

APPENDIX A

Decision of the

UNITED STATES COURT OF APPEALS

For

THE SIXTH CIRCUIT

Case No. 17-2022

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 05, 2018
DEBORAH S. HUNT, Clerk

PAMELA SUZANNE HARNDEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
STATE OF MICHIGAN DEPARTMENT OF	)	THE EASTERN DISTRICT OF
HUMAN AND HEALTH SERVICES, et al.,	)	MICHIGAN
	)	
Defendants-Appellees.	)	
	)	

ORDER

Before: GILMAN and DONALD, Circuit Judges; HOOD, District Judge.*

Pamela Suzanne Harnden, proceeding pro se, appeals the district court's judgment dismissing her complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In November 2016, Harnden filed a 127-page complaint against the State of Michigan's Department of Human and Health Services ("DHHS"), as well as a number of DHHS employees in their official and individual capacities. Harnden's lengthy complaint contains kidnapping, gross negligence, and civil rights claims, all of which stem from the defendants' alleged misconduct in two child-abuse and neglect cases that DHHS brought against her and her husband

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Appendix A

between 2008 and 2010. According to Harnden's complaint, both cases were closed in March 2010. She seeks \$100,000,000 in reparations.

The defendants filed a motion to dismiss Harnden's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief may be granted. The magistrate judge recommended that the district court grant the defendants' Rule 12(b)(6) motion because: (1) Eleventh Amendment immunity bars all of Harnden's claims against DHHS and the individual defendants in their official capacity; (2) the applicable statute of limitations bars all of Harnden's claims; and (3) no private cause of action for kidnapping exists under federal law. The district court overruled Harnden's timely objections, adopted the magistrate judge's report and recommendation in part, and granted the defendants' motion to dismiss.

On appeal, Harnden challenges each of the district court's bases for granting the defendants' Rule 12(b)(6) motion to dismiss.

We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 433 (6th Cir. 2008). In order to state a claim upon which relief may be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The district court properly dismissed Harnden's complaint. First, the Eleventh Amendment bars all of Harnden's claims against DHHS and the individual defendants in their official capacity. The Eleventh Amendment prohibits a suit brought in federal court against a State and its officials unless the State has expressly waived its sovereign immunity or unequivocally consented to be sued. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Cady v. Arenac County*, 574 F.3d 334, 342-43 (6th Cir. 2009); *Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008). The Eleventh Amendment protects a State official from suit for monetary

damages in his or her official capacity because “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.” *Will*, 491 U.S. at 71 (citation omitted); see *Pusey v. City of Youngstown*, 11 F.3d 652, 657-58 (6th Cir. 1993). The State of Michigan has not waived its sovereign immunity or consented to be sued in federal court. *Johnson v. Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)). Thus, as a state agency, DHHS and its officials are entitled to Eleventh Amendment immunity.

Second, all of Harnden’s claims are time-barred. Because § 1983 does not contain a statute of limitations, federal courts borrow the forum state’s statute of limitations for personal-injury actions, which in Michigan is three years. See Mich. Comp. Laws § 600.5805(10); *Carroll v. Wilkerson*, 782 F.2d 44, 44 (6th Cir. 1986). Although state law governs the length of the statute of limitations, federal law governs the accrual date. See *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007). We have held that “under § 1983, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury that is the basis of the action. ‘A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.’” *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009) (internal citation omitted); see also *Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001). “Stated differently, ‘[i]n determining when the cause of action accrues in § 1983 cases, we look to *the event* that should have alerted the typical lay person to protect his or her rights.’” *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007) (emphasis added) (quoting *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 856 (6th Cir. 2003)).

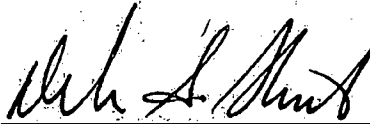
Harnden’s claims all stem from two child-abuse and neglect cases that DHHS filed in 2008 and 2010, respectively. Harnden acknowledges that both cases were officially closed on March 15, 2010, and her complaint does not allege that the defendants took any further action against her following this date. Harnden, however, did not file her complaint in the present matter until November 2016. Thus, regardless of whether Harnden should have been first alerted to protect her rights in 2008 or 2010, her complaint is untimely. Harnden contends that the three-year statute of limitations was tolled while the Michigan Attorney General’s Office and the

Federal Bureau of Investigation investigated her claims against DHHS. However, Harnden cites no legal authority that persuasively supports her argument that a civil case cannot be filed during an ongoing investigation.

Finally, Harnden contends that 18 U.S.C. § 3299 grants “an express right to private action” under federal law. However, § 3299 is a criminal statute and does not create a private cause of action. Although Harnden raises claims for kidnapping within her complaint, she failed to set forth the elements of any cause of action under any federal statute. The district court therefore properly dismissed Harnden’s kidnapping claim.

Accordingly, we **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

APPENDIX B

Decision of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Judge's Opinion & Order

Case No. 16-13906

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA S. HARNDEN,

Plaintiff,

Case No. 16-cv-13906

v.

HON. MARK A. GOLDSMITH

STATE OF MICHIGAN DEPARTMENT
OF HUMAN & HEALTH SERVICES, et al.,

Defendants.

OPINION & ORDER
OVERRULING PLAINTIFF'S OBJECTIONS (Dkt. 19), ACCEPTING THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Dkt. 18) IN PART,
AND GRANTING DEFENDANTS' MOTION TO DISMISS (Dkt. 10)

This matter is before the Court on the Report and Recommendation ("R&R") of Magistrate Judge Anthony P. Patti (Dkt. 18), which recommends granting Defendants' motion to dismiss (Dkt. 10). Plaintiff Pamela Harnden timely filed objections to the R&R (Dkt. 19), to which Defendants filed a response (Dkt. 20). Because oral argument will not aid the decisional process, the objections to the R&R will be decided based on the parties' briefing. See E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b).

For the reasons discussed fully below, the Court overrules Harnden's objections, accepts the recommendation contained in the R&R in part, and grants Defendants' motion to dismiss.

I. BACKGROUND

The factual and procedural background, along with the standard of decision and legal principles governing motions to dismiss, have been adequately set forth by the magistrate judge and need not be repeated here in full. In brief summary:

This is one of four lawsuits filed in this Court in pro per by Pamela Sue Harnden, in the past two years, stemming from actions taken by state and local child protective services officials and peace officers, resulting in the questioning and/or temporary removal of the Harndens' natural, adoptive and foster children. Plaintiff alleges that she and her husband ultimately prevailed at the conclusion of various state court proceedings which sought to remove the children from their care and custody. More specifically and pertinent to this motion, she alleges that March 15, 2010 — the date on which the government's second case against them was closed — “concludes the nightmare that we had lived for 17 months.”

5/31/2017 R&R at 2-3 (emphasis omitted).

II. STANDARD OF REVIEW

The Court reviews de novo any portion of the R&R to which a specific objection has been made. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Alspaugh v. McConnell, 643 F.3d 162, 166 (6th Cir. 2011) (“Only those specific objections to the magistrate’s report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have.”). Any arguments made for the first time in objections to an R&R are deemed waived. Uduko v. Cozzens, 975 F. Supp. 2d 750, 757 (E.D. Mich. 2013).

III. DISCUSSION

A. Doctrine of Sovereign Immunity

In the R&R, the magistrate judge first concluded that the Michigan Department of Health and Human Services enjoys sovereign immunity under the Eleventh Amendment and, as such, any claims asserted against the Department should be dismissed without prejudice because the Court lacks subject matter jurisdiction. R&R at 15. The magistrate judge reached the same

conclusion for any claims against the 13 individual Defendants to the extent that they were sued in their official capacities as government employees. Id. at 16-17.¹

Harnden objects to these conclusions for several reasons.² Harnden first argues that Defendants are not entitled to sovereign immunity under the plain language of the Eleventh Amendment. Pl. Objs. at 2. Specifically, Harnden states that, because she is a citizen of the State of Michigan, the Eleventh Amendment does not bar her suit against a Michigan government agency and its employees in either their official or individual capacities. Id. Citing Ex parte Young, 209 U.S. 123 (1908), Harnden then contends that government employees are not shielded by sovereign immunity “when those employees act outside of their official capacity.” Pl. Objs. at 3. According to Harnden, the allegations in the complaint sufficiently demonstrate that the individual Defendants are liable in their individual capacities. Id. Harnden also argues that the Court has subject matter jurisdiction under 42 U.S.C. § 1983 because “it has been determined that it is proper to bring charges against any offender, no matter their job description, and in both their official and individual capacities.” Id. at 13 (appearing to cite to O’Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004)). Finally, Harnden argues that the doctrine of sovereign immunity does not bar her daughter S.H.’s claims because the Court “previously ruled that her claims have merit as to immunity” when the Court dismissed those claims without prejudice in a different case. Id. at 2.

¹ The individual Defendants include Williams Weston, Joseph Linert, Jennifer Hutkowski, Marnie DeBell, Sarah Meddaugh, Kim Irwin, Chiquita Ford-White, Samantha Pietrykowski, Mandy Dalrymple, Amy Sherrod, Christina Moses, Jennifer Henderson, and Melisa Hazen. Although Harnden does not clearly identify the titles or responsibilities for each of these Defendants, they all appear to be employees of the Michigan Department of Health and Human Services or some other state agency.

² Because the arguments raised in Harnden’s first, second, and tenth objections all concern the applicability of the doctrine of sovereign immunity, they will be considered together for purposes of this opinion.

Upon de novo review, the Court agrees with the magistrate judge. “Sovereign immunity is the privilege of the sovereign not to be sued without its consent.” Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 253 (2011). The Eleventh Amendment, which specifically bars “any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,” U.S. Const. amend. XI, confirmed “the structural understanding that States entered the Union with their sovereign immunity intact,” Stewart, 563 U.S. at 253. Because sovereign immunity applies to state agencies, as well as state officials sued in their official capacities, Will v. Mich. Dep’t of State Police, 491 U.S. 58, 70-71 (1989); Kentucky v. Graham, 473 U.S. 159, 166 (1985), the Michigan Department of Health and Human Services and the individual Defendants (to the extent those government officials were sued in their official capacities) are immune from suit under the Eleventh Amendment. See Brent v. Wayne Cnty. Dep’t of Human Servs., No. 11-10724, 2014 WL 3956730, at *3 (E.D. Mich. Aug. 13, 2014) (“Federal district courts within the State of Michigan have repeatedly determined that county offices of the Department of Human Services are arms of the state.”).³ The U.S. Supreme Court

³ When a suit is brought against a state official, the “question arises as to whether that suit is a suit against the State itself.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984). In general, state sovereign immunity extends to a state official who is sued for money damages in his or her official capacity. Will, 491 U.S. at 71; Cory v. White, 457 U.S. 85, 89-91 (1982); Edelman v. Jordan, 415 U.S. 651, 663 (1974). This is because such suits “generally represent only another way of pleading an action against an entity of which an officer is an agent,” and, therefore, they “should be treated as suits against the State.” Hafer v. Melo, 502 U.S. 21, 25 (1991).

On the other hand, the Eleventh Amendment provides no immunity against officers in their individual and personal capacities. Id.; Hutsell v. Sayre, 5 F.3d 996, 1003 (6th Cir. 1993). Unlike official-capacity suits, which seek “to impose a liability which must be paid from public funds in the state treasury,” Edelman, 415 U.S. at 663, relief in individual-capacity suits is sought from the official’s personal assets, see, e.g., Graham, 473 U.S. at 166-168; Scheuer v. Rhodes, 416 U.S. 232, 238 (1974); Ford Motor Co., 323 U.S. at 462. Whether or not an official can be sued in his or her individual capacity does not depend on whether the official was acting outside the scope of his or her employment. See Larson v. Domestic & Foreign Commerce

has also held that the doctrine of sovereign immunity extends to suits brought against a state by one of its own citizens. Hans v. Louisiana, 134 U.S. 1, 15 (1890). Thus, insofar as Harnden argues that the Eleventh Amendment does not bar her suit because she is a citizen of Michigan, her contention lacks merit.

There are three exceptions to a state's sovereign immunity: (i) when the state has consented to suit; (ii) when Congress has properly abrogated a state's immunity; and (iii) when the exception first set forth in Ex parte Young applies. See S & M Brands, Inc. v. Cooper, 527 F.3d 500, 507 (6th Cir. 2008). The State of Michigan has not expressly consented to suit in this case, and Congress did not abrogate Michigan's immunity here. Although Harnden cites to Ex parte Young in her objections, that exception is not applicable in this case.

Under the Ex parte Young exception, federal courts may, consistent with the Eleventh Amendment, entertain suits seeking prospective equitable or declaratory relief for violations of federal law against a state officer sued in his or her official capacity. Caspar v. Snyder, 77 F. Supp. 3d 616, 633 (E.D. Mich. 2015) (citing Will, 491 U.S. at 71 n.10); see also Johnson v. Unknown Dellatifa, 357 F.3d 539, 545 n.1 (6th Cir. 2004) (plaintiff can avoid the "sovereign immunity bar by suing for injunctive or declaratory relief, rather than monetary relief"). Harnden is not seeking any prospective equitable or declaratory relief. See generally Compl. (Dkt. 1-1). Rather, she is seeking only monetary relief in the amount of \$100,000,000. Id. at 126. Therefore, the Ex parte Young exception is not applicable in this case.

Harden's reliance on O'Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004), fares no better. Although the court denied summary judgment for the Ingham County Child Protective Services caseworkers on the individual-capacity claims in that case, it agreed with those

Corp., 337 U.S. 682, 714 (1948); Harrington v. Grayson, 764 F. Supp. 464, 468 (E.D. Mich. 1991).

defendants that any claims against them in their official capacities under § 1983 would be barred by the Eleventh Amendment. Id. at 829; see also id. at 815 (dismissing official-capacity claims against City of Lansing police officers).

Finally, although Harnden is correct that this Court previously dismissed her daughter S.H.'s claims without prejudice, in part, because those claims were subject to Michigan's infancy saving provision, see Harnden v. Croswell-Lexington Cmty. Schs., No. 15-cv-12738, 2016 WL 2731188, at *4-6 (E.D. Mich. May 11, 2016), the Court expressed no opinion as to whether those claims had merit in general, or whether the defendants in that case were similarly immune under the Eleventh Amendment in particular. Moreover, Harnden, as an individual plaintiff, cannot represent the interests of others. See Warth v. Seldon, 422 U.S. 490, 499 (1975) ("[T]he plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). S.H. is not a party to this action and a ruling on her claims at this juncture would amount to an advisory opinion, which the Court cannot provide. See Fialka-Feldman v. Oakland Univ. Bd. of Trustees, 639 F.3d 711, 715 (6th Cir. 2011) ("The 'case or controversy' requirement prohibits all advisory opinions, not just some advisory opinions, and not just advisory opinions that hold little interest to the parties or the public.").⁴

Therefore, the Court concludes that the Eleventh Amendment bars suit against the Michigan Department of Health and Human Services and the individual Defendants in their official capacities. Because no exception to sovereign immunity applies in this case, the Court lacks subject matter jurisdiction over these claims. See Russell v. Lundergan-Grimes, 784 F.3d

⁴ Even if S.H. were a party to this matter, Harnden still could not represent her. See Thompson v. Mohammed, No. 13-CV-12388, 2013 WL 4747537, at *1 (E.D. Mich. Sept. 4, 2013) ("The law is well settled that a parent may not represent the interests of a minor child pro se because a minor's personal cause of action is her own. . . . While Federal Rule of Civil Procedure 17(c) allows the guardian of an incompetent person to sue on the incompetent's behalf, the rule does not allow the guardian to appear pro se.").

1037, 1046 (6th Cir. 2015) (holding sovereign immunity, guaranteed under the Eleventh Amendment, “deprives federal courts of subject-matter jurisdiction when a citizen sues his own State unless the State waives its immunity or Congress abrogates that sovereign immunity”). Harnden’s objections on this issue lack merit and are overruled.

Although the individual Defendants are entitled to sovereign immunity under the Eleventh Amendment in their official capacities, they are not entitled to sovereign immunity for the claims asserted against them in their personal capacities. Nonetheless, those claims will be dismissed for the reasons discussed below.

B. No Private Right of Action for “Kidnapping” Under Any Federal Statute

In the R&R, the magistrate judge concluded that there is no private cause of action for kidnapping under federal statutory law. See R&R at 1, 10, 23. Harnden’s reliance on 18 U.S.C. § 3299, which states that, “[n]otwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim,” did not alter the magistrate judge’s conclusion because that “statute relates to the time frame for filing a criminal indictment or information; it has nothing to do with civil actions.” R&R at 23 (emphasis in original).

Harnden objects to these conclusions and maintains that there is a private right of action for kidnapping under federal statutory law.⁵ Harnden recognizes that the Federal Kidnapping Act, 18 U.S.C. § 1201, defines the act of kidnapping and “does not contain language in regards to the civil action.” Pl. Objs. at 15. However, Harnden argues that § 3299, which she states “falls under the umbrella of § 1201,” does “contain [a] civil action for kidnapping.” Id.

⁵ Because the arguments raised in Harnden’s fourth, ninth, twelfth, thirteenth, and fourteenth objections all concern Harnden’s purported kidnapping claim, they will be considered together for purposes of this opinion.

According to Harnden, the language of § 3299 “expresses two different options for kidnapping” — an “indictment” (civil) “or” an “information” (criminal). See id. at 5 (emphasis omitted). Harnden contends that “indictment” should be interpreted in accordance with a definition she found on Google as “a thing that serves to illustrate that a system or situation is bad and deserves to be condemned.” Id. at 5, 14. Based on this definition, Harnden states that an indictment is civil, not criminal, because “[i]t does not make sense to utilize the word ‘or’ if both subjects in the same sentence were the same (criminal).” Id. at 5; see also id. at 14 (stating that her “previous case did not contain the theory under § 3299 and the obvious civil action allowed as evidenced by the definition of indictment and the conjoining word ‘or’”).

Upon de novo review, the Court agrees with the magistrate judge; there is no private right of action for kidnapping under any federal statutory law. See Harnden, 2016 WL 2731188, at *2 (collecting cases). Overlooking the fact that Harnden never claimed that she herself was kidnapped, as opposed to her children (who are not parties to this action), Harnden’s new “theory” that a private right of action is found in § 3299 lacks merit.

Harnden fails to appreciate the legal difference between an indictment and an information. On the one hand, an indictment is a “formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.” Black’s Law Dictionary 842 (9th ed. 2009); see also Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 221 (2008) (Thomas, J., dissenting) (“Blackstone defined an ‘indictment’ as ‘a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.’”); United States v. Fawcett, 115 F.2d 764, 767 (3d Cir. 1940) (same); cf. U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger. . . .” (emphasis added)).⁶ On the other hand, an information is a “formal criminal charge made by a prosecutor without a grand-jury indictment.” Black’s Law Dictionary 849 (9th ed. 2009). Because an indictment and an information are two distinct methods of initiating a criminal proceeding, see Rothgery, 554 U.S. at 198 (“[T]he initiation of adversary judicial criminal proceedings . . . [commence] by way of formal charge, preliminary hearing, indictment, information, or arraignment.”), Congress’s use of the conjunction “or” was entirely appropriate when drafting § 3299 and does not suggest the creation of a civil cause of action for kidnapping.

Furthermore, Harnden does not provide any evidence that Congress meant anything other than the traditionally understood legal definition of indictment when it drafted § 3299 of the federal criminal code, or that a different definition of indictment, such as one Harnden found on Google, should control in this case. Nor does Harnden argue that, in addition to a private right, § 3299 also creates a private remedy. See Alexander v. Sandoval, 532 U.S. 275, 286-287 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.”). Therefore, Harnden’s objections lack merit and are overruled.

⁶ The Merriam-Webster Dictionary also defines “indictment” as a “formal written statement framed by a prosecuting authority and found by a jury (such as a grand jury) charging a person with an offense.” Indictment Definition, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/indictment> (last visited July 21, 2017).

C. Time-Barred Claims

In the R&R, the magistrate judge concluded that Harnden's remaining claims are barred by the applicable statute of limitations. R&R at 19-20. In analyzing Harnden's federal claims brought under 42 U.S.C. § 1983, the magistrate judge properly borrowed Michigan's three-year limitations period for personal-injury claims. Id. at 20. The magistrate judge also applied the three-year limitations period for any purported state-law claims for gross negligence. Id. at 24-25. The magistrate judge then found that Harnden's complaint described Defendants' actions as occurring from October 2008 through March 2010 (at the latest), and that Harnden knew or had reason to know of the alleged acts and the resulting injuries at that time. Id. at 20, 25. Because the complaint was filed on November 3, 2016 — over three years after the statute of limitations had run — the magistrate judge concluded that Harnden's claims were time-barred. Id. The magistrate judge also noted that a criminal investigation initiated by Harnden neither delayed nor tolled the limitations period. Id. at 20-22.

Harnden does not object to the length of the statute-of-limitations period for either her § 1983 claims or the gross-negligence claims. She also concedes that she knew or had reason to know of the alleged bad actions of Defendants and the resulting injuries during the timeframe identified in the R&R. Pl. Objs. at 13. Nevertheless, Harnden objects to the magistrate judge's conclusions, arguing that she could not initiate her civil action until the conclusion of the criminal investigation, which "came to an end November 12, 2014." Id. at 14; see also id. at 4 (claiming that she was informed "by all attorneys" that "a civil case cannot be filed during a

criminal case as it would not only interfere with the investigation it would also compromise the civil rights of all parties involved”).⁷

Upon de novo review, the Court agrees with the magistrate judge that Harnden’s remaining claims are barred by the statute of limitations, and that any criminal investigation did not toll that time period. The question of when a federal civil rights claim accrues is one of federal law. Harnden, 2016 WL 2731188, at *4. “In general, a civil rights claim for relief accrues when the plaintiff knows or has reason to know of the injury that is the basis of his action,” the latter of which the plaintiff “should have discovered . . . through the exercise of reasonable diligence.” Id. (quoting Bowden v. City of Franklin, Ky., 12 F. App’x 266, 273 (6th Cir. 2001)). As noted above, Harnden acknowledges that she was aware of the actions giving rise to the present action, which ceased on March 15, 2010. As such, Harden had until March 15, 2013 to file her lawsuit. She did not. Instead, she waited until November 3, 2016 — over three years after the statute of limitations had run.

For Harnden’s claims to still be timely, the limitations period must have been tolled. Tolling principles are governed by state law. Id. (citing Bowden, 12 F. App’x at 272-273). “[T]he Michigan Court of Appeals has held that a pending criminal matter does not toll the time to file a civil action.” Id. (citing Attorney Gen. v. Harkins, 669 N.W.2d 296, 302 (Mich. Ct. App. 2003); Runions v. Auto-Owners Ins. Co., 495 N.W.2d 166, 168 (Mich. Ct. App. 1992)). Harden has not provided any Michigan authority reaching the opposite conclusion.⁸ Therefore, Harnden’s objections lack merit and are overruled.

⁷ Because the arguments raised in Harnden’s third and eleventh objections all concern the statute of limitations and any tolling or delay regarding a criminal investigation, they will be considered together for purposes of this opinion.

⁸ Harnden cites non-binding authority for the proposition that a court has the discretion to stay civil proceedings pending criminal proceedings. As the magistrate judge correctly pointed out in

D. Case Reassignment

At the outset of the R&R, the magistrate judge noted that, in addition to the present action, Harnden's two other pending cases — Nos. 16-cv-13904 and 16-cv-13905, both of which were filed on the same day as the present case — were also reassigned to him and the undersigned. R&R at 2 n.1.

In her objections, Harnden argues that reassignment of this case to the undersigned violated Local Rule 83.11(b)(2)-(3), because the parties were not offered an opportunity to respond and no hearing was held prior to reassignment. Pl. Objs. at 6. The Court construes Harnden's objection as a motion for reconsideration of the reassignment order. See Dietrich v. Patti, 2016 WL 3682957, at *3 (E.D. Mich. July 12, 2016) (construing the plaintiff's "objection" to the reassignment of the case as a motion for reconsideration).

Pursuant to Local Rule 7.1(h), a motion for reconsideration must be filed within fourteen days after the entry of the judgment or order. E.D. Mich. LR 7.1(h)(1). A party seeking reconsideration must demonstrate (i) a "palpable defect" by which the court and the parties have been "misled," and (ii) that "correcting the defect will result in a different disposition of the case." Id. A "palpable defect" is an error that is "obvious, clear, unmistakable, manifest or plain." United States v. Cican, 156 F. Supp. 2d 661, 668 (E.D. Mich. 2001).

This case was reassigned from Judge Nancy Edmunds to the undersigned on March 3, 2017, because the case "appeared to be a companion case" to Harnden's first action, No. 15-cv-

the R&R, however, the concept of a stay "is inapplicable here, as there was no pending civil suit for which she could have sought a stay during the pendency of the criminal investigation." R&R at 22 n.7; see also id. at 9 n.4 ("[T]he line of cases to which Plaintiff cites do not stand for the proposition that plaintiffs are barred from filing civil cases during the pendency of a criminal action, and merely address the court's ability to stay such a case once it has been filed. The cases to which she cites, therefore, have no bearing on the instant matter." (emphasis in original)).

12738. 3/27/2017 Order (Dkt. 16). Because Harden's objection was filed beyond the fourteen days required under the Local Rule, it is untimely. Nevertheless, even if the Court were to consider the merits of the objection, Harnden has not demonstrated a palpable defect by which the Court was misled, nor has she shown that correcting any defect would have resulted in a different outcome.

Local Rule 83.11(b) provides eight different situations in which a civil case may be reassigned, including the existence of "companion cases," which are defined as "cases in which it appears that: (i) substantially similar evidence will be offered at trial, or (ii) the same or related parties are present and the cases arise out of the same transaction or occurrence" E.D. Mich. LR 83.11(b)(7)(A)(i)-(ii). Because all of her lawsuits stem from actions taken by state and local child protective services officials and peace officers, which allegedly resulted in the questioning and/or temporary removal of the Harndens' natural, adoptive, and foster children, the cases clearly arise out of the same transaction or occurrence, and substantially similar evidence will be offered at trial. Therefore, Harnden's cases qualify as companion cases under the Local Rule.⁹

Local Rule 83.11(b) further provides that, "[w]hen it becomes apparent to the Judge to whom a case is assigned and to a Judge having an earlier case number that two cases are companion cases, upon consent of the Judge having the earlier case number, the Judge shall sign an order reassigning the case to the Judge having the earlier case number." E.D. Mich. LR 83.11(b)(7)(D). In this case, it became apparent to both Judge Edmunds and the undersigned that this case is a companion to Harden's earlier case. The undersigned thereafter consented to

⁹ The fact that Harnden's previous case has been terminated does not alter this fact. See E.D. Mich. LR 83.11(b)(7)(B) ("Cases may be companion cases even though one of them has been terminated.").

reassignment. Notably, the Local Rule does not require either an opportunity to respond or a hearing before companion cases are reassigned.

Therefore, Harnden's objection to the reassignment of the instant case to the undersigned is overruled, and any perceived request to have the case reassigned back to Judge Edmunds is denied.

E. Factual Disagreements

In her sixth, seventh, and eighth objections, Harnden challenges several of the magistrate judge's factual assertions.¹⁰ However, Harnden never explains how correcting any of these facts would alter the magistrate judge's legal conclusions in the R&R or result in a different outcome. As such, these objections lack merit and are overruled.

F. Enjoining Harnden from Future Filing Without Leave or Pre-Filing Screening

In the R&R, the magistrate judge recommended that this Court consider enjoining Harnden from filing any further lawsuits without leave of the Court or pre-filing screening because the "allegations and arguments made herein make clear that Plaintiff has not assimilated, or worse yet has ignored, this Court's prior rulings on the dispositive issues addressed herein." R&R at 25-26; see also id. at 2 n.1 (same).

In her fifteenth objection, Harnden takes issue with this recommendation, which she considers as "attacking [her] character." Pl. Objs. at 16. Harnden acknowledges that she made "many mistakes . . . in the previous case," but states that she has "not ignored the Court's

¹⁰ For example, the magistrate judge noted that the complaint made a passing reference to the kidnapping of "Bobby," which he believed to be a reference to Harnden's husband Robert, and then stated that Harnden could not pursue claims on behalf of other people. See R&R at 5 n.3. In her objections, Harnden states that "Bobby" refers to her son, not her husband, and suggests that the magistrate judge may be "plant[ing] evidence that could possibly taint future jurists' opinions." Pl. Objs. at 8. Although she contends that her "son was kidnapped from [her]," Harnden states that she is "not representing anyone other than [herself] in this Complaint." Id. at 9.

previous rulings” and she has “learned (and [she is] still learning) from them” Id. at 17. Harnden also argues that enjoining her would “violate [her] rights as a citizen of this Country.” Id. at 16. Defendants have not taken any position regarding this issue. See Defs. Resp. at 7.

The Court possesses the inherent authority to enjoin vexatious litigants from filing future pleadings without first obtaining court approval to do so. See Feathers v. Chevron U.S.A., Inc., 141 F.3d 264, 269 (6th Cir. 1998) (“There is nothing unusual about imposing prefiling restrictions in matters with a history of repetitive or vexatious litigation.”); Filipas v. Lemons, 835 F.2d 1145, 1146 (6th Cir. 1987) (entering an order requiring leave of court before the plaintiffs filed any further complaints was “the proper method for handling the complaints of prolific litigators”); see also Wrenn v. Vanderbilt Univ. Hosp., 50 F.3d 11 at *3 (6th Cir. 1995) (table) (“This court has the authority to enjoin harassing litigation under its inherent authority and the All Writs Act, 28 U.S.C. § 1651(a).”); Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1524 (9th Cir. 1983) (“The general pattern of litigation in a particular case may be vexatious enough to warrant an injunction in anticipation of future attempts to relitigate old claims.”). Nevertheless, upon de novo review, the Court believes that such a drastic remedy is not needed at this time. The Court is confident that a warning should suffice. Should Harnden continue to file frivolous complaints concerning the same claims that have been raised and litigated or could have been raised and litigated in prior proceedings, however, the Court will reconsider imposing a pre-filing review requirement, as well as any other sanctions that may be appropriate.

IV. CONCLUSION

For the reasons stated above, Harnden’s objections (Dkt. 19) are overruled, the recommendation contained in the R&R (Dkt. 18) is accepted in part, and Defendants’ motion to

dismiss (Dkt. 10) is granted. Any claims against the Michigan Department of Health and Human Services and the individual Defendants in their official capacities are dismissed without prejudice. All remaining claims are dismissed with prejudice.

SO ORDERED.

Dated: July 31, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 31, 2017.

s/Karri Sandusky
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA S. HARNDEN,

Plaintiff,

Case No. 16-cv-13906

v.

HON. MARK A. GOLDSMITH

STATE OF MICHIGAN DEPARTMENT
OF HUMAN & HEALTH SERVICES, et al.,

Defendants.

JUDGMENT

Judgment is entered in accordance with the opinion and order entered on today's date.

Plaintiff's complaint is dismissed with prejudice.

Dated: July 31, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 31, 2017.

s/Karri Sandusky
Case Manager

APPENDIX C

Decision of the

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Magistrate Judge's Report and Recommendation

Case No. 16-13906

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA SUE HARNDEN,

Plaintiffs,

v.

Case No. 2:16-cv-13906

District Judge Mark A. Goldsmith

Magistrate Judge Anthony P. Patti

STATE OF MICHIGAN
DEPARTMENT OF HUMAN
AND HEALTH SERVICES, *et al.*,

Defendants.

REPORT AND RECOMMENDATION TO GRANT DEFENDANTS'
MOTION TO DISMISS (DE 11)

I. **RECOMMENDATION:** The Court should grant Defendants' motion to dismiss. The claims against the State of Michigan Department of Human and Health Services f/k/a the Family Independence Agency (HHS) should be dismissed without prejudice because the claims against it are barred by sovereign immunity under the Eleventh Amendment of the United States Constitution. Likewise, the claims against state government employees, to the extent they are alleged against them in their official capacities, should be dismissed without prejudice based on sovereign immunity. All other claims should be dismissed with prejudice because they are barred by the applicable statutes of limitation and because there is no private cause of action for kidnapping under federal statutory law.

Appendix C

II. REPORT

A. Introductory Background

This is one of four lawsuits filed in this Court *in pro per* by Pamela Sue Harnden, in the past two years, stemming from actions taken by state and local child protective services officials and peace officers, resulting in the questioning and/or temporary removal of the Harndens' natural, adoptive and foster children.¹ Plaintiff alleges that she and her husband ultimately prevailed at the conclusion of various state court proceedings which sought to remove the children from their care and custody. More specifically and pertinent to this motion, she alleges that **March 15, 2010**—the date on which the government's second case against them

¹ The other lawsuits include Case Nos. 15-12738, 16-13904, and 16-13905, the latter two of which were filed on the same day as the instant lawsuit, namely November 3, 2016. Since motions for dismissal of the two simultaneously docketed lawsuits were not filed until considerably later than the instant motion, they will be addressed under separate cover in the future. All of these cases have been assigned or reassigned Judge Goldsmith and the Undersigned. The proliferation of litigation stemming from this same series of incidents, pursued in several different lawsuits, at least two of which have suffered from fatal legal defects, raises the question of whether the Court should consider enjoining Plaintiff from filing any further lawsuits without leave or pre-filing screening. *See Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996); *Feathers v. Chevron U.S.A. Inc.*, 141 F.3d 264, 269 (6th Cir. 1998); *Dietrich v. Patti*, No. 16-11469, 2016 WL 3682957, at *5 (E.D. Mich. July 12, 2016) (Hood, C.J.).

was closed—“concludes the nightmare that we had lived for 17 months.” (DE 1 at 1, 113-115.)²

In her 2015 lawsuit concerning these events, filed by Plaintiff and her husband for themselves and “on behalf of their then minor children,” against the children’s school district, various officials therein, and the local police department, she alleged kidnapping under the Federal Kidnapping Act, 18 U.S.C. § 1201, as well as various constitutional violations, which were construed as being brought pursuant to 42 U.S.C. § 1983. (15-12738, hereinafter referred to as the “Prior Lawsuit”.) Upon my report and recommendation, which was adopted by Judge Goldsmith while overruling Plaintiff’s objections thereto, the Prior Lawsuit was dismissed on May 11, 2016, *inter alia*, because there is no private right of action for kidnapping and because all of Plaintiff’s claims were barred by the applicable statutes of limitation. (DE 29 therein.) Undaunted by this Court’s pronouncements in that case, Plaintiff filed the instant matter slightly less than six months later, asserting the same claims against new parties. These new defendants have likewise moved for dismissal on various grounds, including sovereign immunity, qualified immunity, and because the claims are time-barred. For the reasons that follow, this case, like the prior one, should be dismissed.

² References to the plaintiff’s pleadings are by page number only, as the 127 page complaint is not broken down into numbered paragraphs.

B. Background, as Plead

1. Form of the Pleadings and Claims Alleged

Unlike her Prior Lawsuit – and despite the fact that the pleading is captioned with the identifier “Plaintiffs” in the plural and commences with the words “We (Robert and Pamela Harnden)” — the only named plaintiff in this case is Pamela Suzanne Harnden, the biological, adoptive or foster mother of the various children whose welfare was at issue in the underlying proceedings. Notably, she is also the only one who signed the complaint, with her lone signature appearing both on the cover page as well as on page 127, at the conclusion. Although broken down into what she styled as eight “counts,” these appear to merely serve as subheadings for the various sections of her factual allegations under the bigger section called “Kidnapping,” relating to each child individually, more akin to a criminal indictment. The legal claims, as identified through additional, boldfaced headings and as best construed through this Court’s own scrutiny, appear to include: Kidnapping (under 18 U.S.C. § 1201) and “Gross Negligence and Civil Right Violations.” (DE 1 at 11 & 40.) The complaint also contains a major section titled “Brief in Support” at pages 116 through 126. Within that section, Plaintiff explains that the civil rights violations of which she complains include violations of the

Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.³ She seeks reparations in the amount of \$100 million. (DE 1 at 126.)

Her pleadings grossly violate the procedural requirement that they be “simple, concise and direct,” Fed. R. Civ. P. 8(d), and go well beyond the “notice pleading” method which is applied in federal court; however, for purposes of this motion and taking into account Plaintiff’s *pro se* status, I have chosen to largely overlook this defect and have done my best to “construe” her pleadings “so as to do justice.” Fed. R. Civ. P. 8(e). Tellingly, these pleadings expend considerable space addressing the issues of governmental immunity and the statute of limitations, arguing that while “an express private right of action” for kidnapping “is not written in the laws,” this should be overlooked (in this particular lawsuit) because “they aren’t expressly denied either.” (DE 1 at 5-6, 11, 39.) Such “allegations” demonstrate a keen awareness of this Court’s previous rulings on those issues, in apparent anticipation of the instant motion.

³ There is also a passing reference to her husband’s “false arrest,” although it is unclear whether this is meant to allege a separate common law claim or is simply given as an example of due process civil rights violations. (DE 1 at 120-121.) In any case, her husband is not a party to this case, this plaintiff has no standing to pursue such a claim on his behalf, and the Court will therefore not expend any further resources analyzing this issue, Plaintiff having previously been warned that, as a non-attorney, she may not pursue claims on behalf of other people. (Case No. 15-12738, DE 29 at 3 therein.)

2. Factual Substance of the Pleadings

For purposes of this motion, it is not necessary to review the factual allegations in great detail. In reviewing a motion to dismiss under Rule 12, Plaintiff's factual allegations are assumed to be true. If in fact they are true, Plaintiff has generally alleged what she has accurately described as a "nightmare" (DE 1 at 1), namely, a several year battle with government officials, based upon false accusations of child neglect and abuse, all of which terminated in her and her husband ultimately being vindicated through multiple administrative and judicial proceedings. (DE 1 at 1, *passim*.) While weathering this storm, Plaintiff alleges that she had to deal with the temporary removal of her children, false accusations of sexual abuse made by an extremely troubled foster daughter against Plaintiff's husband, and his consequent false arrest. Most pertinent to the Court's present consideration are the alleged dates of these events and the identities of the various parties.

Of particular interest to the Court for purposes of this motion are the following allegations, contained in the opening section of the complaint (DE 1 at 2), under the subheading "Nature of Grievance: Kidnapping, Gross Negligence, Civil Right Violations[:]"

The allegations arose from continued abuse of our family by the Michigan Department of Human Services, Saint Clair County Prosecutor's Office and Saint Clair County 31st Circuit Court. An abuse/neglect case (08-497) was opened on October 22, 2008 and a

concurrent second case (given the same case number: 08-497) was opened January 14, 2010, [and] **both cases were closed March 15, 2010.**

(Emphasis added.)

The complaint goes on to explain in great detail—for 112 pages and with multiple specific dates provided—a series of events, starting with an October 1, 2008 court order and ending with the closure of both cases in March 2010. (DE 1 at 13-115.) Nearly all of these events occurred in 2008 or 2009, for example a foster review board hearing on March 4, 2009, a jury trial on July 21, 2009, an interrogation of the children despite contrary advice from the prosecutor on January 4, 2010, several court hearings, and multiple child protective services reviews throughout this period. (DE 1 at 13, 75, 91, 105, *passim*.)

Mr. and Mrs. Harnden fought back against the perceived harassment of their family by the various government agencies, apparently emboldened by a conversation or conversations they had with St. Clair County Prosecutor Michael Wendling, in which he allegedly told them that his office was “thick as thieves” internally and that it was “kind of thick as thieves” with HHS. (DE 1 at 2, 114.) Plaintiff alleges that on January 11, 2010, she and her husband “took our case to the Federal Bureau of Investigation . . . with the allegations of kidnapping, perjury and wrong-doing in the court.” (DE 1 at 1.) The FBI is alleged to have opened the case on their behalf and made a referral to the Michigan State Police (MPS) to

conduct an investigation. (Id.) Thereafter, an MPS trooper allegedly advised Plaintiff's family "to move out of the country for [their] personal safety" (Id.) Plaintiff contacted the Michigan Attorney General's Office on November 25, 2010 and was "advised to seek local remedies first and if unsuccessful" to then re-contact that office. (Id.) Plaintiff and her husband attempted to leave their "criminal complaints" with the Michigan Attorney General's Office, which "took receipt" of them on October 31, 2011 and assigned them a case number (2011-00031278-A) on January 9, 2012; however, a division chief of that office denied pursuit of the case on March 1, 2012, due to the FBI's concurrent involvement. (DE 1 at 3.) The Harndens again went to the FBI on March 6, 2012, since the local and state law enforcement agencies "refused to investigate...and the FBI could take jurisdiction under the RICO act" (DE 1 at 3-4.)

According to Plaintiff, her attempts to have the harassment of her family and the violation of her civil rights prosecuted criminally came to an end on **November 12, 2014**, when FBI Agent Christenson called to inform them "that since the United States Attorney's Office continued to refuse the issuance of warrants for a full investigation and possible arrest, she was obligated to close our case with instruction to contact her if any future issues arise." (DE 1 at 4.) As discussed below, Plaintiff looks to this date—the conclusion of the FBI's involvement—as

the date on which her claims accrued, or alternatively, as the date through which the pertinent statutes of limitation were tolled. In her own words:

Due to the gathering and attempted gathering of evidences [sic] for criminal charges we were unable to file our civil matters.⁴ As the FBI discontinued the pursuit of criminal charges less than two years ago, **we are within all statute of limitations [sic] for all civil matters that follow or will be discovered during the commission of this complaint.**

(DE 1 at 4 (emphasis in original).)

3. The Instant Motion

Defendants have filed the instant motion to dismiss in lieu of an answer under Fed. R. Civ. P. 12(b)(6). (DE 10.) Plaintiff has filed a response (DE 14) and Defendants have replied. (DE 15.) The Court has reviewed each of these filings, along with the complaint. Defendants argue that this case should be dismissed for several reasons. First, they argue that the claims against the State of Michigan and

⁴ Plaintiff attempts to argue that she was unable to file her civil case because the court has the discretion to stay civil cases pending the outcome of criminal proceedings. (DE 14 at 12, citing to, among others, *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980). However, that case also states that “[t]he Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.” *Id.* at 1375. Moreover, the line of cases to which Plaintiff cites do not stand for the proposition that plaintiffs are *barred* from filing civil cases during the pendency of a criminal action, and merely address the court’s *ability* to stay such a case once it has been filed. The cases to which she cites, therefore, have no bearing on the instant matter.

its employees in their official capacities are barred by sovereign immunity under the Eleventh Amendment. Second, they argue that this lawsuit is simply a challenge to state court judgments, and as such, this Court lacks jurisdiction to consider them under the Rooker-Feldman doctrine. Third, they argue that the claims are all time-barred. Fourth and fifth, they assert that Plaintiff cannot overcome absolute quasi-prosecutorial immunity and/or qualified immunity. Sixth, they argue the plaintiff fails to state a claim for gross negligence under state law, and that governmental immunity bars any intentional tort claims. Somehow, they give little if any attention to the fact that there is no private right of action for kidnapping, apparently unaware of this Court's prior rulings.

In the Undersigned's view, it is unnecessary and indeed improper for the Court to analyze each of these issues in its ruling, as the State of Michigan and all of its agents, to the extent that the latter are alleged to have been acting in their official capacities, are shielded by sovereign immunity. Thus, the Court lacks subject matter jurisdiction to consider such claims on their merits. Moreover, as noted by this Court in the Prior Lawsuit with respect to similar claims made by Mrs. Harnden, all of her claims are barred by the applicable statutes of limitation, which ran long ago, notwithstanding her argument that the claims either did not accrue or were tolled until November 2014. Finally, and as also previously noted by this Court, there is no private cause of action for kidnapping.

C. Discussion

1. Motions to Dismiss under Rule 12(b)(1) and 12(b)(6)

Defendants bring their motion pursuant to Fed. Rules Civ. P. 12(b)(1) and 12(b)(6). As the Sixth Circuit has explained: “the primary difference between Rule 12(b)(1) and 12(b)(6) motions is not in the procedures used but in the effect the ruling will have upon the parties.” *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Specifically, “dismissals for lack of jurisdiction should generally be made without prejudice.” *Ernst v. Rising*, 427 F.3d 361, 367 (6th Cir. 2005).

a. Rule 12(b)(1)

Rule 12(b)(1) permits a party to file a motion for “lack of subject-matter jurisdiction[.]” Such a motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists.” *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). “When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. In addition, the district court is empowered to resolve factual disputes when necessary to resolve challenges to subject matter jurisdiction.” *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th

Cir. 1996) (internal and external citations omitted). Here, there is no need to resolve factual disputes, and the question may be considered on the face of the complaint, all of Plaintiff's allegations being taken as true.

b. Rule 12(b)(6)

When deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must “construe the complaint in the light most favorable to plaintiff and accept all allegations as true.” *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (concluding that a plausible claim need not contain “detailed factual allegations,” but it must contain more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action”). Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant’s conduct.” *16630 Southfield Ltd., P’Ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013).

c. Pro se Pleadings

Furthermore, the Court holds *pro se* complaints to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, even in pleadings drafted by *pro se* parties, ““courts should not have to guess at the nature of the claim asserted.”” *Frengler v. Gen. Motors*, 482 F. App’x 975, 976-77 (6th Cir. 2012) (quoting *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989)). Furthermore, “courts may not rewrite a complaint to include claims that were never presented . . . nor may courts construct the Plaintiff’s legal arguments for him. Neither may the Court ‘conjure up unpled allegations[.]’” *Rogers v. Detroit Police Dept.*, 595 F.Supp.2d 757, 766 (E.D. Mich. 2009) (Ludington, J., adopting report and recommendation of Binder, M.J.).⁵

2. Eleventh Amendment Sovereign Immunity Bars Suit against the State and its Actors in their Official Capacities

Defendant asserts that Plaintiff’s complaint should be dismissed for want of subject matter jurisdiction because a suit against HHS (an executive department) is a suit against the State of Michigan itself, which has not waived its sovereign immunity and consented to suit. Plaintiff counters that the Eleventh Amendment bars only claims against individuals in their official capacities and not their

⁵ See also, *Evans v. Mercedes Benz Fin. Servs., LLC*, No. 11-11450, 2011 WL 2936198, at *2 (E.D. Mich. July 21, 2011) (“Even excusing plaintiff’s failure to follow Rules 8(a)(2) and 10(b), a *pro se* plaintiff must comply with basic pleading requirements, including Rule 12(b)(6).”).

individual capacities. She further argues that the parties named were acting outside of their official capacities and therefore are not entitled to sovereign immunity.

Plaintiff has sued HHS for its role in the removal of her children from her home. HHS was created as an executive department of the Michigan state government pursuant to the Social Welfare Act, Mich. Comp. Laws 400.1. The Eleventh Amendment of the United States Constitution states that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. Eleventh Amendment immunity applies to governmental entities that act as arms of the State. *S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 419 (6th Cir. 2004); *Alford v. City of Detroit*, 657 F.Supp.2d 847, 851 (E.D. Mich. 2009). This includes branches of the state government, including local field offices of HHS. *Lintz v. Skipski*, 807 F. Supp. 1299, 1303 (W.D. Mich. 1992), *aff'd* 25 F.3d 304 (6th Cir. 1994); *see also, Binkowski v. Family & Childrens Serv. Agency*, 39 F. Supp. 2d 882, 887 (W.D. Mich. 1998) (county offices of Department of Social Services are state agencies for purposes of Eleventh amendment immunity). "County [HHS] offices have repeatedly been found to be instrumentalities of the state." *Lintz*, 807 F. Supp. at 1303. Additionally, a state is not a "person" subject to suit under 42 U.S.C. § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). Moreover, official capacity

legal claims against individual state employees are likewise barred under the Eleventh Amendment. *Will*, 491 U.S. at 89. The “government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.” *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939).

Here, Plaintiff tries to plead her way around governmental immunity by alleging gross negligence against the individual actors, citing Mich. Comp. Laws 691.1407(2)(c) and 8(a), which creates an exception for gross negligence. (DE 1 at 5.) In her motion response, she focuses instead upon the distinction between actions done in the government employees’ official capacities, as opposed to their individual capacities. (DE 14 at 7-9.) She does little to explain why these Defendants would have been acting in their individual capacities when carrying out their responsibilities to investigate alleged child abuse and to protect alleged victims, even if Defendants’ concerns later turned out to be unfounded. Plaintiff’s response also essentially ignores the question of whether HHS itself is immune, when seemingly all of the Department’s actions are necessarily performed in an “official” capacity, a division of the State being incapable of performing conduct in an “individual” capacity. Accordingly, I agree with Defendants that HHS is immune, and that consequently the Court does not have subject matter jurisdiction to review its actions as an executive department here.

As to the individual HHS employees named in the suit, I also agree that to the extent they are being sued in their official capacities, they are immune. *See, e.g., Will*, 491 U.S. at 59 (“A suit against state officials in their official capacities is not a suit against the officials but rather is a suit against the officials’ offices and, thus, is no different from a suit against the State itself.”); *Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir. 2003) (“The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.”) (internal quotations omitted).

Unfortunately, Plaintiff does not make clear in her pleadings from the outset—or for that matter, within the scores of pages of allegations contained in the body of her complaint—whether she is suing them in their official capacities, their individual capacities, or both. Since she emphasizes their individual capacities in her response, and since her pleadings arguably allege conduct beyond their official duties and allege gross negligence by these individuals, and bearing in mind her *pro se* status, I will construe these pleadings liberally, and assume that at least some of her claims against at least some of these individual government employees may not be barred by the Eleventh Amendment. Nevertheless, this does not save her claims, as all are barred by the applicable statutes of limitation.

Accordingly, I recommend that all of her claims against HHS be dismissed without prejudice for lack of subject matter jurisdiction, and that all claims made

against the individual defendants in their official capacities be likewise dismissed without prejudice for lack of subject matter jurisdiction.⁶

3. Plaintiff's Case is Not Barred by the *Rooker-Feldman* Doctrine.

When considering affirmative defenses, courts must first address whether or not the claims asserted are barred by *Rooker-Feldman*, “since its application strips federal courts of jurisdiction and the ability to hear a *res judicata*, or other affirmative, defense.” *Hutcherson v. Lauderdale Cnty., Tenn.*, 326 F. 3d 747, 755 (6th Cir. 2003). “The *Rooker-Feldman* doctrine provides that inferior federal courts lack jurisdiction to review the final judgments of state courts.” *Id.* (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). It applies in cases “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The Sixth Circuit has explained the application of *Rooker-Feldman* as follows:

The inquiry then is the source of the injury the plaintiff alleges in the federal complaint. If the source of the injury is the state court

⁶ Defendants argue that even if the claims against the individuals are not barred by governmental or sovereign immunity, they are barred by other types of immunity, namely, qualified immunity and absolute quasi-prosecutorial immunity, and further, that the gross negligence allegations are inadequate to avoid immunity; however, I do not deem it necessary to perform these analyses, as none of the claims against any of the defendants are timely.

decision, then the *Rooker–Feldman* doctrine would prevent the district court from asserting jurisdiction. If there is some other source of injury, such as a third party’s actions, then the plaintiff asserts an independent claim.

McCormick v. Braverman, 451 F.3d 382, 393 (6th Cir. 2006). Federal jurisdiction is proper, therefore, “if a federal plaintiff presents an independent claim, ‘albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party.’” *Brown v. First Nationwide Mortgage Corp.*, 206 F. App’x 436, 439 (6th Cir. 2006) (quoting *Exxon Mobil Corp.*, 544 U.S. at 293). An example of such an independent claim is one where “there is some other source of injury, such as a third party’s actions” *Id.* Here, Defendant argues that Plaintiff seeks to redress injuries arising out of family court orders issued in state court. Plaintiff counters that the injuries outlined in her complaint are distinct from the state court ruling.

I conclude that Plaintiff’s claims are not barred by the *Rooker–Feldman* doctrine because she presents claims independent of the state court trial. To be sure, she does mention the state court trial in her complaint, alleging that hearsay testimony was allowed. (DE 1 at 81.) However, construing the *pro se* complaint in the light most favorable to Plaintiff, all of her allegations against Defendants are related to their actions before and after the trial, but do not challenge the results of the trial itself. For example, she asserts that Joseph Linert came to their home without a warrant or other official reason to be there, that Sara Meddaugh admitted

that CPS did not have a legal right to take the children, and that Marnie DeBell and Jennifer Hutowski violated their rights by interviewing their minor children without permission. (Id. at 8, 9, and 52.) Accordingly, I conclude that Plaintiff's complaint does not challenge the state court judgment and thus her claims are not barred by the *Rooker-Feldman* doctrine.

4. The Remainder of Plaintiff's Claims are Time-Barred.

In the Prior Lawsuit, just a year ago, this Court found that the identical claims which are alleged here, based upon essentially the same factual scenario and timeline, should be dismissed as untimely. (Case No. 15-12738, DE 29 therein, adopting Reports and Recommendations, DE 24, 27.) I see no reason to reinvent the wheel here.

a. The § 1983 Claims are Time-Barred

In this round of the multi-part litigation, Plaintiff expressly alleges that “the above violations [are] brought under 42 U.S.C. § 1983.” (DE 1 at 116.) Thus, unlike in the Prior Lawsuit, the Court need not construe the constitutional claims as arising under that statute, as the basis of her civil rights claims is clear, in light of her allegations that Defendants violated her rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. State statutes of limitations apply to determine the tolling [or accrual or saving] of claims asserted under 42 U.S.C. § 1983. *McCormick v. Miami Univ.*, 693 F.3d

654, 662 (6th Cir. 2012). In Michigan, the three-year statute of limitations for personal injury claims outlined in Mich. Comp. Laws § 600.5805(1) governs § 1983 actions where the cause of action arises in Michigan. *Carroll v. Wilkerson*, 782 F.2d 44, 45 (6th Cir. 1986); *see also Chippewa Trading Co. v. Cox*, 365 F.3d 538, 543 (6th Cir. 2004) (noting that the three-year statute of limitations outlined in § 600.5805(1) is “borrowed for § 1983 claims.”). Specifically, “the statute of limitations period begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred.” *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996). Here, Plaintiff’s complaint describes events occurring from October 2008 through February 2010, and she filed her complaint nearly seven years later, on November 3, 2016. It is without question that she “knew or had reason to know” of the alleged bad actions and the resulting injuries as these events were occurring. Accordingly, Plaintiffs’ claims brought pursuant to § 1983 are time-barred.

**b. The Criminal Investigation Initiated by Plaintiff Neither
Delays Accrual nor Tolls the Limitations Period**

For the second time, again without authority, Plaintiff argues that the criminal investigations which she initiated with the Michigan Attorney General, the MSP and the FBI somehow extended the time within which she needed to file a civil complaint, in compliance with the three-year statute of limitations. Knowing that this was problematic, from previous experience with this Court, she attempted

to plead around this in the case at bar by referencing the November 12, 2014 conclusion of the FBI investigation and alleging that, “As the FBI discontinued the pursuit of criminal charges less than two years ago, **we are within all statute of limitations [sic] for all civil matters that follow or will be discovered during the commission of this complaint.**” (DE 1 at 4 (emphasis in original).) To make this even clearer, she further alleges that, “As our allowed time to file did not start until November 12, 2014[,] this Complaint is filed within the statute of limitations.” (DE 1 at 39.) Unfortunately, notwithstanding these allegations and arguments, it is not so, and indeed, this very argument was rejected by the Court in her Prior Lawsuit. At that time the Court noted—and again notes that—“While statutes of limitation and tolling principles are governed by state law, the question of when a federal civil rights claim accrues remains one of federal law.” *Bowden v. City of Franklin, KY.*, 13 F. App’x 266, 272-273 (6th Cir. 2001). “In general, a civil rights claim for relief accrues when the plaintiff knows or has reason to know of the injury that is the basis of his action,” the latter of which the plaintiff “should have discovered . . . through the exercise of reasonable diligence.” *Id.* at 273. Here, the pleadings make clear that Plaintiff was well aware of the injury that is the basis of this action in 2008, 2009, and certainly by **March 15, 2010**, the date on which government’s second case against them was closed, and which Plaintiff

herself characterizes as “conclud[ing] the nightmare that we had lived for 17 months.” (DE 1-1 at 113-115.)

As noted in *Sec. & Exch. Comm’n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)—and as this Court cited with approval in Plaintiff’s Prior Lawsuit—“In the absence of substantial prejudice to the rights of the parties involved, [] parallel [criminal and civil] proceedings are unobjectionable under our jurisprudence.” Likewise, and as also quoted previously by this Court, “It is clear that nothing in the Constitution requires a civil action to be stayed in the face of a pending or impending criminal indictment, and there is no requirement that a civil proceeding be stayed pending the outcome of criminal proceedings.” *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627 (6th Cir. 2014). Likewise, under state law, the Michigan Court of Appeals has held that a pending criminal matter does not toll the time to file a civil action. *Atty. Gen. v. Harkins*, 669 N.W.2d 296, 302 (Mich. Ct. App. 1992). (See this Court’s prior opinion in Case No. 15-12738, DE 29 therein at 9-10.)⁷

⁷ In her response brief, Plaintiff argues and cites law in support of the proposition that civil cases may be *stayed* pending criminal proceedings. (DE 14 at 12-13.) This may be true in certain circumstances; however, this concept is inapplicable here, as there was no pending civil suit for which she could have sought a stay during the pendency of the criminal investigation.

c. The Kidnapping Claim Does Not Excuse this Case from the Applicable Limitations Statutes

Quoting the federal criminal code at 18 U.S.C. § 3299, Plaintiff argues that her kidnapping claim may be “instituted at any time without limitation[.]” (DE 14 at 10.) However, as even Plaintiff herself acknowledges, this statute relates to the time frame for filing *a criminal indictment or information*; it has nothing to do with civil actions. Leaving aside the issue of whether Plaintiff even has standing to pursue a kidnapping case on behalf of another individual without being appointed his or her next friend or guardian, this Court ruled in Plaintiff’s Prior Lawsuit, and I find again here that there is no private right of action under the Federal

Kidnapping Act. As the Court explained in Plaintiff’s previous case:

Upon de novo review, this Court agrees with the magistrate judge; there is no private right of action for purported violations of the Federal Kidnapping Act. *See, e.g., Monroe v. McNairy Cnty., Tenn.*, 850 F. Supp. 2d 848, 876 (W.D. Tenn. Feb. 6, 2012) (“[T]he Federal Kidnapping Act is a criminal statute, and there is no indication that Congress intended to create a private right of action for violations of its provisions.”); *Giano v. Martino*, 673 F. Supp. 92, 95 (E.D.N.Y. 1987) (“[T]he Federal Kidnapping Act was never intended to confer rights on the victim of a kidnapping, and does not do so by its language.”), *aff’d*, 853 F.2d 1429 (2d Cir. 1987) (Table). The Court finds the substantial breadth of authority on this issue persuasive and declines Plaintiffs’ invitation to “take a step into the unknown[.]”

(Case No. 15-12738, DE 29 therein at 5.) I am unaware of any change in the law in this regard during the past 12 months.

Furthermore (and again overlooking her apparent lack of standing) if Plaintiff actually intended to bring a claim for civil false imprisonment, which would appear to be the common law tort claim most analogous to kidnapping, the statute of limitations for such an action is only two years. Mich. Comp. Laws § 600.5805(2); *see also Mack v. Howell*, 14 F.3d 601, 601 (6th Cir. 1993). Likewise, even if the Court were to construe some portion of her complaint as alleging malicious prosecution, as alluded to in her response brief (DE 14 at 13), the applicable statute of limitations is two years for such a claim. Mich. Comp. Laws § 600.5805(5). *See Sykes v Anderson*, 625 F.3d 294, 308–309 (6th Cir 2010) (requiring the criminal proceeding to end in the accused’s favor as an element of the claim). Going by her own allegation that “the nightmare that we had lived for 17 months” ended on March 15, 2010 when “both cases were closed[,]” she would have only had until March 15, 2012 in which to file suit. (DE 1 at 1, 113-115.) Accordingly, her kidnapping, false imprisonment, and malicious prosecution related claims, if any, are time-barred.

d. Plaintiff’s Gross Negligence Claims, if any, are Time-Barred

Finally, to the extent that Plaintiff was intending to pursue an independent claim for gross negligence, as opposed to simply using that as a theory to avoid governmental immunity, any such claim is also time-barred. The limitations period for gross negligence is three years. Mich. Comp. Laws § 600.5805(10);

Searcy v. Cty. of Oakland, 735 F. Supp. 2d 759, 765 (E.D. Mich. 2010) (“Under Michigan law, the statute of limitations for . . . gross negligence is three years”) (internal citations and quotations omitted). Plaintiff’s complaint describes the Defendants’ actions as occurring from October 2008 through March of 2010, at the latest. (DE 1 at 8-115.) She filed her complaint on November 3, 2016, nearly seven years after the latest possible date of injury listed in her complaint, and thus her gross negligence claims are time-barred. The Court so found in her Prior Lawsuit on the subject, even though it was filed *over a year earlier than this one*, and thus, Plaintiff should have been well aware of this before filing the instant action.

D. Conclusion

For the reasons stated above, the Court should grant Defendants’ motion to dismiss in lieu of an answer (DE 10): (1) dismissing Plaintiff’s claims against HHS without prejudice for lack of jurisdiction due to governmental immunity; (2) dismissing any claims alleged against individual government employees in their official capacities without prejudice for the same reasons; and, (3) dismissing with prejudice all other claims and parties, including any claims alleged against government employees in their individual capacities, as time-barred. Moreover, *sua sponte*, the Court should dismiss with prejudice the federal kidnapping claim, as alleged, for failure to state a claim. Finally, the Court should also consider

enjoining Plaintiff from filing any further lawsuits without leave of the Court or pre-filing screening, as the allegations and arguments made herein make clear that Plaintiff has not assimilated, or worse yet has ignored, this Court's prior rulings on the dispositive issues addressed herein.

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 932 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1273 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the

objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

IT IS SO ORDERED.

Dated: May 31, 2017

s/Anthony P. Patti
Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

I hereby certify that a copy of the foregoing document was sent to parties of record on May 31, 2017, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager for the
Honorable Anthony P. Patti