APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1027

Radomysl Twardowski

Plaintiff - Appellant

v.

Bismarck Police Department; Lt. Glen Ternes; Sgt. Lyle Sinclair; Det. Brandon Rask

Defendants - Appellees

Appeal from U.S. District Court for the District of North Dakota - Fargo
(1:17-cv-00110-DLH)

JUDGMENT

Before GRUENDER, BOWMAN, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 27, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 18-1027

Radomysl Twardowski

Plaintiff - Appellant

v.

Bismarck Police Department; Lt. Glen Ternes; Sgt. Lyle Sinclair; Det. Brandon Rask

Defendants - Appellees

Appeal from United States District Court
for the District of North Dakota - Fargo

Submitted: February 19, 2019
Filed: February 27, 2019
[Unpublished]

Before GRUENDER, BOWMAN, and STRAS, Circuit Judges.

PER CURIAM.

In May 2017, Radomysl Twardowski filed an action under 42 U.S.C. § 1983 seeking damages for injuries he allegedly suffered in January 2007. The district

court[1] granted summary judgment to the Bismarck Police Department and several of its officers because Twardowski filed his lawsuit after the statute of limitations had expired.

We agree with the district court that Twardowski filed his lawsuit too late. *See Spradling v. Hastings*, 912 F.3d 1114, 1119 (8th Cir. 2019) (reviewing a grant of summary judgment on a section 1983 claim "based upon the statute of limitations de novo" (citation omitted)). There is no dispute that he filed it more than ten years after the allegedly wrongful act occurred—long after the six-year statute of limitations for his excessive-force claim had expired. *See Owens v. Okure*, 488 U.S. 235, 249–50 (1989) (explaining that section 1983 actions "borrow" the "general or residual" statute of limitations "for personal injury actions"); N.D. Cent. Code § 28-01-16(5) (providing a six-year statute of limitations for personal-injury actions).

The claim accrued when the wrongful act allegedly occurred in January 2007, not sometime later. *See Johnson v. Precythe*, 901 F.3d 973, 980 (8th Cir. 2018) (stating that, as a matter of federal law, a section 1983 action accrues "when [the plaintiff] discovers, or with due diligence should have discovered, the injury that is the basis of litigation" (citation omitted)). And equitable tolling does not apply because North Dakota law does not recognize it. *See Oakland v. Bowman*, 840 N.W.2d 88, 91–92 (N.D. 2013); *see also Montin v. Estate of Johnson*, 636 F.3d 409, 413 (8th Cir. 2011) ("For a § 1983 action, . . . the issue of equitable tolling, like the underlying statute of limitations, is determined by reference to state law."). Accordingly, we affirm the judgment of the district court. *See* 8th Cir. R. 47B.

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[1]The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

APPENDIX B

Local AO 450 (rev. 5/10)

United States District Court

District of North Dakota

Radomysl Twardowski,

Plaintiff,

vs.

Bismarck Police Department, Lt. Glen Ternes, Sgt. Lyle Sinclair, and Det. Brandon Rask,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 1:17-cv-110

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☑ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

☐ **Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the Order entered on December 22, 2017, the Defendants' summary judgment motion is GRANTED and the Plaintiff's pro se motion for summary judgment is DENIED.

Date: December 22, 2017

ROBERT J. ANSLEY, CLERK OF COURT

by: */s/ Renee Hellwig, Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Radomysl Twardowski, Plaintiff, vs. Bismarck Police Department, Lt. Glen Ternes, Sgt. Lyle Sinclair, and Det. Brandon Rask, Defendants.	)	**ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT** Case No. 1:17-cv-110

Before the Court is the Defendants' motion for summary judgment filed on September 29, 2017. See Docket No. 20. The Plaintiff filed a combined response in opposition to the Defendants' motion and a *pro se* motion for summary judgment on October 5, 2017. See Docket Nos. 23 and 25. The Defendants filed a combined reply and response to Plaintiff's summary judgment motion on October 10, 2017. See Docket Nos. 26 and 27. For the reasons set forth below, the Defendants' motion for summary judgment is granted and the Plaintiff's motion for summary judgment is denied.

I. BACKGROUND

On May 30, 2017, Radomysl Twardowski, acting *pro se*, brought the instant action against the Bismarck Police Department, Lt. Glen Ternes, Sgt. Lyle Sinclair, and Det. Brandon Rask (collectively "the Defendants"). See Docket No. 1. Twardowski's complaint alleges as follows:

> In January of 2007 there was a mounting tension in our family. My wife was diagnosed with multiple sclerosis years before, her attitude was that of wanting to separate the family. One day our youngest son Alex (acting also under stress) hit me in the stomach. I had to discipline him by fending him off and slapping/smacking him several time on the shoulder. A few days later 3 police officers entered our home, without proper introductions, procedures, warrants. They were provocative and in a "full attack mode" in their behavior, with smirks

> on their face and a general "we got you" attitude. They provoked my exasperation, then attacked me using unreasonable force, causing several injuries to wrist and ® hip, which took weeks to heal. I was subjected to unreasonable strip search in jail, and denied due process (innocent until proven guilty).

See Docket No. 1, p. 3. Twardowski's complaint further notes:

> I wrote a letter in January of 2016 to Bismarck PD stating my complaints, which were resulting from multiple violations of my civil rights. Active Chief of Police Dave Draovitch received/acknowledged the letter, Lt. Dwight Offerman conducted an internal investigation and Chief of Police Dan Donlin in a letter dated July 1, 2016 stated that in their opinion "The officers acted in a lawful and appropriate manner." This is an ongoing slight and moral/legal [illegible].

See Docket No. 1, p. 3. In his request for relief, Twardowski requests an "apology and financial compensation in the amount of $75,000,000.00 (million) USD." See Docket No. 1, p. 4.

On September 29, 2017, the Defendants filed a motion for summary judgment, arguing they are entitled to judgment as a matter of law because the action was brought after the statute of limitations period expired. See Docket No. 20. Twardowski filed a *pro se* letter in response in opposition to the Defendants' motion; the title of the letter stated "Plaintiff's Motion for Summary Judgment" and was filed as such on October 5, 2017. See Docket Nos. 23 and 25. The Defendants filed a combined reply and response to Twardowski's summary judgment motion on October 10, 2017. See Docket Nos. 26 and 27.

II. LEGAL DISCUSSION

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007); Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. Anderson

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. Forrest v. Kraft Foods, Inc., 285 F.3d 688, 691 (8th Cir. 2002). The non-moving party may not rely merely on allegations or denials; rather, it must set out specific facts showing a genuine issue for trial. Id.

Upon a review of Twardowski's complaint, he appears to bring a claim pursuant to 42 U.S.C. § 1983. See Docket Nos. 1 and 23. Section 1983 provides a federal cause of action against state officials for deprivation of the "rights, privileges, or immunities secured by the Constitution and laws," of the United States. 42 U.S.C. § 1983; Grey v. Wilburn, 270 F.3d 607, 611 (8th Cir. 2001). "Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose." Wallace v. Kato, 549 U.S. 384, 388 (2007). "This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts." Wallace, 549 U.S. at 388; Mountain Home Flight Service, Inc. v. Baxter County, Ark., 758 F.3d 1038, 1044 (8th Cir. 2014) (Section 1983 does not supply its own statute of limitations; instead, the statute of limitations is borrowed from state law).

North Dakota's six-year statute of limitations outlined in N.D.C.C. § 28-01-16(5) applies to all Section 1983 actions arising in North Dakota. Carpenter v. Williams County, N.D., 618 F. Supp. 1293 (D.N.D. 1985); Rheault v. City of Fargo, No. 3:12-cv-21, 2013 WL 3229909, *7 (D.N.D. June 25, 2013). Twardowski's complaint asserts the alleged incident took place in

January 2007. See Docket No. 1. Twardowski did not commence this action until 2017, more than ten years after the alleged incident.[1]

In Twardowski's response, he asserts the accusations made against him in 2007 were unfounded and "have never been subjected to real scrutiny of a trial." See Docket No. 23, p. 1. Twardowski also states that he withdraws any previous plea agreements and apology letters he has written. See Docket No. 23. Twardowski's response fails to dispute that his cause of action accrued in 2007 or that the statute of limitations has expired. See Docket No. 23. Instead, he simply maintains that the "statutes of limitations do not apply here and should be waived." See Docket No. 23. The Court finds Twardowski has failed to timely bring this action, and the statute of limitations period has long expired. Accordingly, Twardowski's cause of action is barred by the statute of limitations and must be dismissed.[2]

Twardowski suggests the "Discovery Rule" or "Equitable Tolling rule" may apply or, in the alternative, that a "Fraudulent Concealment" was committed by the Defendants. See Docket No. 23, p. 2. The discovery rule tolls the statute of limitations until the time a plaintiff actually learned, or through the exercise of reasonable diligence should have learned, of his or her cause of action against the defendant. Drayton Public School Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410, 1412 (D.N.D. 1989). Here, there is no question that Twardowski was aware of the incident and his alleged injuries ten years ago, but he chose not to pursue the matter at the time

[1] There is no dispute the incident at issue took place in January 2007. See Docket No. 21, p. 7.

[2] The Defendants also argue that any claims brought by Twardowski that are not under 42 U.S.C. § 1983 would likely be classified as state tort law claims against a political subdivision, and North Dakota law provides that a claim against a political subdivision or sheriff must be commenced within three years after it accrues. See N.D.C.C. §§ 32-12.1-10; 28-01-17. Thus, these claims, to the extent that Twardowski's complaint could be construed as bringing such claims, would also be barred by the statute of limitations. See Docket No. 21.

due to a "desire to protect his family." See Docket No. 23, p. 1. Further, Twardowski's suggestion that he is entitled to equitable tolling of the statute of limitations is contrary to North Dakota law. See Brossart v. Janke, 859 F.3d 616, 628 (8th Cir. 2017); Oakland v. Bowman, 2013 ND 217, ¶¶ 10-11, 840 N.W.2d 88. Further, even if equitable tolling was found to be applicable, it may be invoked "only in rare cases such as when circumstances over which a prisoner has no control make it impossible to file a timely petition." Hieb v. Pringle, No. 3:17-cv-31, 2017 WL 3575027, *7 (D.N.D. May 16, 2017) (citations omitted). The Court finds Twardowski has failed to assert any extraordinary circumstance which prevented him from timely filing his claim; thus, equitable tolling can provide him no relief. See id. Finally, the Court finds there is no evidence of fraudulent concealment. In order to toll a limitation period on the basis of fraudulent concealment, there must be: (1) a positive act of fraud (2) that is actively concealed, and (3) is not discoverable by reasonable diligence. Summerhill v. Terminix, Inc., 637 F.3d 877, 880 (8th Cir. 2011). Twardowski has failed to adequately assert any element required to demonstrate fraudulent concealment; rather, he states the name of a legal doctrine with nothing more. See Docket No. 23. This is not sufficient.

In regards to Twardowski's own motion for summary judgment, the burden of proof is on Twardowski to set forth the basis for his motion. See Donovan v. Harrah's Maryland Heights Corp., 289 F.3d 527, 529 (8th Cir. 2002). Twardowski has failed to adequately do so; thus, his motion for summary judgment is denied.

III. CONCLUSION

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, the Defendants' summary judgment motion (Docket No. 20)

is **GRANTED** and the Plaintiff's *pro se* motion for summary judgment (Docket No. 23) is **DENIED**.

IT IS SO ORDERED.

Dated this 22nd day of December, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court