IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

DAVIS MCARTHUR, by and through DANA MCARTHUR, his Court Appointed Guardian,

Plaintiff,

v. CIVIL ACTION NO. 7:23-cv-00105

CHAD CASTLEBERRY, in his individual and official capacity as chief of the City of Adel, Georgia Police Department, et al.

Defendants.

Plaintiff's Response to
Defendants' Douglas G. Hanks and Unknown Cook County Sheriff's Office Employees' Motion to Dismiss

Davis McArthur, by and through his Court Appointed Guardian, Dana McArthur, respectfully files this, his Response to the Defendants' Douglas G. Hanks and Unknown Cook County Sheriff's Office Employees' Motion to Dismiss, respectfully showing the Honorable Court the following:

1.

Plaintiff, Davis McArthur ("Davis"), has suffered from *multiple* diagnosed mental illnesses throughout his entire life. On October 13, 2017, Davis was legally determined to be mentally ill and, as such, lacking in mental capacity by the Probate Court of Cherokee County, Georgia. (Doc. 1, pp. 2-3.)

2.

Plaintiff has been the subject of the court-appointed guardianship of his adoptive father,

Dana McArthur (who brings this suit on Davis' behalf) since October 13, 2017. Throughout Davis' entire lifetime, he has been incapable of managing the ordinary affairs of his life without the substantial assistance of his parents and (since attaining the age of majority) his court-appointed guardians.

3.

The Statement of Facts provided by Defendants is accurate, in all respects. (Doc. 6-1, pp. 2-4.)

In addition to the agreed facts set forth in Defendant Hanks's memorandum [Doc. 6-1], the following facts are also undisputed:

1. Plaintiff is an individual who, on October 13, 2017, was judicially determined to be lacking in capacity (i.e., "legally incompetent") by reason of multiple mental illnesses.
2. Plaintiff's claims against Defendants arose from the events that started when Defendant(s), acting together, arrested and charged Plaintiff with 2 *intentional* felonies and 2 intentional misdemeanors while Plaintiff was being transported for treatment of an emergency psychiatric (i.e., suicidal) condition on or about August 27, 2019.
3. Plaintiff was thereafter indicted on the same crimes but, on or about October 25, 2023, all charges against Plaintiff were dropped by the Cook County, Georgia District Attorney.

Summary of Key Points

4. There are no stated statute(s) of limitations for claims based on 42 U.S.C. §1983.
5. Federal courts apply the substantive law of the forum state for a personal injury tort claim in determining the limitations period. "The applicable statute of limitations for section 1983 claims is the forum state statute of limitations for personal injury torts. Johnson v.

Rivera, 272 F.3d 519, 521 (7th Cir.2001) (citing Wilson v. Garcia, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985))." Day v. Conwell, 244 F.Supp.2d 961 (N.D. Ill. 2003)

6. Georgia law provides for a two-year statute of limitations to personal injury tort claims.
7. Georgia law specifically provides for the tolling of limitations periods when a claimant is mentally ill and lacks legal capacity. O.C.G.A. 9-3-90 (a)
8. Specifically, Georgia law provides that such claimants "…are entitled to the same time *after their disability is removed* to bring an action as is prescribed for other persons." O.C.G.A. 9-3-90(a)
9. Defendants have cited no authority for the (implied) proposition that the "accrual" (or ripeness) of a claim under § 1983 divests Plaintiff of the benefits of *tolling* provided to him *as a matter of substantive Georgia* law under O.C.G.A. 9-3-90 (a).
10. In 42 U.S.C. § 1988 (1976 ed., Supp. V), "…Congress specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations ***and state tolling rules*** unless they are 'inconsistent with the Constitution and laws of the United States'." (emphasis added) Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983).
11. Defendants' Motion to Dismiss is entirely based upon a flawed assumption, to wit: that a Georgia §1983 claimant, such as Plaintiff, who is incapacitated by reason of mental illness, is *not* entitled to the benefits of tolling provided under O.C.G.A. 9-3-90 (a). This assertion is in direct contradiction to both 42 U.S.C. § 1988 and federal case law. Under both, this court is required to apply the substantive law of Georgia in determining both periods of limitations and principles of tolling unless Georgia substantive law is clearly "inconsistent with the Constitution and laws of the United States.

12. In the context of a §1983 claim, Federal courts apply the substantive law of the forum state for a personal injury tort claim to determine *both* the applicable imitations periods and the applicability of tolling. Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir.2001) (citing Wilson v. Garcia, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985))." Day v. Conwell, 244 F.Supp.2d 961 (N.D. Ill. 2003)
13. Georgia law provides for a two-year statute of limitations to tort claims for personal injuries under O.C.G.A. § 9-3-33.
14. Georgia law also provides for the *tolling* of the statute(s) of limitations for claimants who are under the 'disability' of incapacity due to mental illness. O.C.G.A. 9-3-90 (a). Specifically, Georgia law provides that such claimants "…are entitled to the same time *after their disability is removed* to bring an action as is prescribed for other persons."
15. Defendants' Motion completely ignores the substantive (i.e, statutory) law of Georgia with respect to the tolling. Under Georgia law, the limitations periods applicable to Plaintiff's §1983 claims are tolled *until such time as his disability is removed*. Once his disability is removed, Plaintiff is entitled to the same amount of time as other claimants to bring his claims or they would be barred by limitations.

Argument and Authorities

In 42 U.S.C. § 1988 (1976 ed., Supp. V), "…Congress specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations *and state tolling rules* unless they are 'inconsistent with the Constitution and laws of the United States'." (emphasis added) Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983). Federal courts are instructed to refer to state statutes when federal law provides no rule of decision for actions brought under §1983, and §1988 authorizes federal courts to disregard an otherwise applicable

state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States."

Since Congress did not establish a statute of limitations or a body of tolling rules applicable to federal-court actions under §1983, the analogous state statute of limitations and the coordinate tolling rules are binding rules of law in most cases. This "borrowing" of the state statute of limitations includes rules of tolling unless they are "inconsistent" with federal law. Pp. 483-486. (*emphasis added*) Board of Regents of University of State of New York v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980) Also see, *Johnson v. Railway* Express Agency, Inc., supra, at 454, 95 S.Ct. 1716, 44 L.Ed.2d 295; *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. Pp. 483-492, *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554. See also *Carlson v. Green*, 446 U.S. 14, at 22, n. 10, 100 S.Ct. 1468, at 1474, n. 10, 64 L.Ed.2d 15 (1980).

The Courts have also held that, in § 1983 actions....a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.

"Until Congress enacts a federal statute of limitations to govern § 1983 litigation, federal courts must continue the practice of 'limitations borrowing' outlined in Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440...". Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983). Pp. 655-662." Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983) Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983)

In 42 U.S.C. § 1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under §1983."

Robertson v. Wegmann, supra. See also Carlson v. Green, 446 U.S. 14, at 22, n. 10, 100 S.Ct. 1468, at 1474, n. 10, 64 L.Ed.2d 15 (1980).

In Tomanio, supra, the Court said, "...[a]s we held in Robertson, by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States." Tomanio, supra, at 480.

This issue here is tolling, not accrual.[1] Regardless of *when* Plaintiff's claims "accrued", Georgia law provides for the tolling of the otherwise applicable limitations period until his disability is removed.

Defendants suggest that Plaintiff's tolling rights, under Georgia substantive law, should not be tolled because he has a Guardian and the Guardian had some 'awareness' of at least some of the facts or events giving rise to Plaintiff's claims. But Defendants cannot cite any rule or law from *any* jurisdiction for the novel proposition that some 'Notice" to the Guardian of a ward's potential claims is enough to divest that incapacitated Ward of his tolling rights under Georgia law. Further, the Eleventh Circuit Case cited by Defendants, *Shepherd v. Wilson*, 663 Fed. Appx. 813, 817 (11th Cir. 2016) does not speak to the issue of Guardianship or tolling. That case

[1] "Accrual" generally refers to the point in time when a recognized cause of action comes into existence, and marks the beginning point in the applicable limitations period. Sometimes, claims "accrue" when the wrongful act occurs. At other times—such as when the victim could not be fairly charged with "notice" that he has a claim, the "discovery" rule may be applied *to extend the time period until after the claim has been discovered*. In the usual case, the statute of limitations begins to run when a claim occurs and/or when it is (or when it should be) discovered by a reasonable claimant. Tolling, however, is the concept of 'suspending' the limitations period while the claimant is under some incapacity, such as mental illness, minority-age status and/or imprisonment.

only stands for the proposition that the determination of when a claim 'accrued' is made with reference to Federal law, and not to the state's substantive law. Notably, the Plaintiff in Shepherd was a previously incarcerated individual who had been released from incarceration long before the state-prescribed two year statute of limitations for his § 1983 had expired. The issue was not tolling, but rather when the claims had accrued so as to start the running of Alabama's two-year limitations period.

Again, the question of *when* the Plaintiff's claims 'accrued' is an irrelevant question in light of the fact that all of those claims have been tolled under the substantive laws of Georgia. See, O.C.G.A. 9-3-90 (a).

The Federal Courts pay great deference to the wisdom of state legislatures in balancing the interests of §1983 claimants and those against whom such claims are brought. "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, *and exceptions thereto*, on the prosecution of a closely analogous claim." (emphasis added) *Johnson v. Railway* Express Agency, Inc., supra., at 463-464, 95 S.Ct., at 1722.

Neither the courts nor the legislature in Georgia have created any "Guardian" exception to the Georgia tolling statue for mentally ill, incapacitated individuals with tort based claims.

Defendants have cited no authority for the (implied) proposition that the "accrual" (or ripeness) of a claim under § 1983 would serve to divest Plaintiff of the benefits of *tolling* provided to him under O.C.G.A. 9-3-90 (a)—as Defendants' argument also suggests.

Defendants have not questioned the wisdom of the Georgia legislature's balancing the factors in the enactment of Georgia's tolling statute, O.C.G.A. 9-3-90 (a), for individuals suffering from the disability of an incapacitating mental illness, such as Plaintiff. Further, none of the cases cited by Defendants purport to raise "…any inconsistencies between O.C.G.A. 9-3-90 (a) and the United States Constitution and/or the laws of the United States…" as required by both 42 U.S.C. § 1988 and the long line of Supreme Court cases upholding that principle. Defendants' entire Motion is focused exclusively on the issue of when each of Plaintiff's § 1988 claims 'accrued' (through the application of federal law) for purposes of applying Georgia's statute(s) of limitations *while completely ignoring the Georgia's tolling provisions applicable to Plaintiff in this case.*

In 42 U.S.C. § 1988 (1976 ed., Supp. V), "…Congress has specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations ***and state tolling rules*** unless they are 'inconsistent with the Constitution and laws of the United States'." (emphasis added) Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983). Defendants have failed to show that there are any inconsistencies between O.C.G.A. 9-3-90 (a) and the United States Constitution and/or the laws of the United States in the context of Plaintiff's §1983 claims.

None of the cases cited by Defendants (a) purport to deprive a person lacking capacity by reason of mental illness of his expressly granted rights under O.C.G.A. 9-3-90(a), (b) argue for the abrogation of Georgia law concerning the tolling of the claims of mentally ill or incapacitated persons, such as Plaintiff, or (c) point out any 'inconsistency with the Constitution and laws of the United States'." None of the claimants in those cases were under a continuing disability of incapacity, like Plaintiff, at the time their claims were sustained or filed. The cited cases all discuss and concern 'accrual', but none of the discuss tolling.

In sum, Defendants have cited no legal authority for the proposition that O.C.G.A. 9-3-90 (a) is "inconsistent with the Constitution and laws of the United States" as applied to Plaintiff's claims under 42 U.S.C. § 1983. Therefore, 42 U.S.C. § 1988 precludes the disregard of Georgia's tolling provisions for the claims asserted by Plaintiff in this case. Therefore, the Georgia two-year statute of limitations for Plaintiff's tort-based claims is tolled under O.C.G.A. 9-3-90 (a) and Plaintiff's §1983 claims against Defendants were never barred, as Defendants contend. Defendant's Motion should be DENIED.

WHEREFORE, Plaintiff respectfully prays for the following relief:

a. An Order Denying Defendants' Motion to Dismiss.

b. Such other and further relief to which Plaintiff may show himself justly entitled.

This 7th day of December 2023.

Respectfully submitted,
THE LAW OFFICES OF BILL REED

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Certificate of Service

This is to certify that I have served a copy of the foregoing Response upon allcounsel of record this 9th day of November 2023, by email and the ECF filing system.

By: /s/ Bill Reed
Bill Reed, Attorney for Plaintiff