

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	EFILED Document CO Denver County District Court 2nd JD Filing Date: Mar 26 2007 2:27PM MDT Filing ID: 14259455 Review Clerk: Nancy E Magdaleno <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p style="text-align: center;">IN RE ARCHDIOCESE OF DENVER CASES -- GROUP I</p> <p>This Filing Relates to Consolidated Cases 05 CV 6451, 05 CV 6582, 05 CV 7025, 05 CV 7438, 05 CV 7437, 05 CV 9632, 05 CV 10016, 05 CV 10351, 06 CV 243, 06 CV 244, 06 CV 870, 06 CV 3208</p>	<p>Case Number:</p> <p style="text-align: center;">05 CV 6451 (Consolidated Proceedings)</p> <p style="text-align: center;">Courtroom 2</p>
<p>ORDER RE: MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT</p>	

THE COURT, having considered defendants' motion for summary judgment, the response, the reply, the court file and relevant authorities, and being sufficiently advised in the premises, finds, concludes and orders as follows.

1. This action consolidates 12 cases stating substantially identical claims of negligent hiring, retention and supervision (negligent supervision) against defendants based upon the alleged sexual abuse of plaintiffs, as minors, between 1960 and 1974, by a former archdiocesan priest (White) who is now deceased. All of the plaintiffs in this consolidated case have settled except John Does 3, 5 and 6. Their complaints were filed, respectively, on December 8, 2005, December 20, 2005 and January 10, 2006. Defendants move to dismiss pursuant to C.R.C.P. 12(b)(5) or, in the alternative, for summary judgment based upon the statute of limitations. Because no matters outside of the complaint have been presented or considered by the court, the court treats this motion as a Rule 12(b)(5) motion. As to the issues raised by this motion, John Does 3, 5 and 6 are in substantially the same situation. Therefore, the court rules on the motion as to these plaintiffs as a group. For reasons stated below, the court denies the motion.

2. Initially, the court rejects plaintiffs' argument that there is no procedural basis for moving to dismiss under Rule 12(b)(5) on statute of limitations grounds. Although the statute of limitations is generally raised as an affirmative defense, rather than on a motion to

dismiss, when the facts in the complaint show undisputedly that the action was not brought within the statute of limitations, the court may dismiss the case on that basis. *Wasinger v. Perd*, 705 P.2d 533 (Colo. App. 1985).

3. Plaintiff does not dispute defendants' position that the statute of limitations did not begin to run until each of the plaintiffs reached majority, or that the applicable statute of limitations was six years after the cause of action accrued. See former C.R.S. §13-80-110(9). Nor do the parties dispute that C.R.S. §13-80-108(1) governs when plaintiffs' causes of action accrued. That section provides that a cause of action for injury to a person accrues "... on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." The parties further agree with the statement in *Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152, 159 (Colo. App. 1995) that, "The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought."

4. Defendants contend that the factual allegations of the complaint establish as a matter of law that each plaintiff's cause of action accrued at the time of the alleged abuse, and that, therefore, the statute of limitations for each of the plaintiffs' claims expired six years after that plaintiff reached majority. For John Does Nos. 3, 5, and 6 those dates were 1981, 1979, and 1975, respectively. This was long before their complaints were filed in 2005 and 2006. The allegations defendants rely on for their accrual argument are that at the time of the alleged abuse, each plaintiff knew that: (a) he had been abused; (b) White was the perpetrator; and (c) White was an "employee" of the defendants. Motion at 7.

5. As stated above, a cause of action accrues on the date that the injury and its cause are known or should have been known to the plaintiff. C.R.S. 13-80-108(1). Thus, knowledge of the cause is essential. While the factual allegations relied on by defendants establish that the plaintiffs were aware of their injuries at the time of the alleged abuse, they do not establish as a matter of law that they knew, or should have known, of the cause. The claim against the defendants is for negligent supervision, not for abuse. An employer (or other person charged with supervision) is subject to liability for negligent supervision if he or she knows or should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. *Moses v. Dioceses of Colorado*, 863 P.2d 310 (Colo. 1993). The court is not persuaded that the mere knowledge that White was a diocesan priest at the time of the abuse establishes as a matter of law that plaintiffs thereby knew, or should have known in the exercise of reasonable diligence, that the defendants were also aware at that time of White's conduct he would subject third parties to an unreasonable risk of harm. To the contrary, plaintiffs have alleged that despite the exercise of reasonable diligence they only recently learned of the Archdiocese's negligent conduct. This is sufficient to withstand a motion to dismiss on this issue applying the standard applicable to Rule 12(b)(5) motions as set forth in numerous cases including, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290-1291 (Colo. 1992).

6. The court has considered the numerous cases cited by the defendants for the proposition that knowledge of the identity of the employer is sufficient for a claim of negligent supervision to accrue. The court, however, does not find those cases persuasive. The Colorado cases primarily relied upon by defendants to support its position are: *Reider v. Dawson*, 856 P.2d 31 (Colo. App. 1992); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991); *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. App. 2000) and *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991). While *Reider*, *Mosher*, and *Sandoval* contain *dicta* which may be read to imply that knowledge of the employer is sufficient for a claim for negligent supervision to accrue, in none of those cases was that issue raised by the parties or addressed by the court. *Cassidy* is distinguishable because it involved a claim directly against the perpetrator, not against one charged with negligent supervision.

7. Similarly, the court does not find the non-Colorado cases persuasive. While *Doe v. Archdiocese of Cincinnati*, 849 N.E. 268 (Ohio 2006), *Meehan v. Archdiocese of Philadelphia*, 870 A.2d 912 (Pa. Super. 2005) and *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270 (Pa. Super. 2005) each held that knowledge that the perpetrator was employed by the defendant, archdiocese, gave the plaintiff all the facts necessary to investigate and prosecute his potential cause of action against the archdiocese, the statutes of limitation and law on accrual in each of those jurisdictions were materially different from that of Colorado. In *John BBB Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94 (Wis. 1997), applying an accrual standard similar to that of Colorado, *John BBB Doe*, 565 N.W. at 103, the court concluded that "derivative" claims of respondeat superior and negligent employment against the archdiocese accrued at the same time as the claims against the perpetrator of the abuse. *John BBB Doe*, 565 N.W.2d at 114. The negligent supervision claim against the defendants here is a separate substantive claim, not a derivative claim. *Colosimo v. Roman Catholic Bishop of Salt Lake City*, ___ P.3d ___ (Utah 2007) affirmed a summary judgment where the plaintiffs conceded that they made no inquiry into a potential cause of action against the institutional defendants. Here, by contrast, plaintiffs have alleged that their reasonable diligence yielded only recent knowledge of the defendants' negligence.

8. In contrast to the cases relied upon by defendants, *Winkler*, 923 P.2d 152, stands for the proposition that mere knowledge of the employment relationship is not sufficient for a cause of action for negligent supervision to accrue. In *Winkler* the court ruled that although plaintiff was aware of the defendant minister's employment by the defendant, plaintiff did not discover the factual basis for her claim of negligent supervision until she became aware that at least one other woman had a similar experience with the minister. While the court reads *Winkler* as requiring more than mere knowledge of the employment relationship, the court does not agree with plaintiffs' position *Winkler* requires that for a cause of action to accrue, plaintiffs had to be aware that the Archdiocese knew of allegations of sexual abuse by White against others. *Winkler* stated that requirement within the factual context of that case, not as a universal rule. *Winkler* does not rule out other knowledge by plaintiffs that could have put them on notice of negligent supervision.


9. The court also finds that the allegations in the complaints related to equitable tolling as set forth in the Response at 9, also warrant denial of defendants' motion to dismiss. The statute of limitations may be equitably tolled where defendant's wrongful conduct prevented the plaintiff from asserting his or her claims in a timely manner. *See Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996). Applying the standard applicable to a Rule 12(b)(5) motion, the court finds those allegations to be sufficient to state that defense. At the same time, the court rejects plaintiff's contention, relying on *Smith v. Boyett*, 908 P.2d 508 (Colo. 1995), that the statute was equitably tolled by the defendants' failure to affirmatively inform plaintiffs of facts which would support a claim of negligent supervision. The decision in *Smith* was based upon the court's interpretation of a medical malpractice statute of limitations which provided an exception if the act or omission which gave rise to the cause of action was knowingly concealed by the physician. *Smith*, 908 P.2d at 511, 512. Thus, *Smith* has no application to this case. The court is aware of no authority for the dubious proposition that allegations of fiduciary duty in a negligent supervision case serve to equitably toll the statute of limitations where the defendant has not affirmatively informed the plaintiff of facts underlying the negligent supervision claim. Such a rule would read out of section 13-80-108(1) the "exercise of reasonable diligence" requirement and would effectively eliminate the statute of limitations for institutional defendants in a case such as this. *See Colosimo, supra*.

10. Having considered the arguments and authorities presented by counsel, the court does not find that oral argument would be helpful. Defendants' motion is denied.

SO ORDERED.

Dated this 26 day of March, 2007.

BY THE COURT:



John N. McMullen
District Court Judge

cc: All parties.