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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

**FILED**

MAR 30 2005 10

**MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT**

JACQUE HOLLANDER >  
>  
Plaintiff >  
>  
v. >  
>  
JAMES BROWN >  
JAMES BROWN ENTERPRISES, INC. >  
>  
Defendant >  
>

Case No. 05 CV 57  
T. J. Schenkler

RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER  
FED.R.CIV.P.12(b)(6)

Plaintiff, JACQUE HOLLANDER, by and through her attorney Donald Rosen,  
and in response to Defendants JAMES BROWN AND JAMES BROWN  
ENTERPRISES, INC. "Motion to Dismiss Under Fed.R.Civ.P.12(b)(6)" respectfully  
alleges and states as follows:

STATUTE OF LIMITATIONS ARGUMENTS

Commencement of Statute of Limitations

1. Defendants seek dismissal of each count based upon their presumption  
that since the acts giving rise to the causes of action took place in 1988, the statute of  
limitations commenced immediately upon the initiation of those acts. The Defendants  
rely heavily on Sister Marie Golla v. General Motors Corporation, 167 Ill. 2d 353; 657  
N.E.2d 894; 1995 Ill. LEXIS 184; 212 Ill. Dec. 549 (1995); and on Hyon Waste  
Management Services, Inc. v. The City of Chicago, 214 Ill. App. 3d 757; 574 N.E.2d 129;  
1991 Ill. App. LEXIS 854; 158 Ill. Dec. 335 (1991) as support that the statute of

limitations in this case should commence from the time of the 1988 acts, which would have allowed the Plaintiffs only until 1990 to file this action.

2. Each of the cases cited by the Defendants provide that the statute of limitations begins at the time of original injury. As Golla is cited by the Defendants, “Where **an injury** is caused by a sudden, traumatic event, one which is immediate and caused by external force or violence, a personal injury cause of action accrues, and the statute of limitations begins to run, **on the date the injury occurs** [emphasis added].” *Golla*, 167 Ill.2d at 362, 657 N.E.2d 894.

3. In Golla, Plaintiff was injured in an auto accident, in part due to an alleged defective automobile seat. The plaintiff in that case brought an action against General Motors under a theory of product liability. The plaintiff and her doctors admitted in discovery that she suffered contusions and injuries immediately at the time of the accident as a result of the accident. In fact, it was shown that the plaintiff began experiencing symptoms of her later diagnosed injury within the statute of limitations period. The plaintiff was formally diagnosed with RSD after the statute of limitations period expired, after which she attempted to file the lawsuit based on the RSD diagnosis.

4. This case is significantly distinguished from Golla. The defendant in Golla brought a motion for summary judgment rather than a motion to dismiss. In Golla, evidence showed that an original injury existed that put the plaintiff on reasonable notice. In this case, defendants are bringing a motion to dismiss the Complaint. In considering a motion to dismiss, the Court must accept all well pled allegations in the complaint as true and draw all reasonable inferences in the Plaintiff’s favor. See *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 972 (7<sup>th</sup> Circuit, 1995).

5. In this case the Complaint does not allege any injuries between the acts in 1988 and the Graves diagnosis in 2000. Unlike the cases cited by the Defendants, where the injuries were proximate in time to their cause, here a twelve-year span of time separated the cause of the injury from the onset of the injury.

6. In the Hyon case, which involved a civil rights cause of action against a company for environmental violations, the Court did not rule based on similar facts as in this case. Regardless, the Court's full opinion was that the statute of limitations does not commence until all of the facts exist to bring a cause of action:

Generally, a limitations period begins "when facts exist which authorize one party to maintain an action against another." (*Davis v. Munie* (1908), 235 Ill. 620, 622, 85 N.E. 943. See *Kozasa v. Guardian Electric Manufacturing Co.* (1981), 99 Ill. App. 3d 669, 673, 425 N.E.2d 1137.) Thus, a plaintiff's cause of action accrues at the time its interest is invaded; the mere fact that the extent of its damages is not immediately ascertainable does not postpone the accrual of a plaintiff's claim. *Del Bianco v. The American Motorists Insurance Co.* (1979), 73 Ill. App. 3d 743, 747, 392 N.E.2d 120. *Id.* at 11.

7. This opinion assumes injury contemporaneously at the time of the tort. Each of the causes of action pled in this case requires damages as an essential element of the tort. Therefore, the facts required to prove each element of the causes of action did not exist until 2003, when Plaintiff was diagnosed with Graves disease and informed that the cause of the disease was the 1988 acts.

#### Discovery Rule

8. In *Golla*, the Illinois Supreme Court interpreted the discovery rule:

. . .mechanical application of the statute of limitations could, in some situations, bar plaintiffs from bringing suit before the plaintiff was even aware that he was injured. To alleviate the harsh consequences that would flow from literal application of the limitations period, the judiciary created the "discovery rule." The effect of the discovery rule, which this court first adopted in *Rozny v. Marnul* (1969), 43 Ill. 2d 54, 72-73, 250 N.E.2d 656, is to

postpone the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer (1994)*, 158 Ill. 2d 240, 249, 198 Ill. Dec. 786, 633 N.E.2d 627. *Id.* at 360-361.

9. The Defendants cite nothing in the pleading to show that Plaintiff knew, or should have known, that she had been injured and that the injury was wrongfully caused. In *Rosalie A. Hill, v. Prakash Pedapati*, 326 Ill. App. 3d 58; 759 N.E.2d 1015; 2001 Ill. App. LEXIS 897; 259 Ill. Dec. 954 (2<sup>nd</sup> Dist., 2001) the 2<sup>nd</sup> District Court of Appeals rejected the Golla ruling that the statute of limitations period commences immediately upon injury. That Court reasoned the statute of limitations period commences, “. . . when the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.” *Id.* at 1017-1018.

10. The Hill Court distinguished the Golla ruling. “The plaintiff in Golla did not claim that she was unaware of her injury at the time of the collision or that she was unaware of the causal connection between the injury and the alleged defect in the automobile seat. Instead, she contended that the statute of limitations did not begin to run until she was aware of the ultimate extent of her injuries, which initially appeared to be relatively minor.” *Id.*

11. In this case, a reasonable inference from the complaint is that Plaintiff was not aware of her Graves condition and its cause until 2003. Nothing in the facts pled indicates that Plaintiff became aware of the Graves condition through any prior injuries that a reasonable person could have connected to the 1988 acts.

Defendant James Brown Coersion

12. Plaintiff also pleads that, "Brown threatened that he would have Plaintiff killed if she told anyone what had happened." (Complaint, ¶ 18.) Taking this as the truth since it is properly pled, it can be inferred that Plaintiff had a very reasonable belief that she would have suffered considerable harm if she filed an action within the statute of limitations period.<sup>1</sup>

13. Although there is no precedence specifically on point, Defendant Brown should be estopped from invoking a statute of limitations defense when he contributed to the delay in filing as he would under the fraudulent concealment rule *Ill. Rev. Stat. 1977, ch. 83, par. 23*. Further, taking as true all allegations, public policy should be considered before rewarding a rapist that manages to control their victim by fear through the two-year statutory period with immunity from civil liability for their actions.

Use as Affirmative Defense

14. Defendants can use the statute of limitations as an affirmative defense, so that a trier of fact can determine whether Plaintiff was reasonably on notice of her injuries and unreasonably delayed filing past the statutory period. As the Hill Court ruled:

"Whether a party possessed the requisite constructive knowledge contemplates an objective analysis of the factual circumstances involved in the case. Thus, the relevant determination rests on what a reasonable person should have known under the circumstances and not on what the particular party specifically suspected. The trier of fact must examine the factual circumstances upon which the suspicions are predicated and determine if they would lead a reasonable person to believe that wrongful conduct was involved. The fact that a party suspects wrongful conduct, without examining the reasons underlying those suspicions, is not enough to constitute constructive knowledge that an injury was wrongfully caused." *Young, 303 Ill. App. 3d at 390. Id. at 1020.*

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<sup>1</sup> Plaintiff asks that the Court take judicial notice that James Brown is, and was at the time of the allegations, a major celebrity with significant resources.

15. For their dismissal motion, the Defendants seek a mechanical application of the Statute of Limitations without regard to the circumstances in the pleading. It is expected that the Defendants will argue that the violent nature of the allegations implies an injury such that the statute of limitations should have immediately commenced. That would be an improper inference against the Plaintiff not sustained by the pleading.

16. Since the complaint states that it was 2003 before the injury was diagnosed and determined to be part of the 1988 alleged actions, the discovery rule should apply and Defendants' 735 ILCS 5/13-202 arguments should be denied.

#### LACK OF SPECIFICITY

17. Defendants argue that the complaint lacks specificity with regard to when the Plaintiff's physician informed her that the 1988 rape caused her Graves disease. The complaint only specifies that Plaintiff was notified sometime in 2003.

18. Since this action was filed on January 5, 2005 Defendants argue, without precedence, that if the Plaintiff was notified of the connection between January 1 and January 4, 2003, ". . . the statute of limitations will bar [the] plaintiff's claim as being untimely." (Memorandum, p. 7.)

19. Plaintiff's physician notified her of the connection between the 1988 rape and her Graves disease after January 5, 2003. Plaintiff respectfully requests to amend the complaint to make this fact more specific.

#### DUTY OF BROWN ENTERPRISES, INC.

20. Defendants argue that Plaintiff fails to plead sufficient facts to show a duty to her from Brown Enterprises, Inc. Since duty is a vital element of a negligence claim, they conclude that an essential element of the negligence claim is not met against Brown

Enterprises, Inc., and that the claim of negligence against Brown Enterprises should therefore be dismissed with prejudice.

21. Defendants incorrectly cite Illinois law in support of their arguments to dismiss James Brown Enterprises, Inc. from the negligence and respondeat superior causes of actions based on the elements of the torts. While Defendants' arguments regarding the statutes of limitations are procedural, and are governed by the forum state; the arguments regarding the elements of negligence and respondeat superior affect the substantive rights of the parties and are governed by the local laws of the State where the alleged tort took place. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021 (1941).

22. Plaintiff's complaint alleges, "Between the years 1987 and 1988, Defendants retained Plaintiff to aid them with public relations." (Complaint, ¶ 7) ". . . Dallas [attorney for James Brown Enterprises, Inc.] requested that Plaintiff provide him with a waiver and letter of recommendation that she . . . could accompany Brown as a passenger in his vehicle." (Complaint, ¶ 9) "Plaintiff agreed to meet Brown and Dallas at the corporate offices of Brown Enterprises in Augusta, Georgia to deliver the document and discuss their plans for Plaintiff's songwriting career." *Id.* "[In the course of that meeting] Dallas told Plaintiff to accompany Brown in Brown's van. . . ." (Complaint, ¶ 11.) "On information and belief, Brown Enterprises knew of Brown's behavior and drug usage and failed to take steps to mitigate the situation. Brown Enterprises owed a duty to Plaintiff to either act to prevent Brown from taking Plaintiff in his vehicle, or to warn Plaintiff of the risks." (Complaint, ¶ 42, ¶45)

23. The Georgia Supreme Court recognized the need to incorporate social consequences in the duties of employers to their employees. In CSX Transportation, Inc. v. Williams et al. CSX Transportation, Inc. v. Leverett et al., 278 Ga. 888; 608 S.E.2d 208; 2005 Ga. LEXIS 44; 2005 Fulton County D. Rep. 214 (2005), the Court opined, “. . . in fixing the bounds of duty, not only logic and science, but policy play an important role. However, it must also be recognized that there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree.”

23. In Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L. P. et al., 268 Ga. 604; 492 S.E.2d 865; 1997 Ga. LEXIS 714; 97 Fulton County D. Rep. (1995) the Georgia Supreme Court, in determining landlord duty to offer protection against criminal behavior ruled that duty is directly related to the foreseeability of that behavior:

While the prior criminal activity must be substantially similar to the particular crime in question, that "does not mean identical, . . . '[What] is required is that the prior [incident] be sufficient to attract the [landlord's] attention to the dangerous condition which resulted in the litigated [incident].' [Cit.]" Further, the question "of reasonable foreseeability" of a criminal attack is generally "for a jury's determination rather than summary adjudication by the courts." *Id. at 867.*

24. Georgia law recognizes a duty of employers to protect their employees from wrongs that they are aware of. It is a preposterous position to argue that James Brown Enterprises, Inc., with knowledge of James Brown's drug use and violent behavior; did not have a duty to warn their employee of the danger she was in when their attorney told Plaintiff to accompany James Brown, armed with a loaded shotgun, on an errand. At least this is a question for a trier of fact, not one for a dismissal motion.

## RESPONDEAT SUPERIOR ARGUMENTS

### Legitimate Business Purpose

25. Defendant James Brown Enterprises, Inc. argues that the claim of respondeat superior should be dismissed because, under Illinois law, it cannot reasonably be pled that the 1988 sexual assault of Plaintiff by James Brown was within the scope of his employment with Brown Enterprises, or that the sexual assault could be encompassed into the duties of James Brown.

26. As with their negligence arguments, Defendants incorrectly rely on Illinois law in support of their arguments against respondeat superior. The arguments regarding the elements of respondeat superior affect the substantive rights of the parties and are governed by the local laws of the State where the alleged tort took place.

27. Further, the cases that Defendants cite in support of their position that sexual assault is personal in nature and cannot be considered furtherance of a business purpose, *William Deloney and Kaplan & Begy, a partnership, v. Board of Education of Thorton Township, School District No. 205*, 281 Ill.App.3d 775, 786, 666 N.E.2d 792, 799 (1996) regard significantly different facts to this case.

28. In *Deloney*, a respondeat superior action was sought against a school district for sexual misconduct of a teacher. In *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 524 N.E.2d 966, 968 (1<sup>st</sup> Dist., 1988) plaintiffs sought a respondeat superior action against a day care center due to sexual assault of a child by a Teacher's Aide. In this case, the employer is a corporation that exists solely to market James Brown. A trier of fact can easily conclude that, especially in the music industry,

providing drugs and sexual fodder for James Brown was within the scope of James Brown Enterprises' responsibilities.

29. Regardless, Georgia law provides that respondeat superior is an available cause of action against an employer where an employee commits sexual assault. In *Avis D. Simon, v. Morehouse School of Medicine*, 908 F. Supp. 959; 1995 U.S. Dist. LEXIS 20569 (1995) the United States District Court For The Northern District of Georgia, Atlanta Division, considered the legal theory that sexual harassment and assault were not related to any legitimate business interests in a case of respondeat superior where the employee was accused of sexual harassment and sexual assault. The Court opined:

As previously noted, the assault and the sexually harassing conduct were personal acts which did not arise out of the employment. However, under Georgia law, there is an alternative basis for imposing respondeat superior liability against [the employer], to wit: "[If] an employer who possesses or is possessed of knowledge of the employee's behavior. . . fails to correct such conduct[.]. . . [it] essentially ratifies his employee's acts," and may be held liable therefor.

30. In this case, Plaintiff has properly pled that, "On information and belief, Brown Enterprises knew of Brown's behavior and drug usage and failed to take steps to mitigate the situation." (Complaint, ¶ 42, ¶45) Based on the relevant law of the state of Georgia, where the cause of action took place, an action for respondeat superior can be maintained based on the facts pled.

#### Right to Control James Brown

31. Defendants argue also that the claim of respondeat superior against James Brown Enterprises should be dismissed because the complaint fails to allege that Brown Enterprises had a right to control the conduct of James Brown.

32. Defendants misconstrue the issue of control as discussed in *Herman Davila v. Yellow Cab Company*, 333 Ill.App.3d 592, 595, 776 N.E.2d 720, 723 (1<sup>st</sup> Dist. 2002.) In the Davila case control was only used as one factor to determine whether an employment relationship existed. In both Illinois and Georgia law, an employer becomes vicariously responsible, with or without direct control, for the acts of employees done in furtherance of the business of the employer. *Id. at 600*. Official Code of Georgia Annotated § 51-2-2 (*Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily [emphasis added].*)

33. In this case it is properly pled that James Brown and the attorney for James Brown Enterprises, Inc. met with Plaintiff at the corporate offices of James Brown Enterprises, Inc. They discussed business pursuant to Plaintiff's songwriting career, which was compensation for her public relations work with James Brown Enterprises (Complaint, ¶s 7-10.) As part of that meeting, James Brown even ordered Plaintiff to run menial errands for him (Complaint, ¶ 10.) The further errand ordered by the attorney for James Brown Enterprises, to accompany James Brown to the automobile dealership (Complaint, ¶ 11) is well pled as a continued furtherance of that business relationship.

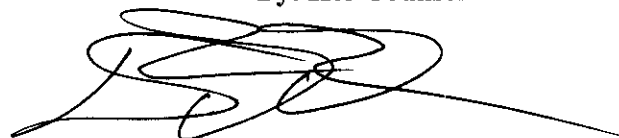
34. Since it is properly pled that James Brown and the Plaintiff were engaged in a business meeting for James Brown Enterprises, Inc. at the headquarters of James Brown Enterprises, Inc., and the errand that caused Plaintiff to be alone with James Brown when he sexually assaulted her was in furtherance of the business interests of James Brown Enterprises, Inc., it is not necessary to also plead that James Brown

Enterprises, Inc. had direct control over James Brown in order to establish a cause of action against James Brown Enterprises, Inc. for respondeat superior.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Dismiss in its entirety; or, in the alternative, allow Plaintiff to amend the Complaint to correct any deficiencies; and, such other relief as this Honorable Court deems reasonable and just.

RESPECTFULLY SUBMITTED,  
JACQUE HOLLANDER

**By: Her Counsel**

A handwritten signature in black ink, appearing to be 'Donald Rosen', written over a horizontal line.

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