Filed in District Court
State of Minnesota
Dated 11-17-20

State of Minnesota
County of Stearns

District Court
Seventh Judicial District

Doe 596,

Plaintiff,

vs.

Holy Innocents' School, Incorporated a/k/a and d/b/a Holy Innocents' School,

Defendant.

Court File No.
73-CV-18-10331

SUMMARY JUDGMENT ORDER

The above-entitled matter came before the Honorable Nathaniel D. Welte, Judge of District Court, on August 26, 2020 at the Stearns County Courthouse in St. Cloud, Minnesota, on Defendant's Motion for Summary Judgment. Michael Alen Bryant appeared on behalf of Plaintiff. Stacey Lynn Sever appeared on behalf of Defendant. The parties appeared through Zoom.

Based upon the affidavits, exhibits, the arguments of counsels, and the applicable law, the Court makes the following:

ORDER

1. Defendant's Motion to Dismiss Count I of Plaintiff's Complaint, public nuisance, is **DENIED**.
2. Defendant's Motion to Dismiss Counts II through V of Plaintiff's Complaint, the private nuisance and all negligence claims, is **GRANTED**.
3. Counts II through V are dismissed with prejudice.
4. The following **MEMORANDUM** is made a part of this order.

BY THE COURT:

Dated: November 17, 2020.

Hon. Nathaniel D. Welte
Judge of District Court

JUDGMENT

I hereby certify that the foregoing Order/Conclusions of Law constitutes the Judgment of the Court.

Dated: 11-18-20
George Lock, Court Administrator

By: Mary Jo M. Deputy

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MEMORANDUM

I. STATEMENT OF FACTS

Doe 596 ("Plaintiff") sued Holy Innocents' School, Inc. ("School") on or about December 3, 2018. The School is a private, non-profit, religious school located in Waite Park, Minnesota. The Complaint sets forth claims for public nuisance, private nuisance, common-law negligence, negligent retention, and negligent supervision. Plaintiff's claims arise from sexual abuse she alleges Father Lawrence Brey ("Fr. Brey") inflicted upon her while she attended the School between 1978 and 1984. The School is still in operation today and offers enrollment to students from kindergarten to 12th grade.

Robert J. Sis ("Robert") and Bernice Sis ("Bernice") founded the School in 1969. The School employed Robert, Bernice, Maria Sis ("Maria"), Heidi Sis ("Heidi"), Christopher Sis ("Christopher"), and Fr. Brey throughout Plaintiff's time at the School.

Fr. Brey was ordained in the Archdiocese of Milwaukee in 1953. He served parishes in the Archdiocese of Milwaukee until 1968, when he was placed on a leave of absence "because of a particularly conservative bent" that made it "difficult for him to find a place where he felt comfortable in the pastoral ministry." (Peck Aff., Ex. 8). In the fall of 1974, Fr. Brey arrived at the School. Robert built Fr. Brey a home on the School's property, and the Sis family allowed him to live there and fed him one meal a day in return for his services. (Peck Second Aff., Ex. 52, pg. 25:11-26:8; Peck Aff., Ex. 12; Ex. 54, pg. 33:14-22). Fr. Brey left in 1975 but returned in 1976 to work full time at the School. Fr. Brey worked at the School for 30 years as a chaplain, leaving the School in 2004.

Plaintiff was sexually, physically, and psychologically abused on a regular basis by Fr. Brey, Robert, Bernice, Maria, Heidi, and Christopher while she attended the School. (Sever Aff., Ex. A, pg. 36-37, pg. 45:7-25,). The abuse ended after Plaintiff and her siblings stopped attending the School in 1984. (Sever Aff., Ex. A, pg. 19:8-14). Because of the alleged abuse, Plaintiff has suffered from post-traumatic stress disorder ("PTSD"), anxiety, major depression, panic attacks, and has struggled with suicidal thoughts, and inability to trust, all of which have resulted in the need for years of medical treatment and therapy. (Peck Second Aff., Ex. 53, pg. 10, 11, 14). Starting in 2004, Plaintiff sought mental health treatment and has since attended numerous therapy sessions.

Sometime in 2008, Plaintiff told her parents about the abuse she suffered at the School. (Sever Aff., Ex. A, pg. 70:1-71:3; Ex. C, pg. 31:6-23). Soon after, her father confronted Robert about the abuse. (Peck Second Aff., Ex. 61; Ex. 57, pg. 73-76; Ex. 69). Robert referred Plaintiff's father to his son, Christopher. (Peck Second Aff., Ex. 69). When Plaintiff's father confronted Christopher, Christopher threatened to kill Plaintiff's father.[1] Plaintiff and her sisters learned of this threat in 2009. (Peck Second Aff., Ex. 61). Plaintiff's father passed away sometime in 2009.

In February 2018, following a weeklong Catholic retreat led by psychologist Theresa Burke, M.A., Ph.D, for survivors of sexual abuse, Plaintiff reported the abuse she suffered to the Waite Park Police and the Stearns County Sheriff's Department. Those law enforcement departments told her the criminal statute of limitations barred her

[1] Defendant's acknowledge there was a meeting between Plaintiff's Father and Christopher, but deny the content of the discussion. For purposes of this motion, the Court assumes the facts in favor of the Plaintiff.

criminal charges. (Peck Second Aff., Ex. 71- 72). Plaintiff then filed this civil action against the School. As part of Plaintiff's suit, Plaintiff completed a psychological evaluation with Mark Raderstorf, MA ("Dr. Raderstorf"), a certified rehabilitation counselor and licensed psychologist. (Peck Second Aff., Ex. 53). Dr. Raderstorf reviewed Plaintiff's counseling and therapy records. He found that Plaintiff disclosed her abuse at the School as part of her treatment, including a recent disclosure to Dr. Gottlieb in 2014. (Peck Second Aff., Ex. 53, pg. 11). Dr. Raderstorf opined that Plaintiff has suffered psychologically, physically, academically, and economically because of the abuse. (Peck Second Aff., Ex. 53, pg. 20-21).

II. SUMMARY JUDGEMENT STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and [a] party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01; *Fenrich v. The Blake Sch.*, 920 N.W.2d 195 (Minn. 2018). "A fact is material if its resolution will affect the outcome of the case." *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001) (citation omitted). All evidence must be viewed in a light most favorable to the non-moving party. *Offerdahl v. University of Minnesota*, 426 N.W.2d 425, 427 (Minn. 1988).

In order to succeed on a motion for summary judgment, the moving party must cite to particular parts of the record to establish that there is no genuine issue of material fact. Minn. R. Civ. P. 56.03 (West). However, the nonmoving party may not rest on mere averments or denials of the moving party's pleading but must present specific facts showing that there is a genuine issue of material fact. *See, Bebo*, 632 N.W.2d at 737. A

genuine issue of material fact "must be established by 'substantial evidence.'" *Id.* (citing *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976)). "There is no genuine issue of material fact if the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* (citing *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)).

III. THE STATUTE OF LIMITATIONS

Defendants seek dismissal of Plaintiff's nuisance and negligence claims on the basis the statute of limitations ran before Plaintiff commenced her action. The statute of limitations is an affirmative defense. Minn. R. Civ. P. 8.03 (West). In Minnesota, the statute of limitations begins to run when a cause of action accrues. Minn. Stat. § 541.01 (West) ("Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues . . . ."). A cause of action accrues when "it could be brought in a court of law without dismissal for failure to state a claim." *Bonhiver v. Graff*, 248 N.W.2d 291, 296 (Minn. 1976) (quoting *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968)). In other words, "[a] cause of action accrues when all of the elements of the action have occurred." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011) (citation omitted).

A party asserting the statute of limitation affirmative defense "bears the burden of establishing that the claims are time-barred as a matter of law." *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 495 (Minn. Ct. App.), rev. denied (Minn. 2004). Despite the harsh

consequence of the statute of limitations, "[t]here are no exceptions to statutes of limitations unless expressly provided." *State v. Bies*, 103 N.W.2d 228, 234 n.1 (Minn. 1960) (citations omitted). "[C]ourts cannot engraft on such statutes exceptions not contained therein, however inequitable the enforcement . . . may be." *Id.*

In Minnesota, a person may bring a cause of action based on child sexual abuse before turning 24 years of age. Minn. Stat. § 541.073, subd. 2(a) (West). "An action based on sexual abuse: (1) must be commenced within six years of the alleged sexual abuse in the case of alleged sexual abuse of an individual 18 years or older . . . and (3) must be commenced before the plaintiff is 24 years of age in a claim against a natural person alleged to have sexually abused a minor when that natural person was under 14 years of age." Minn. Stat. § 541.073, subd. 3 (West). In 2013, the legislature amended Minn. Stat. § 541.073 to allow otherwise time barred claims to be brought between May 25, 2013 and May 25, 2016.

Here, Plaintiff could have brought her claim by her twenty-fourth birthday, which was in June of 1997, or anytime between May 25, 2013 and May 25, 2016. Plaintiff did not commence her action until December 3, 2018. For reasons explained below, the statute of limitations bar Plaintiff's negligence claims but not her nuisance claims.

A. The statute of limitations bars Plaintiff's negligence claims.

As a defense to the enforcement of the statute of limitation, Plaintiff claims the doctrine of equitable estoppel tolled the statute of limitations. "A party seeking to assert the defense of equitable estoppel must prove three elements: (1) that representations were made; (2) that the party reasonably relied on such representations; and (3) that it

will be harmed if estoppel is not applied." *EEP Workers' Comp. Fund v. Fun & Sun, Inc.*, 794 N.W.2d 126 (Minn. Ct. App. 2011) (citing *Eide v. State Farm Mut. Auto. Ins. Co.*, 492 N.W.2d 549, 556 (Minn.App.1992)). "A party can claim estoppel only if the other party's conduct led it to change its position. *Id.* (citing *Cont'l Cas. Co. v. Knowlton*, 305 Minn. 201, 214–15, 232 N.W.2d 789, 797 (1975)).

Here, Plaintiff argues that equitable estoppel is applicable because Christopher's threat to kill her father if he disclosed the abuse prevented her from timely filing suit.[2] Plaintiff alleges that in 2008, Christopher directly threatened Plaintiff's father without her knowledge. Plaintiff states that she learned of this threat in 2009, and claims that it caused her to fear for the safety of herself and her family. Plaintiff did not allege that Christopher made any other threats to herself or other family members besides her father. To support her claim, Plaintiff cited to *Doe v. Racette*, 880 N.W.2d 332 (Mich. Ct. App. 2015) and *Vasek v. Diocese of Crookston*, No. 60-CV-17-927, slip op. (Minn. Dist. Ct. Polk Cty. Dec. 8, 2017).

In *Vasek v. Diocese of Crookston*, a Minnesota district court held that equitable estoppel may apply when a threat caused a party to act contrary to their free will and refrain from timely filing suit. *Vasek v. Diocese of Crookston*, No. 60-CV-17-927, slip op. (Minn. Dist. Ct. Polk Cty. Dec. 8, 2017). Similarly, in *Doe v. Racette*, 880 N.W.2d 332

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[2] In giving all favorable inferences to the Plaintiff, the Court also briefly considered whether the doctrine of estoppel by duress may be applicable here. In some jurisdictions, courts apply the doctrine of estoppel by duress as grounds for tolling the statute of limitations when threats are made to prevent plaintiff from timely filing suit. Courts that have applied the doctrine of estoppel by duress have required that the plaintiff prove that the duress was continuous, such as multiple threats made over a period of time. Plaintiff did not assert such a defense here, and no Minnesota court has considered whether to recognize this doctrine. However, even if this doctrine is recognized, the Court notes that it will be difficult for Plaintiff to claim estoppel by duress as Plaintiff only asserted one instance of duress.

(Mich. Ct. App. 2015), a Michigan Court of Appeals held that "a threat to murder a plaintiff and harm his family should he or she disclose instances of sexual abuse can establish the first element of equitable estoppel." *Racette*, 880 N.W.2d at 335. The court found that "the defendant's conduct is clearly intentionally designed to induce the plaintiff to refrain from taking any action against the defendant, including 'bringing action within the period fixed by statute.'" *Id.* (citation omitted). However, the court did not apply the doctrine of equitable estoppel because plaintiff did not reasonably act to commence suit after the **coercive effect of the threat expired.** *Id.* Specifically, the court reasoned that plaintiff's disclosure to the police two years prior to initiating her law suit "demonstrates that [plaintiff's] fears no longer constrained him to remain silent and so estoppel based upon that fear cannot have remained effective . . . ." *Id.*

The present case is distinguishable from *Racette* and *Vasek*. In *Racette,* the defendant repeatedly made threats directed at the plaintiff during the period in which a lawsuit could be commenced. Here, a single threat was made in 2008, two years after Plaintiff turned 24 and the initial period to commence the suit expired. Christopher's conduct did not cause Plaintiff to change her position and delay bringing her claim because the time for her to bring her claim within the initial six-year window had already expired before Christopher threatened Plaintiff's father. Plaintiff cannot avoid the fact that at the time of the threat, the statute of limitations had run. In other words, Christopher's threat did not cause a change in her position. *See*, *Knowlton* at 797.

Plaintiff's next opportunity to bring her claim became available during the three-year window between May 25, 2013 and May 25, 2016. Plaintiff did not bring her claim

within this window. Here, Plaintiff learned of the threat to her father sometime in 2009. However, she started counseling in 2004 and continued treatment throughout at least 2014. In 2014, during the three-year window allowed by statute to bring her claim, Plaintiff disclosed the sexual abuse to Dr. Gottlieb. Like the disclosure in *Racette*, Plaintiff disclosed the abuse to a third party during the time she was allowed to bring a claim. This disclosure "demonstrates that [Plaintiff's] fears no longer constrained [her] to remain silent . . . ." *Racette*, 880 N.W.2d at 335. In addition, Plaintiff was not the direct recipient of the threat. With the passing of her father in 2009, the "coercive effect" was further dissipated because Christopher could no longer carry out the threat to kill her father. Plaintiff brought her claim on December 3, 2018, approximately ten years after Christopher threatened her father. Under these facts, Plaintiff's delay in commencing suit was not reasonable. Therefore, Plaintiff's negligence claims are time barred.

B. The statute of limitations does not bar Plaintiff's nuisance claims.

In Minnesota, nuisance claims have a six-year statute of limitations window. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001) (statute of limitations applicable to nuisance claims is six years per Minn. Stat. § 541.05, subd. 1(2)). The cause of action accrues when the alleged nuisance "was or should have been discovered." *Nolan & Nolan*, 673 N.W.2d at 497.

The parties here agreed the statute of limitations does not run in the case of an ongoing or continuing nuisance. A nuisance is ongoing when the original activity produces a new injury, and a new cause of action accrues each time there are new special damages. *See, Sloggy v. Dilworth*, 38 Minn. 179, 183 (1888); *Citizens for a Safe Grant*,

624 N.W.2d at 803 (gun range caused "an ongoing series of injuries"). If the Defendant's alleged nuisance persists **without change or human interference**, then Plaintiff's nuisance claims are barred by the statute of limitations. *See, e.g., Union Pac. R.R. Co., v. Reilly Indus., Inc.*, 4 F. Supp. 2d 860, 866 (D. Minn. 1998).

Here, the Complaint alleges continuing acts of concealment and continuing physical and economic injuries. Plaintiff sought treatment for conditions arising out of her abuse as recent as October 10, 2014, well within six years of filing this action. In addition, Plaintiff has incurred costs for therapy and treatment for conditions connected to her abuse since 2004. There is evidence the School engaged in continuing acts of concealment. For example, following Plaintiff's father's confrontation with Christopher in 2008, the School's board discussed the confrontation but did not inform the students and families of the School about the allegations of sexual abuse. Theresa Carlstedt, who attended the School from kindergarten through her 2013 graduation, testified that she never learned of the allegations against Robert until this lawsuit in 2018. (Peck Second Aff., Ex. 70, pp.53:5-56:21). Minnesota Courts have found that similar continuing acts of concealment constitute continuing nuisance. *See, e.g., Doe 1 vs. Archdiocese of St. Paul and Minneapolis, Diocese of Winona, and Thomas Adamson*, No. 62-CV-1 3-4075, slip op., 11-12 (Minn. Dist. Ct. Ramsey Cnty. Dec. 10, 2013), attached to Peck Affidavit as Exhibit 44. Thus, the Court finds that the statute of limitations does not bar Plaintiff's nuisance claims.

IV. THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS PLAINTIFF'S PUBLIC NUISANCE.

Public nuisance claims are governed by Minn. Stat. 561.01, which states:

> Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Minn. Stat. § 561.01. A public nuisance is defined as "an unreasonable interference with a right common to the general public." Restatement (Second) Torts Section 821B (West).

In Minnesota, an individual has a private cause of action for public nuisance if the individual sustained a special or peculiar injury that is not common to the general public. *North Star Legal Foundation v. Honeywell Project*, 355 N.W.2d 186, 189 (Minn. App. 1984); *see also, Dawson v. St. Paul Fire & Marine Ins. Co.*, 15 Minn. 136 (Minn. 1870) (a private person asserting a public nuisance claim must have incurred special or peculiar injuries that is different from injuries sustained by the general public). To sustain a private public nuisance claim, the injuries suffered by the private plaintiff must also be different in both kind and degree. *In re Rollins*, 738 N.W.2d 798, 802 (Minn. App. 2007). In other words, a private public nuisance plaintiff cannot suffer the same type of injuries as the general public.

In this case, Plaintiff alleges several nuisances ongoing at the School. Most relevant to this discussion is the allegation that Defendant has endangered the public by concealing sexual abuse by certain individuals, and will likely continue to do so in the future. The harm to the public caused by the alleged nuisance is the continuing likelihood that other children attending the School will be abused because the concealment of abuse prevent parents and the general community from making informed decisions. Defendant argues that Plaintiff failed to produce evidence that the School has caused or continues

to cause danger to its students, and thus the statute of limitation bars Plaintiff's claim. Defendant further argues that Plaintiff's emotional harm is indistinguishable from the emotional harm suffered by the public, and thus Plaintiff has no standing to bring a public nuisance claim.

The Court must decide whether Plaintiff is conferred standing to bring a private public nuisance claim because the injuries suffered by Plaintiff are unique to the injuries suffered by the public. There is no bright line rule to differentiate the harm suffered by the public and the harm suffered by the private public nuisance plaintiff. *See, Viebahnv, Bd. of Comm'rs of Crow Wing Cnty.*, 96 Minn. 276, 280 (Minn. 1905). Thus, the Court must make its determination on a case-by-case basis. Here, Plaintiff alleges her special and peculiar injuries are lost wages and medical expenses directly related to the nuisance. Citing to Dr. Raderstorf's psychological evaluation of Plaintiff, Plaintiff alleges the abuse she suffered at the School negatively and permanently affected her vocational trajectory. (Peck Second Aff., Ex. 53, pg. 20-21). Plaintiff further alleges she incurred and will continue to incur costs in seeking mental health treatment related to the abuse. Specially, Plaintiff said she began therapy in 2004 and has seen multiple therapists since. (Peck Second Aff., Ex. 53, pg. 6-7). Finally, Plaintiff cited to several Minnesota District Court decisions allowing similar public nuisance claims to go forward to support her position. *See*, *e.g.* (Peck Aff., Ex. 43-51). Defendant disputes these allegations, arguing that Plaintiff's injuries based on emotional distress due to the continuing concealment are the same injuries suffered by the public.

After examining the cases cited by Plaintiff and Defendants, the Court finds the case most analogous to the present situation is *Doe 10 & Doe 37 & 38 v. Diocese of New Ulm*, No. 08-CV-14-863 & 08-CV-13-1084, slip op. (Minn. Dist. Ct. Brown Cty. Mar. 27, 2015), attached to Peck Affidavit as Exhibit 49. In that case, the Minnesota District Court dismissed Doe 10's complaint because it was based on injuries caused by continuing concealment of past sexual abuse, which the court found to be similar to harm suffered by the public.[3] However, the court allowed Doe 37 and 38's claims to go forward because they further alleged economic harm arising out of medical expenses and loss of income and/or earning capacity. *Id.* The court further allowed Doe 10 to amend their complaint to add allegations of economic harm. *Id.*

The Court agrees with Defendant that emotional distress arising out of the alleged incidents of sexual abuse and continuing concealment are injuries similar to those suffered by the general public. However, like the plaintiffs in *Doe 10 & Doe 37 & 38*, Plaintiff's economic harm is different in kind and degree from injuries suffered by the public. The Court finds that Plaintiff has demonstrated standing to bring a public nuisance claim and summary judgment on this claim is inappropriate at this time.

V. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGEMENT AS PLAINTIFF'S PRIVATE NUISANCE'S CLAIM.

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[3] The court specifically stated that "[b]eing victims of child sexual abuse by priests of the Diocese and suffering the mental and emotional effects thereof are injuries essentially the same as those set forth as public nuisance. **If the public nuisance created by the Diocese is an increased risk that children will be molested, and Plaintiffs were molested as children due to this increased risk, the alleged harm is the same**. This does not establish the special damages required for a private claim of public nuisance." Doe l0 & Doe 37 & 38 v. Diocese of New Ulm, No. 08-CV-14-863 & 08-CV-13-1084, slip op., 13 (Minn. Dist. Ct. Brown Cty. Mar. 27, 2015)(emphasis added).

Like public nuisance claims, private nuisance claims are governed by Minn. Stat. 561.01. A private nuisance is defined as "a non-trespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) Torts Section 821D (West). Unlike a public nuisance claim, a private nuisance claim requires an interference with the use and enjoyment of land or real property. *Id.*

Plaintiff alleges that Defendant created a condition that is injurious to health, or indecent or offensive to the senses so as to interfere with her comfortable enjoyment of life. Plaintiff argues that the resulting condition and Defendant's concealment of the sexual assaults constitute a private nuisance as something that is injurious to health, or indecent or offensive to the senses, and that as an individual affected by the nuisance, Plaintiff has standing to bring a private nuisance claim. Defendant is asking this Court to dismiss the private nuisance claim because Plaintiff has failed to demonstrate that condition at the School caused an interference with Plaintiff's use or enjoyment of land or real property.

The Court agrees with Defendant here. Plaintiff's argument has been explicitly rejected by the Minnesota Supreme Court in *Anderson v. State Dep't. of Natural Resources*, 693 N.W.2d 181 (Minn. 2005). In *Anderson*, the Minnesota Supreme Court held that a private nuisance claim could be maintained when the plaintiff failed to identify a real property interest that was affected by the nuisance. *Id.* The Court held a property interest is essential to maintain the claim. *Id.* In this case, Plaintiff has not identified any land or real property interest affected by the alleged nuisance caused by Defendant. Plaintiff's argument that a property interest is not required to maintain a private nuisance

claim is contrary to the Minnesota Supreme Court's decision in *Anderson*. Because Plaintiff failed to establish the requisite property interest, the Court finds that summary judgment in favor of Defendant is appropriate.

NDW