006</b>	<b>Direct Service CW turnover rate in 2006</b>
Butler	206	132	33	21	16%	16%
Cuyahoga	1119	761	60	47	5%	6%
Franklin	755	302	80	42	11%	14%
Hamilton	436	246	73	73	17%	30%
Lake	62	38	12	12	19%	32%
Lorain	155	77	12	8	8%	10%
Lucas	402	211	30	12	7%	6%
Mahoning	144	56	15	8	10%	14%
Montgomery	362	218	22	15	6%	7%
Stark	190	103	13	10	7%	10%
Summit	418	177	73	35	17%	20%
Trumbull	173	59	14	7	8%	12%

Average Direct Service CW Turnover for three Ohio Major Metropolitan Counties 17%  
 Average Direct Service CW Turnover for nine Ohio Metropolitan Counties 14%  
 Average Direct Service CW Turnover for all eighty-eight Ohio Counties 16%



**IN THE SUPREME COURT OF OHIO**  
**2007**

Rev. Iyabo Nadra,

Plaintiff-Appellee,

-vs-

Susan Mbah and Mindy Grote,

Defendants-Appellants.

Case No. 07-525

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case Nos. 06AP-829

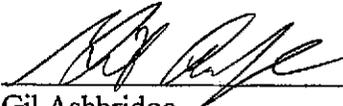
**AFFIDAVIT OF GIL ASHBRIDGE**

STATE OF OHIO,  
COUNTY OF FRANKLIN, SS:

I, Gil Ashbridge, being duly cautioned and **SWORN**, hereby state the following:

- 1.) I am more than 18 years of age and have personal knowledge of all the facts contained in this Affidavit and I am competent to testify to the matters contained herein.
- 2.) I am the MIS Director at Franklin County Children Service, and have been employed in this capacity since April 19, 2005.
- 3.) In this capacity I have personal knowledge of the records kept in the ordinary course of business for Franklin County Children Services with regard to the number of calls the Franklin County Children Service referral hotline receives on an annual basis.
- 4.) The referral hotline operates 24 hours a day, 7 days a week, 365 days a year.
- 5.) In 2005, the referral hotline handled 37,822 calls.
- 6.) In 2006, the referral hotline handled 38,091 calls.
- 7.) Through July 31, 2007, the referral hotline has handled 21, 315 calls.

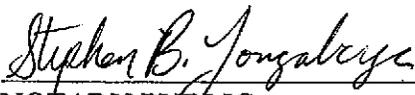
**FURTHER AFFIANT SAITH NAUGHT.**

  
\_\_\_\_\_  
Gil Ashbridge

SWORN to before me and subscribed in my presence this 20<sup>th</sup> day of August,  
2007.



Stephen B. Longaberger  
Notary Public  
In and for  
the State of Ohio  
My Commission Expires  
September 26, 2010

  
\_\_\_\_\_  
NOTARY PUBLIC

**IN THE SUPREME COURT OF OHIO**  
**2007**

Rev. Iyabo Nadra,

Plaintiff-Appellee,

-vs-

Susan Mbah and Mindy Grote,

Defendants-Appellants.

Case No. 07-525

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case Nos. 06AP-829

**AFFIDAVIT OF HARRY GRIGGS**

STATE OF OHIO,  
COUNTY OF FRANKLIN, SS:

I, Harry Griggs, being duly cautioned and **SWORN**, hereby state the following:

- 1.) I am more than 18 years of age and have personal knowledge of all the facts contained in this Affidavit and I am competent to testify to the matters contained herein.
- 2.) I am the Management Analyst at Franklin County Children Service, and have been employed in this capacity since June 7, 1982.
- 3.) In this capacity I have personal knowledge of the records kept in the ordinary course of business for Franklin County Children Services with regard to monthly average child case loads for Franklin County Children Services.
- 4.) In 2004, the monthly average number of children under the supervision of Franklin County Children Service in open cases was 6,455.
- 5.) In 2005, the monthly average number of children under the supervision of Franklin County Children Service in open cases was 6,275.

- 6.) In 2006, the monthly average number of children under the supervision of Franklin County Children Services in open cases was 6, 101.
- 7.) The average number of cases Franklin County Children Service Caseworkers have is seventeen (17).

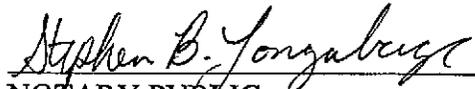
**FURTHER AFFIANT SAITH NAUGHT.**

  
Harry Griggs

SWORN to before me and subscribed in my presence this 20<sup>th</sup> day of August,  
2007.



Stephen B. Longaberger  
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the State of Ohio  
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Citation: 1999 ohio app lexis 4369

1999 Ohio App. LEXIS 4369, \*

RICHARD K. ARCHER, Plaintiff-Appellant -vs- THOMAS PAYNE, ET AL., Defendant-Appellees

Case No. CT98-0043

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, MUSKINGUM COUNTY

1999 Ohio App. LEXIS 4369

September 17, 1999, Date of Judgment Entry

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas. Case No. CH98-0752.

**DISPOSITION:** JUDGMENT: Affirmed.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Appellant sought review of a decision of the Muskingum County Court of Common Pleas (Ohio), which granted appellee enforcement officer's motion to dismiss pursuant to Fed. R. Civ. P. 12(B)(6) and (C), in appellant's civil rights action under 42 U.S.C.S. § 1983.

**OVERVIEW:** Appellant was indicted on felony offenses and arrested. While incarcerated, appellant alleged he requested to contact his attorney, but that his request was denied by appellee deputy sheriff. Appellant later brought an action against appellee alleging a violation of his civil rights under 42 U.S.C.S. § 1983. The trial court granted appellee's motion to dismiss pursuant to Fed. R. Civ. P. 12(B)(6) and (C). On appeal, the court affirmed, reasoning Ohio Rev. Code Ann. § 2305.10's two year statute of limitations was applicable to appellant's civil rights claim. The appellate court determined that appellant brought his action four years after the last possible occurrence of any alleged violation, therefore, his complaint was properly dismissed because it was time barred.

**OUTCOME:** Decision of the lower court affirmed, because appellant failed to bring his action within the two year statute of limitations.

**CORE TERMS:** statute of limitations, jail, assignments of error, personal injury actions, appointed, deputy, felony, doctrine of collateral estoppel, limitations period, aforementioned, incarceration, transported, arraignment, arrested, residual, referee, minute, borrow, latest, trip

### LEXISNEXIS® HEADNOTES

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[Civil Rights Law](#) > [Section 1983 Actions](#) > [Elements](#) > [Color of State Law](#) > [General Overview](#)   
[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN1**  Federal law governs the characterization of a 42 U.S.C.S. § 1983 claim for limitation purposes. [More Like This Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Elements](#) > [Color of State Law](#) > [General Overview](#)   
[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [Borrowing Statutes](#)   
**HN2**  Claims under 42 U.S.C.S. § 1983 are best characterized as personal injury actions, for

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limitation purposes. [More Like This Headnote](#)

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[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#)   
[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [General Overview](#) 

**HN3** Where state law provides multiple statutes of limitations for personal injury actions, courts considering [42 U.S.C.S. § 1983](#) claims should borrow the general or residual statute for personal injury actions. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [General Overview](#) 

**HN4** The two year limitations period set forth in [Ohio Rev. Code Ann. § 2305.10](#) is the appropriate statute of limitations for actions arising in Ohio under [42 U.S.C.S. § 1983](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#)   
[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [General Overview](#) 

**HN5** The date on which the statute of limitations begins to run in a [42 U.S.C.S. § 1983](#) action is a question of federal law. [More Like This Headnote](#)

**COUNSEL:** For Plaintiff-Appellant: RICHARD K. ARCHER, London, Ohio.

For Defendant-Appellees: MARK LANDERS, TIMOTHY S. RANKIN, Columbus, Ohio.

**JUDGES:** Hon. W. Scott Gwin, P.J., Hon. William B. Hoffman, J., Hon. Sheila G. Farmer, J., Hoffman, J., Gwin, P.J. and Farmer, J., concur.

**OPINION BY:** William B. Hoffman

## OPINION

### OPINION

Hoffman, J.

Plaintiff-appellant Richard K. Archer appeals the November 3, 1998 Decision and Judgment Entry entered by the Muskingum County Court of Common Pleas granting the motion to dismiss pursuant to [Civ. R. 12\(B\)\(6\)](#) and [\(C\)](#) of defendants-appellees Thomas Payne, et al.

### STATEMENT OF THE FACTS AND CASE

This appeal arises out of a civil rights action under [42 U.S.C. Section 1983](#) filed by appellant against appellees. Sometime prior to September 23, 1994, the Knox County Grand Jury indicted appellant on felony offenses. Based upon the indictment, Knox County issued a felony arrest warrant. On September 23, 1994, the Muskingum County Sheriff's Department arrested appellant pursuant to the aforementioned warrant. Thereafter, appellant [**\*2**] was held in the Muskingum County Jail. Appellant alleges, while incarcerated in the Muskingum County Jail, appellee Deputy Don Yarger of the Muskingum County Sheriff's Department prohibited appellant from contacting an attorney and/or having an attorney appointed for him. On October 14, 1994, appellant appeared before appellee Judge Thomas Payne of the Muskingum County Court for a hearing pursuant to [Crim. R. 4\(E\)\(1\)](#). Appellant alleges Judge Payne failed to allow him to consult an attorney despite his request to do so. Later that same day, Muskingum County turned appellant over to Knox County on the felony

warrant. Appellee Deputy Robert Durbin of the Knox County Sheriff's transported appellant to the Knox County Jail. Appellant alleges, despite his request to speak with an attorney, Deputy Durbin repeatedly questioned him during the forty-five minute trip to Knox County and after the deputy booked appellant into the jail. On October 17, 1994, appellant appeared before Referee Cynthia D. Barbour in the Mount Vernon Municipal Court. Subsequently, an order to appoint counsel was filed. Appellant asserts his first opportunity to consult with an attorney occurred on October 28, 1994, at [\*3] his arraignment before appellee Judge Otho Eyster of the Knox County Court of Common Pleas. On January 6, 1995, Judge Eyster conducted a suppression hearing relative to the issue of the continuous denial of appellant's requests for counsel as set forth supra. Appellant appeared at the hearing with his court appointed counsel, Knox County Public Defenders Fred Mayhew and Curt Zimansky, also appellees herein. The trial court denied appellant's motion to suppress. Appellant was ultimately convicted and sentenced to serve a five to fifteen year term of incarceration in the Ohio Department of Rehabilitation and Correction. On September 15, 1998, appellant filed a 1983 action in the Muskingum County Court of Common Pleas, seeking declaratory, monetary, and injunctive relief. Appellees filed a timely answer as well as a motion to dismiss and/or for judgment on the pleadings. Appellees asserted appellant's complaint was barred by the applicable statute of limitations, and barred by the doctrine of collateral estoppel pursuant to the United States Supreme Court's decision in Heck v. Humphrey (1994), 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383. Via Decision and Judgment Entry [\*4] dated November 3, 1998, the trial court granted appellees' motion pursuant to Civ. R. 12(B)(6) and (C). The trial court found the two year statute of limitations set forth in R.C. 2305.10 was applicable to the action; therefore, appellant's complaint was time barred. The trial court also found the action was barred by the doctrine of collateral estoppel. On November 30, 1998, appellant filed a motion for relief from judgment pursuant to Civ. R. 60. In support of his motion, appellant attaches a letter dated October 29, 1998, he wrote to the Muskingum County Clerk of Courts, requesting an enclosed Motion for Leave to Amend Complaint be filed immediately. Also attached to his motion for relief from judgment, appellant submits a copy of the motion for leave. From the record, it appears the motion for leave was returned to appellant, unfiled, with a note allegedly from the Clerk stating the action had been dismissed. On November 30, 1998, appellant filed a Notice of Appeal of the trial court's November 3, 1998 Decision and Judgment Entry. Via Decision and Journal Entry dated December 16, 1998, the trial court denied appellant's motion for relief from judgment, [\*5] finding the court did not have jurisdiction to consider said motion as appellant had filed a Notice of Appeal. It is from the November 3, 1998 Decision and Journal Entry appellant prosecutes this appeal, raising the following assignments of error:

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CIVIL RIGHTS COMPLAINT ON THE BASIS THAT IT WAS PLAINLY BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS SET FORTH IN R.C. 2305.10. (TRIAL COURT DECISION AND JUDGMENT ENTRY (NOV. 3, 1998 AT PP. 3-4).

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CIVIL RIGHTS COMPLAINT BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL SET FORTH IN HECK V. HUMPHREY, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994). (TRIAL COURT DECISION AND JUDGMENT ENTRY (NOV. 3, 1998 AT P. 4).

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW PLAINTIFF TO AMEND THE COMPLAINT PURSUANT TO CIV. R. 15(A) IN ORDER TO MORE CLEARLY DEMONSTRATE THE FACT THAT SUCCESS ON PLAINTIFF'S 1983 CLAIM WILL NOT NECESSARILY IMPLY INVALIDITY OF HIS CONVICTION. (PLAINTIFF'S MOTION TO AMEND AND TRIAL COURT'S DOCKETING STATEMENT).

IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CIVIL [\*6] RIGHTS COMPLAINT PURSUANT TO CIV. R. 12(B)(6) AND 12(C) WHERE THE APPLICABLE STATUTE OF LIMITATIONS IS IN DISPUTE WITHIN THE STATE APPELLATE COURTS, AND WHERE SUCCESS ON PLAINTIFF'S 1983 CLAIM WILL NOT NECESSARILY IMPLY THE INVALIDITY OF HIS CONVICTION, AN ERROR WHICH DEMONSTRATES THAT THE TRIAL COURT FAILED TO REVIEW THE COMPLAINT IN A LIGHT MOST FAVORABLE TO PLAINTIFF. (TRIAL COURT DECISION AND JUDGMENT ENTRY (NOV. 3, 1998 AT P.4).

V. THE TRIAL COURT DENIED PLAINTIFF "DUE PROCESS" UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS WHEN IT DENIED PLAINTIFF SUFFICIENT TIME TO RESPOND TO DEFENDANTS'

MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADING, CAUSING PLAINTIFF TO BE DENIED THE OPPORTUNITY TO BE HEARD. (TRIAL COURT DECISION AND JUDGMENT ENTRY (NOV. 3, 1998 AT PP. 1-5).

#### I & IV

Because appellant's first and fourth assignments relate to the propriety of the trial court's dismissal of appellant's complaint upon a finding the action was barred by the statute of limitations, we shall address said assignments together. In his first assignment of error, appellant maintains the trial court erred in dismissing his complaint as barred by the two year statute of limitations set forth in [\*7] R.C. 2305.10. In his fourth assignment of error, appellant contends the trial court erred in dismissing his complaint pursuant to Civ. R. 12(B)(6) and (C) when Ohio appellate courts disagree on the applicable statute of limitations. <sup>HN1</sup> Federal law governs the characterization of a section 1983 claim for limitation purposes. Wilson v. Garcia (1985), 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254. "Claims <sup>HN2</sup> under Section 1983 \* \* \* are best characterized as personal injury actions, for limitation purposes." *Id.* at headnote 5. The Wilson Court held a trial court entertaining claims brought under 42 U.S.C. Sec. 1983 should borrow the State statute of limitations for personal injury actions. *Id.* at 280. However, the U.S. Supreme Court recognized the Wilson decision did not address the question of which statute of limitations should apply to a 1983 action where a State has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions. Owens v. Okure (1989), 488 U.S. 235, 236, 109 S. Ct. 573, 574, 102 L. Ed. 2d 594. The Owens Court [\*8] held "where <sup>HN3</sup> state law provides multiple statutes of limitations for personal injury actions, courts considering sec. 1983 claims should borrow the general or residual statute for personal injury actions." *Id.* at 249-250. Shortly after the United States Supreme Court issued its decision in Owens, the United States Court of Appeals for the Sixth Circuit addressed the question of whether the appropriate statute of limitations for 1983 actions arising in Ohio was contained in R.C. 2305.11 or R.C. 2305.10. Browning v. Pendleton (1989), 869 F.2d 989. The Sixth Circuit held "the <sup>HN4</sup> two year limitations period [set forth in R.C. 2305.10] is the appropriate statute of limitations for actions arising in Ohio under 42 U.S.C. Sec. 1983." *Id.* at 990. Subsequently, in L.R.L. Properties v. Portage Metro Hous. Auth. (1995), 55 F.3d 1097, the Sixth Circuit reaffirmed the Browning decision in a case in which the plaintiffs argued R.C. 2305.09 (D), which provides a four year statute of limitations for certain torts, was the applicable [\*9] statute of limitations in 1983 cases. Pursuant to the aforementioned authority, we find R.C. 2305.10 is the applicable statute of limitations to appellant's claims. We now must determine the date on which the statute limitations began to run in appellant's action. "The <sup>HN5</sup> date on which the statute of limitations begins to run in a Section 1983 action is a question of federal law." Sevier v. Turner (6th Cir. 1984), 742 F.2d 262, 272. "Ordinarily, the limitations period starts to run 'when the plaintiff knows or has reason to know of the injury which is the basis of his action'." Kuhnle Brothers, Inc. v. County of Geauga (6th Cir. 1997), 103 F.3d 516, 520 (Citation omitted). "In determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights." Dixon v. Anderson (6th Cir. 1991), 928 F.2d 212, 215 (Citation omitted). In the instant action, the Muskingum Sheriff's Department arrested appellant on the Knox County felony warrant prior to September 23, 1994. During his incarceration in the Muskingum County Jail, appellant requested [\*10] he be allowed to contact an attorney and/or to have an attorney appointed for him. Deputy Sheriff Yarger failed to comply with appellant's request. After approximately twenty-two days in jail, appellant appeared before Muskingum County Court Judge Payne on October 14, 1994, for a Crim. R. 4 hearing. Upon appellant's request to speak with and/or to have an attorney appointed, Judge Payne informed appellant he would have wait until he was returned to Knox County. On the same day, Detective Durbin of the Knox County Sheriff's Department transported appellant to the Knox County Jail. During the forty-five minute trip to Knox County, and after appellant's booking into the Knox County Jail, appellant again requested counsel. On October 17, 1994, appellant appeared before a referee in the Mount Vernon Municipal Court. Thereafter, the court ordered counsel be appointed. At his arraignment on October 28, 1994, appellant had his first opportunity to consult with an attorney. Thus, the latest date referred to in the complaint upon which appellees could have violated appellant's constitutional rights is October 28, 1994. Appellant filed his 1983 action on September 15, 1998, more than 4 years [\*11] after the latest date on which a constitutional violation by appellees could have occurred. Because R.C. 2305.10 required appellant to file his complaint on or before October 28, 1996, we find the action is

barred by the statute of limitations. Accordingly, we find the trial court did not err in granting appellees' motion to dismiss. Appellant's first and fourth assignments of error are overruled.

II, III, V

In light of our finding appellant's complaint is barred by the statute of limitations, any discussion of appellant's second, third, and fifth assignments of error is moot.

The judgment entry of the Muskingum County Court of Common Pleas is affirmed.

By: Hoffman, J. Gwin, P.J. and Farmer, J. concur

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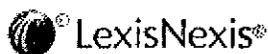
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\* Signal Legend:

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1998 Ohio App. LEXIS 4927, \*

JO ANN ERKINS, Plaintiff-Appellant, v. CINCINNATI MUNICIPAL POLICE DEPARTMENT, MICHAEL J. SNOWDEN, POLICE CHIEF, C. HAINS, and D. POPE, Defendants-Appellees.

APPEAL No. C-970836

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

1998 Ohio App. LEXIS 4927

October 23, 1998, Date of Judgment Entry on Appeal

**NOTICE:** [\*1] THESE ARE NOT OFFICIAL HEADNOTES AND OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

**PRIOR HISTORY:** Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. A-9704377.

**DISPOSITION:** Judgment Appealed From Is: Affirmed in Part, Reversed in Part and Cause Remanded.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff citizen sued defendant municipal police department for violating her civil rights after the defendants' allegedly refused to return certain items of personal property to her following disposition of the citizen's criminal case. The Hamilton County Court of Commons Pleas (Ohio) granted the police department's motion to dismiss. The citizen appealed.

**OVERVIEW:** The citizen argued that the trial court erred because it did not state its findings of facts and conclusions of law. The appellate court disagreed because this case involved a motion to dismiss pursuant to Ohio R. Civ. P. 12(B)(6) and the trial court did not need to state findings of fact or conclusions of law in ruling on such a motion. The citizen argued that that the trial court erred in dismissing her complaint on the grounds that the statute of limitations had run. The appellate court agreed, in part. The appellate court held that the statute of limitations began to run when the citizen knew or had reason to know that she was entitled to the return of her property which was when the plea bargain was read in open court. Because her complaint was not filed within two years of that date, the appellate court held that her claim based on 42 U.S.C.S. § 1983 was time-barred. However, the appellate court also held that the complaint also supported a cause of action for conversion which was governed by a four year statute. Consequently, the citizen's claim for return of her personal property was not time-barred.

**OUTCOME:** The appellate court affirmed the dismissal of the citizen's claim under 42 U.S.C.S. § 1983 and reversed the trial court's dismissal if her claim for the recovery of her personal property.

**CORE TERMS:** statute of limitations, assignments of error, prosecutor, personal property, cause of action, plea bargain, join, civil rights, personal-injury, time-barred, conclusions of law, plea agreement, police officers, began to run, bodily injury, indispensable parties, enumerated, conversion, pleaded, accrued, privy

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[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 

**HN1** ↓ When a court dismisses a complaint pursuant to [Ohio R. Civ. P. 12\(B\)\(6\)](#), it makes no factual findings beyond its legal conclusion that the complaint fails to state a claim upon which relief can be granted. Thus, the court does not assume the role of fact finder and has no duty to issue findings of fact and conclusions of law. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 

**HN2** ↓ An [Ohio R. Civ. P. 12\(B\)\(6\)](#) motion tests the sufficiency of the complaint, and the trial court, in ruling on such a motion, must take all the allegations in the complaint as true, drawing all reasonable inferences in favor of the nonmoving party. A court may dismiss a complaint on a [Rule 12\(B\)\(6\)](#) motion only when it appears that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [General Overview](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN3** ↓ To determine which statute of limitations applies to a plaintiff's claims, a reviewing court must determine the true nature or subject matter of the acts giving rise to the complaint, rather than the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial. [More Like This Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN4** ↓ Because [42 U.S.C.S. § 1983](#) does not contain a statute of limitations, the proper statute of limitations to be applied is the personal-injury statute of limitations in the state where the [§ 1983](#) claim arises. If a state has multiple statutes of limitation for personal-injury actions, the residual or general personal-injury statute of limitations applies. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN5** ↓ The appropriate statute of limitations for [42 U.S.C.S. § 1983](#) actions in Ohio is the two-year statute of limitations in [Ohio Rev. Code Ann. § 2305.10](#), for bodily injury and injury to personal property. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Torts](#) > [Intentional Torts](#) > [Conversion](#) > [Elements](#) 

**HN6** ↓ Conversion is the wrongful exercise of dominion over property in exclusion of the right of the owner, or the withholding of property from the owner's possession under a claim inconsistent with the owner's rights. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

[Torts](#) > [Intentional Torts](#) > [Conversion](#)

**HN7** ↓ [Ohio Rev. Code Ann. § 2305.09\(B\)](#) provides a four-year statute of limitations for a cause of action for the recovery of personal property, or for taking or detaining it. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Parties](#) > [Joinder](#) > [Necessary Parties](#) 

**HN8** ↓ Dismissal for failure to join a necessary party is warranted only when the defect cannot be cured. [More Like This Headnote](#)

**HEADNOTES**

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**HEADNOTES**

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## CIVIL MISCELLANEOUS - TORT MISCELLANEOUS - PROCEDURE/RULES

**SYLLABUS**

The appropriate statute of limitations to be applied in Ohio, to actions under Section 1983, Title 42, U.S.Code, is the two-year statute of limitations in R.C. 2305.10 for bodily injury and injury to personal property. Where the plaintiff alleged that her civil rights were violated when the police wrongfully detained her property after a plea bargain that called for the police to return the property to her, the plaintiff's Section 1983 cause of action accrued when she knew or had reason to know, at the time the plea bargain was recited in open court, that she was entitled to the return of her property. Since her complaint was not filed within two years of that date, her Section 1983 claim for damages was time-barred.

A fair reading of the plaintiff's *pro se* complaint supported the conclusion that she had a cause of action for conversion even though she specifically [\*2] designated her complaint as one brought under Section 1983, Title 42, U.S.Code, when her claims were premised on the wrongful detention of her property and when she specifically requested its return. R.C. 2305.09(B) provides a four-year statute of limitations for a cause of action for the recovery of personal property, and since the plaintiff's complaint was filed within four years of the date she knew or should have known she was entitled to the return of her property, her state-law claim for conversion was not time-barred.

When the plaintiff's *pro se* complaint validly asserted a claim against the police department for the wrongful detention of her property, her failure to join the prosecutor and the judge involved in the plea bargain that called for the return of the property did not justify dismissal of the complaint, even if the judge and the prosecutor were persons to be joined if feasible under Civ.R. 19(A).

**COUNSEL:** Jo Ann Erkins, *pro se*.

Michael J. Harmon, for Defendants-Appellees Cincinnati Municipal Police Department and Michael J. Snowden, and Donald E. Hardin, for Defendants-Appellees C. Hains and D. Pope. <sup>1</sup>

<sup>1</sup> Neither of the attorneys for the defendants-appellees filed a brief with or argued before this court.

[\*3]

**JUDGES:** DOAN, P.J., GORMAN and M.B. BETTMAN, JJ.

**OPINION**

## DECISION.

*Per Curiam.*

Plaintiff-appellant, Jo Ann Erkins, appeals a decision of the Hamilton County Court of Common Pleas dismissing her complaint against defendants-appellees, Cincinnati Municipal Police Department, Michael J. Snowden, Police Chief, and C. Hains and D. Pope, two Cincinnati police officers. We affirm in part and reverse in part.

Erkins filed her complaint *pro se* on June 9, 1997. She alleged that appellees had deprived her of her civil rights in violation of Section 1983, Title 42, U.S.Code, by unlawfully holding her personal property. She claimed that she was arrested on July 16, 1994, and that police officers Hains and Pope confiscated her automobile and various items of personal property even though she demanded their return. On March 20, 1995, Erkins pleaded guilty to aggravated trafficking. She alleged that, as

part of the plea agreement discussed in open court, her purse and all its contents were to be returned to her. Despite numerous requests to the police and prosecutor for information on how to obtain her property, she received no response. She alleged that she has suffered extreme emotional [\*4] distress and has incurred monetary damages. In her prayer for relief, she sought return of her personal property or replacement in cash and "punitive damages" for violation of her civil rights.

Appellees filed a motion to dismiss the complaint because it was not timely filed. They argued that the statute of limitations for an action under Section 1983, Title 42, U.S. Code, is two years. They further alleged that the statute of limitations began to run either on July 16, 1994, when Erkins's property was seized, or on March 20, 1995, when she agreed to the plea bargain. Since her complaint was not filed within two years of either of those dates, it was time-barred. Appellees also argued briefly that the prosecutor and the judge who were involved in the plea agreement were not named as defendants. Also, they argued, none of the named defendants were privy to any agreement to return property. Consequently, they should be dismissed as defendants. The trial court granted appellees' motion to dismiss without stating its reasons for doing so. This appeal followed.

Erkins presents three assignments of error for review. In her first assignment of error, she states that the trial court erred [\*5] in granting appellees' motion to dismiss without stating its findings of facts and conclusions of law. She relies on Civ.R. 56, which applies to motions for summary judgment. But this case involves a motion to dismiss pursuant to Civ.R. 12(B)(6). <sup>HN1</sup> When a court dismisses a complaint pursuant to Civ.R. 12(B)(6), it makes no factual findings beyond its legal conclusion that the complaint fails to state a claim upon which relief can be granted. Thus, the court does not assume the role of fact finder and has no duty to issue findings of fact and conclusions of law. State ex rel. Drake v. Athens Cty. Bd. of Elections (1988), 39 Ohio St. 3d 40, 41, 528 N.E.2d 1253, 1254; Pollock v. Rashid (1996), 117 Ohio App. 3d 361, 366, 690 N.E.2d 903, 907. Accordingly, we overrule Erkins's first assignment of error.

In her second assignment of error, Erkins states that the trial court erred in dismissing her complaint on the grounds that the statute of limitations had run. She argues that her cause of action did not accrue until June 21, 1995, when the plea bargain became effective, and, therefore, that her June 9, 1997, complaint was timely. We hold that the trial court improperly dismissed Erkins's [\*6] complaint in its entirety, and we therefore find this assignment of error to be well taken in part, although not for the reasons she states.

<sup>HN2</sup> A Civ.R. 12(B)(6) motion tests the sufficiency of the complaint, and the trial court, in ruling on such a motion, must take all the allegations in the complaint as true, drawing all reasonable inferences in favor of the nonmoving party. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St. 3d 190, 192, 532 N.E.2d 753, 756. A court may dismiss a complaint on a Civ.R. 12(B)(6) motion only when it appears that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. O'Brien v. Univ. Comm. Tenants Union, Inc. (1975), 42 Ohio St. 2d 242, 327 N.E.2d 753, syllabus; Greenwood v. Taft (1995), 105 Ohio App. 3d 295, 297, 663 N.E.2d 1030, 1031.

<sup>HN3</sup> To determine which statute of limitations applies to Erkins's claims, we must determine the true nature or subject matter of the acts giving rise to the complaint, rather than the form in which the action is pleaded. Doe v. First United Methodist Church (1994), 68 Ohio St. 3d 531, 536, 629 N.E.2d 402, 407; Hunter v. Shenango Furnace Co. (1988), 38 Ohio St. 3d 235, [\*7] 237, 527 N.E.2d 871, 873. "The grounds for bringing the action are the determinative factors, the form is immaterial." Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St. 3d 179, 183, 465 N.E.2d 1298, 1302.

Construing the complaint most strongly in Erkins's favor, we conclude that the facts it sets forth give rise to two causes of action. One is the cause of action she specifically enumerates in her complaint, an action under Section 1983, Title 42, U.S. Code, for a deprivation of her civil rights. <sup>HN4</sup> Because Section 1983 does not contain a statute of limitations, the proper statute of limitations to be applied is the personal-injury statute of limitations in the state where the Section 1983 claim arises. Wilson

*v. Garcia* (1985), 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254. If a state has multiple statutes of limitation for personal-injury actions, the residual or general personal-injury statute of limitations applies. *Owens v. Okure* (1989), 488 U.S. 235, 236, 109 S. Ct. 573, 574, 102 L. Ed. 2d 594. The Sixth Circuit Court of Appeals has consistently held that <sup>HN5</sup> the appropriate statute of limitations for Section 1983 actions in Ohio is the two-year statute of limitations [\*8] in R.C. 2305.10, for bodily injury and injury to personal property. *Hull v. Cuyahoga Valley Jt. Voc. School Dist. Bd. of Edn.* (C.A.6, 1991), 926 F.2d 505, 510, certiorari denied *sub nom. Hull v. Schuck* (1991), 501 U.S. 1261, 111 S. Ct. 2917, 115 L. Ed. 2d 1080; *Browning v. Pendleton* (C.A.6, 1989), 869 F.2d 989, 990-992. The majority of Ohio courts have reached the same conclusion. See *Gaston v. Toledo* (1995), 106 Ohio App. 3d 66, 78, 665 N.E.2d 264, 272; *Francis v. Cleveland* (1992), 78 Ohio App. 3d 593, 596, 605 N.E.2d 966, 967-968; *State ex rel. Eckstein v. Midwest Pride IV*, 1998 Ohio App. LEXIS 1442 (Apr. 6, 1998), Fayette App. Nos. CA97-03-007 and CA97-04-011, unreported, appeal allowed (1998), 83 Ohio St. 3d 1418, 698 N.E.2d 1007. We find these courts' reasoning to be sound and we apply the two-year statute of limitations for bodily injury contained in R.C. 2305.10 to Erkins's Section 1983 claim. But, see, *Bojac Corp. v. Kutevac* (1990), 64 Ohio App. 3d 368, 370, 581 N.E.2d 625, 626-627; *Weethee v. Boso* (1989), 64 Ohio App. 3d 532, 534-535, 582 N.E.2d 19, 20-21 (applying R.C. 2305.09[D]), a four-year statute of limitations for an injury to the rights of the plaintiff not enumerated [\*9] elsewhere in the Revised Code).

The date that Erkins claims that her cause of action accrued is not mentioned anywhere in her complaint. In our view, the statute of limitations began to run when Erkins knew or had reason to know that she was entitled to the return of her property, which occurred when the plea bargain was read in open court on March 20, 1995. See *Sevier v. Turner* (C.A.6, 1984), 742 F.2d 262, 272-273; *Eckstein, supra*; *Coburn v. Grimshaw*, 1993 Ohio App. LEXIS 6478 (Dec. 28, 1993), Scioto App. No. 92CA2094, unreported. Since her complaint was not filed within two years of that date, her claim for damages based on Section 1983 is time-barred.

Nevertheless, a fair reading of the facts set forth in Erkins's complaint also supports the conclusion that she has a cause of action for conversion. <sup>HN6</sup> Conversion is the wrongful exercise of dominion over property in exclusion of the right of the owner, or the withholding of property from the owner's possession under a claim inconsistent with the owner's rights. *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St. 3d 98, 103, 519 N.E.2d 363, 369; *Bragg v. Gollahon*, 1996 Ohio App. LEXIS 5340 (Nov. 29, 1996), Montgomery App. No. 15931, unreported. Erkins premised her claims [\*10] on the wrongful detention of her property. Further, though she specifically enumerated her complaint as being under Section 1983, it reads more like she was pleading an action in replevin. One of the remedies she specifically requested was the return of her property.

<sup>HN7</sup> R.C. 2305.09(B) provides a four-year statute of limitations for a cause of action "for the recovery of personal property, or for taking or detaining it[.]" and it is the proper statute of limitations to be applied to this claim. See *Hambleton, supra*, at 181, 465 N.E.2d at 1300; *Farmers State Bank & Trust Co. v. Mikesell* (1988), 51 Ohio App. 3d 69, 80, 554 N.E.2d 900, 909; *Bragg, supra*; *Coburn, supra*. Erkins's cause of action accrued on March 20, 1995, and her complaint was filed within four years of that date. Consequently, her claim for return of her personal property is not time-barred. Under the circumstances, we cannot say that she can prove no set of facts entitling her to relief. The trial court erred in granting appellees' motion to dismiss as to that claim, and we sustain her second assignment of error in part.

In her third assignment of error, Erkins states that the trial court erred [\*11] in granting appellees' motion to dismiss on the basis that she failed to join as parties the judge and the prosecutor who were involved in the plea bargain. She contends that appellees were the proper parties responsible for returning her property to her, and that, therefore, appellees were the proper defendants in this case. We find this assignment of error to be well taken.

In their motion to dismiss, appellees alleged in the last paragraph:

Furthermore, the complaint (at the bottom of page four) that the March 20, 1997, [sic] plea bargain agreement to return the property was entered into by the prosecutor and the judge, neither of whom are named as defendants. None of the named defendants are mentioned as being privy to

any agreement to return property. For this reason, the named defendants should be dismissed.

We assume that in this paragraph appellees were claiming that the trial court should have dismissed Erkins's complaint or that they should have been dismissed as defendants because Erkins failed to join indispensable parties under Civ.R. 19. Assuming, for argument's sake, that the judge and the prosecutor to whom the appellees referred were persons to be joined [\*12] if feasible under Civ.R. 19(A), we hold that the remedy was not immediate dismissal, but joinder of those parties and the issuance of service of process. If service cannot be obtained or the court determines that it cannot obtain jurisdiction over those parties, only then does the court decide if they are indispensable to the litigation. Evans v. Graham (1991), 71 Ohio App. 3d 417, 421-422, 594 N.E.2d 71, 73-74; State ex rel. Gill v. Winters (1990), 68 Ohio App. 3d 497, 503-504, 589 N.E.2d 68, 73. <sup>HNB</sup> "Dismissal for failure to join a necessary party is warranted only when the defect cannot be cured." Evans, supra, at 422, 594 N.E.2d at 74.

The record does not demonstrate that service on the judge or the prosecutor was even attempted, much less that it could not be obtained. Further, considering Erkins's allegation that the Cincinnati Police Department continued to exercise control over her property from the date it was taken from her, it is the real party in interest. Consequently, we cannot conclude that either the judge or the prosecutor meet the definition of an "indispensable party" in Civ.R. 19(B). See Layne v. Huffman (1975), 42 Ohio St. 2d 287, 289-290, 327 N.E.2d [\*13] 767, 770; Malakpa v. Red Cab Co. (C.P.1995), 72 Ohio Misc. 2d 27, 30-31, 655 N.E.2d 458, 460, 461. Consequently, the trial court erred if it dismissed the complaint for the failure to join the judge and the prosecutor as parties, and we sustain Erkins's third assignment of error on that basis.

In sum, we hold that the trial court properly granted appellees' motion to dismiss as to Erkins's claim for damages under Section 1983, Title 42, U.S.Code, because it was barred by the statute of limitations. But the trial court erred in granting the motion to dismiss as to Erkins's claim for recovery of her personal property. Accordingly, we affirm the judgment of the trial court in part, reverse it in part, and remand the case for further proceedings.

*Judgment affirmed in part and reversed in part, and cause remanded.*

DOAN, P.J., GORMAN and M.B. BETTMAN, JJ.

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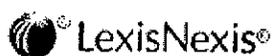
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1997 Ohio App. LEXIS 4054, \*

DONALD A. HARMAN, PLAINTIFF-APPELLANT, - vs - BRAD L. GESSNER, DEFENDANT-APPELLEE.

CASE NO. 96 C.A. 123

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

1997 Ohio App. LEXIS 4054

September 9, 1997, Dated

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Common Pleas Court, Case No. 96 CV 349.

**DISPOSITION:** JUDGMENT: Affirmed.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Appellant civil rights claimant sought review of the decision of the Mahoning County Common Pleas Court (Ohio), which sustained the Ohio R. Civ. P. 12(B)(6) motion to dismiss filed by appellee prosecutor in an action brought by the claimant against the prosecutor under 42 U.S.C.S. § 1983.

**OVERVIEW:** The claimant brought an action under § 1983, arguing that the prosecutor acted outside of his official capacity in prosecuting him for voluntary manslaughter by knowingly using false and perjured testimony. The claimant contended that during his criminal trial, the prosecutor altered and misstated testimony to make him sound guilty. The claimant further alleged that the prosecutor withheld evidence tending to show he was not guilty and continued to refuse to dismiss the voluntary manslaughter charge until three and one-half years after his conviction was reversed on appeal. On appeal, the court affirmed, holding that the prosecutor's conduct in prosecuting the claimant was clearly and unquestionably shielded by absolute immunity, and hence, the claimant's action under § 1983 did not state a claim upon which relief could be granted. The court held that prosecuting attorneys enjoyed absolute immunity under § 1983 for actions performed within the scope of their prosecutorial duties. The court reasoned that prosecuting attorneys enjoyed such immunity because to hold them liable to disgruntled criminal defendants would defeat their role of vigorous prosecution on behalf of the state.

**OUTCOME:** The court affirmed the decision of the trial court, which dismissed defendant's § 1983 action against the prosecutor.

**CORE TERMS:** prosecuting attorney, perjured testimony, immune, voluntary manslaughter, absolute immunity, prosecutor, civil rights, injunctive relief, prosecutorial immunity, completion, discovery, lawsuit, recusal, assignments of error, cause of action, civil action, disqualification, prosecutorial, prosecuting, sustaining, knowingly, withheld, immunity, altered, recuse, criminal trial, disqualified

### LEXISNEXIS® HEADNOTES

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Civil Rights Law > Section 1983 Actions > Scope 

**HN1**  Claims based upon alleged perjured testimony do not state a cause of action under 42 U.S.C.S. § 1983. [More Like This Headnote](#)

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[Civil Rights Law](#) > [Section 1983 Actions](#) > [Law Enforcement Officials](#) > [General Overview](#)   
[Criminal Law & Procedure](#) > [Appeals](#) > [Prosecutorial Misconduct](#) > [Use of False Testimony](#)   
[Torts](#) > [Public Entity Liability](#) > [Immunity](#) > [Judicial Immunity](#) 

**HN2**  A prosecuting attorney enjoys absolute immunity from liability under [42 U.S.C.S. § 1983](#) for actions which were within the scope of his prosecutorial duties. A prosecutor is absolutely immune from damages liability under [42 U.S.C.S. § 1983](#) for alleged civil rights violations committed in the course of initiating a prosecution and in presenting the state's case. The primary justification underlying prosecutorial immunity is the need to insulate prosecutors from unfounded retaliatory lawsuits by disgruntled criminal defendants as such lawsuits would deter vigorous prosecution of criminal cases, deflect prosecutors' energies and ultimately harm the judicial process. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN3**  A prosecuting attorney is a quasi-judicial officer and enjoys the same absolute immunity from a civil action for damages as that which protects a judge. Privileges of the first class absolute privileges are based chiefly upon a recognition of the necessity that certain officials and others charged with the performance of important public functions shall be as free as possible from fear that their actions may have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from liability but from the danger of even an unsuccessful civil action. This being so, it is necessary that the propriety of their conduct shall not be indirectly inquired into either by court or jury in civil proceedings brought against them for misconduct in office. [More Like This Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#)   
[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN4**  The two-year statute of limitations set forth in [Ohio Rev. Code Ann. § 2305.10](#) has been held to govern [§ 1983](#) actions. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

**COUNSEL:** For Plaintiff-Appellant: Donald A. Harman, Pro Se, T.C.I. 313-037, Leavittsburg, Ohio.

For Defendant-Appellee: Atty. Bradley L. Snyder, Columbus, Ohio.

**JUDGES:** Hon. Gene Donofrio, Hon. Edward A. Cox, Hon. Cheryl L. Waite, Donofrio, P.J., concurs, Waite, J., concurs.

**OPINION BY:** Edward A. Cox

## OPINION

OPINION

COX, J.

This matter presents a timely appeal from a judgment rendered by the Mahoning County Common Pleas Court, sustaining the [Civ.R. 12\(B\)\(6\)](#) motion to dismiss filed by defendant-appellee, Brad L. Gessner.

The within cause of action initially arose out of plaintiff-appellant, Donald A. Harman's prosecution and conviction on a charge of voluntary manslaughter. Appellee, Brad Gessner, was formerly an assistant prosecuting attorney for Mahoning County and acted as the prosecuting attorney on the

charges against appellant. Approximately seven years after his conviction, appellant filed a civil rights complaint against appellee on February 5, 1996.

In his complaint, appellant stated that appellee acted out side his official capacity in prosecuting appellant for voluntary [\*2] manslaughter by knowingly using false and perjured testimony. Appellant claimed that during his criminal trial, appellee altered and misstated testimony to make him sound guilty. Appellant further alleged that appellee withheld evidence which tended to show he was not guilty and continued to refuse to dismiss the voluntary manslaughter charge until three and one-half years after his conviction was reversed on appeal.

Appellant stated that appellee knew his actions were violating appellant's civil rights for six years, never attempted to withdraw the alleged perjured testimony and brought an additional charge against appellant based upon false and perjured testimony. Appellant concluded that as a result of appellee's actions, he suffered personal loss, loss of income, pain and suffering and loss of consortium.

In response to appellant's complaint, appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6). Appellant replied by filing a pleading contra to said motion. On June 12, 1996, the trial court filed its judgment entry, sustaining appellee's motion to dismiss.

Appellant sets forth three assignments of error on appeal.

Appellant's first, second and third assignments of [\*3] error are interrelated and will therefore be discussed together:

"Trial court erred when it failed to recluse (*sic*) itself in the civil lawsuit.

"Trial court erred when it ruled appellee was immune for his action's (*sic*).

"Apellee (*sic*) is not immune from injuctive (*sic*) relief."

Appellant contends that the trial judge should have disqualified himself from hearing the within matter as appellee was a former assistant prosecuting attorney and therefore, the trial judge could not rule in an unbiased manner.

Appellant repeatedly reiterates his belief that appellee used perjured testimony against him at trial regarding the voluntary manslaughter charge. Appellant submits that not only should the trial judge have disqualified himself from hearing this case, he also should have filed a complaint against appellee with the bar association as a result of his improper conduct. Appellant alleges that the trial judge's failure to do so undermined the concept of a fair trial and the United States Constitution.

Appellant complains that the trial court erred in dismissing this case prior to the completion of discovery since even if appellee was entitled to a [\*4] qualified immunity, he was not protected from liability with regards to appellant's legal fees. Appellant further maintains that appellee was certainly not immune in this case as he knew prior to appellant's criminal trial that the testimony being used against appellant was false.

Appellant finally claims that a prosecuting attorney is not immune from cases wherein a complainant is seeking injunctive relief or attorney fees pursuant to 42 U.S.C. § 1983 and therefore, the trial court erred in ruling that appellee was immune in this case.

<sup>HN1</sup> Claims based upon alleged perjured testimony do not state a cause of action under 42 U.S.C. § 1983. Macko v. Bryon (C.A.6, 1985), 760 F.2d 95. <sup>HN2</sup> A prosecuting attorney enjoys absolute immunity from liability under 42 U.S.C. § 1983 for actions which were within the scope of his prosecutorial duties. Imbler v. Pachtman (1976), 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984. In Imbler, supra at 431, the United States Supreme Court held that a prosecutor is absolutely immune

from damages liability under 42 U.S.C. § 1983 for alleged civil rights violations committed in the course of "initiating a prosecution and in presenting the State's [\*5] case."

The primary justification underlying prosecutorial immunity is the need to insulate prosecutors from unfounded retaliatory lawsuits by disgruntled criminal defendants as such lawsuits would deter vigorous prosecution of criminal cases, deflect prosecutors' energies and ultimately harm the judicial process. *Imbler, supra* at 423-425. Prosecutorial immunity is applicable even where the prosecutor knowingly used perjured testimony at trial, failed to prevent or correct deceptive or misleading testimony, withheld exculpatory information or failed to make a full disclosure of all facts casting doubt upon the state's testimony. *Imbler, supra*. (See also *Burns v. Reed* (1991), 500 U.S. 478, 114 L. Ed. 2d 547, 111 S. Ct. 1934).

To the extent appellant's complaint might be construed as alleging state law claims against appellee, any such claims would also be barred by absolute immunity. <sup>HN3</sup> A prosecuting attorney is a quasi-judicial officer and enjoys the same absolute immunity from a civil action for damages as that which protects a judge. *Hunter v. City of Middletown* (1986), 31 Ohio App. 3d 109, 509 N.E.2d 93. The rationale behind this rule of absolute immunity was aptly [\*6] set forth by the Ohio Supreme Court in *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 583-584, 37 N.E.2d 584, citing to 3 *Restatements of Torts*, 224, Section 584, as follows:

Privileges of the first class [absolute privileges] are based chiefly upon a recognition of the necessity that certain officials and others charged with the performance of important public functions shall be as free as possible from fear that their actions may have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from liability but from the danger of even an unsuccessful civil action. This being so, it is necessary that the propriety of their conduct shall not be indirectly inquired into either by court or jury in civil proceedings brought against them for misconduct in office."

Appellee's conduct in prosecuting appellant was clearly and unquestionably shielded by absolute immunity and hence, appellant's claim under 42 U.S.C. § 1983 did not state any claim upon which relief could be granted.

Furthermore, appellant's claims as asserted in counts one and two of the complaint pursuant to 42 U.S.C. § 1983, were barred [\*7] by the applicable statute of limitations set forth in R.C. 2305.10. Counts one and two of appellant's complaint relate to his prosecution and conviction in June of 1989 on the voluntary manslaughter charge. Appellant's complaint herein was filed on February 5, 1996. Since <sup>HN4</sup> the two-year statute of limitations set forth in R.C. 2305.10 has been held to govern § 1983 actions pursuant to *Browning v. Pendleton* (C.A.6, 1989), 869 F.2d 989, and since the within action was initiated more than two years after the occurrence of the events upon which counts one and two were based, appellant's claims were barred.

The trial court did not err in dismissing appellant's complaint pursuant to Civ.R. 12(B)(6) prior to appellant's completion of discovery. Appellant's claims were deficient as a matter of law and the completion of discovery would not have altered the nature of said claims as it was clear that appellant's complaint failed to state claims upon which relief could be granted.

Additionally, the trial court did not err in failing to recuse itself in this matter. Appellant did not identify or articulate any reason or circumstances which would form the basis for any recusal or disqualification [\*8] of the trial court herein. Furthermore, even if there was some basis to seek recusal or disqualification of the trial court, appellant did not file an affidavit of prejudice pursuant to R.C. 2701.03 or a motion for recusal. Assuming arguendo that the trial court improperly failed to recuse itself, any such alleged error was not prejudicial since appellee was entitled to a dismissal of appellant's complaint on the basis of absolute prosecutorial immunity.

Finally, although appellant alleges on appeal that the trial court improperly dismissed his complaint

because absolute prosecutorial immunity would not extend to claims for injunctive relief, appellant's complaint did not set forth any claims for injunctive relief. Therefore, the trial court properly granted appellee's motion to dismiss pursuant to Civ.R. 12(B)(6).

Appellant's first, second and third assignments of error are found to be without merit.

The judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.

APPROVED:

EDWARD A. COX, JUDGE

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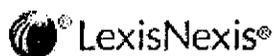
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1994 Ohio App. LEXIS 867, \*

ROBERT MARTIN, PLAINTIFF-APPELLANT v. ADULT PAROLE AUTHORITY, DEFENDANT-APPELLEE

CASE NUMBER 9-93-45

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, MARION COUNTY

1994 Ohio App. LEXIS 867

March 4, 1994, Entered

**NOTICE:**

**[\*1]** THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

**DISPOSITION:** JUDGMENT: Judgment affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** In an action under 42 U.S.C.S. § 1983, contesting a parole revocation, plaintiff inmate challenged a judgment from the Court of Common Pleas of Marion County (Ohio), granting the motion of defendants, Adult Parole Authority and a hearing officer, to dismiss for failure to state a claim for relief. He asserted errors in the refusal to appoint discretionary counsel and the dismissal of the complaint as untimely under Ohio Rev. Code § 2305.09(D).

**OVERVIEW:** The inmate filed a complaint under 42 U.S.C.S. § 1983 against defendants, asserting that his parole had been revoked arbitrarily and contesting the constitutionality of the proceedings. The trial court refused to appoint discretionary counsel and dismissed the complaint for failing to state a claim for relief. The inmate appealed, asserting that the trial court had erred in refusing to appoint discretionary counsel and had committed plain error in dismissing the complaint as time-barred. The court disagreed and affirmed. It explained that the inmate had not demonstrated that he had met the criteria in Ohio Rev. Code § 120.51 for the appointment of discretionary counsel. The court further noted that, in cases under 42 U.S.C.S. § 1983, the general or residual four-year statute of limitations in Ohio Rev. Code § 2305.09(D) applied. As the inmate filed his complaint on July 20, 1993, alleging that his parole had been arbitrarily revoked on March 5, 1985, his complaint was not timely. A motion to dismiss could be granted for failure to state a claim when on the face of the complaint it appeared that the action was barred by the appropriate statute of limitations.

**OUTCOME:** The court affirmed the judgment.

**CORE TERMS:** parole, indigent's, discretionary, appointment, assignments of error, statute of limitations, referral, legal aid, generating, appointment of counsel, legal aid, private practice, arbitrarily, appointed, revoked, state law, civil matters, civil cases, pro se, plain error, personal injury actions, tolling provisions, counterclaim, revoking, opposing, calendar, residual, funding

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[Public Health & Welfare Law](#) > [Social Services](#) > [Legal Aid](#) 

**HN1**  [Ohio Rev. Code § 120.52](#) does not allow for the appointment of discretionary counsel in civil matters but establishes the legal aid fund as a charitable tax exempt foundation. [Ohio Rev. Code § 120.53 \(A\)](#) states: A legal aid society that operates within the state may apply to the state public defender for financial assistance from the legal aid fund established by [Ohio Rev. Code § 120.52](#) to be used for the funding of the society during the calendar year following the calendar year in which application is made. [Ohio Rev. Code § 120.53\(A\)](#) does not contain a provision for the appointment of discretionary counsel. [Ohio Rev. Code § 120.54\(B\)](#) states that legal aid shall not be used for any fee generating case. As attorney fees can be awarded in a successful [42 U.S.C.S. § 1983](#) action, it is a fee generating case and legal aid cannot be appointed to represent an indigent plaintiff in such matters. [More Like This Headnote](#)

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**HN2**  [Ohio Rev. Code § 120.51](#) states in part: "Fee generating case" means any case or matter which, if undertaken on behalf of an indigent by an attorney in private practice, reasonably would be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered a fee generating case if adequate representation is unavailable and if any of the following circumstances exist during the case: (1) The legal aid society that represents the indigent in the case has determined that free referral is not possible for any of the following reasons: (a) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case. (b) Neither the local lawyer referral service, if one exists, nor any attorney will consider the case without payment of a consultation fee. (c) The case is of a type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee. (d) Emergency circumstances compel immediate action before a referral can be made, but the client is advised that, if appropriate, referral will be attempted at a later time. [More Like This Headnote](#)

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[Public Health & Welfare Law](#) > [Social Services](#) > [Legal Aid](#) 

**HN3**  [Ohio Rev. Code § 120.51\(c\)](#) states in part: (2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims. (3) A court has appointed a legal aid society or its employee to represent the indigent in the case pursuant to statute, or a court rule or practice of equal applicability to all attorneys in the jurisdiction. (4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement is based upon need. [More Like This Headnote](#)

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[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [General Overview](#) 

**HN4**  A motion to dismiss may be granted for failure to state a claim when on the face of the complaint it appears the action is barred by the appropriate statute of limitations. [More Like This Headnote](#)

[Civil Rights Law](#) > [Contractual Relations & Housing](#) > [Civil Rights Act of 1866](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

[Torts](#) > [Procedure](#) > [Statutes of Limitations](#) > [General Overview](#) 

**HN5**  No specific statute of limitations is set forth in [42 U.S.C.S. § 1983](#) for the filing of such actions. [Section 1983](#) claims are best characterized as personal injury actions for statute

of limitations purposes and the length of the limitation period is to be decided by state law. Where state law provides multiple statutes of limitations for personal injury actions, the general or residual statute is utilized when considering § 1983 claims. The Ohio general or residual statute of limitations is set forth in Ohio Rev. Code § 2305.09(D) and provides a period of four years in which to bring the action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Rights Law](#) > [Contractual Relations & Housing](#) > [Civil Rights Act of 1866](#)

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Tolling](#)

**HN6** One of the policy provisions of 42 U.S.C.S. § 1983 is deterrence. Quick resolution of such disputes is vital and the Ohio tolling statute is therefore inconsistent with the policies of § 1983. [More Like This Headnote](#)

**COUNSEL:** ROBERT MARTIN, In Propria Persona, Inmate #138-186, P.O. Box 57, Marion, OH 43302 Appellant.

LEE FISHER, Attorney General, Gary D. Andorka, Reg. #0037214, 30 East Broad Street, 26th Floor, Columbus, OH 43215-3428, For Appellee.

**JUDGES:** HADLEY, EVANS, BRYANT

**OPINION BY:** HADLEY

## OPINION

## OPINION

**HADLEY, J.** This is an appeal by plaintiff-appellant, Robert Martin, ("Martin") from the judgment of the Court of Common Pleas of Marion County granting the motion of defendants-appellees, Adult Parole Authority, ("APA") and Constance Upper ("Upper"), pursuant to Civ.R. 12(b)(6), and dismissing appellant's complaint.

On December 3, 1985, a formal parole revocation hearing against Martin commenced before a two-member panel of the parole board. The hearing was continued on February 4, 1986, and on March 5, 1986. Martin was charged with violating the terms of his parole, to wit: (1) on or about the first week in May, 1985, he had sexual contact with one Lorie Murray without her consent/against [\*2] her will in violation of parole rule #3; (2) on or about September 25, 1985, and on October 4, 1985, he harassed Marsha Phelps in violation of parole rule #7, special condition #7; and (3) on or about October 2, 1985, he attempted to communicate with Lorie Murray in violation of parole rule #7, special condition #5.

After all the testimony and evidence was presented, the panel recommended that Martin's parole be revoked to October 1990. <sup>1</sup>

## FOOTNOTES

<sup>1</sup> In August 1990, for a reason not explained in the record, Martin's incarceration was extended to August 1994.

On July 20, 1993, Martin filed a complaint under Section 1983, Title 42, U.S.Code, alleging that his parole was arbitrarily revoked and that the written statement of reasons for revoking his parole by the APA was inadequate and the proceedings were therefore unconstitutional under Morrissey v. Brewer (1972), 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593. Martin filed an amended complaint

on August 5, 1993, and named as an additional defendant, appellee Upper, [\*3] the hearing officer who authored the written statement revoking his parole. Martin then filed a motion for discretionary appointment of counsel.

On August 19, 1993, APA filed a Civ.R. 12(b)(6) motion to dismiss, alleging the complaint failed to state a claim for relief. Martin filed his motion opposing APA's motion to dismiss and to treat Martin's motion as a motion for summary judgment. The trial court denied Martin's motion for appointment of discretionary counsel on August 25, 1993. On October 1, 1993, the trial court granted APA's motion to dismiss stating:

**This matter is before the Court for consideration of Defendant's motion to dismiss, Plaintiff having had to respond. After due consideration the Court finds the motion to be well taken. The Court further finds to [sic] reasonable cause for delay in granting judgment of dismissal.**

**IT IS THEREFORE ORDERED that the within action is dismissed at Plaintiff's costs.**

It is from this judgment that appellant appeals and asserts two assignments of error.

#### **ASSIGNMENT OF ERROR NO. II**

**A trial court abuses its discretion in a 42 U.S.C. (Section) 1983 civil rights action when it arbitrarily [\*4] denies an indigent pro se motion for "appointment of discretionary counsel due to a colorable claim with exceptional circumstances" when Ohio law holds a pro se indigent to the same standards as an attorney and the trial court states as its reasons for denial "there is no authority for appointment of counsel in civil cases and there is no funding for such appointment(").**

Appellant cites R.C. 120.52 and 120.53(A) in support of his contention. However, R.C. 120.52 <sup>HN1</sup> does not allow for the appointment of discretionary counsel in civil matters but establishes the legal aid fund as a charitable tax exempt foundation. R.C. 120.53 (A) states:

**A legal aid society that operates within the state may apply to the state public defender for financial assistance from the legal aid fund established by section 120.52 of the Revised Code to be used for the funding of the society during the calendar year following the calendar year in which application is made.**

R.C. 120.53(A) does not contain a provision for the appointment of discretionary counsel. In fact R.C. 120.54(B) states that legal aid shall not be used for any fee generating case. As attorney fees can be awarded in [\*5] a successful 1983 action, it is a fee generating case and legal aid cannot be appointed to represent an indigent plaintiff in such matters. R.C. 120.51 (C) <sup>HN2</sup> states:

**"Fee generating case" means any case or matter which, if undertaken on behalf of an indigent by an attorney in private practice, reasonably would be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered a fee generating case if adequate representation is unavailable and if any of the following circumstances exist during the case:**

**(1) The legal aid society that represents the indigent in the case has determined that free referral is not possible for any of the following reasons:**

**(a) The case has been rejected by the local lawyer referral service, or if there is**

no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(b) Neither the local lawyer referral service, if one exists, nor any attorney will consider the case without payment of a consultation fee.

(c) The case is of a type that attorneys in private practice in the area [\*6] ordinarily do not accept, or do not accept without prepayment of a fee.

(d) Emergency circumstances compel immediate action before a referral can be made, but the client is advised that, if appropriate, referral will be attempted at a later time.

**HN3** (2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a legal aid society or its employee to represent the indigent in the case pursuant to statute, or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement is based upon need.

Appellant has not demonstrated in the record that he has met the above criteria for the appointment of discretionary counsel in this case.

Appellant also cites *Maclin v. Freake* (1981), 650 F.2d 885 in support of his argument. *Maclin, supra*, [\*7] states that which the trial court should consider in determining if an indigent plaintiff is entitled to have counsel appointed to represent him in a civil matter; namely, the merits of an indigent claim, the nature of factual issues raised in the claim, complexity of the legal issues raised, and capability of the indigent to present the claim. Again, appellant has not demonstrated in the record that without appointment of counsel he cannot adequately litigate his claim.

Therefore, appellant's second assignment of error is overruled.

#### ASSIGNMENT OF ERROR NO. I

It is plain error for a trial court to erroneously dismiss a 42 U.S.C. (section) 1983 action when the indigent's complaint alleges 1st, 8th, 14th Amendment violations and the Equal Protection Clause to the United States Constitution without a liberal reading of the complaint and unless the plaintiff can prove no set of facts entitling [sic] him to relief. Accord *Huges v. Rowe* [sic] (1981), 101 S.Ct. 173, 176 and ftn 7, 179(,) quoting *Conley v. Gibson* [sic] (1957), 78 S.Ct. 99, 101-102; *O'Connell v. Chesapeake & Ohio R. Co.* [sic] (Ohio 1991), 569 N.E.2d 889, 892 (,) applying plain error doctrine [\*8] to civil cases.

Martin filed his complaint on July 20, 1993, alleging that his parole was arbitrarily revoked on March 5, 1985. **HN4** A motion to dismiss may be granted for failure to state a claim when on the face of the complaint it appears the action is barred by the appropriate statute of limitations. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 320 N.E.2d 668.

**HN5** No specific statute of limitations is set forth in Section 1983, Title 42 U.S.Code, for the filing of such actions. The United States Supreme Court in *Wilson v. Garcia* (1985), 471 U.S. 261, 85 L. Ed.

2d 254, 105 S. Ct. 1938, stated that Section 1983 claims are best characterized as personal injury actions for statute of limitations purposes and that the length of the limitation period is to be decided by state law.

In Owens v. Okure (1989), 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594, the United States Supreme Court stated that where state law provides multiple statutes of limitations for personal injury actions, the general or residual statute should be utilized when considering Section 1983 claims.

The Ohio general or residual statute of limitations is set forth in R.C. 2305.09(D) and provides **[\*9]** a period of four years in which to bring the action. Since appellant did not file his complaint within the four year period, his complaint does not state a timely claim and the motion to dismiss was therefore properly granted.

Since appellant was incarcerated at the time, the tolling provisions of R.C. 2305.16 would also apply unless the tolling provision is inconsistent with policies underlying Section 1983. In Vargas v. Jago (S.D. Ohio 1986), 636 F.Supp. 425, the court held that <sup>HNG</sup> one of the policy provisions of Section 1983 is deterrence. The court then determined that quick resolution of such disputes is vital and that the state tolling statute is therefore inconsistent with the policies of Section 1983. Thus, R.C. 2305.16 does not apply.

Appellant's first assignment of error is overruled.

The judgment of the Marion County Court of Common Pleas is affirmed.

**Judgment affirmed.**

EVANS and BRYANT, JJ., concur.

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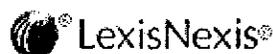
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1999 Ohio App. LEXIS 6475, \*

Craig G. Prohazka, Plaintiff-Appellant, v. Ohio State University Board of Trustees et al., Defendants-Appellees.

No. 99AP-2

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1999 Ohio App. LEXIS 6475

December 16, 1999, Rendered

**SUBSEQUENT HISTORY:** Subsequent appeal at Prohazka v. Ohio State Univ. Bd. of Trs., 2004 Ohio App. LEXIS 1374 (Ohio Ct. App., Franklin County, Mar. 30, 2004)

**PRIOR HISTORY:** [\*1] APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** Judgment affirmed in part and reversed in part; case remanded.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff appealed from a judgment of the Franklin County Court of Common Pleas (Ohio) in favor of defendants, in an action arising out of plaintiff's dismissal from medical school.

**OVERVIEW:** Plaintiff was dismissed from a state university medical school after receiving unsatisfactory grades and refusing to meet the school's requirements to remain enrolled. He filed multiple breach of contract, tort, conspiracy, fraud, and 42 U.S.C.S. § 1983 actions against various defendants, including the school's board of trustees, the clinic and hospital where his rotations were performed, and various doctors. Because jurisdiction over breach of contract claims against defendant board of trustees was vested in the court of claims, the trial court lacked jurisdiction. The same was true of several of defendant doctors' claims of personal immunity under Ohio Rev. Code Ann. § 9.86. The statute of limitations which applied to § 1983 actions had not run when plaintiff filed his complaint. Plaintiff's allegation that one of defendant doctors was acting in his capacity as a state university instructor was sufficient to allege he was acting under color of state law.

**OUTCOME:** The court held that trial court lacked jurisdiction over breach of contract claims against defendant board of trustees. Trial court could not consider matters outside pleadings on motion to dismiss and thus plaintiff's claims against defendant clinic had to be reinstated, except libel claim, which was properly dismissed due to expiration of statute of limitations. Plaintiff's § 1983 claims were improperly dismissed.

**CORE TERMS:** statute of limitations, residual, personal injury, summary judgment, doctor, conspiracy, assignment of error, grade, failure to state a claim, libel, grading, arbitrary and capricious, tortious interference, motion to strike, state law, confidentiality, capriciously, arbitrarily, tortiously, interfere, immunity, founded, medical school, color of state law, qualified immunity, motion to dismiss, right to privacy, doctor-patient, enumerated, statute of limitations applicable

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Appx. Page 64

**HN1** In reviewing the trial court's decision to dismiss plaintiff's claims for failure to state a claim pursuant to Ohio R. Civ. P. 12(B)(6), the appellate court does not defer to the trial court's decision, but must independently review plaintiff's complaint to determine if the dismissals were appropriate. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN2** Dismissal of a claim for failure to state a claim upon which relief may be granted is appropriate only where it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [More Like This Headnote](#)

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**HN3** In construing a complaint on a motion to dismiss pursuant to Ohio R. Civ. P. 12(B)(6), a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. [More Like This Headnote](#)

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**HN4** See Ohio Rev. Code Ann. § 3335.03(B).

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[Civil Procedure](#) > [Judgments](#) > [Relief From Judgment](#) > [Independent Actions](#)

**HN5** Ohio Rev. Code Ann. § 2743.03(A)(2) provides in relevant part that the Court of Claims Act does not affect, and shall not be construed as affecting, the original jurisdiction of another Ohio court to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief. Thus, civil actions against the Ohio State University Board of Trustees, other than actions where only equitable relief is sought, must be brought in the Ohio Court of Claims. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN6** Ohio Rev. Code Ann. § 9.86 confers limited, personal immunity upon officers and employees of the state. [More Like This Headnote](#)

[Governments](#) > [Courts](#) > [Courts of Claims](#)

[Torts](#) > [Public Entity Liability](#) > [Immunity](#) > [General Overview](#)

**HN7** Pursuant to Ohio Rev. Code Ann. § 2743.02(F), jurisdiction to make the initial determination of whether a defendant is entitled to personal immunity under Ohio Rev. Code Ann. § 9.86 is vested exclusively in the Ohio Court of Claims. [More Like This Headnote](#)

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**HN8** Where an action initially is brought in the Court of Common Pleas of Ohio against a defendant who is alleged by either party to have been an officer or employee of the state when the cause of action accrued, the court of common pleas properly should dismiss the action for lack of subject matter jurisdiction. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Healthcare Law](#) > [Actions Against Facilities](#) > [Defenses](#) > [General Overview](#)

**HN9** See Ohio Rev. Code Ann. § 2305.25(A)(1), (2), (5).

[Healthcare Law](#) > [Actions Against Facilities](#) > [Defenses](#) > [General Overview](#)

[Healthcare Law](#) > [Actions Against Healthcare Workers](#) > [General Overview](#)

[Torts](#) > [Vicarious Liability](#) > [Employers](#) > [Activities & Conditions](#) > [General Overview](#) 

**HN10** ↓ To establish its immunity under [Ohio Rev. Code Ann. § 2305.25\(A\)\(1\), \(2\), \(5\)](#), a health care entity must present evidence of factual matters, such as evidence of the nature of the relevant boards and committees, sufficient to show that the entities are committees or boards of the type granted immunity by [Ohio Rev. Code Ann. § 2305.25\(A\)\(1\), \(2\), \(5\)](#). Moreover, the entity must show that the conduct for which plaintiff seeks to hold it vicariously liable was committed by employees while in the scope of their duties as members of the committees or boards. [More Like This Headnote](#)

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**HN11** ↓ When considering a motion to dismiss brought pursuant to [Ohio R. Civ. P. 12\(B\)\(6\)](#), a court may consider only the averments contained in the complaint, not matters outside the pleadings. [More Like This Headnote](#)

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[Torts](#) > [Business Torts](#) > [Commercial Interference](#) > [Contracts](#) > [Elements](#) 

**HN12** ↓ If the determination of whether a health care entity is immune under [Ohio Rev. Code Ann. § 2305.25\(A\)\(1\), \(2\), \(5\)](#) requires proof of matters outside the record, the determination cannot be made on a motion to dismiss for failure to state a claim pursuant to [Civ.R. 12\(B\)\(6\)](#). [More Like This Headnote](#)

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[Torts](#) > [Intentional Torts](#) > [Defamation](#) > [Elements](#) > [Libel](#) 

**HN13** ↓ A cause of action for libel accrues upon the first publication of the allegedly defamatory statement. [More Like This Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#) 

**HN14** ↓ [42 U.S.C.S. § 1983](#) provides a remedy for violations of substantive rights created by the United States Constitution or federal statute. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Elements](#) > [Color of State Law](#) > [General Overview](#) 

[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#) 

**HN15** ↓ In order to state a claim under [42 U.S.C.S. § 1983](#), a plaintiff must establish that: (1) the conduct in controversy was committed by a person acting under color of state law, and (2) the conduct deprived plaintiff of a federal right, either constitutional or statutory. [More Like This Headnote](#)

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**HN16** ↓ See [42 U.S.C.S. § 1983](#).

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**HN17** ↓ Because federal law does not provide a statute of limitations applicable to [42 U.S.C.S. § 1983](#) actions, the applicable statute of limitations must be borrowed from the state in which the cause of action arose. [More Like This Headnote](#)

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**HN18** ↓ All [42 U.S.C.S. § 1983](#) claims are to be characterized as personal injury actions for statute of limitations purposes. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN19** ↓ Where a state has multiple statutes of limitations for personal injury actions, the "general or residual" statute of limitations for personal injury actions should be applied to [42 U.S.C.S. § 1983](#) claims. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN20** ↓ Although the question of how to characterize [42 U.S.C.S. § 1983](#) claims for statute of limitation purposes, and the question of whether Ohio's general or residual statute of limitations should be applied to [42 U.S.C.S. § 1983](#) claims are questions of federal law, the question of which Ohio statute of limitations constitutes the state's general or residual statute of limitations is a question of state law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN21** ↓ [Ohio Rev. Code Ann. § 2305.09\(D\)](#) is Ohio's general or residual personal injury statute of limitations. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN22** ↓ See [Ohio Rev. Code Ann. § 2305.10](#).

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**HN23** ↓ See [Ohio Rev. Code Ann. § 2305.09\(D\)](#).

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**HN24** ↓ The express language of [Ohio Rev. Code Ann. § 2305.10](#) limits the provision's application to actions for bodily injury or injuring personal property. The language of [Ohio Rev. Code Ann. § 2305.09\(D\)](#), by contrast, applies the provision otherwise to all undelineated personal injury actions. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Civil Rights Law](#) > [Section 1983 Actions](#) > [Scope](#) 

**HN25** ↓ The doctrine of qualified immunity shields public officials performing discretionary functions from liability for civil damages under [42 U.S.C.S. § 1983](#) where their conduct did not violate clearly established federal rights of which a reasonable person would have known. [More Like This Headnote](#)

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**HN26** ↓ To satisfy the "under color of state law" element of a [42 U.S.C.S. § 1983](#) claim, a plaintiff must show that the conduct complained of was taken pursuant to power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. [More Like This Headnote](#)

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**HN27** ↓ [Ohio R. Civ. P. 10\(D\)](#) provides that when any claim or defense is founded on an account or

other written instrument, a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading. [More Like This Headnote](#)

[Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation](#)   
 HN28 [Ohio R. Civ. P. 10\(D\)](#) does not require that all documents which are relevant in any way to a claim be attached to the complaint. [More Like This Headnote](#)

[Civil Procedure > Summary Judgment > Appellate Review > General Overview](#)   
[Civil Procedure > Summary Judgment > Standards > General Overview](#)   
 HN29 Normally, an appellate court's review of a trial court's grant of summary judgment requires the appellate court to determine independently whether, viewing the evidence most strongly in favor of the non-moving party, no genuine issues of fact exist, the moving party is entitled to judgment as a matter of law, and reasonable minds could only reach a conclusion which is adverse to the non-moving party. [More Like This Headnote](#)

[Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview](#)   
[Civil Procedure > Summary Judgment > Opposition > General Overview](#)   
[Civil Procedure > Summary Judgment > Supporting Materials > General Overview](#)   
 HN30 [Ohio R. Civ. P. 56\(F\)](#) states that should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Civil Procedure > Summary Judgment > Supporting Materials > General Overview](#)   
[Civil Procedure > Pretrial Matters > Continuances](#)   
 HN31 Pursuant to [Ohio R. Civ. P. 56\(F\)](#), a party who believes that it is unable to adequately oppose a motion for summary judgment by affidavit must submit an affidavit to the court stating the reasons why it is unable to present facts necessary to oppose the motion for summary judgment by affidavit. If the trial court finds that the affidavit sets forth sufficient reasons for the party's inability to oppose the motion for summary judgment by affidavit, the trial court may refuse to grant summary judgment, or order a continuance to permit the party to obtain affidavits or to conduct discovery. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

**COUNSEL:** Craig G. Prohazka, pro se.

Chester, Willcox & Saxbe, L.L.P., Charles R. Saxbe, Elizabeth J. Watters, Karen Hoffman, Sarah Morrison and David Butler, for appellees Ohio State University Board of Trustees, Cleveland Clinic Foundation, Jacob Palomaki, Jeffrey Hutzler, William Michener, Donald Malone, Pamela Jelly-Bowers, Seth Kantor, Brian Bowyer, James Hoekstra, Thomas Mauger, Roy St. John, Mary McIlroy, Todd Ivan, Alexander Kennedy, Jerome Belinson, and William H. Kobak.

Arter & Hadden, and Gregory V. Mersol, for appellees Fairview Hospital and Michael Makil, M.D.

**JUDGES:** BRYANT, J. PETREE and TYACK, JJ., concur.

**OPINION BY:** BRYANT

**OPINION:** REGULAR CALENDAR

BRYANT, J.

Plaintiff-appellant, Craig G. Prohazka, appearing *pro se*, appeals from a judgment of the Franklin

County Court of Common Pleas in favor of defendants-appellees, Ohio State University Board of Trustees ("OSU Board of Trustees"), the Cleveland Clinic Foundation ("Cleveland Clinic"), Fairview Hospital, Dr. Jacob Palomaki, Dr. Jeffrey Hutzler, Dr. William Michener, Dr. Donald Malone, Dr. Pamela [\*2] Jelly-Bowers, Dr. Seth Kantor, Dr. Brian Bowyer, Dr. James Hoekstra, Dr. Thomas Mauger, Dr. Roy St. John, Dr. Neal E. Krupp, Dr. Mary McIlroy, Dr. Todd Ivan, Dr. Anne Linton, Dr. Alexander Kennedy, Dr. Marie Fidela Paraiso, Dr. Jerome Belinson, Dr. Michael Makii, and Dr. William H. Kobak.

Plaintiff's action arises out of his dismissal from The Ohio State University College of Medicine ("OSU"). According to plaintiff's complaint, plaintiff was a medical student at OSU from August 20, 1992, until June 14, 1995. For his third year of medical school, plaintiff chose a program OSU offered in cooperation with the Cleveland Clinic. The program allowed plaintiff to complete his clinical rotations, the bulk of a third-year medical student's work, at the Cleveland Clinic and Fairview Hospital in Cleveland.

On December 12, 1994, OSU informed plaintiff he received a grade of unsatisfactory for the obstetrics/gynecology rotation he had just completed. Plaintiff unsuccessfully appealed the grade to the grading committee on January 23, 1995. On December 12, 1995, a hearing was held before the Student Review Subcommittee. Following the hearing, the members of the Student Review Subcommittee unanimously [\*3] voted to dismiss plaintiff from medical school. Plaintiff was informed of the decision in a January 22, 1995 letter from the Student Review Subcommittee chairperson, Dr. Kathy Shy.

On February 9, 1995, the Clinical Academic Standing Committee met to hear plaintiff's appeal from the decision of Student Review Subcommittee. On February 13, 1995, the Clinical Academic Standing Committee notified plaintiff that all of his third year credit was being revoked, that he was being suspended from further participation in the normal course of study, and that he would be dismissed from OSU unless he agreed to (1) embark on a three-month unaccredited course of education with a mentor/tutor, (2) repeat the entire third year of medical school, and (3) submit to all recommendations and interventions suggested by a psychiatrist for an indefinite period of time. Plaintiff refused to accede to those conditions, and on June 14, 1995, the Academic Review Board dismissed plaintiff from OSU.

On June 11, 1997, plaintiff filed a ninety-five paragraph complaint against defendants in the Franklin County Court of Common Pleas. Specifically, plaintiff's complaint contained (1) eleven breach of contract claims [\*4] against the OSU Board of Trustees, (2) forty-five claims for tortious interference with a contract against the Cleveland Clinic, and Drs. Palomaki, Kennedy, Paraiso, Belinson, Ivan, Linton, Hutzler, and Malone, (3) twenty-five claims for "arbitrary and capricious grading" against the Cleveland Clinic, Fairview Hospital, and Drs. Palomaki, Kennedy, Belinson, Ivan, Linton, Hutzler, Michener, and Makii, (4) eighteen claims for libel against the Cleveland Clinic, and Drs. Palomaki, Kennedy, Paraiso, Belinson, Hutzler, Linton, Malone, and Kobak, (5) six claims for conspiracy to grade arbitrarily and capriciously against the Cleveland Clinic, Fairview Hospital, and Drs. Palomaki, Michener, Hutzler, and Makii, (6) twelve claims for conspiracy to tortiously interfere with a contract against The Cleveland Clinic, Fairview Hospital, and Drs. Palomaki, Hutzler, Michener, and Makii, (7) three claims for breach of doctor/patient confidentiality against The Cleveland Clinic, and Drs. Krupp and Hutzler, (8) one claim for fraud against The Cleveland Clinic, and (9) eleven claims under Section 1983, Title 42, U.S. Code ("section 1983") alleging violations of plaintiff's right to privacy by Dr. Jelly-Bowers, [\*5] violations of plaintiff's right to freedom of religion by the OSU Board of Trustees and Dr. Kantor, violations of plaintiff's right to due process of law by Drs. Palomaki, Kantor, and McIlroy, and violations of plaintiff's right to freedom of speech by Drs. Shy, Bowyer, Hoekstra, Mauger, and St. John.

Plaintiff subsequently served on all defendants several discovery requests, including a request for six hundred seven admissions. On December 19, 1997, Fairview Hospital and Dr. Makii (hereinafter collectively, the "Fairview Hospital defendants") filed a motion for a protective order, seeking to relieve them of responsibility for responding to any of plaintiff's requests for admissions, or in the alternative requiring them to respond to only twenty of the six hundred seven requests. On March 17, 1998, the trial court filed an entry granting in part the Fairview Hospital defendants' motion, ordering them to respond to forty of the six hundred seven requests for admission, to be chosen by

plaintiff. On March 18, 1998, Fairview Hospital defendants filed a motion for summary judgment on all of plaintiff's claims against them.

On December 19, 1997, the OSU Board of Trustees, the Cleveland [\*6] Clinic, and Drs. Palomaki, Hutzler, Michener, Malone, Jelly-Bowers, Shy, Kantor, Bowyer, Hoekstra, Mauger, St. John, Krupp, McIlroy, Ivan, Linton, Kennedy, Paraiso, Belinson, and Kobak (hereinafter collectively, the "OSU defendants") moved, pursuant to Civ.R. 12(B)(6), to dismiss various claims of plaintiff's complaint for failure to state a claim upon which relief can be granted. On March 18, 1998, the OSU defendants followed with a second motion to dismiss pursuant to Civ.R. 12(B)(6), together with a motion to strike certain of plaintiff's claims. The second motion to dismiss sought dismissal of all claims against the OSU defendants. The motion to strike sought to have the claims contained in eighty-four different paragraphs of plaintiff's complaint stricken for plaintiff's failure to attach the written instruments on which the claims were founded, as required by Civ.R. 10(D).

On November 13, 1998, the trial court granted the OSU defendants' two motions to dismiss and motion to strike, as well as the Fairview Hospital defendants' motion for summary judgment. The trial court filed a judgment entry journalizing its decision on December 9, 1998. Plaintiff timely appeals, assigning [\*7] the following errors:

The court erred in granting:

Appellees' Motion to Dismiss, filed December 19, 1997

Appellees' Motion to Strike Appellant's Claims Set Forth In Paragraphs 1, 2, 3, 5, 7-9, 11-66, 73-82, And [*sic*] 85-95, Filed March 18, 1998,

Appellees' Second Motion To Dismiss, Filed March 18, 1998,

Appellees' Motion For Summary Judgment, Filed March 18, 1998,

The Entry Granting In Part And Denying In Part Appellees' Motion For A Protective Order Filed December 19, 1997.

### **I. Plaintiff's Claims Against the OSU Defendants.**

Plaintiff's first and third assignments of error will be addressed together, as both challenge the trial court's dismissing plaintiff's claims against the OSU defendants pursuant to Civ.R. 12(B)(6).

<sup>HN1</sup>¶ In reviewing the trial court's decision to dismiss plaintiff's claims against the OSU defendants for failure to state a claim pursuant to Civ.R. 12(B)(6), we do not defer to the trial court's decision, but must independently review plaintiff's complaint to determine if the dismissals were appropriate. McGlone v. Grimshaw (1983), 86 Ohio App. 3d 279, 285, 620 N.E.2d 935.

<sup>HN2</sup>¶ Dismissal of a claim for failure [\*8] to state a claim upon which relief may be granted is appropriate only where it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. York v. Ohio State Highway Patrol (1991), 60 Ohio St. 3d 143, 144, 573 N.E.2d 1063. <sup>HN3</sup>¶ In construing a complaint on a motion to dismiss pursuant to Civ.R. 12(B)(6), a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. Mitchell v. Lawson Milk Co. (1989), 40 Ohio St. 3d 190, 192. at 193, 532 N.E.2d 753.

#### **A. Plaintiff's breach of contract claims against the OSU Board of Trustees.**

Plaintiff contends the trial court improperly dismissed his breach of contract claims against the OSU Board of Trustees (paragraphs 1, 2, 3, 4, 5, 6, 9, 13, 16, 83, and 95). <sup>HN4</sup>¶ As amended September 26, 1988, R.C. 3335.03(B) provides that "except as specifically provided in division (A)(2) of section

2743.03 of the Revised Code, the court of claims has exclusive, original jurisdiction of all civil actions against the Ohio state [\*9] university board of trustees." <sup>HN5</sup> R.C. 2743.03(A)(2) provides in relevant part that the Court of Claims Act "\*\*\*\* does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief." Thus, civil actions against the OSU Board of Trustees, other than actions where only equitable relief is sought, must be brought in the Court of Claims. Cf. *Willson v. Bd. of Trustees of The Ohio State Univ.* (Dec. 24, 1991), Franklin App. No. 91AP-144, unreported (1991 Opinions 5884) (applying *Schwarz v. Bd. of Trustees (1987)*, 31 Ohio St. 3d 267, 510 N.E.2d 808 and former R.C. 3335.03 to determine jurisdiction). Here, plaintiff seeks relief only in the form of monetary damages on his breach of contract claims against the OSU Board of Trustees. Because subject matter jurisdiction over those claims rests exclusively in the Court of Claims, the trial court was without jurisdiction over the claims, and did [\*10] not err in dismissing the claims.

#### B. State law claims against individual doctors.

The trial court also dismissed all of plaintiff's state law claims against Drs. Palomaki, Hutzler, Michener, Malone, Ivan, Linton, Kennedy, Paraiso, Belinson, Makii, and Kobak (paragraphs 8, 15, 18, 21, 23, 25, 26, 28, 31, 33, 35, 37, 38, 40, 42, 43, 45, 47, 49, 50, 52, 54, 56, 58, 60, 62, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77, 78, 80, 82, 84, 85, 87, 90, 92, 94) on the grounds that the doctors are personally immune pursuant to R.C. 9.86 and 2743.02(F).

<sup>HN6</sup> R.C. 9.86 confers limited, personal immunity upon officers and employees of the state. *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App. 3d 69, 73, 686 N.E.2d 1146. <sup>HN7</sup> Pursuant to R.C. 2743.02(F), jurisdiction to make the initial determination of whether a defendant is entitled to personal immunity under R.C. 9.86 is vested exclusively in the Court of Claims. *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas* (1991), 60 Ohio St. 3d 78, 80, 573 N.E.2d 606. The trial court thus lacked jurisdiction to determine [\*11] whether Drs. Palomaki, Hutzler, Michener, Malone, Ivan, Linton, Kennedy, Paraiso, Belinson, Makii, and Kobak were personally immune for their actions.

<sup>HN8</sup> Where an action initially is brought in the court of common pleas against a defendant who is alleged by either party to have been an officer or employee of the state when the cause of action accrued, the court of common pleas properly should dismiss the action for lack of subject matter jurisdiction. *Suver v. Morris*, 1991 Ohio App. LEXIS 106 (Jan. 8, 1991), Franklin App. No. 90AP-898, unreported (1991 Opinions 43). Because the issue of immunity was raised with respect to the state law claims against Drs. Palomaki, Hutzler, Michener, Malone, Ivan, Linton, Kennedy, Paraiso, Belinson, Makii, and Kobak, the trial court properly dismissed all of plaintiff's state law claims against them, albeit for the wrong reasons: dismissal should have been for lack of subject matter jurisdiction under R.C. 2743.02(F), not for failure to state a claim pursuant to Civ.R. 12(B)(6). The trial court's judgment is ordered revised to so reflect.

#### C. State law claims against the Cleveland Clinic.

Plaintiff's state law claims against the [\*12] Cleveland Clinic (paragraphs 8, 10, 14, 17, 22, 24, 27, 29, 32, 34, 36, 39, 41, 44, 46, 48, 51, 53, 55, 57, 59, 61, 63, 65, 67, 68, 69, 70, 71, 72, 74, 76, 79, 81, 84, 86, 88, 91, 93) include fourteen claims for tortious interference with a contract, two claims for conspiracy to tortiously interfere with a contract, eleven claims for arbitrary and capricious grading, one claim for conspiracy to grade arbitrarily and capriciously, one claim for fraud, one claim for violation of doctor-patient confidentiality, and nine claims for libel, all premised on the theory that the Cleveland Clinic is vicariously liable for the conduct of the doctors on its staff who evaluated and graded plaintiff's performance as a medical student. The OSU defendants moved to dismiss, and the trial court dismissed, all but plaintiff's libel claims solely on the basis that the Cleveland Clinic was immune from liability for the doctors' conduct pursuant to R.C. 2305.25(A)(1), (2), and (5).

<sup>HN9</sup> R.C. 2305.25(A)(1), (2), and (5) provide:

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(A) No health care entity and no individual who is a member of or works on behalf of any of the following boards or committees [\*13] of a health care entity or of any of the following corporations shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the board, committee, or corporation:

(1) A peer review committee of a hospital, a nonprofit health care corporation which is a member of the hospital or of which the hospital is a member, or a community mental health center;

(2) A board or committee of a hospital or of a nonprofit health care corporation which is a member of the hospital or of which the hospital is a member reviewing professional qualifications or activities of the hospital medical staff or applicants for admission to the medical staff;

\*\*\*

(5) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or pharmacists [.]

In moving for dismissal of plaintiff's claims under R.C. 2305.25(A)(1), (2), and (5), the Cleveland Clinic argued immunity because some of the [\*14] doctors who evaluated and graded plaintiff were members of the Student Review Subcommittee, the Clinical Academic Standing Committee, or the Academic Review Board, the academic committees and board which played a role in plaintiff's dismissal from OSU.

*HN10* To establish its immunity under R.C. 2305.25(A)(1), (2), and (5), the Cleveland Clinic necessarily had to present evidence of factual matters outside the pleadings, such as evidence of the nature of the Student Review Subcommittee, the Clinical Academic Standing Committee, and the Academic Review Board, sufficient to show that the entities are committees or boards of the type granted immunity by R.C. 2305.25(A)(1), (2), and (5). Moreover, the Cleveland Clinic needed to show that the conduct for which plaintiff seeks to hold it vicariously liable was committed by the doctors while in the scope of their duties as members of the academic committees or board.

*HN11* When considering a motion to dismiss brought pursuant to Civ.R. 12(B)(6), a court may consider only the averments contained in the complaint, not matters outside the pleadings. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App. 3d 199, 207, 614 N.E.2d 827. [\*15] *HN12* Because the determination of whether the Cleveland Clinic is immune under R.C. 2305.25(A)(1), (2) and (5) requires proof of matters outside the record, the determination cannot be made on a motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6). *Id.* Accordingly, the trial court's decision to dismiss plaintiff's claims against the Cleveland Clinic for tortious interference with a contract, conspiracy to tortiously interfere with a contract, arbitrary and capricious grading, conspiracy to grade arbitrarily and capriciously, fraud, and breach of doctor-patient confidentiality must be reversed.

The Cleveland Clinic also moved to dismiss plaintiff's nine libel claims as filed outside the one-year statute of limitations set forth in R.C. 2305.11(A). *HN13* A cause of action for libel accrues upon the first publication of the allegedly defamatory statement. *Reimund v. Brown*, 1995 Ohio App. LEXIS 4824 (Nov. 2, 1995), Franklin App. No. 95APE04-487, unreported (1995 Opinions 4618).

Plaintiff's libel claims against the Cleveland Clinic allege doctors on the Cleveland Clinic's staff made libelous statements which contributed to plaintiff's [\*16] dismissal from medical school. All of the allegedly libelous statements for which plaintiff seeks to hold the Cleveland Clinic responsible were made, at the latest, by February 13, 1995, the date on which the Clinical Academic Standing Committee notified plaintiff that he would be dismissed from medical school unless he agreed to the committee's three conditions. Because plaintiff did not file his complaint until June 11, 1997, more than two years after the accrual of his libel claims against the Cleveland Clinic, the trial court properly dismissed those claims.

## D. Plaintiff's Section 1983 Claims.

Plaintiff's eleven section 1983 claims (paragraphs 7, 11, 12, 19, 20), allege that plaintiff's right to privacy was violated by Dr. Jelly-Bowers, his right to free exercise of his religion was violated by the OSU Board of Trustees and Dr. Kantor, his right to due process of law was violated by Drs. Palomaki, Kantor, and McIlroy, and his right to free speech was violated by Drs. Shy, Bowyer, Hoekstra, Mauger, and St. John. Because plaintiff states in his brief that he has decided not to pursue his section 1983 claims against the OSU Board of Trustees and Dr. Kantor for violation of his [\*17] right to free exercise of his religion, we do not address those claims.

**HN14** Section 1983 n1 provides a remedy for violations of substantive rights created by the United States Constitution or federal statute. Barnier v. Szentmiklosi (E.D. Mich. 1983), 565 F. Supp. 869, 871, reversed in part on other grounds, (C.A.6, 1987), 810 F.2d 594, 597. **HN15** In order to state a claim under section 1983, plaintiff must establish that: (1) the conduct in controversy was committed by a person acting under color of state law, and (2) the conduct deprived plaintiff of a federal right, either constitutional or statutory. Parratt v. Taylor (1981), 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908, overruled on other grounds; Daniels v. Williams (1986), 474 U.S. 327, 330, 88 L. Ed. 2d 662, 106 S. Ct. 662; 1946 St. Clair Corp. v. Cleveland (1990), 49 Ohio St. 3d 33, 34, 550 N.E.2d 456.

----- Footnotes -----

n1 **HN16** Section 1983 provides in relevant part as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress \*\*\*."

----- End Footnotes----- [\*18]

The trial court dismissed plaintiff's section 1983 claims on several grounds, including a determination that the claims all were filed outside the applicable two-year statute of limitations set forth in R.C. 2305.10. Plaintiff argues that the trial court erred, as the four-year statute of limitations set forth in R.C. 2305.09(D) is applicable to his section 1983 claims.

**HN17** Because federal law does not provide a statute of limitations applicable to section 1983 actions, the applicable statute of limitations must be borrowed from the state in which the cause of action arose. See Wilson v. Garcia (1985), 471 U.S. 261, 266, 85 L. Ed. 2d 254, 105 S. Ct. 1938. Recognizing that courts were grappling with the question of which state statute of limitations to use in section 1983 claims, the United States Supreme Court, for many years urged courts to apply the statute of limitations "most analogous" or "most appropriate" to the particular section 1983 action. Board of Regents, Univ. of New York v. Tomanio (1980), 446 U.S. 478, 488, 64 L. Ed. 2d 440, 100 S. Ct. 1790; Johnson v. Railway Express Agency, Inc. (1975), 421 U.S. 454, 462, 44 L. Ed. 2d 295, 95 S. Ct. 1716. [\*19] That approach led to confusion, as different statute of limitations were being applied to section 1983 actions depending on what common-law action the facts giving rise to the section 1983 claim most closely resembled. Owens v. Okure (1989), 488 U.S. 235, 240, 102 L. Ed. 2d 594, 109 S. Ct. 573. "Often the result had less to do with the general nature of § 1983 relief than with counsel's artful pleading and ability to persuade the court that the facts and legal theories of a particular § 1983 claim resembled a particular common-law or statutory cause of action. \*\*\* Predictability, a primary goal of statutes of limitations, was thereby frustrated." *Id.*

Seeking to correct the uncertainty, in Wilson the court first concluded that the characterization of section 1983 claims for statute of limitation purposes is a question of federal law. Wilson at 268-269. The court further concluded that federal interests in "uniformity, certainty, and the minimization of unnecessary litigation" supported characterizing all section 1983 claims in the same

way for statute of limitations purposes. 471 U.S. at 271-275. <sup>HN18</sup> After undertaking a review of the legislative [\*20] history and purpose of section 1983, the court concluded that all section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes. 471 U.S. at 276-280.

*Wilson* failed to completely eliminate disagreement over the proper statute of limitations for section 1983 claims. *Okure*, at 241. *Wilson* was helpful in states with only one statute of limitations applicable to all personal injury actions. However, in states such as Ohio with multiple statutes of limitations applicable to personal injury actions, a split soon arose over whether to apply the statute of limitations used to certain enumerated intentional torts, or the "general or residual" personal injury statute of limitations. *Id.* at 242. <sup>HN19</sup> The Supreme Court resolved the disagreement in *Okure* when it held that where a state has multiple statute of limitations for personal injury actions, the "general or residual" statute of limitations for personal injury actions should be applied to section 1983 claims. 488 U.S. at 249-250.

Accordingly, the dispute in the present case revolves to whether R.C. 2305.10 or 2305.09(D) [\*21] is Ohio's "general or residual" statute of limitations. While the OSU defendants contend the trial court correctly applied the two-year statute of limitations set forth in R.C. 2305.10, plaintiff argues that R.C. 2305.09(D) provides Ohio's general or residual statute of limitations. Although the Ohio Supreme Court has not addressed which Ohio personal injury statute of limitations constitutes the state's general or residual personal injury statute of limitations, the subject has been the topic of considerable discussion at both the state and federal level.

In *Browning v. Pendleton* (1989), 869 F.2d 989, 992, the United States Court of Appeals for the Sixth Circuit, sitting *en banc* determined that R.C. 2305.10 is Ohio's general or residual personal injury statute of limitations. *Browning*, however, did not consider R.C. 2305.09(D), as the parties did not raise it as a possible choice. See *LRL Properties v. Portage Metro Housing Auth.* (1995), 55 F.3d 1097, 1105, fn. 2 (acknowledging that "there might be a good argument" for concluding that [\*22] R.C. 2305.09(D), rather than R.C. 2305.10, is Ohio's general or residual personal injury statute of limitations," but concluding the panel was bound by the Sixth Circuit's prior *en banc* decision in *Browning*).

<sup>HN20</sup> Moreover, although the question of how to characterize section 1983 claims for statute of limitation purposes, and the question of whether Ohio's general or residual statute of limitations should be applied to section 1983 claims are questions of federal law, the question of which Ohio statute of limitations constitutes the state's general or residual statute of limitations is a question of state law. See *Okure, supra*; *Bojac Corp. v. Kutevac* (1990), 64 Ohio App. 3d 368, 370, 581 N.E.2d 625 (declining to follow *Browning*).

In *Weethee v. Boso* (1989), 64 Ohio App. 3d 532, 582 N.E.2d 19, this court determined that R.C. 2305.09(D) is the statute of limitations applicable to section 1983 claims, as it, rather than R.C. 2305.10, is Ohio's general or residual personal injury statute of limitations. Nonetheless, since *Boso*, [\*23] this court has held that both R.C. 2305.10 and 2305.11(A) are the statutes of limitations applicable to section 1983 claims. *Herdman v. Capretta*, 1996 Ohio App. LEXIS 5763 (Dec. 17, 1996), Franklin App. No. 96APE05-684, unreported (1996 Opinions 4860, 4864); *Kent v. Natalucci-Persichetti*, 1994 Ohio App. LEXIS 1196 (Mar. 22, 1994), Franklin App. No. 93APE11-1569, unreported (1994 Opinions 1006, 1010); *Twine, M.D. v. Winkfield*, 1990 Ohio App. LEXIS 3932 (Sept. 4, 1990), Franklin App. No. 90AP-150, unreported (1990 Opinions 3779, 3781); and *Twine, M.D. v. Probate Ct. of Franklin Cty.*, 1990 Ohio App. LEXIS 2665 (June 28, 1990), Franklin App. No. 89AP-1170, unreported (1990 Opinions 2780, 2783). None of those latter cases, however, addresses the pivotal issue of which Ohio statute of limitations constitutes Ohio's general or residual statute of limitations.

The other Ohio appellate districts which have addressed the issue of which Ohio statute of limitations constitutes Ohio's general or residual statute of limitations have split on the issue. In *Bojac*, 64 Ohio App. 3d at 370, and *Martin v. Adult Parole Auth.*, 1994 Ohio App. LEXIS 867 (Mar. 4, 1994), Marion App. No. 9-93-45, unreported, the Eleventh and Third [\*24] Ohio Appellate Districts, respectively, determined that R.C. 2305.09(D) is Ohio's general or residual personal injury

statute of limitations. However, the First, Fifth, Seventh, Eighth, and Twelfth Ohio Appellate Districts have held that R.C. 2305.10 provides Ohio's general or residual statute of limitations. State ex rel. Eckstein v. Midwest Pride IV (1998), 128 Ohio App. 3d 1, 14, 713 N.E.2d 1055; Francis v. Cleveland (1992), 78 Ohio App. 3d 593, 596, 605 N.E.2d 966; Archer v. Payne, 1999 Ohio App. LEXIS 4369 (Sept 17, 1999), Muskingum App. No CT-98-0043, unreported; Erkins v. Cincinnati Municipal Police Dept., 1998 Ohio App. LEXIS 4927 (Oct. 23, 1998), Hamilton App. No. C-970836, unreported; Harman v. Gessner, 1997 Ohio App. LEXIS 4054 (Sept 9, 1997), Mahoning App. No. 96 C.A. 123, unreported. n2 Only Eckstein reached its result based upon an independent comparison of R.C. 2305.10 and 2305.09(D). Francis, Erkins, Archer, and Harman simply relied upon the Sixth Circuit's determination that R.C. 2305.10(A) is Ohio's general or residual statute of limitations. Further, Francis, like the Sixth Circuit [\*25] in Browning, did not consider R.C. 2305.09(D) in determining which statute of limitations is Ohio's general or residual personal injury statute of limitations, as only R.C. 2305.11 and 2305.10 were raised by the parties.

----- Footnotes -----

n2 See, also, Gaston v. Toledo (1995), 106 Ohio App. 3d 66, 665 N.E.2d 264; Dodrill v. Lorain Cty. Sheriff (1988), 53 Ohio App. 3d 79, 557 N.E.2d 1238; and Freshour v. Radcliff, 1993 Ohio App. LEXIS 3708 (July 20, 1993), Ross App. No. 1941, unreported, applying a statute of limitations other than R.C. 2305.09(D) to section 1983 claims without determining whether the statute is Ohio's general or residual personal injury statute of limitations.

----- End Footnotes -----

HN21 ¶ Following a careful review of the differing positions set forth by the United States Sixth Circuit and the other Ohio appellate districts, we continue to believe that we correctly concluded in Boso that R.C. 2305.09(D) is Ohio's general [\*26] or residual personal injury statute of limitations.

The plain language of R.C. 2305.09(D) and 2305.10(A) indicate that the former, rather than the latter, is Ohio's general or residual personal injury statute of limitations. HN22 ¶ R.C. 2305.10 provides in relevant part that "\*\*\* an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues." HN23 ¶ R.C. 2305.09(D) provides:

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

\*\*\*

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1304.35 of the Revised Code.

HN24 ¶

The express language of R.C. 2305.10 limits the provision's application to actions for "bodily injury or injuring personal property." The language of R.C. 2305.09(D), by contrast, applies the provision otherwise to all undelineated personal injury actions.

Our conclusion that R.C. 2305.09(D), rather than R.C. 2305.10 [\*27] provides Ohio's residual personal injury statute of limitations is supported by Okure. In discussing why a state's general or residual personal injury statute of limitations, rather than a state's statute of limitations for certain enumerated intentional torts, is more appropriately applied to section 1983 claims, the Okure court indicated that most states have multiple intentional tort provisions, with each provision applying only to certain enumerated intentional torts. Okure, supra, at 243. Therefore, the court concluded, adopting state intentional tort statutes of limitations as the statute of limitations applicable to section 1983 claims would "succeed only in transferring the present confusion over the choice among multiple personal injury provisions to a choice among multiple intentional tort provisions." 488 U.S. at 244. In further explaining this rationale, the Okure court cited R.C. 2305.10 as one of Ohio's several enumerated intentional tort statutes, 488 U.S. at 243, suggesting the court did not

believe R.C. 2305.10 to be Ohio's general or residual personal injury statute of limitations.

Because the [\*28] conduct which gave rise to plaintiff's section 1983 claims occurred at the earliest during the fall of 1994, the four-year residual personal injury statute of limitations contained in R.C. 2305.09(D) had not run when plaintiff filed his complaint on June 11, 1997. Accordingly, the trial court erred in dismissing plaintiff's section 1983 claims on statute of limitations grounds.

The trial court also dismissed plaintiff's section 1983 claims on the grounds that plaintiff's complaint failed to allege facts sufficient to survive the defense of qualified immunity, as required by Bettio v. Village of Northfield (N.D. Ohio 1991), 775 F. Supp. 1545. <sup>HN25</sup> The doctrine of qualified immunity shields public officials performing discretionary functions from liability for civil damages under section 1983 where their conduct did not violate clearly established federal rights of which a reasonable person would have known. Harlow v. Fitzgerald (1982), 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727.

In Bettio, the court applied a heightened pleading standard for section 1983 claims brought against public officials who may be entitled [\*29] to qualified immunity, holding that to avoid dismissal for failure to state a claim, such a section 1983 claim must allege facts sufficient to overcome the defense of qualified immunity. Bettio, at 1551. While the Court of Appeals for the Sixth Circuit has adopted this heightened pleading standard, Veney v. Hogan (C.A.6, 1995) 70 F.3d 917, 922, the majority of the Ohio courts of appeals have not. See, e.g., Asher Investments, Inc. v. Cincinnati (1997), 122 Ohio App. 3d 126, 137, 138, fn. 6, 701 N.E.2d 400 (stating that application of the Sixth Circuit's heightened pleading standard for qualified immunity would be inconsistent with notice pleading). But, see, Patrick v. Wertman (1996), 113 Ohio App. 3d 713, 717, 681 N.E.2d 1385 (dismissing a section 1983 claim pursuant to Civ.R. 12(B)(6) for failure to comply with Bettio). Moreover, immunity determinations are more properly dealt with on summary judgment, because often, as here, they require consideration of matters outside the pleadings. Asher, 122 Ohio App. 3d at 138. The trial court thus erred when it dismissed plaintiff's section 1983 claims on the authority of Bettio.

Finally, [\*30] the trial court dismissed plaintiff's section 1983 claims against Dr. Palomaki, concluding that plaintiff's complaint failed to allege Dr. Palomaki was acting "under color of state law" when he (1) denied plaintiff access to plaintiff's performance evaluations, and (2) took steps which led to the confiscation of plaintiff's property interest in his accumulated third-year medical school credits and in his ongoing medical education.

<sup>HN26</sup> To satisfy the "under color of state law" element of a section 1983 claim, a plaintiff must show that the conduct complained of was taken pursuant to "power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic (1941), 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031. Here, plaintiff's complaint alleges that in violating plaintiff's procedural due process rights, Dr. Palomaki was acting in his capacity as an OSU instructor. Those allegations are sufficient for purposes of Civ.R. 12(B)(6) to allege Dr. Palomaki was acting "under color of state law" when he committed the alleged constitutional violations. The trial court erred in dismissing plaintiff's [\*31] section 1983 claims against Dr. Palomaki on the premise that plaintiff failed to allege Dr. Palomaki was acting under color of state law.

Accordingly, the trial court erred in dismissing plaintiff's section 1983 claims against Drs. Jelly-Bowers, Palomaki, Kantor, McIlroy, Shy, Bowyer, Hoekstra, Mauger, and St. John.

Given the foregoing, plaintiff's first and third assignments of error are sustained with respect to (1) plaintiff's claims against the Cleveland Clinic for tortious interference with a contract, conspiracy to tortiously interfere with a contract, arbitrary and capricious grading, conspiracy to grade arbitrarily and capriciously, fraud, and violation of doctor-patient confidentiality, and (2) his section 1983 claims for violation of his right to privacy, right to free speech, and right to due process.

E. The OSU defendants' motion to strike.

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Plaintiff's second assignment of error asserts the trial court erred in granting the OSU defendants'

motion to strike the claims stated in paragraphs 1, 2, 3, 5, 7-9, 11-66, 73-82, and 85-95 of plaintiff's complaint for plaintiff's failure to comply with Civ.R. 10(D). Plaintiff's second assignment of error is moot to the extent [\*32] it arises out of claims which properly were dismissed for lack of jurisdiction or for failure to state a claim. Therefore, we limit our review of the stricken claims to those improperly dismissed.

The claims which remain at issue are (1) plaintiff's section 1983 claims against Drs. Jelly-Bowers, Palomaki, Kantor, McIlroy, Shy, Bowyer, Hoekstra, Mauger, and St. John alleging violations of plaintiff's right to privacy, right to free speech, and right to due process, and (2) plaintiff's claims against the Cleveland Clinic for tortious interference with a contract, conspiracy to tortiously interfere with a contract, arbitrary and capricious grading, conspiracy to grade arbitrarily and capriciously, fraud, and violation of doctor-patient confidentiality.

HN27 Civ.R. 10(D) provides as follows:

When any claim or defense is founded on an account or other written instrument, a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading.

Neither the OSU defendants in moving to strike, nor the trial court in granting the motion, indicated with any specificity which of plaintiff's claims were founded on which written instruments. [\*33] Instead, the OSU defendants' motion to strike merely alleged that plaintiff's claims are "founded upon written instruments, including, but not limited to, a written psychological evaluation of Plaintiff, the Ohio State College of Medicine student handbook, letters from College of Medicine committees to plaintiff, written evaluations and performance reviews of Plaintiff and reports in Plaintiff's student file."

In fact, both plaintiff's section 1983 claims and his claims at issue against the Cleveland Clinic are not founded upon written instruments. Rather, those claims are founded on amendments to the United States Constitution, and common law tort and fraud principles, respectively. While the documents the OSU defendants allude to may be relevant to some of those claims as evidence or otherwise, the claims are not based on duties arising out of the instruments. HN28 Civ.R. 10(D) does not require that all documents which are relevant in any way to a claim be attached to the complaint. *City of Fairlawn v. Fraley*, 1981 Ohio App. LEXIS 13742 (Feb. 11, 1981), Summit App. No. 9827, unreported.

Thus, plaintiff's second assignment of error is sustained with respect to plaintiff's section 1983 claims alleging violations [\*34] of plaintiff's right to privacy, right to free speech, and right to due process, and plaintiff's tortious interference with a contract, conspiracy to tortiously interfere with a contract, arbitrary and capricious grading, conspiracy to grade arbitrarily and capriciously, fraud, and doctor-patient confidentiality claims against the Cleveland Clinic.

## II. Plaintiff's Claims Against the Fairview Hospital Defendants.

Plaintiff's fourth assignment of error challenges the trial court's granting summary judgment to the Fairview Hospital defendants on all of plaintiff's claims against them.

HN29 Normally, our review of a trial court's grant of summary judgment requires us to determine independently whether, viewing the evidence most strongly in favor of the non-moving party, no genuine issues of fact exist, the moving party is entitled to judgment as a matter of law, and reasonable minds could only reach a conclusion which is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 65, 375 N.E.2d 46; *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App. 3d 704, 711, 622 N.E.2d 1153.

In the present case, however, [\*35] plaintiff does not contend that genuine issues of fact exist or that the Fairview Hospital defendants were not entitled to judgment as a matter of law. Rather, plaintiff contends that summary judgment was inappropriate because the Fairview Hospital defendants and the trial court prevented him from presenting evidence which would have created

genuine issues of fact. Specifically, plaintiff contends he was unfairly prevented from successfully opposing the motion for summary judgment by (1) the trial court's issuing a protective order on March 17, 1998, which prevented plaintiff from conducting any discovery of the OSU defendants pending the trial court's ruling on the OSU defendants' first motion to dismiss, and (2) the Fairview Hospital defendants' failure to respond to plaintiff's requests for admissions. Essentially, plaintiff argues that the trial court's discovery rulings so prejudiced his ability to oppose the motion for summary judgment that the trial court decision to grant summary judgment should be reversed.

**HN30** ¶ Civ.R. 56(F) addresses the situation in which plaintiff claims to have found himself in opposing the Fairview Hospital defendants' motion for summary judgment, and it **[\*36]** states:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

**HN31** ¶ Pursuant to Civ.R. 56(F), a party who believes that it is unable to adequately oppose a motion for summary judgment by affidavit must submit an affidavit to the court stating the reasons why it is unable to present facts necessary to oppose the motion for summary judgment by affidavit. If the trial court finds that the affidavit sets forth sufficient reasons for the party's inability to oppose the motion for summary judgment by affidavit, the trial court may refuse to grant summary judgment, or order a continuance to permit the party to obtain affidavits or to conduct discovery. Stewart v. Seedorff, 1999 Ohio App. LEXIS 2375 (May 27, 1999), Franklin App. No. 98AP-1049, unreported (1999 Opinions 1398). Here, plaintiff never submitted an affidavit to the trial court pursuant to Civ.R. 56(F). The trial **[\*37]** court thus was without authority to provide plaintiff with relief under Civ.R. 56(F). State ex rel. Coulverson v. Ohio Adult Parole Auth. (1991), 62 Ohio St. 3d 12, 14, 577 N.E.2d 352.

Further, with respect to plaintiff's contention that the Fairview Hospital defendants did not respond to his requests for admissions, the record reveals that plaintiff never specified the forty requests for admissions to be answered, per the trial court's order granting in part the Fairview Hospital defendants' motion for protective order. Plaintiff's failure to do so in effect waived their responses, and plaintiff may not raise the issue for the first time on appeal. Carabello v. Carabello, 1985 Ohio App. LEXIS 9655 (Dec. 16, 1985), Clermont App. No. CA84-11-079, unreported.

Plaintiff's fourth assignment of error is overruled.

Plaintiff's fifth assignment of error asserts the trial court erred in granting the Fairview Hospital defendants' protective order and requiring them to respond to only forty of the six hundred seven requests for admission plaintiff served on them. Our resolution of plaintiff's fourth assignment of error renders this argument moot. Therefore, we decline to address plaintiff's fifth **[\*38]** assignment of error. App.R. 12(A)(1)(c).

Having sustained plaintiff's first, second, and third assignments of error to the extent indicated, having overruled plaintiff's fourth assignment of error, and having determined plaintiff's fifth assignment of error to be moot, the judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for further proceedings in accordance with this opinion.

*Judgment affirmed in part and reversed in part; case remanded.*

PETREE and TYACK, JJ., concur.

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ORC Ann. 2305.09

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\*\*\* WITH THE EXCEPTION OF FILE 15 (HB 119) \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 4/1/07 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH 6/11/07 \*\*\*

TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS  
TORTS

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ORC Ann. 2305.09 (2007)

§ 2305.09. Four-year limitation for certain actions

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud;
- (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;
- (E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

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TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS  
TORTS

ORC Ann. **2305.10** (2004)

§ **2305.10**. Bodily injury or injury to personal property

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become aware that the plaintiff had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in [section 5903.21](#) of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, upon the date on which the plaintiff learns from a licensed physician that the plaintiff has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have become aware that the plaintiff has an injury which may be related to such exposure, whichever date occurs first.

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