McMurtry v. Wexford Health Source, Inc. et al

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION CORDELLUS McMURTRY,) Plaintiff,) Case No. 18-cv-02176 v.) Hon. Steven C. Seeger

WEXFORD HEALTH SOURCES, INC., et al.,) Defendants.)
_____)

MEMORANDUM OPINION AND ORDER Plaintiff Cordellus McMurtry, an inmate, has glaucoma. He received the diagnosis in May 2017, while incarcerated at Stateville Correctional Center. But the diagnosis of a serious eye condition did not come out of the blue. By that point, McMurtry had spent three years voicing concerns about delayed treatment for his vision problems. In March 2018, McMurtry sued medical provider (Wexford), medical director, and two other prison officials under section 1983. Almost two years later, in January 2020, he amended the complaint and added a claim against Jason Dunn, the optometrist. He claims that all five defendants violated his Eighth Amendment rights by showing deliberate indifference to his medical needs. He alleges that the delayed treatment caused him to develop glaucoma and worsened his condition. Two defendants challenged the complaint. Optometrist Dunn moved to dismiss based on the statute of limitations. McMurtry was diagnosed with glaucoma in 2017, but did not sue Dunn until 2020, more than two years later. provider, moved for judgment on the pleadings. Wexford argues that it cannot be liable because none of its current or former employees remains a defendant.

The Court grants for judgment on the pleadings.

Background Cordellus McMurtry was diagnosed with glaucoma on May 19, 2017. See Am. Cplt., at ¶ 1 (Dckt. No. 71); see also UIC Diagnosis (Dckt. No. 71, at 19 of 74). 1

He claims that he developed the disease and suffered from deteriorating vision because of delayed appointments and a lack of proper care during his incarceration at Stateville. See, e.g., Am. Cplt., at ¶ r. Obaisi and his employer Wexford Health Source, Inc. continual delay and lack of treatment

allegation 2

was delayed for more than three years. Id. at ¶ 1. He also complains that he received deficient medical care from Jason Dunn, the Stateville optometrist, during on-site appointments at Stateville

throughout that delay. Id. at ¶ 5. The exhibits to the complaint describe medical care starting in December 2012, when Dunn initially referred McMurtry to a UIC eye specialist. See Medical Special Services Referral and Report (Dckt. No. 71, at 14 of 74). McMurtry does not describe this 2012 appointment in his complaint, but he mentions the fact that he saw Dunn before his visit to UIC in May 2013. See Am. Cplt., at ¶ 5 (Dckt. No. 71)

1 McMurtry attached 19 exhibits to his amended complaint, and cited the exhibits extensively in his pleading. The Court can consider exhibits to a complaint when deciding a motion to dismiss. See Williamson v. Curran, 714 F.3d 432, 436 (7th Cir. 2013). 2 See UIC Diagnosis (Dckt. No. 71, at 19 of 74); see generally University of Illinois Hospital & Health Sciences System, Wikipedia, https://en.wikipedia.org/wiki/University_of_Illinois_Hospital_%26_Health_ Sciences_System (last visited March 26 Research Institute, the Light House for the Blind, and the Illinois Eye and Ear Infirmary (IEEI), making

23, 2013 and durning [sic] my visits with him afterwards

McMurtry visited the external specialist at UIC in May 2013. Id. At this appointment, the specialist diagnosed him as a See 5/23/13 UIC - specialist recommended that he return to UIC for an appointment within six to 12 months. See Am. Cplt., at ¶ 1 (Dckt. No. 71). Dr. Obaisi, the Stateville Medical Director, told McMurtry that he would return to UIC Id. But Id. In the meantime, McMurtry frequently requested another exam at UIC. Id. am I returning to the U. of I. for my follow-up treatment. The nurses would tell me, they cannot

But McMurtry to UIC within the year, or within two years, or even three. Throughout that time, he orally complained to Dr. Obaisi and filed grievances about the delay. Id. Id. He asked to see an -site 3

Id. While he waited, McMurtry did attend several appointments with on-site optometrists, including Dunn. From October 2013 four times. Id. at ¶ 5. McMurtry complains that during two of the four appointments, he

received inadequate care because Dunn did not check his eye pressure. Id. That testing, he

3 As noted below, McMurtry doe See Am. Cplt., at ¶ 5 (Dckt. No. 71). The complaint explain the discrepancy between the allegation that Stateville had no on-site eye doctor (id. at ¶ 1) and the allegation that Dunn was the on-site optometrist (id. at ¶ 5). Maybe McMurtry means that Stateville had no on-site ophthalmologist, but that he was able to see an on-site optometrist.

believes, could have helped diagnose his eye problems. (or tonometry) is one of several tests used to diagnose glaucoma. See generally Glaucoma Diagnosis & treatment, Mayo Clinic, https://www.mayoclinic.org/diseases- conditions/glaucoma/diagnosis-treatment/drc-20372846 (last visited March 26, 2021).

The first of these appointments occurred in October 2013, five months after first visit to UIC. See Am. Cplt., at ¶ 5 (Dckt. No. 71). At that appointment, Dunn checked Id. So, during that first appointment, Dunn did check his eye pressure (unlike two later visits).

McMurtry next saw Dunn in April 2014. Id. He complained of eye pain, but Dunn did not check his eye pressure. Id.

During another appointment four months later, in August 2014, McMurtry told Dunn that he was having headaches. Id. at

that visit, either, even though eye pain and headaches are symptoms of glaucoma. Id.; see also Glaucoma Symptoms & causes, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/glaucoma/symptoms-causes/syc-20372839 (last visited March 26, 2021). So despite

check his eye pressure at the later appointments.

More months passed. The fourth appointment did not take place until June 1, 2015. See Am. Cplt., at ¶ 5 (Dckt. No. 71). At that point, McMurtry saw a , who performed the next pressure check. Id. But the complaint does not include any information about the results of that test. And it does not mention Dunn, either.

Then, from July 2015 to October 2016, McMurtry received no follow-up care on-site or off-site. See Am. Cplt., at ¶ eye-doctor from July 2015 to Oct. 2016, a 15- id. at ¶ Oct. 31, 2016) 15- ontop [sic] of an already 10- 25

Eventually, he had three more on-site appointments in October 2016, December 2016, and February 2017. Id. at ¶ 5. The complaint does not during those three appointments in 2016 and 2017. Id. The complaint gives no indication that Dunn treated him during any of those visits. Id. The exhibits to the complaint include a medical summary suggesting that McMurtry last saw Dunn in 2014, and saw a different optometrist in 2016 and 2017. 4 The complaint alleges that he did not receive a pressure check during the appointments in December 2016 or February 2017. Id. The

complaint is not entirely clear whether he received a pressure check during the appointment in October 2016. In May 2017, four years after his first visit, McMurtry finally returned to UIC for an appointment. Id. At this appointment, the specialist diagnosed him with glaucoma. Id. at ¶ 1;

4 In the exhibits to the amended complaint, McMurtry included a document summarizing his medical records. See Summary of UIC and Stateville Medical Records (Dckt. No. 71, at 40 50 of 74). The summary lists Dunn for three appointments: October 4, 2013, April 17, 2014, and August 5, 2014. Id. at 4 (Dckt. No. 71, at 43 44 of 74). The summary states at the 2016 and 2017 appointments, not Dunn. Id. at 4 5 (Dckt. No. 71, at 43 44 of 74).

see also UIC Diagnosis (Dckt. No. 71, at 19 of 74) (indicating that he was diagnosed at the UIC Eye and Ear Infirmary on May 19, 2017). Even after the glaucoma diagnosis, McMurtry endured more delayed appointments, which made his condition worse. See Am. Cplt., at ¶ 1 (Dckt. No. 71). The UIC specialist recommended that he return to the clinic two months after his diagnosis in May 2017. Id. Instead, he did not return until November 3, 2017. Id. second eye drop because [his] condition had grown worse durning [sic] that 6- Id.

Throughout his difficulties obtaining treatment, McMurtry filed grievances with Stateville. Id. McMurtry attached the grievances and responses as exhibits to the amended complaint. He also attached letters that he wrote to prison officials. McMurtry alleges that he - Id. at ¶ 4. Four of the grievances related to his request to return to UIC. See 5/28/14 Grievance (Dckt. No. 71, at 16 of 74); 5/25/15 Grievance (Dckt. No. 71, at 17 18 of 74); 10/29/16 Grievance (Dckt. No 71, at 28 29 of 74); 2/10/17 Grievance (Dckt. No. 71, at 34 35 of 74). One later grievance requested an appointment with a neuro-ophthalmologist after his diagnosis, as the specialist had recommended. See 7/21/17 Grievance (Dckt. No. 71, at 25 of 74). The final grievance complained about the delays, the lack of proper care, and his worsening eye condition. See 11/4/17 Grievance (Dckt. No. 71, at 38 39 of 74). The last grievance was returned as misdirected, because it was filed with the Administrative Review Board prematurely, before Pontiac Correctional Center (his facility at that time) had the chance to review the issue. See Return of Grievance (Dckt. No. 71, at 37 of 74).

On March 19, 2018, McMurtry filed a pro se complaint against four defendants: (1) Wexford Health Sources, Inc.; (2) Dr. Obaisi, Warden Randy Pfister; and (4) grievance officer Anna McBee. Dr. Obaisi passed away before the filing of the amended complaint. He is no longer a defendant because there was no timely substitution. 5 On January 22, 2020, McMurtry filed an amended complaint also composed on his own though by that time he had a court-appointed lawyer. See Am. Cplt. (Dckt. No. 71); see also 1/29/20 Minute Order (Dckt. No. 73). The amended complaint added Jason Dunn as a defendant. See Am. Cplt., at ¶ 5.

McMurtry claims that Dunn showed deliberate indifference to his medical needs by failing to perform pressure checks and by failing to address his complaints of eye pain and headaches. Id. ( ). his condition. Id.

At the end of the paragraph setting out his allegations against Dunn, McMurtry does mention his delayed return to UIC. Id. [ ]t until May 19, 2017 when I was returned to U.I.C. 4-years after my May 23, 2013 visit which stated I should be returned in 6- .

5 on April 18, 2018. See 4/18/18 Order (Dckt. No. 11). McMurtry included Dr. Obaisi as a defendant in the original complaint in March 2018, and also named Dr. Obaisi as a defendant in his first amended complaint in January 2020. See Cplt., at ¶ 1 (Dckt. No. 1); Am. Cplt., at ¶ 1 (Dckt. No. 71). On July 1, See ion (Dckt. two-year delay in requesting the substitution, especially after Judge Tharp proactively flagged the issue. See 7/8/20 Mem. Opin. and Order (Dckt. No. 95); 7/31/20 Order (Dckt. No. 102). Even

if one considers the filing of the amended complaint, the motion for substitution came too late. The motion for substitution (in July 2020) came long after the filing of the amended complaint, too (in January 2020). See

Id. So the inadequate care during on-site appointments and its effect on his eye condition make up the entirety of his claim against Dunn. As for Wexford, McMurtry alleges that its policies caused the delays that contributed to his glaucoma. Id. at ¶ failing to return patients to off-site specialist [sic] and with conducting follow- 6

Id.

McMurtry believes that, because of financial incentives, Wexford has established policies Id. at ¶ 2. One such cost- en when doing so is contrary to Id. of a continued pra[c]tice and custom promulgated by Wexford in an attempt to save money at the Id.

Discussion Dunn moved to dismiss under Rule 12(b)(6). Wexford moved for judgment on the pleadings under Rule 12(c). The Court considers each motion in turn. I. Dunn moved to dismiss under Rule 12(b)(6) on three grounds. See Mtn. to Dismiss, at 7 11 (Dckt. No. 79). First, he argues that the claim is untimely under the two-year statute of limitations. Second, he contends that the complaint fails to sufficiently plead

6 The Court notes that McMurtry refers to Stateville here, rather than Wexford. But because Wexford is the medical provider for Stateville, and construing the complaint in the light most favorable to the plaintiff, this allegation appears intended to apply to Wexford, too.

deliberate indifference to medical needs. Third, he argues that he is entitled to Eleventh Amendment immunity on the official capacity claim. The Court concludes that the claim is untimely. is barred by the statute of limitations, the Court does not need to consider the second and third

grounds for dismissal. A. Legal Standard A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not the merits of the case. See Fed. R. Civ. P. 12(b)(6); Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). At this early stage, the Court assumes the truth of the well-pleaded facts in the complaint, including the exhibits. See Forrest v. Universal Savings Bank, F.A., 507 F.3d 540, 542 (7th Cir. 2007). A court normally cannot consider evidence outside the pleadings on a motion to dismiss without converting it to a motion for summary judgment. See Hecker v. Deere & Co., 556 F.3d 575, 582 83 (7th Cir. 2009). But an exhibit to the complaint is deemed to be part of the complaint itself, so it is fair game on a motion to dismiss. See Williamson v. Curran, 714 F.3d 432, 436 (7th Cir. 2013). Finally, di liberall Arnett v. Webster, 658 F.3d 742, 751 (7th Cir. 2011) (citing Erickson v. Pardus, 551 U.S. 89, 94

(2007)). The statute of limitations is an affirmative defense, so it typically is not a viable basis for

challenging a complaint on a motion to dismiss. See Cancer Found., Inc. v. Cerberus Capital Mgmt., LP, 559 F.3d 671, 674 (7th Cir. 2009). But a complaint can defeat itself. A plaintiff can plead himself out of court on statute of limitations grounds if the face of the complaint shows that the claim is time-barred. See, e.g., Logan v. Wilkins, 644 F.3d 577, 582 (7th Cir. 2011)

omplaint reveal that relief is barred by the applicable statute of Jay E. Hayden Found. v. First Neighbor Bank, N.A. f it is plain from the complaint that the defense is indeed a bar to the suit dismissal is proper without further pleading. ; Cancer Found., 559 F.3d at 675 (recognizing that dismissal is appropriate when it is t is hopelessly time- Andonissamy v. Hewlett-Packard Co., 547 F.3d 841, 847 (7th Cir. 2008) (stating that defense, while not normally part of a motion under Rule 12(b)(6), is appropriate where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that an action is untimely under the governing and citation omitted); Jones v. Bock, 549 U.S. 199,

taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative (citation omitted). B. Timeliness of the Claim The statute of limitations for a claim under section 1983 depends on the statute of limitations for a personal injury action in the state where the injury occurred. See Neita v. City of Chicago, 830 F.3d 494, 498 (7th Cir. 2016). Here, McMurtry was incarcerated in Illinois at all the statute of limitations for personal-injury actions is two years from when the cause of action accrued Id. (citing 735 ILCS 5/13 202 (2016)).

McMurtry first named Dunn as a defendant on January 22, 2020. See Am. Cplt. (Dckt. No. 71). So the claim against Dunn is barred if the limitations period began to run more than two years before that date, subject to two exceptions (i.e., tolling, and relation back) suits, which add new parties after the two-year period, are untimely and must be dismissed Terry v. , 200 F. Supp. 3d 719, 724 (N.D. Ill. 2016). The Court will address the timeliness of the claim in three steps. The first step is when the claim accrued. The second step is whether tolling applies. The final step is whether the filing of the amended complaint relates back to the filing of the original complaint. See Fed. R. Civ. P. 15(c)(1)(C)(ii). 1. Accrual When deciding whether a claim is timely, the first step is deciding when the claim accrued. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990). The statute of limitations begins to run when the claim accrues. Id. two-year clock started ticking. Dunn makes an accrual argument based on material outside the pleadings. He argues that the claim is See Mtn. to

Dismiss, at 5 (Dckt. No. 79). In his view, since he stopped caring for McMurtry more than five years before he became a defendant, the claim is untimely. Id. at 8. Dunn might have a good argument on the merits, but a motion to dismiss is not the time or the place to inject material outside the pleadings. On a motion to dismiss, a complaint rises or

falls based on the contents of the complaint itself, not extraneous material. Challenging the merits of

a claim based on other material is best reserved for a motion for summary judgment. Next, Dunn argues that even if the limitations period started to run in 2017, the claim is still untimely. See Mtn. to Dismiss, at 8. That is, in his view, the face of the complaint shows time-barred. Id. On a motion to dismiss, the Court must look to the allegations of the complaint to determine when the claim accrued. Again, the statute of limitations borrowed from Illinois law is two years. Wilson v. Wexford Health Sources, Inc., 932 F.3d 513, 517 (7th Cir. 2019). So state law determines the amount of time on the clock, and federal law determines when it starts to tick. In deliberate indifference cases based on medical error, a section 1983 claim accrues Devbrow v. Kalu, 705 F.3d 765, 768 (7th Cir. 2013); see also King v. Newbold The plaintiff in Devbrow allege[d] that the defendants were deliberately indifferent to his medical needs by unnecessarily delaying a biopsy and thus preventing the diagnosis of his prostate cancer Devbrow, 705 F.3d at 769. Id. The limitations period starts to run at the point of diagnosis, Id. at 768. But when a plaintiff alleges a continuing violation, the claim can accrue after the injury is discovered. Id. at 768 69 later (emphasis in original). If a claim of deliberate indifference s] an ongoing

denial of care Wilson, 932 F.3d at 517 (citing Heard v. Sheahan, 253 F.3d 316, 319 (7th Cir. 2001)). he continuing-violation doctrine operates to delay the start of the limitations period. A contrary rule, we explained in Heard, would encourage the proliferation of protective lawsuits. Devbrow, 705 F.3d at 770 (emphasis in original; citing Heard, 253 F.3d at 319 20). For continuing Eighth Amendment violations, the two-year period starts to run (that is, the cause of action accrues) from the date of the last incidence of that violation, not the first. Turley v. Rednour, 729 F.3d 645, 651 (7th Cir. 2013). Heard is a good example of how a claim can accrue after discovery of an injury based on a continuing violation. After complaining about pain for months, the inmate in Heard was diagnosed with a ruptured hernia. Heard, 253 F.3d at 317. But the jail officials refused to act on the recommendation for treatment. Id. The inmate did not receive any care until he left jail, and he eventually sued within two years of the end of his incarceration. Id. at 317 18. The Seventh Circuit held that the claim was timely. The lack of care after discovery of the injury constituted a continuing violation that delayed the start of the statute of limitations. Id. at 318 19. Every day that they prolonged his agony by not treating his painful condition marked a fresh infliction of punishment that caused the statute of limitations to start running Id. at 318; see also Devbrow, 705 F.3d at Heard thus holds that when the violation

to run any earlier than the last day Judge Easterbrook has noted that Turley, 729 F.3d at 654 (Easterbrook, J., concurring). A continuing violation occurs

Id. Deliberate indifference cases under the Eighth Amendment are a good example, because Id. As a result, Id.

[a] discrete wrongful act causes continuing harm, a new discrete violation does not extend the time to sue about an old discrete violation, even if the new violation occurs Id. That situation is not a continuing Id. So a continuing injury .

rests See Am. Cplt., at ¶ 5 (Dckt. No. 71) ( ). McMurtry

received a diagnosis of glaucoma on May 19, 2017. See UIC Diagnosis (Dckt. No. 71, at 19 of 74). That date is the latest possible date for the injury. At that point, McMurtry knew about the injury because he knew he had glaucoma. But under Devbrow and Heard, the continuing violation doctrine could delay the start of the statute of limitations if the complaint alleged that Dunn failed to provide care after the diagnosis in May 2017. The lack of ongoing care would constitute ongoing inaction and thus be Turley, 729 F.3d at 654 (Easterbrook, J., concurring). But the complaint alleges no such thing. The complaint does not allege anything about Dunn after May 2017. In fact, all of the allegations about Dunn in the complaint pre-date the diagnosis of glaucoma. The claim against Dunn is about his failure to perform tests that could

have detected glaucoma, not his failure to provide treatment after the diagnosis of glaucoma. It is a pre-diagnosis claim, not a post-diagnosis claim. Specifically, McMurtry alleges several eye appointments with Dunn spanning almost two years. See Am. Cplt., at ¶ 5 (Dckt. No. 71) (describing eye appointments with Dunn in October 2013, April 2014, and August 2014). In the same paragraph, McMurtry also describes four other on-site eye appointments from June 2015 to February 2017. Id. (describing eye appointments in June 2015, October 2016, December 2016, and February 2017). One appointment involved Id. The complaint does not reveal who provided treatment during the other three appointments during that period. Id. The complaint does not allege that Dunn failed to act after the diagnosis of glaucoma in May 2017, so there is no basis to extend the accrual of the claim based on a continuing violation. The complaint does not allege that Dunn was continuing to do anything (or nothing) after May 2017. McMurtr The date of diagnosis (May 19, 2017) is more than two years before the date of the amended complaint (January 22, 2020), when McMurtry sued Dunn for the first time. As a result, McMurtry against Dunn is untimely unless the statute of limitations was tolled until January 2018 (that is, two years before he filed an amended complaint and added McMurtry in January 2020), or unless the amended complaint relates back to the original complaint filed on March 19, 2018. 2. Tolling The next question is whether tolling applies. Accrual is about when the clock starts ticking, and tolling is about whether the clock was paused.

Tolling interrupts the statute of limitations after it has begun to run . . . . Heard, 253 F.3d at 317. Just as they apply state statutes of limitations to section 1983 claims, federal courts must also apply state tolling rules. See Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir. 2001). So state law determines the amount of time on the clock, federal law determines when it starts to tick, and state law determines when the clock is paused. Under Illinois law, stayed by injunction, order of a court, or statutory prohibition -216 (emphasis added). So a federal court applying Illinois law must toll the statute of limitations if a statutory prohibition exists that prevents a plaintiff s cause of action. Johnson, 272 F.3d at 521. Here, a statutory prohibition was potentially available. When a prisoner sues under section 1983 about prison conditions, the PLRA requires him to exhaust administrative remedies before filing the claim. See 42 U.S.C. § No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or

other correctional facility until such administrative remedies as are available are exhausted. federal court relying on the Illinois statute of limitations in a § 1983 case must toll the limitations period while a prisoner completes the administrative grievance process. Johnson, 272 F.3d at 522. Otherwise, a prisoner could face a heads-I-win, tails-you-lose situation. -evident: the prisoner who files suit under § 1983 prior to

exhausting administrative remedies risks dismissal based upon § 1997e; whereas the prisoner Id. In short, pursuing administrative remedies can toll the statute of limitations.

McMurtry needs to bridge the gap between the accrual of the claim (in May 2017, when he was diagnosed) to the two-year mark before filing suit on January 22, 2020 (i.e., January 22, 2018). pursued administrative remedies against Dunn from the date of his diagnosis through January 22, 2018. But tolling does not apply here for a simple reason: McMurtry did not pursue administrative remedies against Dunn at all. McMurtry attached his grievances, letters, and the responses to his grievances as exhibits to the complaint. See Exhibits to Am. Cplt. (Dckt. No. 71). But none of these failure to check his eye pressure. 7

See Johnson, 272 F.3d at 522 (noting that tolling applies while In this suit, McMurtry laim against Dunn rests solely on his failure to perform the pressure checks at several appointments. See Am. Cplt., at ¶ 5 (Dckt. No. 71). But none of his six grievances raised issues about the lack of pressure checks. See Exhibits to Am. Cplt. (Dckt. No. 71, at 16 18, 25, 28 29, 34 35, 38 39).

7 PLRA does not specify what a prisoner must do to exhaust his administrative remedies. Those requirements are found in the law establishing the relevant administrative remedies: state law for state Schillinger v. Kiley, 954 F.3d 990, 995 (7th Cir. 2020). by Illinois See Lewis v. Pfister, 2019 WL 5577164, at *1 (N.D. Ill. 2019); 20 Ill. Admin. Code § 504.800 (2017). The Administrative Code describes what information an inmate must include in a grievance: The grievance shall contain factual details regarding each aspect of the offender s complaint, including what happened, when, where and the name of each person who is the subject of or who is otherwise involved in the complaint. This provision does not preclude an offender from filing a grievance when the names of individuals are not known, but the offender must include as much descriptive information about the individual as possible. 20 Ill. Admin. Code § 504.810(c).

Four of the grievances involved his delayed return to UIC. See 5/28/14 Grievance (Dckt. No. 71, at 16 of 74); 5/25/15 Grievance (Dckt. No. 71, at 17 18 of 74); 10/29/16 Grievance (Dckt. No 71, at 28 29 of 74); 2/10/17 Grievance (Dckt. No. 71, at 34 35 of 74). One grievance, filed after his glaucoma diagnosis, requested an appointment with a neuro- ophthalmologist. See 7/21/17 Grievance (Dckt. No. 71, at 25 of 74). And his final grievance complained about his difficulties obtaining treatment from May 2013 to November 2017, summarizing the delays and their impact on his condition. See 11/4/17 Grievance (Dckt. No. 71, at 38 39 of 74). grievance probably comes the closest. In this grievance, McMurtry complained more generally about his medical care at Stateville. He cited the delay in his return - d to

his diagnosis, and other failures by Wexford and Dr. Obaisi to properly treat his glaucoma following his diagnosis. Id. He concluded: because of the continuing deliberate indifference displayed since May of 2013 thru Id. Still, he never mentioned the lack of pressure checks and never raised any issues about Even if that grievance did apply to his claim against Dunn, and therefore tolled the limitations period, tolling would not apply beyond 2017. That grievance was finally resolved on November 14, 2017, when the Administrative Review Board returned it as misdirected. See Return of Grievance (Dckt. No. 71, at 37 of 74). At that point, the clock was ticking. From the face of the complaint and the exhibits, McMurtry did not pursue an administrative remedy against Dunn in the grievances, so there is no basis for tolling. Even if, for the sake of argument, the last grievance complained about Dunn, the administrative process

for that grievance ended in November 2017. So, there was no tolling after November 2017. McMurtry sued Dunn more than two years later (in January 2020), so his claim is untimely. claim against Dunn accrued in May 2017, and there is no basis for tolling. As a result, the claim is barred by the statute of limitations unless the amended complaint relates back to the original complaint. 3. Relation Back Sometimes an untimely claim can pass muster under the statute of limitations by latching onto a timely claim. Rule 15(c)(1) governs when an amended complaint adds a new defendant and relates back to the filing of an earlier complaint. The first hurdle is a shared subject matter. the date of the original pleading when: . . . (C) the amendment changes the party or the naming See Fed. R. Civ. P. 15(c)(1)(C). Rule 15(c)(1)(B) provides that the amendment must assert a claim arising or attempted to be set out in the See Fed. R. Civ. P. 15(c)(1)(B). If an amended complaint passes that barrier, a plaintiff must overcome two additional hurdles. The new prejudiced in defending on the merits. See Fed. R. Civ. P. 15(c)(1)(C)(i). Next, the new complaint relates back if the new See Fed. R. Civ. P. 15(c)(1)(C)(ii). Here, at a minimum, McMurtry has not satisfied the last requirement.

McMurtry argues that he lacked notice of the lawsuit. See Resp. to Mtn. to Dismiss, at 7 (Dckt. No. 90). He largely relies in Krupski v. Costa Crociere S. p. A., 560 U.S. 538 (2010). In Krupski, the Supreme Court considered relation back of an amended pleading that named a new party. Id. Id. at 546. The plaintiff in Krupski tripped and broke her leg on a cruise, and intended to sue the cruise line. Id. at 541 42. But she sued the wrong entity. Costa Cruise, the original defendant,

ac Id. at 543. By the time Krupski moved to amend the complaint to name the right defendant, the statute of limitations had run. Id. at 543 44. The Eleventh Circuit held that because Krupski knew, or should have known, about the existence of Costa Crociere (the new defendant) before the limitations period expired, her failure to name the entity was not a mistake but a deliberate choice. Id. at 546.

The Supreme Court reversed, explaining that Rule 15(c) places the focus on the new knowledge of a mistaken identity Rule 15(c)(1)(C)(ii) asks what the prospective defendant knew or should have known during the Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing her original complaint. Id. at 548 (emphasis in original). A reclude a finding of

exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that

misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Id. at 549. Because Krupski originally intended to sue the new defendant, but misunderstood its status, she made the type of mistake contemplated by Rule 15(c). Id. Krupski did not dispense with the mistake requirement, which appears in the text of the Rule itself. Instead, the Supreme Court simply reminded lower courts that the proper focus is on , when it comes to the mistake. Id. at

Krupski id. at 547, and the text of the Rule expressly requires a mistake. See Fed. R. Civ. P. 15(c)(1)(C)(ii). If anything, Krupski reinforced the notion that a mistake is a sine qua non of relation back under Rule 15. See Krupski, 560 U.S. at 548 49 (reviewing dictionary definitions of Id. at 549. The Supreme Court addressed whose

knowledge of the mistake matters the p without giving any indication that relation back could apply if there was no mistake at all. In fact, the Supreme Court distinguished an earlier case (Nelson) because it involved no mistake. Id. at 551 52

existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against [ ] Nelson v. Adams USA, Inc., 529 U.S. 460, 467 n.1 (2000)). The Court continued:

In that case, there was nothing in the initial pleading suggesting that Nelson was an intended party, while there was evidence in the record (of which Nelson was aware) that Adams sought to add him only after learning that the company would not be able to satisfy the judgment. This evidence countered any implication that

Nelson only after the fact in an attempt to ensure that the fee award would be paid. Id. at 552 (citing Nelson, 529 U.S. at 463 64). The Seventh Circuit confronted a similar case of corporate confusion in Joseph v. Elan Motorsports Techs. Racing Corp., 638 F.3d 555 (7th Cir. 2011). There, too, a plaintiff sued the wrong entity. Id. at 560. Relying on Krupski, the Seventh Circuit instructed district courts to focus on what the new defendant knew or should have known, and whether the new defendant suffered prejudice: The only two inquiries that the district court is now permitted to make in deciding whether an amended complaint relates back to the date of the original one are, first, whether the defendant who is sought to be added by the amendment knew or should have known that the plaintiff, had it not been for a mistake, would have sued him instead or in addition to suing the named defendant; and second, y to defend himself. Id. at 559 60. Krupski in Krupski . . . changed what we and other courts had understood, in Hall and the other cases we

Id. at 559 (citation omitted). But the standard did not dispense with the threshold need for a mistake, as commanded by the text of Rule 15(c)(1)(C)(ii). Here, as in Nelson, there is no indication that McMurtry made a mistake in the original complaint by suing someone else instead of Dunn. In fact,

as an exhibit to the original complaint, McMurtry attached a medical report listing Dunn as his optometrist. See Medical

Special Services Referral and Report (Dckt. No. 1, at 16 of 46) (bearing the printed name and signature of referring practitioner Jason Dunn). McMurtry knew that Dunn played a role in his care, but he advanced no claims against him. See Cplt. (Dckt. No. 1).

I argue that he mistakenly sued another practitioner when he intended to sue Dunn. Indeed, the original complaint left little room for that argument. The amended complaint included the same four parties as the initial complaint, with the addition of Dunn as a fifth party. Compare Cplt. (Dckt. No. 1) (listing four defendants: Dr. Obaisi, Wexford Health Sources, Inc., Randy Pfister, and Anna McBee) with Am. Cplt. (Dckt. No. 71) (listing same four defendants and Jason Dunn). he

The text of the Rule expressly requires a case of mistaken identity. Relation back applies only if the new defendant knew or should have known that he would have been sued See Fed. R. Civ. P. 15(c)(1)(C)(ii). Changing

or making a tactical decision to expand the boundaries of the lawsuit to add new defendants does not qualify as mistaken identity. complaint and the plaintiff s conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant s identity, the requirements of Rule Krupski, 560 U.S. at 552; see also Pierce v. City of Chicago, 2010

and did not conflate the identity of that defendant with another did not make any mistake akin to the misunderstanding in Krupski); Hiler v. Extendicare Health Network, Inc., 2013 WL 756352,

at *6 (E.D. Ky. 2013) (rejecting relation back where p

The Rule requires kn

See Fed. R. Civ. P. 15(c)(1)(C)(ii). Knowledge of a mistake presupposes the existence of a mistake. And not just any mistake identity Id. (emphasis added). If there was no mistake, there was no way for a defendant to know about the mistake. The absence of a mistake compels the absence of relation back.

Here, there was no mistaken identity. he played in his medical care when he composed his original complaint in 2018. He simply

chose not to sue him. Nothing about this case suggests that it is a case of mistaken identity, like Krupski or Joseph. Even if, for the sake of argument, there was a mistake, there is no basis for the notion that Dunn knew, or should have known, that McMurtry would have sued him but for a mistake. Relation back would require a finding that Dunn knew or should have known that

McMurtry would have included him in the original complaint, absent mistaken identity. But the record is devoid of any basis to conclude that Dunn knew that McMurtry would have sued him but for a mistake. In fact, there is no reason to believe that Dunn even knew about the original complaint, let alone had reason to know that McMurtry mistakenly neglected to name him. See Joseph, 638 F.3d at 560 the statute of limitations has run is entitled to repose unless it is or should be apparent to that person that Rendall Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997)).

it is barred by the statute of limitations II. Defendant Wexford moved for judgment on the pleadings under Rule 12(c). Wexford argues that it cannot be liable under section 1983 because none of its employees is a defendant. A. Legal Standard A party may move for judgment on the pleadings any time after the pleadings are closed. See Fed. R. Civ. P. 12(c); Moss v. Martin, 473 F.3d 694, 698 (7th Cir. 2007). The standard is the same as the standard for a motion to dismiss under Rule 12(b)(6). See Armada (Singapore) PTE Ltd. v. Amcol Int l Corp., 885 F.3d 1090, 1092 (7th Cir. 2018). a motion for judgment on the pleadings, a complaint must state a claim to relief that is plausible Denan v. Trans Union LLC, 959 F.3d 290, 293 (7th Cir. 2020) (cleaned up). The Court takes all well-pled facts as true. See Forseth v. Vill. of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). favorable to the nonmoving party and will grant the motion only if it appears beyond doubt that the plaintiff cannot prov Denan, 959 F.3d at 293 (cleaned up); see also 5C Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1368 (3d ed. 2020) adversary s pleadings are assumed to be true and all contravening assertions in the movant s pleadings are Legal conclusions don t move the needle the Court need not accept any legal assertions as true. See Bishop v. Air Line Pilots Ass n Int l, 900 F.3d 388, 397 (7th Cir. 2018); see also Buchanan Moore v. Cty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009).

B. Section 1983 Liability for Private Corporations Wexford believes that it can only be held liable under section 1983 if one of its employees is also a defendant. See Mtn. for Judgment on the Pleadings, at 3 (Dckt. No. 96) Monell or respondeat superior if there is no underlyin its former employee, Dr. Obaisi, Wexford argues, ended the case against it, too. Id. there is no underlying constitutional claim against Dr. Obaisi, the Plaintiff cannot show that his

Wexford basically argues that a section 1983 claim against a private corporation depends on vicarious liability. That is, the liability of the entity depends on the liability of its employee. The trouble is that, as Wexford acknowledges, vicarious liability is not the standard in this Monell official policy standard to private corporations. , 436 U.S. 658, 691 (1978) e conclude that a municipality cannot be held liable solely because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory. ; Iskander v. Vill. of Forest Park, 690 F.2d 126, 128 (7th

respondeat superior for the constitutional torts of its employees . . . a private corporation is not vicariously liable under [section] 1983 (citations omitted); see also , 746 F.3d 782, 790 (7th Cir. 2014)

Monell, our court has applied the Monell standard to private cor

Monell often acts as a shield from suit for private corporations whose employees have See, e.g., Shields, 746 F.3d at 794 Insulating private corporations from respondeat superior liability significantly reduces their incentives to control their employees . constitutional violation by one of its employees, it cannot be held liable. Under Monell, an entity

is not liable simply because its agent is liable. And on the flipside, the fact that an agent is not liable does not mean that the entity is not liable. In support of its argument, Wexford cites language from another case in which it was a defendant. There cannot be vicarious liability without primary liability. The individual defendants all prevailed in this suit, so there is no constitutional tort for which Wexford could be vicariously liable. See Mtn. for Judgment on the Pleadings, at 4 (Dckt. No. 96) (quoting Montague v. Wexford Health Sources, Inc., 615 378, 379 (7th Cir. 2015)). But Wexford omits key context from that case. The quoted language is not an application

Court overrule its precedent.

The plaintiff in that case advocated that the Seventh Circuit overrule its precedent applying Monell to private corporations. See Montague So instead of the official policy standard from Monell, the plaintiff was arguing for vicarious liability. But none Id. So the Court of Appeals explained that applying respondeat superior rather than Monell would not help the plaintiff, because vicarious liability requires primary liability. Id. The Court was not suggesting as

Wexford does here that under Monell a corporation can never be liable without primary liability. Monell s argument falls flat. Even if vicarious liability did apply, the Court of Appeals has observed that such liability would be in addition to, not instead of, Monell liability. ., 849 F.3d tioned in Shields whether private corporations might also be subject to respondeat superior liability, unlike their public counterparts, but we have no need in Shields, 746 F.3d at 790 92).

in Glisson v. Indiana Department of Corrections, 849 F.3d 372 (7th Cir. 2017). No individual employee defendants were left in the lawsuit, but the Seventh Circuit held that the medical provider could still be liable. an organization might be liable even if its indiviId.

institutional policies are themselves deliberately indifferent to the quality of care provided, Id. Corporate liability under Monell need not depend on individual employee critical question under Monell . . . is whether a municipal (or corporate) policy or custom gave

rise to the harm (that Id. at 379. Either the content of an official policy, a decision by a final decisionmaker,

Id. As long as McMurtry has pled that an official policy, decision, or custom harmed him, no individual employee needs to be a party to the suit to hold Wexford liable.

The complaint brings a claim against Wexford based on its own practices, separate and apart from any misconduct of any employee. over all [sic] policy and custom to suit its own financial bottom line rather than afford proper

See Am. Cplt., at ¶ 2 (Dckt. No. 71). He points to several delays in his return to UIC, even though the specialist had recommended a return within a year. Id. at ¶ 1. He alleges that ,

Id. at ¶ 2. And ultimately, these failures harmed him. Id. at ¶ 1. Wexford moved for judgment on the pleadings based on its assumption that it could not be liable after the dismissal of Dr. Obaisi from the case. Seventh Circuit precedent says

Conclusion

pleadings.

Date: March 26, 2021 Steven C. Seeger United States District Judge