No. 20-1708

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Daniel A. Rassier and Rita Rassier,

Appellants,

vs.

John L. Sanner, Pam Jensen and Stearns County, Minnesota,

Appellees.

On Appeal from the United States District Court for the District of Minnesota, the Honorable Donovan W. Frank, presiding.

APPELLANTS' PRINCIPAL BRIEF

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This case arises out of alleged wrongs committed by Stearns County, Sheriff John Sanner, and Captain Pam Jensen when they labeled Dan Rassier a "person of interest" in the infamous child kidnapping of Jacob Wetterling. Rassier filed this suit alleging nine causes of action. The District Court dismissed five of those claims, but allowed four to advance: First Amendment retaliation, intentional infliction of emotion distress ("IIED") and defamation as to Sanner and Jensen, and municipal liability against Stearns County insofar as it parallels the First Amendment Retaliation claim. Appellees moved for summary judgment on the remaining claims. On March 5, 2020, the district court erred in granting summary judgment to Appellees on all claims and denying Appellants' request for reconsideration. The district court ruled that the Rassier claims were barred by the applicable statute of limitations and that equitable tolling does not apply. The district court did not address Appellees' alternative arguments for dismissal. The district court erred in its analysis of the date of accrual by giving greater weight to those facts that support its conclusion while ignoring other contradictory facts. It also erred in finding equitable tolling does not apply. Rassier now files the pending appeal of the district court's dismissal of all claims.

Appellants request twenty minutes of oral argument.

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JURISDICTIONAL STATEMENT

The district court has jurisdiction pursuant to 28 U.S.C. § 1331, § 1343, § 1367 and 42 U.S.C. § 1983 as Rassier's claims are based on rights under the United States Constitution, state-law, and common law.

On March 5, 2020, the district court issued an order granting Appellee's motion for summary judgment and entered on March 6, 2020 because Daniel Rassier's claims were barred by the applicable statutes of limitations and dismissing all claims with prejudice. This court has jurisdiction because this appeal is taken from a final decision, 28 U.S.C. § 1291, and because the notice of appeal was timely filed within 30 days of entry of the order granting summary judgment and dismissing all claims with prejudice.

STATEMENT OF THE ISSUES

1. **Did the district court err in holding that there were no genuine issues of material fact demonstrated as to when Appellant Daniel Rassier knew he had a complete and present cause of action and could file suit and obtain relief and thus when his claims accrued?**

Apposite Authority:

Wallace v. Kato, 549 U.S. 384, 387 (2007).

Geka v. Vasiliades, 814 F.3d 890, 894 (7th Cir. 2016).

Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997).

2. **Did the district court err in holding that there were no genuine issues of material fact demonstrated that would warrant application of the doctrine of equitable tolling?**

Apposite Authority:

Menomonee Indian Tribe of Wis. v. United States, 136 S.Ct. 750, 755 (2016).

Lamere v. St. Jude Med., Inc., 820 N.W. 2d 782 (Minn. App. 2013).

Wild v. Rorig, 302 Minn. 419, 451, 234 N.W. 2d 775, 795 (1975).

STATEMENT OF THE CASE AND FACTS

I. Relevant procedural history.

On July 3, 2017, Appellants Daniel A. Rassier and Rita Rassier, filed a First Amended Complaint against Sheriff John L. Sanner, Captain Pam Jensen and Stearns County, alleging nine causes of action.[1] A19. Six of those were federal claims against individual defendants, one was a federal claim against Stearns County for municipal liability and two claims were based on state and common law.

On November 30, 2017, on Appellants' motions to dismiss, the district court dismissed all but four counts which pertained to Sanner, Jensen and Stearns County and were based upon Sanner's labeling Rassier a "Person of Interest". These claims were based upon First Amendment Retaliation in violation of 42 U.S.C. § 1983, IIED and defamation. The district court permitted these four claims to continue on the theory that Appellants had properly pled equitable tolling and thus those claims were not barred by the applicable statutes of limitation.

On August 29, 2019, Appellees filed a motion to dismiss or alternatively summary judgment on all remaining counts. On March 5, 2020, after a hearing on the motion, the district court issued a Memorandum

[1] Appellants also alleged claims against the BCA Agency.

Opinion and Order granting Appellees' motion in its entirety and dismissing all remaining claims of Appellants' First Amended Complaint. A667.

On April 1, 2020, Appellants appealed from the district court's order dismissing all remaining claims on the grounds that they are barred by the applicable statutes of limitations and that the doctrine of equitable tolling does not apply.

II. Fact[2]

On October 22, 1989, Jacob Wetterling was abducted, sexually assaulted and murdered by Danny Heinrich. A19. Jacob Wetterling was forced into Heinrich's vehicle at the end of Robert and Rita Rassier's driveway to their 168-acre farm in St. Joseph, Minnesota (the "Rassier Property"). A27. Appellant Dan Rassier ("Rassier"), the 34-year old son of Robert and Rita, was at home on the Rassier property at the time of Jacob's abduction. Id. He witnessed a car come up the driveway, turn around near the farmhouse and exit the Rassier property at or about the same time Jacob was taken. A27-28. Rassier later contacted investigators after observing a search party on his property which he at first thought were burglars. A417.

Shoe and tire tracks were identified as being consistent in size and design to Heinrich's shoes and tires used on his blue 1982 Ford EXP sedan.

[2] The facts stated here rely on the facts as stated in the district Courts' Memorandum Opinion and Order. A676.

A618. Despite knowing this information as early as 1990, Sanner did not disclose this to the public even after he became Sheriff in 2002. A168. This information was not even shared with Jacob Wetterling's parents, Patty and Jerry until 2014. A381. It was not disclosed to the public until October, 2015 during a press conference by the U.S. Attorney announcing the arrest of Danny Heinrich. A381-382.

Sanner had been working in law enforcement with Stearns County since 1984 and was elected Sheriff in November 2002, assuming office in January 2003. A120-121. Solving the Wetterling abduction was an admitted priority for him. A129-130. This was even a platform of his election campaign in 2002. A289. Jensen became a detective in the SCSO in 2000 and was assigned to the Jacob Wetterling investigation to which she continued as the lead investigator up until Heinrich was arrested in October of 2015. A242.

In his First Amended Complaint, Rassier states that on the afternoon of October 22, 1989, Heinrich was operating a tan full size vehicle in St. Joseph while "trolling for a victim when he accidentally stumbled onto the [Rassier] property." A26. Heinrich drove approximately one-quarter of a mile down the property's long driveway turned around in the yard by the farmhouse and left at an extremely high rate of speed. Id. Rassier was

alerted to this vehicle by the family dog's barking. Id. Later that same evening at approximately 9:15pm, Heinrich emerged from the dark, with his face covered and brandishing a handgun, stopped Jacob Wetterling, his brother and another boy, asked their ages, and abducted Jacob Wetterling, telling the others to run. A27. Heinrich then drove down Rassier's driveway, and turned around in the yard by the farmhouse and drove away, again at an extremely high rate of speed. Rassier was again alerted to the vehicle, looked out his 2nd floor window and saw the vehicle, this time a blue-sedan type vehicle. Id. The driver exhibited the same driving pattern as the tan vehicle earlier in the day, and Rassier was confident that the driver of both vehicles was the same person. A28.

The FBI joined the Wetterling investigation the day of the abduction. A174. They looked at Rassier due to the fact that the abduction occurred on the driveway where he lived with his parents. A601. The FBI quickly found no evidence linking Rassier to the crime and promptly began looking at other persons. Id. These conclusions were made by the FBI in the very early stages of the investigation in 1989 and 1990. Id. The investigation quickly turned to Heinrich who was known to Stearns County Sheriff's Office ("SCSO") because he had been investigated regarding the sexual assaults of other boys in the area and because shoe prints and tire tracks were identified

as being consistent in size and design to Heinrich's shoes and tires used on his blue 1982 Ford EXP sedan. A249, 605-610, 612, 618-619.

In the fall of 2003, Kevin Hamilton came forward and told SCSO that he had driven onto the Rassier's driveway the night of Jacob Wetterling's abduction after learning of the abduction over a police scanner. This led to a new theory by Sanner and Jensen that Jacob Wetterling was not taken in a car. A251-254. This became known as the "abduction-on-foot theory". Rassier met with Jensen and McDonald regarding their new theory and during the same time frame he continuously asserted his observations of the two vehicles that entered his driveway and that their new theory was inept. He was critical of the theory, the investigation and law enforcement during this interview. A159, 163, 164, 189, 201, 202, 204, 265. Sanner was aware of these criticisms. A160.

This new theory mysteriously led to a television story by Trish Van Pilsum of Fox 9 news in which she interviewed Rassier and he shared his two-car observations and his involvement in the investigation, including an interview with Jensen and McDonald. A201, 202, 204, 373. In her story, Van Pilsum wrote that Rassier told her that he was a suspect in the Wetterling Investigation. A373. This fact remains in dispute in that Rassier not only repeatedly stated that he was not sure and that it was only possible,

but also that he never believed SCSO considered him a suspect. A201, 202, 204, 205. She further suggested Rassier's involvement by depicting Rassier in the video, albeit blocking his face. A36,37,143. It was clear from the content of the story that Rassier was identifiable. A143,204.

Soon after the Fox 9 story, Sanner met with Patty Wetterling at which time he explained the new abduction on foot theory. A149. He told Patty Wetterling that they now had a vehicle [Kevin Hamilton] that possibly could have made the tire tracks found on the Rassier's driveway even though there already was a match. Id. He also advised her that a local person could be responsible for the abduction. Id.

After this meeting, another news story ran on television depicting Patty Wetterling on camera claiming: "The car that turned around really quick in the driveway has now been located, and that particular person did not take Jacob." A637. The news story went on to connect the abduction and sexual assault of another young boy in the area ten months before Jacob Wetterling disappeared. Id. Patty Wetterling went on to declare, "It is almost unfathomable to believe that somebody right here took Jacob and has been here all along…even the possibility of there being no car…it changes everything." Id. These statements were the direct result and influence of the Sanner meeting. A387,392.

Despite these developments and for reasons unexplained, the Wetterling investigation went cold for nearly five years with no developments or new evidence implicating Rassier. A145,158. In fact, Sanner admits that he could not call Rassier a "suspect" because "a suspect, to [him], is a person that's thought to be guilty of a crime and that they [SCSO] could never associate the guilt part with Rassier – ever." A145.

Then, suddenly, Patty Wetterling and SCSO investigators concocted a plan to stage an encounter with Rassier, in which Patty Wetterling would wear a wire and ask Rassier questions about what happened to Jacob. A388-390.

On October 20, 2009, Patty Wetterling did then meet with Rassier while wearing a recording device and being monitored by law enforcement. A413-437. During their conversation, Rassier shared his observations as to the two cars he saw turn around in his driveway on the date of the abduction and how he had no doubt that the driver of those cars was the person who abducted Jacob Wetterling. He also was vastly critical of the investigation, calling the police and FBI "idiots", big bullies" and "liars who have completely screw[ed] up" the investigation. Id. Speaking as to Sanner specifically, Rassier said, "Sheriff Sanner saying we are closer than ever to

solving this case. That should tell you right there, they are, t-they're just, they're lost." Id.

Interestingly, Appellees' claim and the district court found that Sanner claims that he neither listened to an audio nor viewed a transcript of Patty Wetterling's conversation with Rassier. A160. Instead, he relied on Jensen to brief him on what was said during the conversation Id.; and Jensen denies that she provided him with a transcript of the interview or inform him of Rassier's criticisms of law enforcement or the investigation. Id. This despite Sanner admitting that recording was a big deal to the investigation. A160. Sanner and Jensen's candor on this is further thrown into question by the following exchange at Sanner's deposition:

"Q: Isn't it true, sir, that in this interview, Mr. Rassier was critical of law enforcement?

Mr. Wolf: Objection. Foundation.

A. I had heard…

Mr. Wolf: Do you want him to read the whole thing first?

Mr. Padden: No, he can if he wants. I mean, I can point to a specific part if you'd like me to, but, if you remember. I mean, it's whatever you prefer, I mean, you know, like anything else.

A. I know that Mr. Rassier had been critical of the investigation early on." A160-161.

As the transcript plainly reads Sanner was cut off by Mr. Wolf before he could finish his answer which may very well have contradicted Jensen's declaration wherein she states that she did not inform him [Sanner] about the other critical comments Rassier made during the interview.

Nonetheless, it is undisputed that Sanner was well aware of Rassier's criticism of him, law enforcement and the investigation. A159, 163, 264, 265. During the summer of 2010, investigators obtained warrants to search the Rassier property. A439. On June 30, 2010, investigators from Stearns County, the FBI and the BCA began executing the warrants. A546, 549, 555. Several media outlets covered the search. A163. The media coverage implicated Rassier without directly saying as much, and Rassier believed the articles portrayed him as a suspect in the Jacob Wetterling abduction. A203, 204, 546, 549, 555.

On July 3, 2010, just two days after the search, Rassier spoke with Kari Petrie of the St. Cloud Times. A559. Rassier indicated that he supported the search of his family's property and that he would do what he could to help authorities. Id. Rassier told Petrie that he had been interviewed numerous times and voluntarily submitted to a lie-detector test and hypnosis

and provided DNA. Id. He also explained how the negative media attention had affected him and his family's lives, including death threats, threatening emails, and over 20 years of a never ending nightmare. Id.

Following the interview, Petrie called Sanner at home, told him of her conversation with Rassier and that he had explained his involvement in the investigation over the years. A163. Petrie asked for confirmation, but Sanner declined to confirm or deny due to the fact that there was still an open investigation. Id. Petrie then asked Sanner, "With everything that Dan Rassier just told us, would you consider him a suspect?" Id. Sanner replied "No, that's not what I would consider him." Id. Petrie then followed up by asking, "Then what would you consider him?" Id. Sanner responded by saying he was a "person of interest." Id.

On July 1, 201, the second day of the search of the Rassier property, Rassier and Sanner were talking alone underneath a tree on the property and Rassier commented that this was really bad. A193. Sanner replied "yup, yup…This is what happens when you talk." Id. Rassier replied "What did you say?" Id., to which Sanner again stated, "This is what happens when you talk." Then, he conveniently got a phone call and walked away. Id.

Despite the district court's inappropriate finding that it was at this moment that Rassier was certain that he was being retaliated against for his

criticisms of law enforcement and the investigation, there are material facts in dispute as to when and what Rassier actually knew. Rassier was asked throughout his deposition on several occasions as to when he realized that he was being retaliated against. A191-200, 206-209, 212, 213, 216, 217.

To these questions, Rassier gave many different answers. The first time he is asked "when did you realize that you were being retaliated against?" Rassier replied that it became crystal clear to him when Sanner said to him, "This is what happens when you talk" and that it became even more clear when he went to his [Sanner] office a week later. A193. He was then asked to confirm that he realized, and he says "it wasn't like a resurrection day" and references his letter of 2012 to several government agencies. Id. In an attempt to clarify, he was immediately asked again if July 1, 2010 was the date, and he replies it was his "frankness and honesty with Patty Wetterling about how - how bad they were, how bad Sanner was, what an idiot he is and was, and Jensen and McDonald." Id. Again Mr. Wolf asked for clarification, and this time Rassier contradicts or denies his first answer and says: "Never knew for sure." Id. He goes on to say "after Sanner said that, it surely started being on my mind, toward the front of my mind that…But it could have been many other things." Id. He was then asked if his certainty grew over time and Rassier stated inter alia, "But as

time went on 2010 and all the stuff that went with it and they find nothing and I - it becomes - everything becomes a hell. When I see the affidavit of probable cause and I go - I mean, they had - they had nothing," referring to the unsealing of the warrants in 2015. A193-194.

After discussing the 2004 interview with Jensen and McDonald and the story by VanPilsum of Fox 9, he was asked if he was retaliated against in 2004. A194-195. Rassier responded, inter alia, "I think it's all - what's the word - cumulative where things get back to Sanner…and which particular thing are they going to retaliate against me for? There's so many things." A195. When asked again when he realized that he was being retaliated against for comments he made to Patty Wetterling he reverts and states, "Like I said before, when I talked to Sanner." A196. He is then asked for a specific date, and he states July 1, 2010. Id. He then is asked if he had any suspicions before July 1, 2010, and Rassier again retracts and says:

> Crystal clear that something weird is going on…the idea of being retaliated against, it becomes crystal clear that something weird is going on here…it becomes crystal clear that something strange is happening here. And what is it? Is it retaliation? Maybe…so, the thought – I mean, the whole process starts to pretty much – it was like the seed of retaliation has been planted. Does that make sense, crystal clear that they're doing something. But what are they doing to me?...it started the seed with not knowing that what it's going to grow into when Sanner says – and what he says before that, 'This is what happens when you talk.' So – and then when I finally see this affidavit for the warrant, and you find out about all of the stuff that comes out…

A196, 197.

Rassier's comments above further confound as to when he was certain of the retaliation. Rassier further noted, "I would never have called it retaliation." A197. He also denies that the 2004 events were retaliatory. A198. When asked if he was retaliated against for comments to Wetterling on October 20, 2009 he contradicts himself in the same answer when he stated, "Yeah, about that date, if it's not exact, well, not right away." Id.

When asked about other retaliatory actions, Rassier states that Sanner continued to retaliate against him after Heinrich's confession and Gudmundson's press conference every time he went online, or on the news and said that (SCSO did everything right and wouldn't change a thing. A199.

The issue of when is further complicated when Rassier is questioned on his Amended Complaint about when he became the target of retaliation and he replies "Never--I never knew - I didn't know - even to this day it's like no one's admitted that they--you know--." A206. Asked to clarify this answer and admit that he knew in 2010, Rassier unequivocally states, "I think this is the first time that I had proof. I had proof that, you know, something was in writing that was you know, that I can use this to prove my case." A207. He confirms this when pressed again to admit he knew of the

retaliation in 2010 and states "This is the first time I had real—like I said before, proof that, hey, this guy did me in." This was a reference to the warrants unsealed in 2-15 that he did not see until 2016. Id. Mr. Wolf takes one final shot and asks if he knew in 2011 he was being retaliated against for his comments to Patty Wetterling based upon his journal entry of June 9, 2011. Rassier again responded, "I only –I only can say in my own mind, I thought I knew it could have. Was I sure? Could I go out and sue somebody? No. I had really nothing except. What I thought. And what I thought was nothing." A208.

The above confusion of Rassier as to when he knew he was being retaliated against and could bring suit and obtain relief is clarified by Rassier when he submitted and signed the errata sheet for his deposition dated May 15, 2019. A672. His notes to supplement page 111, line 14 make clear that it was seeing the Ball affidavit in 2016 that made him aware the conduct was a result of an unlawful purpose. A674. He notes:

> I wish to clarify my answer. What I was trying to communicate with This answer, and all prior answers concerning this topic, was that up and all prior answers concerning this topic, was that up and until I have seen the affidavit of probably cause, after it was unsealed, the conduct that I did not understand, of which I complained, could have been related numerous purposes such as sheer incompetence. However, seeing the affidavit, was the first piece of evidence that put me on notice that the conduct of which I complained was a result of

> unlawful purpose. State another way, up until the affidavit of probably cause was unsealed, I speculated without evidence personally about the numerous reasons why I was being targeted. However, once the affidavit was unsealed, I no longer needed to speculate. A673-674.

His confusion is emphasized and apparent when he called the Stearns County Attorney's Office on June 9, 2011, and spoke with an assistant county attorney, Matt Flynn: "I asked lots of questions…Can I see the reasoning behind the search warrants? NO…those are sealed because of the info in them is important in the case. Can I talk to the judge about it? No…" A589. He also advised Flynn that he believed the police were doing this in retaliation and threatened to go to the media. Id.

Finally, he asked about suing the police and the applicable statutes, to which Flynn refused to answer saying only "hmmmm…good question…I don't know", and "he[I] represent the police…and "[I'm] not going to comment." Id.

Rassier's confusion and frustration came to a head in 2012 when he sent a formal complaint letter to various state officials and agencies, claiming, inter alia, that law enforcement had violated his civil rights in retaliation for his sticking with his original witness accounts and for being critical of their dishonest actions and statements. A594. He also discussed the County Attorney's office "flushing" away of his complaint without

hesitation which further questions and reiterated his belief that Sanner retaliated against him on July 1, 2010. Id.

SUMMARY OF THE ARGUMENT

On October 22, 1989, Jacob Wetterling was abducted, sexually assaulted and murdered by Danny Heinrich. The abduction occurred at the end of Robert and Rita Rassier's driveway of their farm in St. Joseph, Minnesota. Dan Rassier, the 34-year old son of Robert and Rita, was at home alone and witnessed a vehicle drive up their driveway and turn around and speed away at or about the time of the abduction. He had seen a different vehicle exhibit similar driving conduct earlier that day. He reported these facts to law enforcement on multiple occasions. They were ignored and Rassier became critical of the investigation telling media that law enforcement were idiots.

Law Enforcement and particularly Sanner began to target Rassier questioning him, luring him into a wire-tap conversation with Patty Wetterling, obtaining search warrants to conduct a dig on the Rassier property, leaking info to the media and ultimately reporting Dan Rassier as a "person of interest". Rassier claims these actions and others were in retaliation for his critical comments.

The seminal issue is when did Rassier know he had a complete and present cause of action for which he could file suit and obtain relief? The district court erred when it improperly weighed evidence and made

credibility determinations, and cherry-picked certain testimony supporting its finding that Rassier knew he was being retaliated against and had a complete and present cause of action on July 1, 2010 while ignoring other evidence that suggested otherwise.

Additionally, the district court erred when it held that the doctrine of equitable tolling did not apply because Rassier did not pursue his rights diligently and no extraordinary circumstances stood in history of filing his claims sooner.

The district court then dismissed Rassier's claims on summary judgment. The district courts errors warrant reversal and remand for further proceedings and trial.

ARGUMENT

I. Standard of Review

This court reviews de novo a district court's grant or denial of summary judgment. Myers v. Lutsen Mountains Corp., 587 F.3d 891, 893 (8th Cir. 2009). It also applies the same standard as the district court for summary judgment. Jaurequi v. Carter, 173 F.3d 1076, 1085 (8th Cir. 1999). Summary judgment is proper if, upon viewing the facts in the light most favorable to the non-moving party, and giving her or him the benefit of all reasonable inferences, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Reich v. Hoy Shoe Co., 32 F.3d 361, 364 (8th Cir. 1994). In ruling on a motion for summary judgment a court must not weigh evidence or make credibility determinations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when she or] he is ruling on a motion for summary judgment…).

II. The district court erred in granting Appellee's summary judgment by weighing the evidence, making credibility determinations and drawing inferences when it found that Appellant knew he had a complete and present cause of action for which he could sue and obtain relief as of July 1, 2010.

In its November 30, 2017 order, the district court determined a six-year period of limitations applied to Rassier's §1983 claim, and a two-year

limitations period applied to his state law claims. See, Wallace v. Kato, 549 U.S. 384, 387 (2007)(explaining that courts apply the state statute of limitations for personal injury torts for §1983 claims); Minn. Stat. § 541.05 (six year statute for personal injury torts in Minnesota); United States v. Bailey, 700 F.3d 1149, 1153 (8th Cir. 2012) (noting that the statute of limitations on §1983 claims is six years in Minnesota). In addition, the district court determined Rassier's state-law claims – IIED and defamation – are governed by a two-year statute of limitations. Minn. Stat. §541.07(1); Songa v. Sunrise Senior Living Invs., Inc., 22 F.Supp. 3d 939, 942 (D. Minn. 2014). Rassier agrees with the court's analysis and application of the six-year period to §1983 claims and a two-year period to IIED and defamation claims.

The court next considered the accrual issue and concluded that Rassier's claims accrued on July 3, 2010, the day that Sanner called him a "person of interest" to the media. A676. (From the court's March 5, 2020 Opinion and Order, p. 14, A689). In doing so, the court weighed certain evidence (i.e., Rassier's testimony, greater than others and thereby made credibility determinations in violation of applicable law.

The analysis behind accrual begins with a determination of when the plaintiff has "a complete and present cause of action" – in other words when

"the plaintiff can file suit and obtain relief." Wallace v. Kato, 549 U.S. 384, 388 (2007).

Applying the aforementioned test to Rassier, the district court repeatedly relied upon Rassier's testimony that it was clear to him on July 1, 2010 that Sanner and SCSO were retaliating against him when he said "This is what happens when you talk." A676. In doing so, the court ignored and gave less weight to Rassier's repeated testimony that he, "it wasn't like a resurrection day" (A193), "Never knew for sure." Id.; or "after Sanner said that, it surely started being on my mind, toward the front of my mind…that…But it could have been many other things (Id.), and "as time went on in 2010 and all the stuff that went with it and they find nothing and I – it becomes – everything becomes hell. When I see the affidavit of probable cause and I go – I mean, they had – they had nothing" referring to the unsealing of the warrants in 2015. A193-194. The district court ignored Rassier's testimony that all of this retaliation was "cumulative" and "so many" (A195), and that it was weird or strange, but not necessarily retaliation (A196-197). The district court gives no weight or less weight to Rassier's very important testimony that Sanner's comments started the seed, but that the warrant and Don Gudmundson's press conference finally made it clear. Id. It ignored the testimony that the retaliation continued even after

Heinrich's arrest and confession by telling the media they did everything right and wouldn't change a thing. A199. Finally, and most importantly, the district court discounted and gave less weight to Rassier's testimony as to when he became a target of retaliation that he "Never – I never know – I didn't know – ever to this day it's no one's admitted that they – you know – " and "I think this is the first time that I had proof. I had proof that, you know, something was in writing that was you know, that I can use to prove my case? A206-207, and again "This is the first time I had real – like I said before proof that, hey, this guy did me in?" A207, and lastly, "I only – I only can say in my own mind, I thought I knew it could have. Was I sure? Could I go out and sue somebody? No. I had really nothing except what I thought. And what I thought was nothing." A208

As is evident from the above, the are material questions of facts as to when Rassier knew he was being retaliated against in violation of his First Amendment Rights. He seems to say it was 2004, 2010, 2011, 2012, 2015, 2016 and even as late as 2017. His knowledge or discovery of a complete or present cause of action, or the right to sue and obtain relief is pivotal on the determination of accrual and on the limitations period. The district court's improper weighing of the evidence and determination of credibility merits

reversal and remand of it's order granting Appellee summary judgment. Kenny v. Swift Transportation, Inc., 347 F.3d 1041 (8th Cir. 2003).

Moreover, Rassier did not and could not have obtained relief on his claims until 2016 when substantive evidence of Heinrich became public or when Heinrich confessed and detailed his crimes. Without that information for Rassier to obtain relief against Sanner and SCSO, he would have had to have proven his innocence, or provide substantive evidence of another perpetrator. Sanner, Jensen, McDonald, the SCSO, the BCA, the FBI and presumably others could not do that for a time frame of almost 27 years so to expect Rassier to do so is unreasonable and unfair.

In short, for Rassier to have a complete and present cause of action; he needed to be able to obtain relief. This was not possible until the evidence of Heinrich became public. As such, Rassier's §1983, IIED and defamation claims did not accrue until September 6, 2016, when Heinrich confessed on the record in open court. Rassier's claims are timely. He filed his original complaint against Appellees on March 29, 2017 well within the six-year limitations period for the §1983 claims, and the two year limitations period of the state-law claims.

III. The district court erred in holding that there were no genuine issues of material fact that would warrant application of the doctrine of equitable tolling.

Even if this court disagrees and finds the claims accrued on July 3, 2010, which Appellant vigorously opposes, the doctrine of equitable tolling and continuing violations applies and the district court's order must be reversed and remanded.

At the motion to dismiss stage of the proceedings, the district court found that Rassier had adequately pled that the statute was tolled under the doctrine of equitable tolling. The district court noted that even in cases where a claim has accrued and the statute of limitations has facially run, courts sometimes find that the statute of limitations is tolled for the sake of equity.

Subsequently on summary judgment the court found that the facts on discovery demonstrate that equitable tolling does not apply. In doing so, the court again weights heavily Rassier's testimony that by July 2010, he believed he was being retaliated against and that it was crystal clear, obvious and certain to him. (Memo and Order dated May 5, 2020, A690-691). The district court ignored Rassier's testimony as to the continuing violations, and the direction he sought from Mark Flynn and others. A589. Specifically, the district court writes: "Again, the record clearly demonstrates that Sanner labeled Dan Rassier a person of interest in 2010, Rassier was aware of the statements in 2010, and Rassier believed at the time that they were

retaliatory in nature and suffered negative consequences. Based on this, Rassier could have filed suit at that time and his claims accrued in 2010. In addition, Rassier has failed to point to evidence sufficient to create a genuine issue of material fact as to equitable tolling. No reasonable juror, on the record before the court, could conclude that Rassier had been pursuing his rights diligently or that some extraordinary circumstance stood in his way of filing his claim sooner. A692-693.

When reviewing statutes of limitations, federal courts will apply state statutes of limitations. Wallace v. Kato, 549 U.S. 384, 387 (2007). Likewise, federal courts will do the same when determining whether the statute of limitations is tolled for the sake of equity. See Wallace, 549 U.S. at 394.

Minnesota recognizes the doctrine of equitable tolling set forth in Holland v. Florida, 130 S.Ct. 2549, 2560 (2010), which tolls a statute when a litigant establishes: (1) That he has been pursuing his rights diligently; and (2) That some extraordinary circumstance stood in his way and prevented timely filing. Menomonie Indian Tribe of Wisconsin v. United States, 136 S.Ct. 750, 755 (2016); quoting Holland v. Florida, 130 S.Ct. at 2567 (2010). Minnesota has since gone on to further apply tolling when some factor

outside the claimant's control prevented him from meeting a statutory deadline Sanchez v. State, 816 N.W. 2d 550, 561 (2012).

In further defining the doctrine, this Court has held that equitable tolling focuses on the plaintiff's ignorance of a claim, and tolls the limitations period when the plaintiff, "despite all due diligence, is unable to obtain vital information bearing on the existence of his claim." Henderson v. Ford Motor Co., 403 F.3d 1026, 1033 (8th Cir. 2005). In other words, the question for equitable tolling is "whether a reasonable person in the plaintiff's position would have been aware" that his rights had been violated (Id.) This doctrine also applies where the defendant fraudulently conceals from plaintiff the facts constituting the cause of action, and the concealment by positive affirmative action and not mere silence, is itself fraudulent so as to prevent the statute from running. Township of Normania v. County of Yellow Medicine, 205 Minn. 451, 457; 286 N.W. 881, 884 (1939) see also, Wild v. Rorig, 302 Minn. 419, 450; 234 N.W. 2d 775, 795 (1975).

Here Rassier has demonstrated facts that he attempted to pursue his rights diligently. He contacted the Appellee county attorney and requested his assistance by attempting to obtain a copy of the search warrants and accompanying affidavits, he asked for the reasoning behind the warrants, he asked if he could talk to the judge about it, he asked about suing the police,

he asked for the return of evidence that would assist him, he asked about the statute for suing the police. A592. He was adamantly rebuffed and continuously told "No" by the assistant county attorney Matt Flynn. A592.

Rassier has also demonstrated extraordinary circumstances that prevented him from filing suit. He testified adamantly that he "never knew for sure" and so when I saw the search warrant in 2016 given to me by Madeleine Baran it became clear in my mind right there that I was never a suspect" and that "this is the first time that I had proof that I could use to prove my case. A193, 207. Without that information, Rassier would have to prove the extraordinary: that he was innocent, or that there was another perpetrator; something that Sanner, Jensen, SCSO, the BCA, the FBI and others could not do for almost 27 years. Rassier did everything he could to understand his rights and whether they had been violated but was consistently denied the access to the necessary information to no fault of his own.

Finally, Rassier can show that Appellees actively concealed information so as to prevent the statute from running. He asked Jensen if they were retaliating against him for his criticisms of them to the media. She replied "No." A591. He asked Sanner to explain his comment, "This is what happens when you talk." A22-23. Sanner refused to answer. A191,193. He

asked Matt Flynn if he could sue and for information that would help him determine if he could sue to only be rebuffed and misled. A589.

As the above clearly demonstrates, material facts exist that warrant application of the doctrine of equitable tolling and the district court's order dismissing Appellants' claims must be reversed.

CONCLUSION

For all the reasons stated above, the district court erred in granting Appellees' motion for summary judgment. Accordingly, Appellants respectfully request that this court reverse the district court's order and remand this case for trial.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that this brief is typed in Microsoft Word 2010 using 14-point type and "Times New Roman" proportionally-spaced font. The length of this brief is 6,377 words, excluding the table of contents, table of citations, summary of the case and statement with respect to oral argument, and certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

PADDEN LAW FIRM P.L.L.C.

Dated: June 26, 2020

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