IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STEVE SNYDER-HILL, *et al*., Plaintiffs, v. THE OHIO STATE UNIVERSITY, Defendant.	Case No. 2:18-cv-00736-MHW-EPD

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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have known they were abused *and* (2) knew or should have known of OSU's role in causing that abuse. *See Sowers v. Bradford Area Sch. Dist.*, 694 F. Supp. 125, 132 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3d Cir. 1989) (vacated on other grounds) (denying motion to dismiss on statute of limitations grounds because factual questions remained as to whether student knew or should have known school district caused student's injury); *T.R. v. Boy Scouts of Am.*, 181 P.3d 758, 763 (Or. 2008) ("[T]he limitations period begins to run as to each defendant when the plaintiff discovers, or a reasonable person should have discovered, *that defendant's* causal role.") (emphasis added).

The question of what a plaintiff knew, or should have known, is a fact-intensive inquiry ordinarily "reserved for the jury [except when] the facts are so clear that reasonable minds cannot differ." *In re Arctic Exp. Inc.*, 636 F.3d 781, 802 (6th Cir. 2011). OSU cannot meet its burden of demonstrating that the allegations of the complaint affirmatively show that no reasonable juror could find that plaintiffs did not know and should not necessarily have known of their abuse and OSU's role in causing it more than two years ago.

The vast majority of the plaintiffs allege that, until this year, they did not know that Dr. Strauss had sexually abused them at all—that Dr. Strauss's and OSU's obfuscation led them to reasonably believe Dr. Strauss's behavior was medically necessary and appropriate. Sexual abuse by a physician is particularly insidious. Unlike other professionals, such as teachers, coaches and priests, doctors are authorized *and expected* to touch a person's body and sexual organs. When a student would question the need for Dr. Strauss's behavior—for example, the prolonged unnecessary genital exams he routinely performed—he always had a ready answer. Dr. Strauss's clinical explanations succeeded in convincing the young college students he victimized that his treatments were simply ordinary medical care.

OSU also obfuscated and legitimized Dr. Strauss's abuse by, among other things, telling student-athletes who expressed discomfort that "Dr. Strauss's examinations were appropriate and there was no reason to complain," promoting Dr. Strauss to serve as OSU's sports team physician, and employing staff who witnessed Dr. Strauss's prolonged genital exams and treated them as normal. As a result, the vast majority of the plaintiffs—like many young men in their situation would—discounted their own discomfort and continued to trust that Dr. Strauss's examinations were legitimate. Because these plaintiffs have plausibly alleged that they did not discover—and could not have discovered—their injuries until this year, OSU cannot demonstrate that their Title IX claims are time-barred. *See Walburn v. Lockheed Martin Util. Servs., Inc.*, 443 F. App'x 43, 47 (6th Cir. 2011); *Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986) (plaintiff's psychiatric malpractice claim accrued when new doctor informed plaintiff that sexual relationship with therapist caused her psychological damage); *Doe*

Until 2018, when OSU announced its investigation into Dr. Strauss, none of the plaintiffs had any reason to know of OSU's role in their abuse—none of the plaintiffs had any reason to believe that their school knew that its physician was an abuser, and could have stopped the abuse, before they were ever his patients. Courts have refused to dismiss cases as time-barred under similar circumstances. *See, e.g., Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 663 (W.D. Tex. 2017) (Title IX heightened-risk claims could not be dismissed on limitations grounds, even where plaintiffs knew of their injuries at time sexual assaults occurred, because plaintiffs had no reason to know of university's causal connection to their assaults until media reports years later on rampant nature of sexual assault on university's campus); *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616 (W.D. Tex. 2017) (Title IX pre-assault claims could not be dismissed on limitations grounds where plaintiff learned years later of university's indifference to multiple prior complaints of sexual assault by her assailant through law firm investigative report).

Courts across the country have held in similar circumstances that the statute of limitations did not accrue until the plaintiff became aware of the school's role in perpetuating their sexual abuse. *See, e.g.*, *Bd. of Educ of Hononegah Cmty. High Sch. Dist. No. 207*, 833 F. Supp. 1366 (N.D. Ill. 1993) (in § 1983 context, where same rules apply, denying motion to dismiss on statute of limitations grounds because student could not reasonably be expected to discover that school caused sexual abuse to flourish, when plaintiff alleged school concealed teacher's prior sexual misconduct); *Sowers*, 694 F. Supp. at 133 (denying motion to dismiss on statute of limitations grounds because factual questions remained as to whether student knew or should have known school district caused student's injury by fostering environment of deliberate indifference to sexual abuse of female students).

Even if the plaintiffs did have reason to investigate OSU's conduct at the time, their efforts would have been futile. OSU controlled access to information about prior complaints, the information was confidential, and OSU's response to Plaintiff Snyder-Hill's inquiry makes clear that, when asked directly about Dr. Strauss's abuse, it would simply lie. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 122 (1979) (claim does not accrue because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *T.R. v. Boy Scouts of Am.*, 181 P.3d 758, 763-64 (Or. 2008) ("[W]hen a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts," and the party asserting limitations defense "must prove that an

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INTRODUCTION

For twenty years, Ohio State University physician Richard Strauss sexually harassed and abused his patients—Ohio State students. And for years, Defendant, The Ohio State University ("OSU"), facilitated and covered up this abuse—and the school's own role in perpetuating it. Indeed, although Dr. Strauss began abusing students in 1978, it was only this year—2018—that OSU finally announced it was opening an investigation into his misconduct.

The university's decades-long campaign of concealment worked. Until this year's announcement of an investigation, none of the plaintiffs in this case had any idea of OSU's role in the abuse they suffered. None of the plaintiffs knew that OSU had received numerous complaints about Dr. Strauss's conduct; that OSU had a widespread practice of rebuffing and ignoring those complaints, creating a sexually hostile environment that substantially increased their risk of being sexually abused; or that their abuse by Dr. Strauss could have been prevented, if only OSU had acted on students' earlier complaints instead of allowing him to see students—without saying a word to them.

Indeed, until this year, the vast majority of the plaintiffs did not even know that they *were* abused. Any student who questioned Dr. Strauss directly was told his "examinations" were medically necessary—that there was a genital lymph node that needed checking or a testicle that needed monitoring. And OSU itself legitimized and obfuscated Dr. Strauss's conduct. It told students that Dr. Strauss's exams were appropriate and there was no reason to complain; OSU staff who witnessed the exams treated them as appropriate; and OSU even lied to one plaintiff, telling him no one had previously complained about Dr. Strauss—even though complaints had poured in for 17 years. It was only this year, when OSU announced its investigation into Dr. Strauss and when another university sports physician, Larry Nassar, was criminally convicted for similar

conduct, that most of the plaintiffs realized that Dr. Strauss's "examinations" were, in fact, sexual abuse.

OSU argues that it cannot be held liable for its role in the sexual harassment and assault of its students because it was a long time ago. The statute of limitations, OSU contends, has run. Having successfully concealed for decades its role in facilitating Dr. Strauss's abuse, OSU claims—now that its misconduct has finally been revealed—it's too late for the students it harmed to do anything about it. But that's not the law.

A "statute of limitations begins to run" only once a "reasonable person knows, or in the exercise of due diligence should have known, both his injury" *and* the defendant's role in causing that injury. *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010).[1] After all, a plaintiff "cannot maintain an action before she knows she has one." *City of Aurora, Colorado v. Bechtel Corp.*, 599 F.2d 382, 387-88 (10th Cir. 1979). Here, most of the plaintiffs did not know until this year that they were sexually abused. And, *none* of them knew of OSU's role in causing that abuse. The statute of limitations, therefore, did not begin to run until this year. And the plaintiffs' claims fall well within it.

Motions to dismiss on statute of limitations grounds are rarely granted, for what each plaintiff knew—and what a reasonable plaintiff should have known—are "factual question[s]" ordinarily "reserved for the jury." *In re Arctic Express Inc.*, 636 F.3d 781, 802 (6th Cir. 2011). Dismissal may only be granted in the rare circumstance that the defendant can *conclusively* demonstrate—based on the allegations in the complaint itself—that the claims are time-barred. OSU cannot do so here. Its motion to dismiss, therefore, should be denied.

[1] Unless otherwise specified, all citations and internal quotation marks are omitted.

FACTUAL BACKGROUND

Dr. Strauss's Sexual Abuse

Plaintiffs are 39 of the estimated 1,500 to 2,500 former OSU students who were sexually assaulted, abused, and harassed by Dr. Strauss. First Am. Compl. ("FAC") (Doc. 27) ¶ 1. OSU employed Dr. Strauss to provide medical care and treatment to its students, especially its student-athletes, making him the official physician for OSU's sports teams, an assistant professor of medicine, a part-time physician with Student Health Services, and a "Professor Emeritus" upon his retirement. FAC ¶¶ 2, 65-67, 121. As OSU's official sports team physician for 16 years, Dr. Strauss had regular contact with male student-athletes in at least 17 sports. FAC ¶ 66. As a physician at OSU's student health center for at least four years, he had access to the entire male student population. FAC ¶ 67.

Dr. Strauss used his position of trust and confidence at OSU to sexually abuse male students on a regular basis throughout his 20-year tenure, from 1978 to 1998. FAC ¶¶ 3, 69. Dr. Strauss's sexual abuse and harassment included performing invasive and medically unnecessary examinations of students' genitals; groping and fondling their genitalia, often without gloves; performing unnecessary rectal examinations and digitally penetrating their anuses; and making inappropriate comments about their bodies, including comments on their physical appearance, heritage, skin tone, and physique. FAC ¶¶ 4, 72-74, 77.

When students questioned Dr. Strauss about the genital exams he was performing, he gave a clinical explanation for why the exams were needed. For example, Dr. Strauss told John Doe 17 that prolonged genital exams were needed because one of the student's testicles was larger than the other and needed monitoring. FAC ¶¶ 897, 899. And Dr. Strauss told John Doe 23, who sought treatment for a sore throat, he needed to check the lymph nodes in the student's genitals to make

sure they were not swollen. FAC ¶ 1108. Similarly, Dr. Strauss explained to John Doe 21, who sought treatment of a hamstring injury, he was required to examine the student's entire body. FAC ¶¶ 1048-49. These explanations caused students to discount their discomfort and blame themselves, instead of Dr. Strauss. *See, e.g.,* FAC ¶¶ 1052, 1058 (John Doe 21 "questioned himself and his perception of the examination" and "thought his reaction might have been from his own naiveté."). The explanations turned out to be false. *See, e.g.,* FAC ¶¶ 3, 69, 72-74, 82.

OSU's Facilitation and Concealment of the Sexual Abuse

OSU started receiving complaints about Dr. Strauss during his first year of employment, including from Plaintiffs Mulvin and John Doe 25. FAC ¶¶ 6, 88, 230-31, 1171-73. Mulvin told an attending physician at the student health center that Dr. Strauss had examined his genitals for 20 minutes and appeared to be trying to get him sexually excited. FAC ¶¶ 6, 88, 230-31. John Doe 25 told his coach that Dr. Strauss had offered to "milk" John Doe 25's penis, after commenting on a penile bruise that Dr. Strauss said had been caused by "too much masturbating." FAC ¶¶ 1171-73.

OSU did not take action on these complaints, those that may well have preceded them, or the many others that poured in over the years to OSU administrators, coaches, physicians, athletic trainers, and other employees.[2] Instead, OSU perpetuated and obfuscated Dr. Strauss's serial sexual predation, making the vast majority of the plaintiffs believe that Dr. Strauss's conduct was of no real concern, despite their discomfort.[3]

[2] FAC ¶¶ 7-8, 10, 86, 167-74, 88-93, 107-08, 117, 119-121, 211, 234, 258-60, 263-66, 350, 421-26, 490-91, 550-51, 621-22, 664-65, 805-06, 902-04, 972-74, 1173-74. Given the breadth of Dr. Strauss's abuse, and that it began in his very first year of employment, there is good reason to believe that Dr. Strauss abused other students that year who may have complained before Mulvin or John Doe 25.

[3] Until this year, 34 of the plaintiffs—David Mulvin, William Rieffer, William Brown, Kurt Huntsinger, Steve Hatch, John Does 1-8, John Does 10-18, and John Does 20-31—did not even

OSU facilitated and concealed Dr. Strauss's conduct in numerous ways. OSU employees lied about prior complaints against Dr. Strauss, telling Plaintiff Snyder-Hill in writing that "we had never received a complaint about Dr. Strauss before, although we have had several positive comments." FAC ¶¶ 86, 170. OSU employees also rebuffed and ignored complaints, stating that "Dr. Strauss's examinations were appropriate and there was no reason to complain." FAC ¶ 360 (Huntsinger).[4] OSU trainers and physical therapists who witnessed Dr. Strauss's examinations treated them as normal. *See* FAC ¶¶ 406-07 (John Doe 1). OSU promoted Dr. Strauss to the highly-coveted position of official sports team physician, touting his reputation as an "Olympic-level doctor," and making students like John Doe 13 "question himself and feel like he was the one doing something wrong," not Dr. Strauss. FAC ¶¶ 768-69.[5] OSU's athletic department treated Dr. Strauss's examinations as something to joke and laugh about—not something serious to complain about.[6] OSU treated Dr. Strauss as an inextricable part of its athletics program and gave him carte blanche to shower and spend time with athletes in the Larkins Hall locker room.[7] And despite

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realize that Dr. Strauss had sexually assaulted them in the guise of medical care. FAC ¶¶ 126, 239-41, 243, 297-99, 303, 328-30. 333, 362-64, 367, 390-92, 395, 437-40, 456-59, 474-78, 499-503, 516-20, 530-34, 560-64, 593-95, 597, 685, 688-89, 713-15, 738-40, 743, 775-77, 781, 808-10, 814, 834-36, 840, 866-68, 872, 924-26, 930, 950-52, 956, 1022-25, 1029, 1060-62, 1065, 1081-83, 1086, 1125-27, 1130, 1151-53, 1156, 1177-79, 1182, 1213-15, 1218, 1234-36, 1239, 1262-64, 1266, 1281-84, 1303-05, 1308, 1328-30, 1333.

[4] *See also* FAC ¶¶ 233-34 (Mulvin); 409-10, 421-26 (John Doe 1); 490, 497 (John Doe 4); 550-51, 558 (John Doe 7); 664-65, 688 (John Doe 10); 805-06 (John Doe 14); 902-05, 916 (John Doe 17); 1173-74 (John Doe 25).

[5] *See also* FAC ¶¶ 65-67, 81, 1355.

[6] *See* FAC ¶¶ 350, 356 (Huntsinger); 438 (John Doe 1); 457 (John Doe 2); 476 (John Doe 3); 493, 501 (John Doe 4); 518 (John Doe 5); 556-57, 562 (John Doe 7); 902-04, 928 (John Doe 17); 1027 (John Doe 20); 1118 (John Doe 23); 1136-37 (John Doe 24); 1298-1300 (John Doe 30); 1325 (John Doe 31).

[7] *See* FAC ¶¶ 354 (Huntsinger); 586, 588-89 (John Doe 8); 674-80 (John Doe 10); 708-09 (John Doe 11); 764-65 (John Doe 13); 799-801 (John Doe 14); 829-30 (John Doe 15); 861-62 (John Doe 16); 913-15 (John Doe 17); 946-47 (John Doe 18); 1111-13 (John Doe 23); 1146 (John Doe 24);

student complaints that poured in over the years, OSU continued to require its athletes to get their physicals and treatment from Dr. Strauss or risk losing their scholarships and eligibility for university sports.[8]

OSU's 2018 Investigation of the Sexual Abuse

Although Dr. Strauss's abuse spanned two decades and began 40 years ago, it was not until this year—on April 5, 2018—that OSU announced it was opening an investigation into his sexual misconduct. FAC ¶¶ 123-24. A few months earlier, in January 2018, another university sports physician, Larry Nassar, was criminally convicted for similar conduct, and female gymnasts and other survivors publicly shared their experiences of Dr. Nassar's sexual abuse.[9] As a result of the publicity on one or the other of these events, the 34 of 39 plaintiffs who had not previously known they were abused realized for the first time that Dr. Strauss's "examinations" were, in fact, sexual abuse. *See supra* note 3.[10] And before the publicity on OSU's investigation, none of the plaintiffs knew that OSU had received and rebuffed numerous complaints about Dr. Strauss, and

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1175 (John Doe 25); 1207 (John Doe 26); 1232 (John Doe 27); 1256 (John Doe 28); 1299 (John Doe 30); 1326 (John Doe 31).

[8] FAC ¶¶ 9, 70, 98 (preliminary and common factual allegations); 278-79, 299 (Rieffer); 330 (Brown); 364 (Huntsinger); 372, 392 (Hatch); 400, 438 (John Doe 1); 456-57 (John Doe 2); 475-76 (John Doe 3); 483, 491, 493-94, 501 (John Doe 4); 518 (John Doe 5); 528, 532 (John Doe 6); 539-40, 551, 553, 555, 561-62 (John Doe 7); 568, 595 (John Doe 8); 650, 689 (John Doe 10); 697, 715 (John Doe 11); 723, 740 (John Doe 12); 748, 777 (John Doe 13); 786, 810 (John Doe 14); 819, 824, 836 (John Doe 15); 844-45, 868 (John Doe 16); 878, 880, 909, 926 (John Doe 17); 936-38, 952 (John Doe 18); 1001-02, 1016, 1025 (John Doe 20); 1069, 1083 (John Doe 22); 1092-93, 1105, 1127 (John Doe 23); 1135, 1153 (John Doe 24); 1161, 1179 (John Doe 25); 1188-89, 1203, 1215 (John Doe 26); 1222-23, 1236 (John Doe 27); 1289, 1305 (John Doe 30); 1313-14, 1330 (John Doe 31).

[9] *See, e.g.*, Victim impact statements against Larry Nassar: 'I thought I was going to die,' Jan. 24, 2018, https://www.theguardian.com/sport/2018/jan/24/victim-impact-statements-against-larry-nassar-i-thought-i-was-going-to-die (last visited Dec. 11, 2018).

[10] Even for the five plaintiffs who earlier realized Dr. Strauss had abused them (Snyder-Hill, McDaniel, Reed, and John Doe 9 and 19), it was this year's news that made them realize OSU had harmed them too. FAC ¶¶ 178-86, 213, 217, 269, 273, 637-39, 643, 994, 997.

could have prevented their abuse, if only OSU had acted on students' prior complaints.[11] Nor could any of the plaintiffs have learned this earlier, because OSU controlled access to that information—and when asked, lied about it.[12]

Plaintiffs' Title IX Claims

In their First Amended Complaint (the "complaint"), the plaintiffs allege that OSU violated Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, *et seq*., in three different ways. First, all of the plaintiffs allege that OSU created, and acted with deliberate indifference to, a sexually hostile culture in its athletic and student health programs, which substantially heightened the risk that the plaintiffs and other students would be sexually harassed (the "heightened-risk claim"). FAC ¶¶ 1336-58. Second, all of the plaintiffs allege that OSU could have prevented their abuse by Dr. Strauss, if OSU had taken appropriate action on students' prior complaints about his conduct (the "pre-assault claim"). FAC ¶¶ 1359-67. Third, Plaintiff Snyder-Hill alleges that OSU acted with deliberate indifference to his report of sexual harassment by Dr. Strauss (the "post-report claim"). FAC ¶¶ 1368-76.

STANDARD OF REVIEW

Ordinarily, Rule 12(b)(6) is an "inappropriate vehicle for dismissing a claim based upon the statute of limitations" because "a plaintiff generally need not plead the lack of affirmative defenses to state a valid claim." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Dismissal is only warranted if "the allegations in the complaint affirmatively show that the claim

[11] FAC ¶¶ 178-80, 213-16, 239, 243, 269-70, 300-03, 331-33, 365-67, 393-95, 439-40, 458-59, 477-78, 502-03, 518-20, 532-34, 563-64, 596-97, 637-42, 690-92, 716-18, 741-43, 778-81, 811-14, 837-40, 869-72, 927-30, 953-56, 994-96, 1026-29, 1063-65, 1084-86, 1128-30, 1154-56, 1180-82, 1216-18, 1237-39, 1265-66, 1282-84, 1306-08, 1331-33.

[12] FAC ¶¶ 86, 184, 216, 242, 272, 302, 332, 366, 394, 458, 477, 502, 519, 533, 563, 596, 642, 692, 718, 742,780, 813, 839, 871,929, 955, 996, 1028, 1064, 1085, 1129, 1155,1181, 1217, 1238, 1283, 1307, 1332.

is time-barred." *Id.*; *see also Walburn v. Lockheed Martin Util. Servs., Inc.*, 443 F. App'x 43, 47 (6th Cir. 2011) (noting the facts must be "definitively ascertainable from the pleadings and conclusively establish the affirmative defense").

"Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run, and if the defendant meets this requirement then the burden shifts to the plaintiff to establish an exception to the statute of limitations." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir. 2013). To prove the statute of limitations has run, a defendant must establish when the plaintiff's claims accrued. *See Nat'l Credit Union Admin. Bd. v. Jurcevic*, 867 F.3d 616, 625 (6th Cir. 2017) ("It was [the defendant's] burden to show that the [plaintiff] should have discovered his fraudulent conduct before the relevant time period, not the [plaintiff's] burden to plead around the possibility.").

In reviewing a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Courtright v. City of Battle Creek*, 839 F.3d 513, 517 (6th Cir. 2016). The court must determine "whether the factual allegations present a plausible claim." *BAC Home Loans Servicing LP v. Fall Oaks Farm LLC*, 848 F. Supp. 2d 818, 821 (S.D. Ohio 2012). For a claim to be considered plausible, the factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 822. This is a low bar. "[A] Rule 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ricco v. Potter,* 377 F.3d 599, 602 (6th Cir. 2004).

ARGUMENT

"To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law." *City of Aurora, Colorado v. Bechtel Corp*., 599 F.2d 382, 387-88 (10th Cir. 1979). The plaintiffs here did not know they had been wronged until just this year: It was only this year that they learned that OSU knew of the sexually hostile environment in its athletics and student health programs, and yet did nothing to stop it; that the school also knew that its official sports team physician was sexually abusing students, and yet did nothing to stop him; that their alma mater could have prevented their abuse but chose not to do so. In fact, it was only this year, that most of the plaintiffs even realized that they had been abused at all—that Dr. Strauss's genital exams, rectal prodding and invasive questions were not the legitimate medical treatment the doctor and university claimed them to be, but in actuality sexual harassment and assault. It was only this year, therefore, that the plaintiffs' Title IX claims against the university accrued. And the two-year statute of limitations on those claims has nowhere near expired.

Furthermore, even if the plaintiffs' claims had accrued earlier, the statute of limitations should be equitably tolled because OSU fraudulently concealed evidence of Dr. Strauss's abuse and its own role in facilitating that abuse.

To succeed on its motion to dismiss, OSU would have to conclusively demonstrate that the plaintiffs' allegations themselves affirmatively show that their claims are time-barred. It cannot do so. Its motion, therefore, should be denied.

I. OSU Cannot Show that Plaintiffs' Claims Against the University for its Role in Causing Their Harassment and Abuse are Time-Barred.

A. Under the Federal Accrual Rule, Plaintiffs' Claims Did Not Accrue Until 2018

1. A Claim Does Not Accrue Until a Plaintiff Knows or Should Have Known of his Injury and the Defendant's Role in Causing that Injury.

The question at the heart of OSU's motion is when the two-year clock on the plaintiffs' Title IX claims began to run. The answer is governed by the federal accrual rule. "The general federal rule is that the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Bishop*, 618 F.3d at 536-37. In other words, a statute of limitations does not begin running until the plaintiff knows both of "(1) [t]he existence of the injury;" *and* (2) "the connection between the injury and the defendant's actions." *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *see also United States v. Kubrick*, 444 U.S. 111, 122 (1979) (statute of limitations in Federal Torts Claims Act action accrues once plaintiff discovers both the fact of his injury and its cause); *Tackett v. Marion Cty. Fair Bd.*, 272 F. Supp. 2d 686, 689 (6th Cir. 2003) (applying *Kubrick's* two-pronged inquiry to civil rights claims); *Owner Operator Indep. Drivers Ass'n, Inc. v. Comerica Bank*, 540 F. Supp. 2d 925, 932 (S.D. Ohio 2008) (applying two-pronged test).

OSU acknowledges that the federal accrual rule governs here. Def.'s Mot. Dismiss at 5. But it misapplies the injury prong of the rule and ignores the "causation" prong entirely. *Id*. at 5-6. OSU asserts that a Title IX claim accrues when the "alleged sexual abuse, assault, or harassment occurred." *Id.* at 6. But that's just plain wrong. As explained above, it's well established that a claim does *not* necessarily occur when the injury occurs. It occurs when a plaintiff *knew*, or should have known, of the injury *and* the defendant's role in causing that injury. *See Bishop*, 618 F.3d at 536-37; *Tackett*, 272 F. Supp. 2d at 689; *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 590 (6th

Cir. 2001); *Hicks v. Hines Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987); *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 814 (6th Cir. 1996).[13]

Here, there are two claims raised by every plaintiff: First, the plaintiffs claim that OSU's creation of, and deliberate indifference to, the sexually hostile environment that flourished within the school's athletic and student health programs "substantially increased the risk" that the plaintiffs, and other OSU students, would be sexually harassed or assaulted. FAC ¶ 1356. And second, they claim OSU knew that Dr. Strauss had sexually harassed students, yet did nothing to stop this harassment from continuing; and as a result of this deliberate indifference, the plaintiffs "were subjected to severe sexual harassment by Dr. Strauss" that OSU could have prevented if it had acted on previous complaints. FAC ¶ 1365.

Contrary to OSU's contention, neither of these claims necessarily accrued when the plaintiffs were sexually abused. They accrued when the plaintiffs (1) *knew* or should have known they were abused *and* (2) knew or should have known of OSU's role in causing that abuse. *See Sowers v. Bradford Area Sch. Dist.*, 694 F. Supp. 125, 132 (W.D. Pa. 1988), *aff'd*, 869 F.2d 591 (3d Cir. 1989) (vacated on other grounds) (denying motion to dismiss on statute of limitations grounds because factual questions remained as to whether student knew or should have known school district caused student's injury); *T.R. v. Boy Scouts of Am.*, 181 P.3d 758, 763 (Or. 2008) ("[T]he limitations period begins to run as to each defendant when the plaintiff discovers, or a

[13] In fact, many of the cases OSU itself cites apply the two-part accrual standard the school attempts to sidestep. *See, e.g.*, *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) ("[A] plaintiff's awareness [for a claim to accrue] encompasses two elements: (1) the existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions."); *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 9 (2d Cir. 2014) (claim accrues when plaintiff "discover[s] the critical facts of both his injury and its cause"); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir. 2014) (claim accrues when "plaintiff knew or should have known the facts necessary to establish her cause of action, such as the fact that a surgeon left a sponge in the plaintiff's abdomen after an operation").

reasonable person should have discovered, *that defendant's* causal role.") (emphasis added); *see also Browning v. Burt*, 613 N.E.2d 993, 1005 (Ohio 1993) (holding under state accrual rule that statute of limitations for medical malpractice claim against hospital—as opposed to doctor—didn't start running until plaintiffs saw TV program and learned that their doctor "may have committed a number of harmful . . . surgeries upon a number of unsuspecting patients" such that the hospital's credentialing practices "could reasonably be brought into question").

The question of what a plaintiff knew, or should have known, is a fact-intensive inquiry ordinarily "reserved for the jury except when the facts are so clear that reasonable minds cannot differ." *In re Arctic Exp. Inc.*, 636 F.3d at 802; *see also Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 933 F. Supp. 2d 974, 1016 (S.D. Ohio 2013) ("[T]he determination of when a cause of action accrues is to be decided by the trier of fact."). And, on a motion to dismiss, the facts are limited to those pleaded in the complaint. Thus, to succeed on its motion, OSU must demonstrate that the allegations of the complaint affirmatively show that no reasonable juror could disagree with the contention that plaintiffs knew or should have known of their abuse and OSU's role in causing it more than two years ago.

OSU cannot meet this burden. The vast majority of the plaintiffs allege that, until this year, they did not know that Dr. Strauss had sexually abused them at all—that Dr. Strauss's and OSU's obfuscation led them to reasonably believe Dr. Strauss's behavior was medically necessary and appropriate. And all of the plaintiffs allege that they did not know—and could not be expected to know—of OSU's role in causing this abuse.

2. OSU Cannot Show That 34 of the Plaintiffs Knew or Should Have Known Before This Year that Dr. Strauss Sexually Abused Them.

The vast majority of the plaintiffs—David Mulvin, William Rieffer, William Brown, Kurt Huntsinger, Steve Hatch, John Does 1-8, John Does 10-18, and John Does 20-31—were unaware

until this year that Dr. Strauss's "medical care" was, in fact, sexual abuse. And with good reason: Both Dr. Strauss and OSU worked hard to obfuscate and legitimize Dr. Strauss's conduct, to convince students that what may seem to a layperson to be sexual misconduct is simply a routine part of the practice of medicine. Of course, Dr. Strauss's behavior was not a routine part of the practice of medicine. But Dr. Strauss and OSU were able to use their power and authority to successfully convince OSU students otherwise for decades. It wasn't until this year's media reports about OSU's investigation into Dr. Strauss's behavior, and Larry Nassar's criminal sentencing for similar behavior, that most of the plaintiffs realized that the behavior their physician and alma mater for years claimed was legitimate was, in fact, sexual harassment and abuse.

Sexual abuse by a physician is particularly insidious. *See infra* page 16. Unlike other professionals, such as teachers, coaches and priests, doctors are authorized *and expected* to touch a person's body and sexual organs. Moreover, Dr. Strauss was no ordinary physician. For most of his 20-year tenure at OSU, he was OSU's official sports team doctor, a coveted position offered only to physicians considered to be at the top of the profession. *See* FAC ¶¶ 2, 65-66.

Dr. Strauss capitalized on his role as a doctor—as OSU's official sports team doctor—to disguise his abuse as medical treatment, ensuring that most of the plaintiffs would not recognize his misconduct for what it really was—sexual harassment and assault. FAC ¶¶ 3, 83.[14]

And when a student would question the need for Dr. Strauss's behavior—for example, the prolonged unnecessary genital exams he routinely performed—he always had a ready answer. One testicle was larger than the other and needed monitoring, he would explain; or he needed to check

[14] *See also* FAC ¶¶ 240-41 (Mulvin); 298-99 (Rieffer); 329-30 (Brown); 363-64 (Huntsinger); 391-92 (Hatch); 437-38, 456-57, 475-76, 500-01, 517-18, 531-32, 561-62, 594-95 (John Does 1-8); 688-89, 714-15, 739-40, 776-77, 809-10, 835-36, 867-68, 925-26, 951-52 (John Does 10-18); 1024-25, 1061-62, 1082-83, 1126-27, 1152-53, 1178-79, 1214-15, 1235-36, 1263-64, 1279-81, 1304-05, 1329-30 (John Does 20-31).

all lymph nodes to see if they were swollen; or he was required to examine a patient's entire body. FAC ¶¶ 897, 899, 1048-49, 1108. These explanations turned out to be false. But there was no way the plaintiffs could have known that at the time. At the time, Dr. Strauss's clinical explanations succeeded in convincing the young college students he victimized that his treatments were simply ordinary medical care. *See supra* page 3-4. Indeed, Dr. Strauss's esteemed role at OSU convinced some plaintiffs to question *themselves* and feel that *they* must have done something wrong, not Dr. Strauss. FAC ¶¶ 768-69; *see also* FAC ¶¶ 236 (Mulvin); 1052-53 (John Doe 21).

Making matters worse, OSU obfuscated and legitimized Dr. Strauss's abuse by telling student-athletes who expressed discomfort that "Dr. Strauss's examinations were appropriate and there was no reason to complain," FAC ¶ 360; laughing off complaints about Dr. Strauss's conduct; continuing to require student-athletes to see Dr. Strauss for annual physicals and medical treatment, even after student-athletes raised concerns; permitting Dr. Strauss to spend a prolonged time with student-athletes in the Larkins Hall locker room and showers; promoting Dr. Strauss to serve as OSU's sports team physician; and employing staff who witnessed Dr. Strauss's prolonged genital exams and treated them as normal. *See supra* pages 4-6. The school sent a clear message to its students: what you think happened didn't happen, what you thought might be medically inappropriate wasn't, and Dr. Strauss is a well-regarded medical professional who should be trusted. As a result, the vast majority of the plaintiffs—like many young men in their situation would—discounted their own discomfort and continued to trust that Dr. Strauss's examinations were legitimate.[15]

[15] While all of the students Dr. Strauss abused were young, at least one—Plaintiff John Doe 3—was actually a minor when the abuse began. FAC ¶ 465. These students' youth made it even easier for Dr. Strauss to prey on them, while at the same time hiding from them the true nature of his misconduct.

OSU seizes on the plaintiffs' allegations that they were uncomfortable with Dr. Strauss's conduct to argue that the plaintiffs knew at the time they had been abused. *See* Def.'s Mot. Dismiss at 8-10, 15. But the school ignores the allegations demonstrating that Dr. Strauss—a physician in a position of authority over these young students—and OSU itself repeatedly told them that Dr. Strauss's "examinations" were legitimate; that OSU condoned, legitimized, and obfuscated Dr. Strauss's behavior; and that the school and the doctor impressed upon these young men that nothing was the matter, that their discomfort—not Dr. Strauss's behavior—was the problem. The question here isn't whether OSU can cherry-pick allegations that, in isolation, might support their argument. The question is whether the allegations of the complaint, taken as a whole, affirmatively and "conclusively" demonstrate that *no* reasonable juror could find that the students did not know—and should not necessarily have known—that they were being sexually abused, rather than getting the legitimate medical treatment their doctor and their university did everything in their power to convince them they were getting. *Walburn*, 443 F. App'x at 47; *see also Courtright*, 839 F.3d 513 at 520 (6th Cir. 2016) (allegations must be taken as a whole). The answer is clear: They do not. To the contrary, the facts alleged in the complaint demonstrate that most of the plaintiffs did not know—and should not necessarily have known—that Dr. Strauss's "medical treatments" were, in actuality, sexual abuse.[16]

OSU suggests that "a typical lay person" would know they were being sexually harassed or abused immediately when it occurred. *See* Def.'s Mot. Dismiss at 6-8. Not so. To the contrary, empirical research demonstrates that it is exceedingly common for reasonable people—

[16] OSU also argues that the plaintiffs' lack of awareness at the time the abuse occurred that their injuries could form the basis of a Title IX claim is insufficient to delay accrual of the statute of limitations. Def.'s Mot. Dismiss at 9-10. Plaintiffs agree, but this is beside the point. Plaintiffs' argument is that they were unaware of the *factual basis* for their claims, not the claims themselves.

particularly young people and particularly those abused by doctors—to fail to recognize that they were abused. *See, e.g.*, DuBois, et al., *Sexual Violation of Patients by Physicians*, Sexual Abuse: A Journal of Research and Treatment 2 (2017) (noting patients are often not aware of sexual abuse by a doctor because they may be "confused as to whether abuse occurred"—like "not realizing that an ungloved vaginal exam was unnecessary"); Carrie Teegardin, et al., *License to Betray*, The Atlanta Journal-Constitution (2016) (analyzing 100,000 disciplinary documents of physicians' sexual misconduct and finding some patients "didn't realize at first what had happened because the doctor improperly touched them or photographed them while pretending to do a legitimate medical exam"), *available at* http://doctors.ajc.com/part_1_license_to_betray/ (last accessed Dec. 18, 2018).

Courts, too, have recognized that a typical layperson may not immediately know that they've been abused—and set the accrual date accordingly. *See Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986) (plaintiff's psychiatric malpractice claim accrued when new doctor informed plaintiff that sexual relationship with therapist caused her psychological damage); *Doe v. Cherwitz*, 518 N.W.2d 362, 364 (Iowa 1994) (patient's claim that doctor sexually assaulted her during pelvic exam accrued when plaintiff knew, or should have known, both of the injury and its cause).

OSU's blanket assumption that students know they have been injured the moment they are sexually harassed or abused is often—but not always—true. It may be that when the harasser is a teacher, coach, or fellow student, sexual abuse is more obvious. But, as the Larry Nassar cases painfully illustrate, it is much more difficult to discern abuse when the harasser is a physician. And, most important here, OSU's assumption is not consistent with the allegations of most of the plaintiffs, who are struggling with the realization, for the first time this year, that they were

sexually abused—despite what Dr. Strauss and OSU led them to believe. If OSU were correct—that a reasonable person would necessarily know they were abused immediately—that would mean that 34 of the 39 plaintiffs in this case are not reasonable people. That can't be right.

None of the cases OSU cites for its assertion that a claim accrues immediately upon sexual harassment or abuse involves a plaintiff like the 34 here, who allege that they did not know they were injured at the time the sexual harassment occurred. *See* Def.'s Mot. Dismiss 6-8.[17] Nor does OSU cite a single case involving sexual harassment of a student by a medical professional. *See id*.

Here, thirty-four plaintiffs allege that they were deceived by their doctor and their school into believing they were not abused. That deception was finally broken by the publicity surrounding OSU's April 5, 2018 investigation announcement and Larry Nassar's January 2018 criminal sentencing. *Cf. Hughes v. Vanderbilt Univ.*, 215 F.3d 543 at 548 (6th Cir. 2000) (recognizing that widespread press coverage can trigger a plaintiff's discovery of their injury). Because these plaintiffs have plausibly alleged that they did not discover—and could not have discovered—their injuries until this year, OSU cannot demonstrate that their Title IX claims are time-barred.

3. OSU Cannot Show that Any of the Plaintiffs Knew or Should Have Known Before This Year that OSU Facilitated Dr. Strauss's Sexual Abuse.

Dr. Strauss abused the plaintiffs. But OSU made it possible. OSU knew of, yet ignored, the sexually hostile culture that pervaded its athletic and student health programs. Worse, it knew of,

[17] For example, OSU cites *Gilley v. Dunaway*, but, first, that case is about fraudulent concealment under Kentucky law—not the federal accrual standard—and, second, the court refused to toll the statute of limitations because the plaintiff *did know* she was injured, as she was in a sexual relationship with her high school coach and "knew of the Board's district investigation" into the ongoing sexual abuse. 572 F. App'x 303, 306, 309 (6th Cir. 2004).

yet ignored—and, in fact, concealed—prior complaints about Dr. Strauss' sexual harassment and abuse. The school's deliberate indifference—and obfuscation—allowed Dr. Strauss to continue his harassment and abuse on an unending stream of unwitting students, including the plaintiffs. But until 2018, none of the plaintiffs had any reason to know of OSU's role in their abuse—none of the plaintiffs had any reason to believe that their school knew that its physician was an abuser, and could have stopped the abuse, before they were ever his patients. *See supra* page 6-7. Thus, even if the plaintiffs had been aware they were abused by Dr. Strauss—and, as explained above, most weren't—their claims against OSU still wouldn't have accrued until this year, because it wasn't until this year that the plaintiffs knew of OSU's role in causing that abuse.

Courts have refused to dismiss cases as time-barred under similar circumstances. For example, a district court in the Fifth Circuit recently denied Baylor University's motion to dismiss as time-barred claims against the university that are strikingly similar to the plaintiffs' claims against OSU. *Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017). In that case, the plaintiffs, who were sexually assaulted when they were students, alleged that "Baylor knew of and permitted a campus condition rife with sexual assault; that sexual assault was rampant on Baylor's campus; that Baylor mishandled and discouraged reports of sexual assault; and that Baylor's response to these circumstances substantially increased the risk that Plaintiffs and others would be sexually assaulted." *Id.* at 661. Based on these allegations, the plaintiffs brought Title IX claims against the university for heightening their risk of assault. *Id.* Although the plaintiffs were assaulted years ago—and, unlike most of the plaintiffs here, they knew of their injury at the time—the court held that their heightened-risk claims could not be dismissed on statute of limitations grounds. *Id.* at 663. The court explained:

> Plaintiffs were aware of their injuries from the time the assaults occurred. *Plaintiffs assert, however, that they had no reason to know of Baylor's alleged causal*

> *connection to their assaults until the spring of 2016, when media reports regarding the rampant nature of sexual assault on Baylor's campus first came to light*. At that point, Plaintiffs allege, they had reason to further look into whether Baylor had a policy of intentionally discriminating against women who reported sexual assault. While it is plausible that Plaintiffs were aware of their heightened-risk claims at the time of their assaults, it is also plausible that they did not have reason to further investigate those claims until 2016. Thus, accepting the allegations in the Complaint as true, the claims for heightened-risk liability did not accrue until spring 2016.

Id. (emphasis added).

Similarly, in another case against Baylor, the court refused to dismiss as time-barred a former student's Title IX claim against the university, which alleged that the plaintiff was sexually assaulted by a football player with a known history of sexual assault, but Baylor did nothing to stop him from assaulting others—including the plaintiff. *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616 (W.D. Tex. 2017). Although the plaintiff was assaulted in 2012, and knew of her injury at that time, she alleged that she first learned of Baylor's role in that injury—its indifference to multiple previous complaints of assault by her assailant—in 2016, when a report into Baylor's handling of sexual assault on campus was released. *See id*. Therefore, the court held, her claim did not accrue until then. *See id.* at 617.[18]

[18] *Hernandez* suggests this analysis might be different if the abuser is a school employee. 274 F. Supp. 3d at 617. It's not. Under Title IX, there is no vicarious liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). Schools are not automatically responsible for harm caused by their employees. *Id*. They are only responsible for such harm if they act with deliberate indifference to sexual harassment known by an official with authority to take correction action. *Id*. at 290. Therefore, a claim against the school only accrues when a plaintiff knows or should know that the school played a role in causing the employee's sexual harassment. *See, e.g., Bd. of Educ of Hononegah Cmty. High Sch. Dist. No. 207*, 833 F. Supp. 1366 (N.D. Ill. 1993) (in § 1983 context, where same rules apply, denying motion to dismiss on statute of limitations grounds because student could not reasonably be expected to discover school's role in allowing sexual abuse to flourish, when plaintiff alleged school concealed teacher's prior sexual misconduct); *Sowers*, 694 F. Supp. at 133 (denying motion to dismiss § 1983 claim on statute of limitations grounds where there were factual questions about whether student knew or should have known that school district caused student's injury by fostering environment of deliberate indifference to sexual abuse of female students); *Armstrong v. Lamy*, 938 F. Supp. 1018, 1033 (D. Mass. 1996) (denying summary judgment on statute of limitations grounds because "the evidence in this case

Similarly here, all of the plaintiffs allege they had no reason to know of OSU's role in causing their harassment and abuse until 2018, when media reports on OSU's investigation revealed rampant sexual abuse by Dr. Strauss for decades—and OSU's knowledge of that abuse. *See supra* note 11. Until then, the plaintiffs did not know—and could not have known—that OSU had long been aware of and hid Dr. Strauss's sexual abuse, and could have prevented their assaults if it had responded appropriately to prior students' complaints. Not only did OSU fail to report previous complaints against Dr. Strauss, it actively concealed them. In a letter written in 1995—17 years into Dr. Strauss's reign of sexual predation—OSU's Director of Student Health Services falsely told Plaintiff Snyder-Hill that there had been no prior complaints about Dr. Strauss, only "positive comments." FAC ¶ 171. The plaintiffs had no way of knowing that while OSU was promoting Dr. Strauss and giving him ever-greater authority over and access to students, it was sitting on a growing pile of complaints about his misconduct—and doing nothing to stop it. *See supra* pages 4-6.

Courts across the country have held in similar circumstances that the statute of limitations did not accrue until the plaintiff became aware of the school's role in perpetuating their sexual abuse. *See supra* note 18; *see also Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d at 663; *Hernandez*, 274 F. Supp. 3d at 617. This Court should do the same.

Furthermore, even if the plaintiffs did have reason to investigate OSU's conduct at the time, their efforts would have been futile. OSU controlled access to information about prior complaints, the information was confidential, and OSU's response to Snyder-Hill's inquiry makes clear that, when asked directly about Dr. Strauss's abuse, it would simply lie. *See, e.g., Kubrick*,

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does not indicate the date on which the plaintiff knew, or should have known, that the alleged acts and omissions on the part of the Municipal Defendants were a proximate cause of his injury, even assuming that he knew he had been injured by [teacher]").

444 U.S. at 122 (claim does not accrue because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Boy Scouts of America*, 181 P.3d 758 at 763-64 ("[W]hen a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts," and the party asserting limitations defense "must prove that an investigation would have disclosed those facts."); *see also Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir. 1995) (statute of limitations tolled "[w]hen a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation").

Thus, even if the plaintiffs had been aware that they had been abused, they were not—and could not possibly have been—aware of OSU's role in causing that abuse. Their claims against OSU, therefore, did not accrue until they became aware of OSU's involvement in 2018.

As is clear from all these cases, it would be improper at this early stage of litigation to dismiss this case as time-barred. The issues of what should have alerted the plaintiffs to the possibility that OSU played a role in Dr. Strauss's abuse, and whether an investigation by the plaintiffs would have disclosed OSU's role, involve fact-intensive inquiries that are inappropriate for resolution on a motion to dismiss. *See In re Arctic Exp.*, 636 F.3d at 802; *Kehoe Component Sales*, 933 F. Supp. 2d at 1016.

B. OSU's Fraudulent Concealment Tolls the Statute of Limitations.

Even if the plaintiffs' claims against OSU for its role in causing their abuse had accrued earlier, the statute of limitations nevertheless should be equitably tolled because the school engaged in a course of conduct designed to conceal evidence of Dr. Strauss's abuse and OSU's role in facilitating that abuse.

"When," as here, "the statute of limitations is borrowed from state law, so too are the state's tolling provisions, except when they are inconsistent with the federal policy underlying the cause of action." *Bishop*, 618 F.3d at 537 (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485 (1980)); *see also Guy v. Lexington-Fayette Urban Cty. Gov't*, 488 F. App'x 9, 18 (6th Cir. 2012) (borrowing Kentucky case law on equitable estoppel in § 1983 action). Under Ohio law, equitable tolling applies "where there is some conduct of the adverse party . . . which excludes suspicion and prevents inquiry." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 474 (6th Cir. 2013). "[A] plaintiff must show that the defendant engaged in a course of conduct to conceal evidence of the alleged wrongdoing, and that the plaintiff, despite the exercise of due diligence, failed to discover the facts supporting the claim." *Id.* The plaintiffs have done so here.

As explained above, the complaint demonstrates that although OSU knew that Dr. Strauss was abusing and harassing students, the school concealed and legitimized Dr. Strauss's conduct as ordinary medical care. *See supra* pages 4-6. OSU employees ignored, rebuffed, and even laughed at students who complained; they witnessed Dr. Strauss's "examinations" and treated them as normal. *See supra* page 5. All the while, OSU promoted Dr. Strauss and increased his access to OSU students. *See supra* pages 5-6. OSU knowingly constructed a façade of legitimacy for Dr. Strauss, convincing his victims that it was their discomfort—not Dr. Strauss's conduct—that was wrong, and making it impossible for most of the plaintiffs to realize that they were abused. In other words, OSU fraudulently concealed from most of the plaintiffs the fact that they were injured in the first place. *Cf. Lutz*, 717 F.3d at 475 (adequately pleaded fraudulent concealment by alleging energy companies concealed miscalculation of royalty payments); *Venture Glob. Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 588 (6th Cir. 2013) (computer company concealed

its own fraud); *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F. Supp. 1229, 1237 (S.D. Ohio 1994) (dairies concealed conspiracy to rig milk contract bidding system).

Furthermore, OSU fraudulently concealed from all of the plaintiffs its own role in their abuse. OSU concealed the fact that it knew Dr. Strauss was abusing and harassing students before any of the plaintiffs were abused, yet failed to disclose or investigate the numerous complaints it had received—a failure that ensured that Dr. Strauss could continue to abuse students, including the plaintiffs. *See supra* at pages 4-6. Indeed, OSU actively lied to at least one student, telling him there had been no prior complaints about Dr. Strauss when, in fact, there had been many. FAC ¶ 170.

The Sixth Circuit in *Gilley* recognized equitable tolling is appropriate when there's an "intent to conceal or an active effort to mislead." 572 F. App'x at 308. Evidence of an intent to conceal sufficient to support tolling includes if the school "failed to report numerous incidents of sexual abuse by [an employee]; concealed secret files with information about the known abuse; failed to discipline or sanction the [employee]; and failed to inform students, faculty, and staff of any of these facts." *Id*. That's exactly the situation here: OSU failed to report numerous incidents of sexual abuse by Dr. Strauss; hid student complaints; never took any disciplinary action; and—for twenty years—failed to inform students of these facts. *See supra* at 4-6. OSU actively misled plaintiffs about what it knew by lauding Dr. Strauss as a well-respected professional, all while lying about its knowledge to the contrary to anyone who asked. OSU "obstructed the prosecution of [the plaintiffs'] cause of action against it by *continually* concealing the fact that it had knowledge of [Dr. Strauss's] problem well before the plaintiffs were abused." *Gilley*, 572 F. App'x at 308.

The statute of limitations for all plaintiffs should be tolled because of OSU's fraudulent concealment of the facts demonstrating its role in their abuse. *See Redwing v. Catholic Bishop for*

Diocese of Memphis, 363 S.W.3d 436, 465 (Tenn. 2012) (holding complaint about sexual abuse by priest 30 years ago plausibly alleges equitable tolling by fraudulent concealment because it alleges plaintiff was "misled by the Diocese with regard to the Diocese's knowledge of Father Guthrie's history and propensity for committing sexual abuse."); *Magnum v. Archdiocese of Philadelphia*, No. 06-CV-2589, 2006 WL 3359642, at *12 (E.D. Pa. Nov. 17, 2006), *aff'd*, 253 F. App'x 224 (3d Cir. 2007) (holding complaint about archdiocese covering up sexual abuse by priests since the 1940s plausibly alleges fraudulent concealment because plaintiffs claim they didn't know about cover-up until 2002).

II. OSU Cannot Demonstrate that Plaintiff Snyder-Hill's Claim of Deliberate Indifference to his Report of Abuse is Time-Barred.

In addition to the claims against OSU brought by all of the plaintiffs for its role in causing their abuse, Plaintiff Snyder-Hill has an additional claim: He claims that, after he was abused, he complained to OSU, and the school was deliberately indifferent to his complaint. OSU has not even attempted to demonstrate that this claim is time-barred. Nor could it. This claim, too, only accrued in 2018. And even if it had accrued earlier, the statute of limitations should be tolled based on fraudulent concealment and equitable estoppel.

Unlike most of the plaintiffs, Snyder-Hill was not an athlete.[19] FAC ¶ 23. He was referred to Dr. Strauss by a triage nurse at OSU's student health center. *See* FAC ¶¶ 6, 155, 157. During his examination, Dr. Strauss made inappropriate sexual comments and asked sexual questions; he insisted on performing testicular and rectal examinations, though Snyder-Hill's complaint was about a lump on his chest; and he pressed his pelvis (and erect penis) against Snyder-Hill while performing his examination. FAC ¶¶ 160-66.

[19] Plaintiff John Doe 29 was not an athlete either. FAC ¶ 59.

The next day, Snyder-Hill complained to Student Health about Dr. Strauss's inappropriate, sexualized conduct. FAC ¶ 167. A few weeks later, he spoke with Ted Grace, M.D., the Director of Student Health Services, and demanded changes be made so that no other student would have to experience what he had suffered. FAC ¶ 170. Although, by this time, Dr. Strauss had worked at OSU for 17 years—and OSU had received numerous complaints against him—Dr. Grace sent Mr. Snyder-Hill a letter, stating that "we had never received a complaint about Dr. Strauss before, although we have had several positive comments." FAC ¶ 171. The letter also assured Snyder-Hill that "[a]ny future complaints would include consideration of all prior complaints of a similar nature" and that all patient comments would be maintained in a quality assurance file subject to review by Joint Commission on Accreditation of Healthcare Organizations. FAC ¶¶ 171-72. The letter also assured Snyder-Hill that Student Health would implement his suggestions for a new form that "asks every patient if he or she would like to have a chaperone present during the office visit," and provide an opportunity for students to opt out of potential genital exams or touching in certain areas. FAC ¶ 173.

Based on this letter, Snyder-Hill felt that OSU had addressed most of his concerns and that the changes it agreed to make would prevent Dr. Strauss from abusing other students. FAC ¶ 174. But, in fact, OSU continued to allow Dr. Strauss to abuse other students. *See* FAC ¶¶ 117-21. And its assurances that nobody else had previously complained were a lie. *See* FAC ¶¶ 86, 170. Until this year, when he saw media coverage of OSU's investigation of Dr. Strauss, Snyder-Hill did not have any reason to believe that OSU had not properly handled his complaint. FAC ¶¶ 180-83, 185. But he does now.

Under the federal accrual rule, because Snyder-Hill did not know—and could not have known—until this year that OSU responded inappropriately to his complaint of sexual abuse, his

claim against OSU for deliberate indifference to that complaint accrued only this year. *See* FAC ¶¶ 1368-76. And even if Snyder-Hill's claim accrued earlier, its statute of limitations should be tolled based on OSU's fraudulent concealment of the fact that—although it purported to address Snyder-Hill's concerns with real changes—the school, in fact, did nothing. *Cf.* FAC ¶¶ 117-21.

Furthermore, OSU is estopped from raising a statute of limitations defense against Mr. Snyder-Hill in the first place. "Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment." *Chubb v. Ohio Bur. of Workers' Comp.*, 690 N.E.2d 1267, 1270 (Ohio 1998). "To invoke the doctrine of equitable estoppel, a party must demonstrate (1) a factual misrepresentation; (2) that is misleading; (3) that induced actual reliance, which was both reasonable and in good faith; and (4) that caused detriment to the relying party." *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 706 F. App'x 269, 279 (6th Cir. 2017). "The applicability of the doctrine of equitable estoppel is generally an issue to be determined by the trier of fact." *Helman v. EPL Prolong, Inc.*, 743 N.E.2d 484, 495 (Ohio App. 2000)

Under this standard, OSU is equitably estopped from raising a limitations defense against Snyder-Hill. The complaint alleges that:

(1) After Snyder-Hill complained to Student Health about Dr. Strauss's inappropriate sexual conduct, Ted Grace, the Director of Student Health Services, wrote him a letter dated January 26, 1995 that falsely represented that no one had previously complained about Dr. Strauss (FAC ¶¶ 171, 181) and that all patient comments are maintained in a quality assurance file available for review by the Joint Commission on Accreditation of Healthcare Organizations (FAC ¶¶ 172, 177).

(2) This misrepresentation misled Snyder-Hill to feel "that his concerns had been addressed." FAC ¶ 174 "Snyder-Hill believed, and had reason to believe, that OSU had responded adequately to the complaint he made in 1995." FAC ¶ 183.

(3) "Snyder-Hill reasonably relied on Dr. Grace's representations that Student Health had never received a complaint about Dr. Strauss before Snyder-Hill's." FAC ¶ 182.

(4) Because Snyder-Hill relied on Dr. Grace's misrepresentation, he believed there was nothing to investigate and no claim to bring against OSU. FAC ¶ 182. Yet now that Snyder-Hill has learned the truth, OSU is trying to deny him access to justice based on a statute of limitations defense after lying to Snyder-Hill to keep him from bringing his claims back in 1995.

Courts consistently toll statutes of limitations when a defendant misrepresents a material fact and the plaintiff, relying on that fact, fails to bring his claim within the limitations period. *See Alford v. Summerlin*, 362 So.2d 103, 105 (Fla. App. 1st. Dist. 1978) (tolling statute of limitations where negligent doctor lied to father about cause of child's death); *Robinson v. Shah*, 936 P.2d 784, 817-18 (Kan. Ct. App. 1997) (tolling statute of limitations where doctor concealed x-ray revealing that he had left sponges in patient's abdomen). Snyder-Hill relied on OSU's false promises to take preventative measures and create a system of accountability. *See Walburn*, 443 F. App'x at 49 (equitable estoppel is proper if defendant "promises to make a better settlement of the claim" or "similar representations or conduct"). OSU should not now be able to prevent him from bringing a claim he did not know existed because of its lies.

CONCLUSION

For years, OSU knew that its physician was sexually harassing and abusing students, and for years, OSU did nothing. Worse than nothing—the school concealed the abuse and empowered

the doctor to go on abusing even more students. It was only this year that the vast majority of the plaintiffs were able to recognize the abuse they suffered for what it was. And it was only this year that any of the plaintiffs were able to begin discerning OSU's role in causing their abuse. Thus, the plaintiffs' claims are timely. OSU has failed to demonstrate otherwise. This Court, therefore, should deny OSU's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served by the Court's ECF System on all counsel of record on December 18, 2018, pursuant to Fed. R. Civ. P. 5(b)(2)(E).

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