NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 21, 2018
DEBORAH S. HUNT, Clerk

JOHNNY TIPPINS,

Plaintiff-Appellant,

v.

PATRICIA CARUSO; BARBARA MEAGHER; JOHN DOES; JANE DOES; GEORGE KUBIN; JAMES C. KELLY; BLAINE LAFLER, Warden,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: COLE, Chief Judge; GIBBONS and BUSH, Circuit Judges.

Johnny Tippins, a Michigan prisoner proceeding pro se, appeals the district court's dismissal of his civil rights complaint filed pursuant to 42 U.S.C. § 1983. 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).

Tippins filed a complaint against the defendants asserting that his Eighth Amendment rights were violated when he was injured as a result of drinking contaminated water while incarcerated at the St. Louis Correctional Facility, in St. Louis, Michigan, from 2004 to 2007. The district court dismissed the complaint as untimely and denied Tippins's motions to amend his complaint as futile. Tippins now argues that application of the statute of limitations found in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") makes his complaint timely.

We review de novo a district court's dismissal of a complaint on statute of limitations grounds. *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003). Because § 1983 does not contain a statute of limitations, federal courts apply the state personal injury statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985). The appropriate statute of limitations for personal injury actions arising in Michigan and brought under § 1983 is three years. *See* Mich. Comp. Laws § 600.5805(10). Although state law governs for the purpose of determining the appropriate statute of limitations, "federal law governs the question of when that limitations period begins to run." *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988). "[T]he statute of limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* While Tippins claims that he did not know of his injury until 2014, when he discovered that the prison drinking water contained the p-CBSA contaminant, in his complaint he asserted that he complained to prison officials of stomach pain, headache, and fever resulting from contaminated water while he was incarcerated at the St. Louis facility from 2004 to 2007. Because Tippins knew of his injury by 2007 at the latest and did not file his complaint until 2014, the district court did not err in dismissing the complaint as untimely.

Although we generally review the denial of a motion to amend a complaint for an abuse of discretion, when the district court denies the motion to amend as futile we review the decision de novo. *Babcock v. Michigan*, 812 F.3d 531, 541 (6th Cir. 2016). An amendment is futile if it could not withstand a motion to dismiss. *SFS Check, LLC v. First Bank of Del.*, 774 F.3d 351, 355 (6th Cir. 2014). The district court did not err in denying the motions to amend because Tippins lacked standing to bring an action under CERCLA. "[CERCLA] permits private party property owners to recover from prior private party property owners certain costs associated with the cleanup of contamination caused by the prior owners, where the cleanup costs were 'necessary.'" *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 699-700 (6th Cir. 2006). Because Tippins is not seeking costs associated with the cleanup of contamination, he lacks standing to bring an action under CERCLA. Additionally, even if Tippins had standing to bring an action under CERCLA, his claims would still be untimely because he knew, or should have known, of his injury and its cause by no later than 2007 when he complained to prison officials of becoming ill from contaminated water. *See* 42 U.S.C. § 9658(b)(4). Because Tippins's CERCLA claim could not survive a motion to dismiss, the district court did not err in denying the motions to amend.

Accordingly, we **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-1508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 24, 2018
DEBORAH S. HUNT, Clerk

JOHNNY TIPPINS,

Plaintiff-Appellant,

v.

PATRICIA CARUSO; BARBARA MEAGHER; JOHN DOES; JANE DOES; GEORGE KUBIN; JAMES C. KELLY; BLAINE LAFLER, Warden,

Defendants-Appellees.

O R D E R

Before: COLE, Chief Judge; GIBBONS and BUSH, Circuit Judges.

Johnny Tippins, a Michigan prisoner proceeding pro se, petitions for rehearing of this court's March 21, 2018, order affirming the district court's dismissal of his 42 U.S.C. § 1983 complaint.

Upon review, we conclude that the court did not misapprehend or overlook any point of law or fact when it issued the March 21, 2018, order. *See* Fed. R. App. P. 40(a). Accordingly, we **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,

Plaintiff,

Case No. 2:14-cv-10956

v.

HONORABLE STEPHEN J. MURPHY, III

PATRICIA CARUSO, et al.,

Defendants.

______________________________/

OPINION AND ORDER GRANTING PLAINTIFF'S MOTIONS TO SUPPLEMENT [68, 70], DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [65], MOTION FOR RELIEF FROM JUDGMENT [66], AND MOTION TO AMEND THE COMPLAINT [67], AND ENJOINING PLAINTIFF FROM FURTHER FILINGS WITHOUT PERMISSION OF THE COURT

Plaintiff Johnny Tippins has filed another batch of motions. Each will be addressed in turn, but one central argument pervades them all. The Court will therefore address the argument at the outset and then dispose of the motions accordingly.

I. The CERCLA Argument

The Court has determined, more than once, that Tippins's claim is time-barred. He argues, however, that this determination was in error because it relied on the Michigan statute of limitations rather than that of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq. See* Mot. 4, ECF No. 68. Specifically, he cites to the Act's provision concerning actions under state law, which provides that when a state's statute-of-limitations commencement date "is earlier than the federally required commencement date," the statute-of-limitations period commences "at the federally required commencement date in lieu of the date specified in such State statute." 42 U.S.C. § 9658(a)(1).

But the federal commencement date under CERCLA is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). The CERCLA commencement date is no different than the one articulated by the magistrate judge: "'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.'" Order 8, ECF No. 44 (citing *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996)).[1] The Court's determination that Tippins's period of limitations began, at the latest, in 2007, remains correct. *See* Order 2–3, ECF No. 62. And Michigan's three-year statute of limitations still applies. Consequently, there is no need to revisit the Court's prior determination that Tippins's claim — whether under § 1983 or CERCLA — is time-barred.

II. <u>Motion for Reconsideration [65]</u>

On May 5, 2016, the magistrate judge entered an Opinion and Order denying Tippins's Motion to Amend (ECF No. 55). Op. and Order, ECF No. 59. Tippins argues that he was neither served with the May 5 Order nor given the chance to file objections to it. That is not true. The docket reflects service was made the same day the Order was entered. And Tippins did not need to wait for the Court's invitation to file an objection: Rule 72 is permissive, so Tippins was free to file an objection within 14 days of being served a copy of the Order. *See* Fed. R. Civ. P 72(a). He failed to do so,[2] but even if he had, the

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[1] The magistrate judge aptly made the same explanation. *See* Op. and Order 6–7, ECF No. 59.

[2] Tippins did, however, file objections to another Order during that same 14-day window. *See* ECF No. 61.

objections would have been unavailing. In his motion for reconsideration, Tippins explains what he would have objected to: the magistrate judge's finding that his claims are time-barred. Mot. 3–4, ECF No. 65. As discussed above, that argument is meritless. Because Tippins has failed to demonstrate any grounds justifying reconsideration under Local Rule 7.1(h), the Court will deny his motion.

III. Motions to Supplement [68, 70]

Although differently styled on the docket, the Court understands docket entry number 68 to be a motion to supplement two previous motions: a Motion to Amend the Complaint (ECF No. 67) and a Motion for Relief from Judgment (ECF No. 66). Likewise, although Tippins's Supplemental Motion to Amend/Correct his Motion to Amend the Complaint (ECF No. 70) contains language that suggests he seeks leave to amend the complaint, the Court understands it to be only a motion to amend docket entry number 67. Accordingly, the Court will grant the Motions to Supplement (ECF Nos. 68, 70) and consider the issues raised within them when ruling on docket entry numbers 66 and 67.

IV. Motion for Relief from Judgment [66]

Tippins's Motion for Relief from Judgment makes the same argument as his Motion for Reconsideration: he was not given an opportunity to object to the May 5 Order and raise his CERCLA limitations argument. He also asks the Court to "revisit" his Motion for Volunteer Appointment of Counsel, which was found to be moot. *See* Mot., ECF No. 58; Order, ECF No. 64. Because Tippins has failed to raise any grounds for relief consistent with Rule 60(b) of the Federal Rules of Civil Procedure, the Court will deny his motion. And because the judgment stands, there is no need to revisit his previously denied motion for appointment of counsel.

V. <u>Motion to Amend Complaint [67]</u>

Tippins's Motion to Amend the Complaint, along with its supplements, reiterate the CERCLA argument regarding the statute of limitations. Tippins also wishes to amend the complaint to properly "assert an underlying CERCLA action providing for cleanup and remedial activities[.]" Mot. 14, ECF No. 67. But because the claim is time-barred, amending the complaint would be futile, as the magistrate judge previously explained. *See* Order 3–7, ECF No. 59; Order 19–20, ECF No. 44. The Court will deny the motion to amend.

VI. <u>Injunction Prohibiting Future Filing Without Leave</u>

As the foregoing analysis demonstrates, Tippins has filed numerous motions that allege, at length, the same meritless arguments already rejected by the Court. To conserve judicial resources from being spent on frivolous filings, the Court will enjoin Tippins from further filings without prior grant of leave from the Court.

Federal district courts "[have] the authority to enjoin harassing litigation under [their] inherent authority and the All Writs Act, 28 U.S.C. § 1651(a)." *Wrenn v. Vanderbilt Univ. Hosp.*, 50 F.3d 11 (6th Cir. 1995) (unpublished table decision). To exercise their inherent authority, federal courts may "'impose carefully tailored restrictions' upon 'abusive litigants.'" *Scott v. Bradford*, No. 13-12781, 2014 WL 6675354, at *3 (E.D. Mich. Nov. 25, 2014) (quoting *Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir.1986)). Although a plaintiff may not be "absolutely foreclosed from initiating an action in a court of the United States," district courts may "require one who has abused the legal process to make a showing that a tendered lawsuit is not frivolous or vexatious before permitting it to be filed." *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996).

Tippins's voluminous motions and supplements to those motions have revolved around his claims arising from allegedly contaminated water and his assertion that the statue of limitations has not run on those claims. The injunction will therefore address filings related to those claims.

ORDER

WHEREFORE, it is hereby **ORDERED** that Plaintiff's Motions to Supplement [68, 70] are **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration, Motion for Relief from Judgment, and Motion to Amend [65, 66, 67] are **DENIED**.

IT IS FURTHER ORDERED that any future filings by Johnny Tippins shall be captioned "Application Pursuant to Court Order Seeking Leave to File" and shall be accompanied by a copy of this order. The Clerk's Office is directed to reject any filing by Tippins which does not comply with these instructions. The district court will review Tippins's filings and shall certify whether or not the filing has been made in good faith. If the district court determines that the filing is not made in good faith, the Clerk's Office is directed to return the material to Tippins unfiled.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: February 16, 2017

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 16, 2017, by electronic and/or ordinary mail.

s/David P. Parker
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,

Plaintiff,

Case No. 2:14-cv-10956

v.

HONORABLE STEPHEN J. MURPHY, III

PATRICIA CARUSO, et al.,

Defendants.

______________________________/

ORDER ADOPTING REPORT AND RECOMMENDATION (document no. 44), **GRANTING DEFENDANT'S MOTION TO DISMISS** (document no. 32), **AND DISMISSING THE CASE**

For the reasons set forth in the previous order, ECF No. 62, the Court orders the following:

ORDER

WHEREFORE, it is hereby **ORDERED** that Plaintiff's objections (document no. 61) are **OVERRULED**.

IT IS FURTHER ORDERED that the magistrate judge's Report and Recommendation (document no. 44) is **ADOPTED**.

IT IS FURTHER ORDERED that Defendant Caruso's Motion to Dismiss (document no. 32) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Volunteer Appointment of Counsel (document no. 58) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that the case is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 4, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 4, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,

Plaintiff,

v.

PATRICIA CARUSO, et al.,

Defendants.

Case No. 2:14-cv-10956

HONORABLE STEPHEN J. MURPHY, III

ORDER ADOPTING REPORT AND RECOMMENDATION (document no. 60), **GRANTING PLAINTIFF'S MOTIONS FOR RECONSIDERATION AND RELIEF** (document nos. 53, 54), **AND REOPENING THE CASE**

On September 1, 2015, Magistrate Judge Anthony Patti issued a Report and Recommendation ("September Report") to dismiss Plaintiff Johnny Tippins' ("Tippins") action in its entirety. Pursuant to Civil Rule 72(b)(2) and Local Rule 72.1(d), the parties had 14 days to file objections to the Report. The Court received no objections and on October 14, 2015 it adopted the Report and entered judgment. The following month, Tippins filed Motions for Relief from the Judgment and for Reconsideration. ECF Nos. 53, 54. In the motions, Tippins claims that he did not receive the September Report until after the deadline for objections had passed.

In response to Tippins' motion for relief from judgment,[1] the magistrate judge issued another Report and Recommendation on May 5, 2016 ("May Report"), noting that Tippins

[1] The motion and a motion for reconsideration were filed within four days of each other. Only the earlier-filed motion for relief from judgment was referred to Magistrate Judge Patti. *See* Order, ECF 57. Although different in form, the two functionally request the same thing: that the Court allow Tippins to file his objections and that Court consider those objections before making its decision regarding the Report and Recommendation. The Court will thus consider the latter-filed motion for reconsideration as part of the motion for relief addressed by the magistrate judge in the May Report.

did not receive adequate notice of the September Report and recommending that the Court grant the motion for reconsideration to allow for Tippins to file his objections. Later that month, on May 19, 2016, Tippins finally, and without invitation, filed his objections to the September Report.

After reviewing the filings, the Court will adopt the May Report and grant Tippins' motion for reconsideration. Having also reviewed Tippins' objections, however, the Court will, in a future order, adopt the September Report and grant Defendant Caruso's motion to dismiss and it will dismiss the remainder of the action *sua sponte* pursuant to 28 U.S.C. § 1915(e).

Tippins raises six objections to the September Report, but because resolution of the first objection renders the following five futile, only the first will be addressed.

In his first objection, Tippins argues that contrary to findings of the September Report, his claim is not barred by the statute of limitations. Obj. 8, ECF No. 61. Tippins argues that though physical symptoms of the illness on which his claim is based manifested in 2007, federal law tolled the statute of limitations. *Id.* Thus, according to the plaintiff, the required commencement date for his action was February 19, 2014 — the day he discovered unpublished decisions relating to the prisons' water contamination. *Id.*

Tippins' argument is not new. He raised the issue in his Proposed Amended Complaint and it was discussed and rejected by the magistrate judge. *See* Order 4–5, ECF No. 59. Tippins has always claimed that his symptoms manifested in 2007. From his very first complaint, Tippins has claimed that he attributed his ailments to the water and complained about it as early as 2007. *See* Comp. 3, ECF No. 1. Nothing tolled the limitations period that ran from that date.

Thus, the magistrate judge properly determined that Tippins' claims are barred by the statute of limitations — even considering the argument that Tippins raises for the second time in his first objection to the September Report. *See* Order 4–5, ECF No. 59. And Tippins' first objection is therefore without merit.

Tippins raises five more objections, each of which relate to the merits of his claims. But since the entire action is time-barred, the Court need not and will not address those objections. Consistent with the September Report, the Court will, in a future order, dismiss the remainder of Tippins' case *sua sponte*, pursuant to 28 U.S.C. § 1915(e)(2)(B)(I) and (ii). *See* Report 11–12, ECF No. 44.

ORDER

WHEREFORE, it is hereby **ORDERED** that the magistrate judge's Report and Recommendation (document no. 60) is **ADOPTED**.

IT IS FURTHER ORDERED that Plaintiff's Motions for Reconsideration (document no. 54) and Relief from Judgment (document no. 53) are **GRANTED** and the case is to be **REOPENED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 3, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 3, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,

Plaintiff,

Case No. 2:14-cv-10956

v.

HONORABLE STEPHEN J. MURPHY, III

PATRICIA CARUSO, et al.,

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OPINION AND ORDER GRANTING PLAINTIFF'S MOTIONS TO SUPPLEMENT [68, 70], DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [65], MOTION FOR RELIEF FROM JUDGMENT [66], AND MOTION TO AMEND THE COMPLAINT [67], AND ENJOINING PLAINTIFF FROM FURTHER FILINGS WITHOUT PERMISSION OF THE COURT

Plaintiff Johnny Tippins has filed another batch of motions. Each will be addressed in turn, but one central argument pervades them all. The Court will therefore address the argument at the outset and then dispose of the motions accordingly.

I. The CERCLA Argument

The Court has determined, more than once, that Tippins's claim is time-barred. He argues, however, that this determination was in error because it relied on the Michigan statute of limitations rather than that of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* *See* Mot. 4, ECF No. 68. Specifically, he cites to the Act's provision concerning actions under state law, which provides that when a state's statute-of-limitations commencement date "is earlier than the federally required commencement date," the statute-of-limitations period commences "at the federally required commencement date in lieu of the date specified in such State statute." 42 U.S.C. § 9658(a)(1).

But the federal commencement date under CERCLA is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). The CERCLA commencement date is no different than the one articulated by the magistrate judge: "'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.'" Order 8, ECF No. 44 (citing *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996)).[1] The Court's determination that Tippins's period of limitations began, at the latest, in 2007, remains correct. *See* Order 2–3, ECF No. 62. And Michigan's three-year statute of limitations still applies. Consequently, there is no need to revisit the Court's prior determination that Tippins's claim — whether under § 1983 or CERCLA — is time-barred.

II. Motion for Reconsideration [65]

On May 5, 2016, the magistrate judge entered an Opinion and Order denying Tippins's Motion to Amend (ECF No. 55). Op. and Order, ECF No. 59. Tippins argues that he was neither served with the May 5 Order nor given the chance to file objections to it. That is not true. The docket reflects service was made the same day the Order was entered. And Tippins did not need to wait for the Court's invitation to file an objection: Rule 72 is permissive, so Tippins was free to file an objection within 14 days of being served a copy of the Order. *See* Fed. R. Civ. P 72(a). He failed to do so,[2] but even if he had, the

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[2] Tippins did, however, file objections to another Order during that same 14-day window. *See* ECF No. 61.

objections would have been unavailing. In his motion for reconsideration, Tippins explains what he would have objected to: the magistrate judge's finding that his claims are time-barred. Mot. 3–4, ECF No. 65. As discussed above, that argument is meritless. Because Tippins has failed to demonstrate any grounds justifying reconsideration under Local Rule 7.1(h), the Court will deny his motion.

III. Motions to Supplement [68, 70]

Although differently styled on the docket, the Court understands docket entry number 68 to be a motion to supplement two previous motions: a Motion to Amend the Complaint (ECF No. 67) and a Motion for Relief from Judgment (ECF No. 66). Likewise, although Tippins's Supplemental Motion to Amend/Correct his Motion to Amend the Complaint (ECF No. 70) contains language that suggests he seeks leave to amend the complaint, the Court understands it to be only a motion to amend docket entry number 67. Accordingly, the Court will grant the Motions to Supplement (ECF Nos. 68, 70) and consider the issues raised within them when ruling on docket entry numbers 66 and 67.

IV. Motion for Relief from Judgment [66]

Tippins's Motion for Relief from Judgment makes the same argument as his Motion for Reconsideration: he was not given an opportunity to object to the May 5 Order and raise his CERCLA limitations argument. He also asks the Court to "revisit" his Motion for Volunteer Appointment of Counsel, which was found to be moot. *See* Mot., ECF No. 58; Order, ECF No. 64. Because Tippins has failed to raise any grounds for relief consistent with Rule 60(b) of the Federal Rules of Civil Procedure, the Court will deny his motion. And because the judgment stands, there is no need to revisit his previously denied motion for appointment of counsel.

V. Motion to Amend Complaint [67]

Tippins's Motion to Amend the Complaint, along with its supplements, reiterate the CERCLA argument regarding the statute of limitations. Tippins also wishes to amend the complaint to properly "assert an underlying CERCLA action providing for cleanup and remedial activities[.]" Mot. 14, ECF No. 67. But because the claim is time-barred, amending the complaint would be futile, as the magistrate judge previously explained. *See* Order 3–7, ECF No. 59; Order 19–20, ECF No. 44. The Court will deny the motion to amend.

VI. Injunction Prohibiting Future Filing Without Leave

As the foregoing analysis demonstrates, Tippins has filed numerous motions that allege, at length, the same meritless arguments already rejected by the Court. To conserve judicial resources from being spent on frivolous filings, the Court will enjoin Tippins from further filings without prior grant of leave from the Court.

Federal district courts "[have] the authority to enjoin harassing litigation under [their] inherent authority and the All Writs Act, 28 U.S.C. § 1651(a)." *Wrenn v. Vanderbilt Univ. Hosp.*, 50 F.3d 11 (6th Cir. 1995) (unpublished table decision). To exercise their inherent authority, federal courts may "'impose carefully tailored restrictions' upon 'abusive litigants.'" *Scott v. Bradford*, No. 13-12781, 2014 WL 6675354, at *3 (E.D. Mich. Nov. 25, 2014) (quoting *Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir.1986)). Although a plaintiff may not be "absolutely foreclosed from initiating an action in a court of the United States," district courts may "require one who has abused the legal process to make a showing that a tendered lawsuit is not frivolous or vexatious before permitting it to be filed." *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996).

Tippins's voluminous motions and supplements to those motions have revolved around his claims arising from allegedly contaminated water and his assertion that the statue of limitations has not run on those claims. The injunction will therefore address filings related to those claims.

ORDER

WHEREFORE, it is hereby **ORDERED** that Plaintiff's Motions to Supplement [68, 70] are **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration, Motion for Relief from Judgment, and Motion to Amend [65, 66, 67] are **DENIED**.

IT IS FURTHER ORDERED that any future filings by Johnny Tippins shall be captioned "Application Pursuant to Court Order Seeking Leave to File" and shall be accompanied by a copy of this order. The Clerk's Office is directed to reject any filing by Tippins which does not comply with these instructions. The district court will review Tippins's filings and shall certify whether or not the filing has been made in good faith. If the district court determines that the filing is not made in good faith, the Clerk's Office is directed to return the material to Tippins unfiled.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: February 16, 2017

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 16, 2017, by electronic and/or ordinary mail.

s/David P. Parker
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,
Plaintiff,

v.

PATRICK CARUSO, *et al.*,
Defendants.
_________________________________/

Case No. 2:14-cv-10956
District Judge Stephen J. Murphy
Magistrate Judge Anthony P. Patti

ORDER DENYING PLAINTIFF'S MOTION FOR ORAL ARGUMENT (DE 52) AND REPORT AND RECOMMENDATION TO GRANT HIS MOTION FOR RELIEF FROM JUDGMENT (DE 53)

I. RECOMMENDATION: The Court should grant Plaintiff's motion for relief from judgment to a limited extent for re-opening the objections period to the September 1, 2015 report and recommendation ("R&R"). In addition, Plaintiff's motion for oral argument is denied, as it is unnecessary pursuant to E.D. Mich. LR 7.1(f)(2).

II. REPORT

A. Procedural Background

On September 1, 2015, I issued an R&R to dismiss this action as time-barred. (DE 44.) The Court received no objections, adopted the R&R on October 14, 2015, and entered judgment on the same day. (DE 49 and 50.) Plaintiff filed the instant post-judgment motions on November 2, 2015. In his motion for relief from judgment, he asks the Court to set aside its October 14, 2015 order pursuant to Federal Rule of Civil Procedure 60(b) for a variety of reasons, including his repeated contention that his case is not barred by the statute of limitations and that he exhausted his administrative remedies (which has not been an issue thus far in the case). He also asserts that he was not mailed a copy of the September 1, 2015 R&R and was not able to view the document until after the objections period ended and judgment had been entered by the Court. (DE 53 at ¶ 10.)

B. Standard

Rule 60(b) provides the Court with discretion to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any of the following enumerated reasons:

> **(1)** mistake, inadvertence, surprise, or excusable neglect;
>
> **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> **(4)** the judgment is void;
>
> **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> **(6)** any other reason that justifies relief.

A motion under Rule 60(b) must be filed within "a reasonable time" but "no more than a year after the entry of judgment." Fed. R. Civ. P. 60(c). A motion under 60(b)(1), however, "must be brought within the normal time for taking an appeal," which is 30 days. *Pierce v. United Mine Workers of Am. Welfare & Ret. Fund*, 770 F.2d 449, 451 (6th Cir. 1985); Fed. R. App. P. 4(1)(A). Here, judgment was entered in this action on October 14, 2015 and Plaintiff timely filed the instant motion on November 2, 2015. (DE 50.)

C. **Discussion**

In this action, the only plausible claim of error identified by Plaintiff is his contention that he did not receive the R&R dated September 1, 2015 in sufficient time to file objections. A review of the docket reveals no evidence that Plaintiff was mailed a hard copy of the R&R. He is not eligible to become an e-filer, so he would not have been alerted to the filing via email. *See, e.g.,* E.D. Mich. LR, "Electronic Filing Policies and Procedures" Appendix, § R3(a) (May 16, 2015) ("A filing user must be an attorney admitted in good standing . . . or a non-incarcerated *pro se* party granted permission to file on a case-by-case basis.") and §R8(c) ("A party who is *pro se* and not a filing user . . . is entitled to a hard copy of any paper filed electronically."). Pursuant to the Federal Rules of Civil Procedure, "[w]ithin 14 days *after being served* with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2) (emphasis added). Here, according to Plaintiff and confirmed by the Court's docket, he was never served with a copy of the R&R and therefore was unable to timely object.[1] He therefore suffered the "surprise" required by Rule 60(b)(1), or alternatively, had a valid "other reason that justifies relief" under Rule 60(b)(6).

The Court may grant relief pursuant to Rule 60(b)(1) in two situations: "(1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000). Here, Plaintiff could prevail under both circumstances. First, he can be said to have committed excusable error by failing to timely file his objections because he did not receive a mailed copy of the R&R. Thereafter, the Court entered its judgment on the mistaken assumption that Plaintiff had received the R&R but had failed to object to it.[2] Accordingly, I recommend that Plaintiff's motion be granted to the extent that the objections period is reopened for an additional fourteen days to allow Plaintiff to object pursuant to Rule 72.

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[1] Plaintiff did note that he viewed the R&R online on October 28, 2015, thus alerting him to its existence, but this was outside of the window for filing a timely objection. (DE 55 at ¶ 12.)

[2] Notably, despite the lack of objections, the Court did a very thorough review of the issues in this case in its October 14, 2015 order. (DE 49.)

Plaintiff also moves the Court to allow oral arguments on the instant motion. The Court has discretion to allow such arguments pursuant to E.D. Mich. LR 7.1(f)(2), but need not in this case because the motion can be decided on the papers. Accordingly, Plaintiff's motion for oral argument is **DENIED**. (DE 52.)

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.

Dated: May 5, 2016

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TIPPINS,

Plaintiff,

v.

PATRICK CARUSO, *et al.*,

Defendants.

Case No. 2:14-cv-10956
District Judge Stephen J. Murphy
Magistrate Judge Anthony P. Patti

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ORDER DENYING PLAINTIFF'S FOURTH MOTION TO AMEND COMPLAINT (DE 34) AND DIRECTING THE CLERK TO STRIKE DE 35 FROM THE DOCKET AND REPORT AND RECOMMENDATION TO GRANT DEFENDANT CARUSO'S MOTION TO DISMISS (DE 32) AND TO DISMISS THE REMAINDER OF THE ACTION *SUA SPONTE* PURSUANT TO 28 U.S.C. § 1915(e)

I. RECOMMENDATION: The Court should grant Defendant Caruso's motion to dismiss and dismiss the remainder of the action *sua sponte* pursuant to 28 U.S.C. § 1915(e). (DE 32.) In addition, Plaintiff's fourth motion to amend his complaint is DENIED as futile. (DE 34).

II. REPORT

A. Procedural Background

Plaintiff, a state prisoner proceeding without the assistance of counsel, filed his complaint and application to proceed without prepayment of fees on March 4, 2014, bringing claims under 42 U.S.C. § 1983. (DE 1, 2.) In his initial complaint, Plaintiff alleged that state prison officials and the Velsicol Chemical Corporation ("Velsicol") violated his rights under the Eighth Amendment by forcing him to drink contaminated water during his incarceration from 2004 through 2007. Initially, Plaintiff sought $100 million in damages for the alleged constitutional violations.

On May 8, 2014, Plaintiff filed his first motion to amend complaint, in which he itemized and revised the amount of alleged damages to around $70 million. (DE 7.) On July 1, 2014, the Court screened Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2)(b) and ordered that Plaintiff's § 1983 claims against Velsicol be dismissed because, unlike the other state Defendants, the private company was not a state actor and therefore not amenable to suit under § 1983. (DE 9.) The same day, the Court granted Plaintiff's first motion to amend complaint. (Id.)

On July 14, 2014, Plaintiff filed his second motion to amend complaint, in which he attempted to argue that his claims against Velsicol should not have been dismissed because Velsicol is a state actor and therefore amenable to suit under § 1983. (DE 10.) Because Plaintiff's Motion contained primarily legal arguments, the Court construed it as a motion for reconsideration of its July 1, 2014 Order and denied the motion. (DE 15.)

Plaintiff filed his third motion to amend on January 23, 2015, in which he sought to add facts related to the chemical he alleges was in the drinking water system in St. Louis, Michigan, thus causing his injury. (DE 16.) The Court granted the motion with respect to the additional facts, but noted that any attempt to assert constitutional claims against Velsicol would remain futile. In addition, the Court ordered Plaintiff to provide a clean copy of his fully amended complaint, in compliance with E.D. Mich. LR 15.2. Plaintiff made a good-faith effort to comply with this order by filing an amended complaint on March 23, 2015, and the Court construed docket entries 1 and 19 to be his fully amended complaint and ordered the U.S. Marshals to serve Defendants. (DE 21 and 22.) To date, Defendants Patricia Caruso, George Kubin, and James C. Kelley have been served, but Defendants Blaine Lafler, Barbara Meagher, and various John Does remain unserved.

B. <u>Factual Background</u>

The Court set out the factual (and historical) background in this case in its December 19, 2014 Order denying Plaintiff's second motion to amend. (DE 15 at 1-3.) I incorporate the December 19, 2014 Order and will only set out the facts necessary to dispose of the instant motion. For the purposes of the motion to dismiss, I will accept the allegations in Plaintiff's complaint as true.

C. The Instant Motions

Defendant Patricia Caruso, Director of the Michigan Department of Corrections ("MDOC") filed a motion to dismiss Plaintiff's claims on June 12, 2015. (DE 32.) She asserts that Plaintiff's claims must be dismissed for three reasons: 1) because the case has been filed outside the statute of limitations for a § 1983 action; 2) Plaintiff has failed to assert a claim under the Eighth Amendment; and 3) Plaintiff's claims against her are barred by the Eleventh Amendment and qualified immunity.[1]

On June 22, 2015, the Court issued an Order requiring Plaintiff to respond to Defendant Caruso's motion on or before August 6, 2015. (DE 33.) Instead of directly responding, Plaintiff filed a fourth motion to amend his complaint.[2] (DE 34.) In his motion, he does respond to the legal issues raised in Defendant

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[1] In her motion, Defendant Caruso also indicates that she is entitled to a grant of dismissal because the Court lacks subject matter jurisdiction. (DE 32 at 1-2.) She does not develop those arguments further in her brief. Accordingly, I will address only the three issues that have been fully briefed and identified as "Issues Presented." (DE 32 at i).

[2] Despite filing the document as a motion to amend, Plaintiff briefly indicates that the amended complaint was filed within 21 days after service of Defendant Caruso's motion to dismiss, thereby entitling him to amend his complaint as of right. (DE 34 at 1.) He fails to note, however, that Defendant George Kubin filed an answer on May 18, 2015. (DE 27.) According to Rule 15(a), Plaintiff is only entitled to amend as a matter of right "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), *whichever is earlier*. Fed. R. Civ. P. 15(a)(1)(B) (emphasis added). Accordingly, in order to amend as of right, Plaintiff would have been required to file his amended complaint on or before June 8, 2015.

Caruso's motion, for example by arguing that the case was filed within the statute of limitations because he applied and was denied class certification in a previous case. He further argues that Defendant Caruso is not entitled to qualified immunity. In addition, he describes the proposed changes to his complaint as "important facts that were not mentioned in previous complaint(s)," including information from the Michigan Department of Environmental Quality and the Environmental Protection Agency. (DE 34 at ¶¶9-14.) Plaintiff also seeks to change his request for damages again, back to his original $100 million. (Id. at ¶ 31.) Although Plaintiff does not describe his other proposed changes in any detail, a review of the proposed amended complaint (DE 35) reveals that he provided additional information and detail about the chemicals discovered in the water.

Defendants George Kubin and James C. Kelly filed a response in opposition to Plaintiff's motion on July 7, 2015. (DE 36.) They (the mayor and former mayor of St. Louis) assert that Plaintiff's proposed amendment should be denied for futility. Specifically, they echo Defendant Caruso's motion to dismiss arguments that the action is barred by the statute of limitations, that they are entitled to absolute legislative immunity, and that Plaintiff has failed to state a claim under the Eighth Amendment. Defendant Caruso did not respond to Plaintiff's motion, presumably relying upon her pending motion to dismiss as a showing of futility.

B. Standard

1. Motion to Dismiss

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); *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). In addition, when deciding a motion to dismiss, "a court may consider exhibits attached to the complaint . . . so long as they are referred to in the complaint and are central to the claims contained therein." *Rondigo, LLC v. Twp. Of Richmond*, 641 F.3d 673, 680-81 (6th Cir. 2011) (internal quotations omitted). 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)).

2. Motion to Amend

Under Federal Rule of Civil Procedure 15(a), a party may amend its pleadings at this stage of the proceedings only after obtaining leave of court. The Rule provides that the Court should freely give leave for a party to amend its pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Nevertheless, leave to amend 'should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile.'" *Carson v. U.S. Office of Special Counsel*, 663 F.3d 487, 495 (6th Cir. 2011) (quoting *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995)).

In addition, the Local Rules of the Eastern District of Michigan require a party moving to amend a pleading to "attach the proposed amended pleading to the motion." E.D. Mich. LR 15.1. Any amendment to a pleading must "reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference." *Id.* Failure to comply with Rule 15.1, however, is not alone grounds for denial of the motion.

C. Discussion

Because Defendant Caruso's motion to dismiss, Plaintiff's motion to amend, and Defendants Kubin and Kelly's response in opposition to Plaintiff's motion all address the same issues and center on the futility of Plaintiff's complaint, I will consider each of their arguments together.

1. Statute of Limitations

State statute of limitations apply to determine the tolling 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 F3d 211, 220 (6th Cir. 1996).

Here, Defendant Caruso asserts that Plaintiff filed this lawsuit well after the three-year statute of limitations. She notes that he suffered from stomach pain, headaches, and fatigue (which he blames on the water) while incarcerated at St. Louis from 2004-2007, but he did not file the instant action until 2014. Defendants Kubin and Kelly make a similar argument in their response. (DE 36.)

In response, Plaintiff points to a separate, largely unrelated 2006 case, in which this Court denied the plaintiffs' (a group of inmates from the St. Louis Correctional Facility) motion for class certification in 2013. *See Rouse v. Caruso*, No. 2:06-cv-10961, 2013 WL 588916, at *1 (E.D. Mich. Jan. 7, 2013) *report and recommendation adopted*, No. 06-cv-10961, 2013 WL 569638 (E.D. Mich. Feb. 13, 2013). The *Rouse* case involved, among many issues, a claim related to the allegedly contaminated drinking water in St. Louis. *Rouse*, DE 200 at ¶¶ 24-26 and 50- 52. Plaintiff was not named as a party in *Rouse*, but attempted to intervene pursuant to Federal Rule of Civil Procedure 24 on March 19, 2014. *Id.* at DE 285. His motion to intervene was denied, however, because the Court dismissed the claims related to contaminated drinking water in 2011 (*Id.* at 239) and because "intervention would permit Tippin[s] to avoid the three year statute of limitations, which has long since passed on his claims which accrued no later than 2007." *Id.* at DE 288.

As Plaintiff asserts, the *Rouse* plaintiffs filed a motion to renew class certification on March 11, 2013, which was denied on October 25, 2013. He correctly cites to *American Pipe v. Utah*, 414 U.S. 538 (1974) for the proposition that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class *who would have been parties* had the suit been permitted to continue as a class action." 414 U.S. at 554 (emphasis added). According to Plaintiff, this demonstrates that his statute of limitations did not begin to run until October 2013. However, his argument fails because he could not have been a class member in *Rouse* based on his allegations related to contaminated drinking water. The *Rouse* plaintiffs moved to certify the class in 2013, nearly two years *after* the Court dismissed their claim related to contaminated drinking water, which is the cause of action Plaintiff asserts here. Once again, it appears that Plaintiff is attempting to avoid the three-year statute of limitations on his claim.

Defendant Caruso's argument is well-taken. Plaintiff's proposed amended complaint does not cure the deficiency. His claim arose between 2004 and 2007, yet he did not file his own case until 2014, more than three years after he knew or had reason to know that the act providing the basis of his injury occurred. For example, as Defendant Caruso points out, Plaintiff's complaint states that "[t]hroughout the period of 2007 until now, Health Care at every facility I went to,

[sic] stated the water at St. Louis prison was not contaminated and it did not cause the hyperthyroidism disease." (DE 1 at 6.) He further indicates that "Health Care ignored my complaints regarding the toxic water I've ingested." (Id.) Thus, from the face of the complaint it appears that Plaintiff was aware of an issue with the water at St. Louis and complained about it *at least* as early as 2007. *See Davis v. City of St. Louis*, No. 12-cv-10528, 2012 WL 1392357, at *2 (E.D. Mich. Mar. 23, 2012) *report and recommendation adopted*, No. 12-10528, 2012 WL 1392352 (E.D. Mich. Apr. 20, 2012) (concluding that the plaintiff's claim should be dismissed under the statute of limitations where he complained of becoming ill from the contaminated water in 2007, but did not file a complaint until 2012). Accordingly, I recommend that the Court grant Defendant Caruso's motion to dismiss on this basis.

In addition, if the Court agrees with my recommendation on this point, I further recommend that it *sua sponte* dismiss the remainder of Plaintiff's case pursuant to 28 U.S.C. § 1915(e), which provides that the Court shall *sua sponte* dismiss a case if it determines that the action is frivolous, malicious, or fails to state a claim upon which relief can be granted. 28 U.S.C. § 1915(e)(2)(B)(i) & (ii). Here, although only Defendant Caruso has moved to dismiss, her motion has alerted the Court that the case has been filed outside of the statute of limitations, necessitating that the entire action be dismissed. Plaintiff brings his claims under §

1983 against all Defendants, based on the events that occurred from 2004 through 2007. (*See, e.g.,* DE 1 at 6: "I was incarcerated at St. Louis Correctional Facility from 2004-2007. Throughout that time, I complained to Health Care of stomach pain, headache, and fatigue.") Accordingly, his claims against all Defendants are subject to a three-year statute of limitations, as addressed above. Where a plaintiff subject to § 1915(e) files a case outside of the statute of limitations, *sua sponte* dismissal is appropriate. *Day v. E.I. Du Pont de Nemours & Co.*, 165 F.3d 27, 27 (6th Cir. 1998) ("Where a particular claim is barred by the applicable statute of limitations, it does not present an arguable or rational basis in law or fact and therefore may be dismissed as frivolous under § 1915(e)(2)(B)."). Here, Plaintiff filed this action well after the time allowed by the statute of limitations, and the Court should dismiss upon a finding of frivolity.

2. Deliberate Indifference

In the alternative, I recommend that the Court grant Defendant Caruso's motion on the basis that Plaintiff has failed to plead a claim under the Eighth Amendment against her. "The deliberate indifference to serious medical needs of prisoners . . . . constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Burgess v. Fischer*, 735 F.3d 462, 476 (6th Cir. 2013) (citing *Estelle v. Gamble,* 429 U.S. 97, 104–05 (1976)). The Court applies a two-prong test with objective and subjective components to assess claims of deliberate indifference to serious medical needs of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). First, the plaintiff must show that the deprivation alleged is "objectively, 'sufficiently serious.'" *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the plaintiff must show that the prison official committing the act did so with a '"sufficiently culpable state of mind.'" *Id.* (citing *Wilson*, 501 U.S. at 302-03). The United States Court of Appeals for the Sixth Circuit applies the test as follows:

> First, we determine whether the plaintiff had a sufficiently serious medical need under the objective prong. A medical need is sufficiently serious if it has been diagnosed by a physician that has mandated treatment or it is so obvious that even a lay person would easily recognize the need for medical treatment. Second, we determine whether the defendant had a sufficiently culpable state of mind in denying medical care under the subjective prong.

Burgess, 735 F. 3d at 476 (internal citations and quotations omitted).

To succeed on the subjective prong, a plaintiff must show "more than mere negligence, but something less than specific intent to harm or knowledge that harm will result. . . ." *Id.* (citing *Farmer*, 511 U.S. at 835). Specifically, the conduct must "demonstrate deliberateness tantamount to an intent to punish." *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988). However, "a prisoner is not required to show that he [or she] was literally ignored by the staff to prove an Eighth Amendment violation, only that his [or her] serious medical needs were consciously disregarded." *Rouster v. Cnty. of Saginaw*, 749 F. 3d 437, 448 (6th Cir. 2014).

Here, Defendant points again to the aforementioned *Davis v. City of St. Louis*, in which the plaintiff provided in his complaint a 2009 letter from the Director of the Michigan Department of Environmental Quality indicating that the level of p-CBSA detected in the City of St. Louis's drinking water was not at levels that exceeded "health based criteria." *Davis*, 2012 WL 1392357 at *3. The Magistrate Judge concluded that the plaintiff failed to state a claim under the Eighth Amendment because his complaint "demonstrate[d] that the concentration level of the chemical found in the St. Louis water system was within allowable limits, and therefore Defendants' decision to allow prisoners to continue consuming the water could not be considered deliberate indifference . . . ." *Id.* The Court reasoned that prison officials were entitled to rely on the expertise of environmental authorities and could not be faulted for failing to take action where those authorities believed there was no reason to take any remedial measures.

Similarly, here, Plaintiff has attached to his initial complaint (which remains an operative pleading) a 2010 memorandum from Dan Welihan, Manager of Environmental Health & Fire Safety in the MDOC to "SLF, STF, and SRP Forums," stating the following:

> In mid-October 2005, the City of St. Louis Mary's Office notified the St. Louis Correctional Facilities that the chemical para-chlorobenzene

> sulfonic acid (p-CBSA) was found in a low concentration in three of the cities['] six water wells that supply the municipal drinking water system.
>
> * * *
>
> Per the Michigan Department Natural Resources and Environment (DNRE) and based on a U.S. Environmental Protection Agency (EPA) assessment, the concentration of p-CBSA found in the water supply is far below the concentration believed to cause adverse effects in humans. As an extra precautionary measure, the City of St. Louis took two of the three affected wells off-line. When the water from the four remaining wells is mixed in, the amount of p-CBSA in the drinking water is even further from the DNRE action level and does not affect the water or health. Because of this, the DNRE states no special precautions need to be taken before bathing, drinking, or cooking with the water.

(DE 1 at 11.) To be sure, the letter attached to Plaintiff's complaint differs slightly from the letter referred to in *Davis*. For example, the letter in *Davis* was from the Director of the Michigan Department of Environmental Quality, whereas the letter in the instant matter is from the manager of the Environmental Health & Fire Safety Section of the MDOC. Nevertheless, the reasoning in *Davis* applies. Plaintiff's letter summarizes the findings of the DNRE and EPA indicating that no special precautions needed to be taken due to the p-CBSA levels found in the water. Although Plaintiff attempts to plead that "prison officials were notified that there [were] harmful chemicals in the drinking water," such a conclusory statement, in addition to the letter indicating that prison officials were notified just the opposite, cannot survive Defendant Caruso's motion to dismiss.[3] Accordingly, if the Court does not agree with the above recommendation to grant Defendant Caruso's motion to dismiss on the basis of statute of limitations, I recommend that the motion be granted because Plaintiff fails to state a claim under the Eighth Amendment.

3. Qualified Immunity and Eleventh Amendment Immunity

Because I have recommended that Defendant Caruso's motion be granted on its merits, I will only briefly address her arguments related to qualified and eleventh amendment immunity.

a. Qualified Immunity

The Court conducts a two-step analysis in assessing qualified immunity. First, the Court determines whether "the violation of a constitutional right has occurred" and second, whether the "constitutional right at issue was clearly established at the time of defendant's alleged misconduct." *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009). Here, viewing the facts in the light most favorable

[3] Although they have not filed a motion to dismiss in the instant action, the same result may not be reached on this basis for Defendants Kubin and Kelley, the mayor and former mayor of the City of St. Louis, because Plaintiff specifically pleads that the mayor improperly informed the city's residents that the MDEQ and EPA "assured the City the drinking water in St. Louis was safe to drink." (DE 19 at ¶ 22.) Accordingly, if the Court concludes that Plaintiff has filed his lawsuit within the statute of limitations, but that he has failed to state a claim against Defendant Caruso under the Eighth Amendment, I recommend at this time only that Defendant Caruso's motion be granted, with the lawsuit continuing to proceed against the remaining Defendants.

to Plaintiff, and with reference to the aforementioned letters, I conclude that he has not established the violation of a constitutional right. *See supra* § (C)(2). Accordingly, Defendant Caruso would be entitled to a grant of qualified immunity.

b. Eleventh Amendment Immunity

Where a plaintiff sues a defendant in his or her official capacity, it "is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Accordingly, Plaintiff's claims against Defendant Caruso, the Director of the MDOC, in her official capacity, are claims against the State of Michigan, and "the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Plaintiff's claims for damages against Defendant Caruso are thus barred by the Eleventh Amendment.

4. Order on Plaintiff's Motion to Amend

Plaintiff's fourth motion to amend is denied as futile without prejudice. It is apparent that he filed the motion in response to Defendant Caruso's motion to dismiss, as he responds to several of her points within his own motion and in his proposed amended complaint. Although a district court "can allow a plaintiff to amend his complaint even when the complaint is subject to dismissal under the PLRA," doing so in this case would not resolve the statute of limitations issues or

Eighth Amendment issues identified by Defendant Caruso. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013).

Plaintiff's motion to amend and proposed amended complaint both address his *Rouse* arguments at length. Specifically, his proposed amended complaint includes information about the tolling of the statute of limitations based on the denial of class certification to the *Rouse* plaintiffs. (DE 35 at ¶ 27.) As addressed above, this argument is unavailing. His proposed amended complaint, therefore, does not cure the statute of limitations deficiency.

In addition, although Plaintiff provides as exhibits to his complaint documents from the 2007-2013 timeframe, which discuss the groundwater contamination in the City of St. Louis, he pleads only conclusory facts. For example, he notes in a conclusory manner that Defendant Caruso was "well aware of the seriousness this contaminated water may cause inmates and continue[ed] to allow inmates to drink the toxic water," presumably during Plaintiff's time in St. Louis from *2004-2007*. *See U.S. v. State of Mich.*, 940 F.2d 143, 154 n. 7 (6th Cir. 1991) (noting that "the subjective intentions of prison authorities must be demonstrated by objective manifestations of such intent, and cannot be proved by factually unsupported, conclusory opinions . . . of the prisoners or their representatives"); *Hix v. Tennessee Dep't of Corr.*, 196 F. App'x 350, 357 (6th Cir. 2006) (concluding that the district court properly dismissed the plaintiff's claim for deliberate indifference because his conclusory allegations that medical professionals denied treatment with full knowledge of his condition was not sufficient to show that defendants acted with deliberateness tantamount to the intent to punish). (Id. at ¶ 13.) Moreover, he provides as exhibits documents that indicate that prison officials like Defendant Caruso were *unaware* of the severity of the contamination during the pertinent time period of 2004-2007, which is what is relevant to his Eighth Amendment claim against her. (*See* DE 35-1.) Specifically, he attaches a January 2006 report from the Michigan Department of Environmental Quality noting that p-CBSA did "not appear to be highly toxic," and was "not likely to be rapidly or extensively absorbed by the gastrointestinal tract," which is consistent with the 2010 letter provided in his first complaint to demonstrate that the level of water contamination was not known to prison officials during the relevant time period. (DE 35-1 at 12.) In light of this, he cannot prevail on a claim of "deliberate indifference," even if the timeframe were properly aligned with the operative limitations period. Accordingly, Plaintiff's motion to amend is denied as futile. (DE 34.)

D. <u>Conclusion</u>

In sum, I recommend that the Court **GRANT** Defendant Caruso's motion to dismiss on the basis that Plaintiff filed this case after the applicable statute of limitations expired. (DE 32.) If the Court agrees, I recommend that the entire action be **DISMISSED** pursuant to §1915(e) on that basis, with an explicit finding of frivolity. In the alternative, I recommend that Defendant Caruso's motion to dismiss be **GRANTED** because Plaintiff has failed to plead a violation of the Eighth Amendment, and is entitled to a grant of qualified and Eleventh Amendment immunity. Finally, Plaintiff's motion to amend his complaint is **DENIED** as futile. (DE 34.) The Clerk is directed to **STRIKE** his proposed amended complaint from the docket. (DE 35.)

III. PROCEDURE ON OBJECTIONS

A. Report and Recommendation

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.

B. Order on Motion to Amend Complaint

The parties are directed to Fed. R. Civ. P. 72(a), which provides a period of fourteen days from the date of this Order within which to file any objections for consideration by the District Judge related to my opinion on non-dispositive matters.

IT IS SO ORDERED.

Dated: September 1, 2015

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 September 1, 2015, electronically and/or by U.S. Mail.

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

Additional material from this filing is available in the Clerk's Office.