IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

No. 32856

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KIMBERLEY MERRILL AND TERESA MAYFIELD,
Plaintiffs Below, Appellants,

V.

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
Defendant Below, Appellee.

Appeal from the Circuit Court of Kanawha County
Honorable Louis H. Bloom, Judge
Civil Action No. 02-C-956
AFFIRMED

Submitted: February 15, 2006
Filed: May 12, 2006

Margaret L. Workman
Charleston, West Virginia
Attorney for the Appellants

Charles R. Bailey
Billie Jo Streyle
Bailey & Wyant, P.L.L.C.
Charleston, West Virginia
Attorneys for the Appellee

The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER and JUSTICE BENJAMIN, deeming themselves disqualified, did not participate in the decision of this case.

JUDGE JOHN T. MADDEN and JUDGE RUDOLPH J. MURENSKY, II, sitting by temporary assignment.

JUSTICE ALBRIGHT and JUDGE MADDEN dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "'"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

3. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus point 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

4. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus point 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d

755 (1994).

5. "Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syllabus point 1, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992).

6. "In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Syllabus point 4, *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997).

7. "Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the 'discovery rule' applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Syllabus point 3, *Cart v. Markham*, 188 W. Va. 241, 423 S.E.2d 644 (1992).

8. “Fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any act or omission tending to suppress the truth is enough.” Syllabus point 3, *Miller v. Monongalia County Board of Education*, 210 W. Va. 147, 556 S.E.2d 427 (2001).

Per Curiam:

Kimberly Merrill and Teresa Mayfield (hereinafter collectively referred to as "Kimberly and Teresa"), plaintiffs below and appellants herein, appeal an order of the Circuit Court of Kanawha County granting summary judgment in favor of the defendant below and appellee, the West Virginia Department of Health and Human Resources (hereinafter referred to as "DHHR").[1] Kimberly and Teresa have asserted various claims against DHHR arising from the services, or lack thereof, provided to them during their infancy by DHHR in relation to sexual abuse they suffered at the hands of their father. The Circuit Court of Kanawha County granted summary judgment based, in part, upon its conclusion that the discovery rule did not operate to toll the running of the statute of limitations in this case. We agree, and therefore affirm the circuit court's order.

I.

FACTUAL AND PROCEDURAL HISTORY

This case involves the tragic history of two sisters who, in their childhood and youth, endured years of sexual abuse by their father, Albert Kirchmar. Kimberly Merrill (hereinafter referred to as "Kimberly") is the older of the two sisters. Kimberly's abuse was first reported to DHHR in January 1978, when DHHR received a report that her father had

[1]During the period of time when the events complained of in this case occurred, this agency was known as the State Department of Welfare. For ease of reference, however, we will refer to the agency as DHHR.

forced her to pose for a nude or semi-nude photograph. She was then twelve years old. Kimberly was not removed from the home by DHHR until July 24, 1982, following a subsequent report of sexual abuse.[2] Kimberly remained out of the home until after her eighteenth birthday.

During the four-and-a-half years between the initial report of abuse and Kimberly's removal from the home, she endured regular sexual abuse from her father.[3] Also during that period, her father moved temporarily out of the house, he admitted himself to a psychiatric hospital, her mother filed for divorce, her parents reconciled, and her family received counseling services. There was apparently no attempt on the part of DHHR during this time to privately interview Kimberly's younger sister Teresa to ascertain whether she was also being subjected to sexual abuse at the hands of her father.

The abuse of Teresa Mayfield (hereinafter referred to as "Teresa") was first

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[2]We note that the circuit court judge who presided over the child abuse hearings involving Kimberly was the Honorable Larry V. Starcher, who now serves as a Justice on this Court. At the time he rendered his rulings regarding Kimberly, Justice Starcher had presided over numerous child abuse and neglect cases and thus could rely upon his extensive experience in this field along with the evidence presented for his consideration in issuing his decisions in this matter.

[3]Between the time of the initial report of abuse and the report of abuse that ultimately lead to Kimberly's removal from the home, Kimberly did not fully disclose to any DHHR representatives the full extent of the abuse she endured. She points out, however, that during that time, DHHR never interviewed her or her younger sister Teresa outside of the presence of their abusive father.

reported to DHHR in June 1984, when it received a referral alleging that Teresa was being sexually abused by her father. In accordance with an agreed order consented to by Teresa's parents and their counsel, Teresa's Guardian ad Litem and DHHR, Teresa was removed from the home by DHHR and placed in foster care for a period of twelve months in August 1984. At the end of the twelve-month period, a counselor and psychologist who had been providing services to the family recommended that Teresa be returned to the custody of her family and that counseling be continued for six months. Accordingly, physical custody of Teresa was returned to her parents in August 1985, while DHHR maintained legal custody. At a review hearing in March 1986, the presiding circuit court found that the Kirchmars had engaged in regular counseling and there was no recurrence of the initial abuses; therefore, the court returned legal custody of Teresa to her parents.[4] After Teresa's return to her parents' home in 1985, she did not immediately disclose further abuse to DHHR; however, she later disclosed that her father resumed his sexual abuse of her. Teresa attempted to commit suicide on two occasions between the time she was returned to the custody of her parents and her eighteenth birthday. During her hospitalization for her first attempted suicide, she reported to her social worker that "nothing had changed" at home. While she was hospitalized following her second suicide attempt, she celebrated her eighteenth birthday and

[4]Hearings related to Teresa were presided over by then Judge and now Justice Larry V. Starcher, as well Judge Robert B. Stone. Like Justice Starcher, *see supra* note 2 for comments regarding Justice Larry V. Starcher, when making his decisions regarding proper placement for Teresa, Judge Stone had at his disposal years of experience in child abuse and neglect cases.

her DHHR file was closed.

The instant lawsuit was filed in the Circuit Court of Kanawha County on April 1, 2002, approximately one month prior to Kimberly's thirty-seventh birthday. Teresa was thirty-three at the time the suit was filed.[5] An amended complaint was later filed on November 14, 2002. The amended complaint alleged (1) negligence by DHHR in returning the girls to their parents' home and/or failing to remove them from the home, being a breach of their statutory and common law duty to protect the girls; (2) a violation of the girls' substantive due process rights by virtue of DHHR's failure to protect them from the harm imposed by their father; (3) a denial of equal protection by virtue of DHHR's failure to protect them; (4) a denial of the girls' due process rights by virtue of DHHR's failure to protect them; (5) a breach of fiduciary duty; and (6) a violation of the girls' right to affirmative protection from harm.[6] The complaint further alleged that DHHR had fraudulently concealed material facts regarding its knowledge of the sexual misconduct of Albert Kirchmar.

On November 7, 2003, DHHR filed a motion for summary judgment claiming,

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[5]Kimberly turned eighteen on May 3, 1983. Teresa turned eighteen on March 11, 1987.

[6]For purposes of resolving the dispositive issue raised in this appeal, we assume, without deciding, that the various theories for liability asserted in the amended complaint present actionable claims.

inter alia, that the case was barred by the statute of limitations.[7] By order entered September 27, 2004, the circuit court granted summary judgment in favor of DHHR based, in part, on its conclusion that the statute of limitations for Kimberly's and Teresa's claims were not tolled by operation of the discovery rule. This appeal followed.[8] Based upon our review of the record, the briefs submitted on appeal, and the pertinent authorities, and after hearing oral arguments, we affirm the circuit court's order granting summary judgment in favor of DHHR.

II.

STANDARD OF REVIEW

This case is on appeal from an order of the circuit court granting summary judgment. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting our de novo review, we apply the same standard for granting summary judgment that is applied by the circuit court. Under that standard,

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be

[7]A second motion for summary judgment was filed on June 14, 2004. We need not address the grounds for summary judgment asserted in that motion, however, as this case is resolved by the first summary judgment motion.

[8]Kimberly and Teresa assert several assignments of error in this appeal. Because the discovery rule issue is dispositive of this case, we need not address the other issues they have raised.

> tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter*. In other words,

> [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 4, *Painter*. Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*.

III.

DISCUSSION

The conduct of DHHR that forms the basis for Kimberly's and Teresa's personal injury claims in this case occurred between 1978 and 1987. Pursuant to W. Va. Code § 55-2-12 (1959) (Repl. Vol. 2000), "[e]very personal action for which no limitation is otherwise prescribed shall be brought: . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries . . . ." However, Kimberly and Teresa were infants during the time of their alleged injuries. Due to their infancy, the statute of limitations did not begin to run on their claims until they reached the age of majority:

> If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, *an infant* or insane, *the same may be brought within the like number of years after his becoming of full age* or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

W. Va. Code § 55-2-15 (1923) (Repl. Vol. 2000) (emphasis added). Kimberly reached the age of majority on May 3, 1983, while Teresa turned eighteen on March 11, 1987. Accordingly, unless the statute of limitations is extended by operation of the discovery rule, their claims became time barred after May 3, 1985, and March 11, 1989 respectively.

"Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syl. pt. 1, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992).[9] In West Virginia, two versions of the discovery rule have been developed:

> A studious observer will note that this Court stated one form of the discovery rule in *Cart v. Marcum*, and then stated a different, more lenient form of the discovery rule in *Gaither v. City Hospital*[, *Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997)] . . . .

[9]"The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application." Syl. pt. 2, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644. There is no statutory prohibition to applying the discovery rule in the instant case.

> . . . . [D]ecisions such as *Keesecker*[*v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997)] make clear that . . . *Cart v. Marcum* governs only those cases where the plaintiff is compelled to allege some deed by the defendant concealed the cause of action from the plaintiff.

Miller v. Monongalia County Bd. of Educ., 210 W. Va. 147, 153 n.3, 556 S.E.2d 427, 433 n.3 (2001). In determining whether the circuit court correctly found that the evidence did not satisfy the elements of the discovery rule in the instant case, we will address each version of the rule, beginning with the version of the rule announced in *Gaither*.

A. Discovery Rule Under Gaither v. City Hospital

In Syllabus point 4 of *Gaither v. City Hospital, Inc.*, this Court held that

> [i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

199 W. Va. 706, 487 S.E.2d 901 (1997). Considering each of these criteria, we find no error in the circuit court's grant of summary judgment in favor of DHHR under a *Gaither* analysis.

The first of the three elements necessary to trigger the running of the statute of limitations under *Gaither* is that the plaintiffs either know, or by the exercise of reasonable diligence, should know that they have been injured. In their response to DHHR's summary

judgment motion and in their brief to this Court, Kimberly and Teresa indicate that their injury was DHHR's failure to protect them by timely removing them from their father's home. Notably, however, "failure to protect" does not describe an injury. Rather, it relates to the duty of DHHR that was claimed to have been breached in this case. Based upon the totality of the arguments set forth by Kimberly and Teresa, we surmise that the injury of which they complain is their continued exposure to sexual abuse at the hands of their father that occurred subsequent to the point in time when, they contend, DHHR should have removed them from the home, and the physical and psychological injuries that resulted therefrom.

We find no material question of fact exists in this case with respect to Kimberly's and Teresa's knowledge of their injury. In separate affidavits attached to the plaintiffs' response to DHHR's motion for summary judgment, both Kimberly and Teresa made the statement "I was sexually abused by my father, Albert Kirchmar, from the earliest age that I can remember." They both further stated, "[d]uring my childhood, I reported the abuse on a number of occasions to people in my life who I felt were figures of authority, including the representatives of the agency that is now called the West Virginia Department of Health and Human Resources." Without question, then, both Kimberly and Teresa have demonstrated that they knew they were being sexually abused by their father, and that the sexual abuse continued after they reported the same to individuals they considered to be "figures of authority." Moreover, each woman further explained that her resulting physical

and emotional injuries had existed throughout her adulthood: "throughout my adulthood, I suffered extreme physical and emotional pain as a result of this continued sexual abuse. I have had a difficult time trying to form positive trusting relationships, very low self-esteem, aggravated difficulty in terms of education and career, and a great deal of personal anxiety." Teresa alone made the additional comment that she had "attempted suicide on two occasions." Based upon these statements in their affidavits, there is simply no genuine issue of material fact with respect to whether Kimberly and Teresa knew of their injury when they reached adulthood, as they have demonstrated plainly that they have been aware of their injuries their entire adult lives.

The next factor that must be present to trigger the running of the statute of limitations under *Gaither* is that the plaintiff knew or by the exercise of reasonable diligence should have known "the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty." With respect to this factor, Kimberly and Teresa argue that, prior to their therapy, they did not know that DHHR owed them a duty of protection or that DHHR had breached that duty. This argument, however, misapprehends the second factor of *Gaither*. The second *Gaither* factor is the *identity* of the wrongdoer, not knowledge of the duty owed. In fact, it has been established that a lack of knowledge of a legal duty owed will not toll the statute of limitations. *See Hays v. City & County of Honolulu*, 81 Hawai'i 391, 399, 917 P.2d 718, 726 (1996) ("[P]laintiff's lack of knowledge regarding a legal duty, the breach of which may have

caused the plaintiff injury, will not justify application of the discovery rule."). We find this principle particularly persuasive where the alleged tortfeasor is a public agency whose duties are established by statute. *See, e.g.*, *Ormiston v. Nelson*, 117 F.3d 69, 72 n.5 (2d Cir. 1997) ("Mere ignorance of the law is, of course, insufficient to delay the accrual of the statute of limitations."); *Miller v. Pacific Shore Funding*, 224 F. Supp. 2d 977, 986 (D. Md. 2002) ("The discovery rule, in other words, applies to discovery of facts, not to discovery of law. Knowledge of the law is presumed."); *Bluitt v. Houston Indep. Sch. Dist*., 236 F. Supp. 2d 703, 718 (S.D. Tex. 2002) ("It is well established that mere ignorance of the law for any reason, including lack of counsel, does not toll a statute of limitations."); *Orlikow v. United States*, 682 F. Supp. 77, 84 (D.D.C. 1988) ("In *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979), a medical malpractice case, the Supreme Court held that the plaintiff's ignorance of his legal rights did not constitute the 'blameless ignorance' for which tolling is applied. Neither does ignorance of the law ordinarily toll the statute of limitations." (additional citation omitted)); *Greene v. Team Props., Inc*., 247 Ga. App. 544, 546, 544 S.E.2d 726, 728 (Ga. Ct. App. 2001) ("[I]gnorance of the law offers no legal excuse for failing to file an action within the applicable statute of limitation."), *overruled on other grounds by Tiismann v. Linda Martin Homes Corp.*, 279 Ga. 137, 610 S.E.2d 68 (2005); *People v. Lander*, 215 Ill. 2d 577, 588, 831 N.E.2d 596, 603, 294 Ill. Dec. 646, 653 (2005) ("It is well settled that all citizens are charged with knowledge of the law. . . . Ignorance of the law or legal rights will not excuse a delay in filing a lawsuit." (citations omitted)); *Moreland v. Aetna U.S. Healthcare, Inc*., 152 Md. App. 288, 297-98, 831 A.2d 1091,1096

(Md. Ct. Spec. App. 2003) ("The discovery rule, in other words, applies to discovery of facts, not to discovery of law. Knowledge of the law is presumed. . . . Ignorance of the rights it grants and protects does not toll the statute of limitations." (internal citations and quotation omitted)); *Lynch v. Dial Fin. Co. of Ohio No. 1, Inc.*, 101 Ohio App. 3d 742, 747, 656 N.E.2d 714, 718 (Ohio Ct. App. 1995) ("Even if, arguendo, the discovery rule did apply to statutory claims, it would apply to the discovery of facts, not to the discovery of what the law requires.").

In order to toll the statute under the discovery rule as announced in *Gaither*, it is not the legal duty owed that must have escaped knowledge by Kimberly and Teresa, but rather the *identity* of the tortfeasor. In their affidavits that were attached to Kimberly and Teresa's response to DHHR's first motion for summary judgment, both women made identical statements asserting "I did not know what entity DHHR representatives were with when I was a child . . . ." However, a review of their deposition testimony demonstrates that Kimberly and Teresa have long known the identity of those who they contend caused them harm. In this regard, when Kimberly was asked during her deposition about her recollection of a home visit by Kaaren Ford, a social service worker for DHHR, Kimberly stated:

> I have a recollection of someone coming to the home, to the trailer, and all of us sitting around a table, a kitchen table, my mother and my father, my sister and my brother, myself and this other person.
>
> I knew that she was someone of an agency or something. . . .

Kimberly additionally testified that she had some, though incomplete, recollections of various meetings at which a social worker identified as Ms. Randolph was present.[10] Furthermore, when Kimberly was asked if she had any reason to dispute the accuracy of a note prepared by Ms. Randolph regarding portions of a meeting Kimberly was unable to recall, she responded that "I do have reason, because *I felt like I was let down then*, and I don't know if I trust everything in these notes." (Emphasis added). This statement clearly indicates that Kimberly recalled the involvement of Ms. Randolph in 1982 and that, at that time, she felt that she had been "let down." She also remembered that there was a court proceeding where Ms. Randolph was present, and she remembered being placed in foster care.[11] Finally, however, and most significantly, Kimberly testified that in June of 1984, after she had reached the age of adulthood and learned that her sister Teresa was being sexually assaulted by their father, Kimberly called DHHR and reported her sister's abuse:[12]

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[10]Kimberly testified to recollections she had of running away from home in 1982 and staying at the Youth Services Center. During Kimberly's stay at the Youth Services Center, there was a meeting with Kimberly, both of her parents, Ms. Randolph, and another individual who may have been employed by the Youth Services Center present. Kimberly stated that she recalled part of this meeting and also a meeting that occurred at home.

[11]Kimberly stated that she recalled being placed in a foster care home after her father would not leave her alone during a short period of time that she lived with an aunt and uncle in Westover, West Virginia. She also recalled being placed in the custody of an aunt and uncle in Pennsylvania for a period of one year.

[12]To the extent that Kimberly's affidavit directly contradicts this deposition testimony, it may be viewed as a sham affidavit. *See Kiser v. Caudill*, 215 W. Va. 403, 409, 599 S.E.2d 826, 832 (2004) ("Basically, the 'sham affidavit' rule precludes a party from creating an issue of fact to prevent summary judgment by submitting an affidavit that directly (continued...)

> Q. Before we begin, it's my understanding – and I'll show it to you out of my notebook here – on 6-18-84 there's a referral for Child Protective Services; and I think we've established that on 6-18-84, thereabouts, you actually called Health and Human Resources and reported that your sister was being sexually abused by your father. Your name is redacted, which is – but I believe we established you were the one more likely than not that made the call, correct?
>
> A. Yes.
>
> Q. Okay, so in June of 1984 you reported to the DHHR that your sister was being sexually abused, correct?
>
> A. Correct.

Kimberly also stated that, after reporting her sister's abuse, she spoke with "different social workers" regarding her sister and her own prior sexual abuse.[13]

Teresa's testimony likewise established that it was Kimberly who had reported Teresa's abuse to DHHR:

> Q. . . . Do you recall your sister reporting to the DHHR that your father was sexually abusing you?
>
> A. Yes, I remember

Teresa also testified that she remembered Brenda Morgan, a DHHR social worker assigned

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[12](...continued)
contradicts previous deposition testimony of the affiant.").

[13]Kimberly specifically stated that she recalled having conversations about Teresa with Ms. Brenda Morgan, who was a DHHR employee. Kimberly's testimony also revealed that she knew her sister Teresa was placed in foster care for a period of one year.

to her case, very well and recalled having lots of meetings with Ms. Morgan.[14]

The deposition testimony of Kimberly and Teresa clearly demonstrates that, sometime during the period when they and their family were involved with DHHR (which was prior to their reaching the age of majority), they became aware of DHHR and the identity of specific social workers who were assigned to them by DHHR. In particular, they were able to specifically identify Ms. Randolph and Ms. Morgan, and, after reaching age eighteen, Kimberly was able to contact DHHR to report that her sister was being abused. Accordingly, there is simply no genuine issue of material fact with respect to whether Kimberly and Teresa knew of the identity of the tortfeasor in this case, as they have demonstrated plainly that they have possessed this knowledge their entire adult lives.[15]

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[14]To the extent that Teresa's affidavit directly contradicts this deposition testimony, it may be viewed as a sham affidavit. *See supra* note 12.

[15]Assuming *arguendo* that Kimberly and Teresa did not associate DHHR with the social workers who were involved with them and their family, they concede in both their affidavits and their deposition testimony that they knew the identities of specific social workers. Having knowledge of the identity of the social workers placed upon them a duty to, upon reaching the age of majority, investigate who employed the social workers. *See, e.g.*, *McCoy v. Miller*, 213 W. Va. 161, 165, 578 S.E.2d 355, 359 (2003) ("Where a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach." (citation omitted)); *Vorholt v. One Valley Bank*, 201 W. Va. 480, 485, 498 S.E.2d 241, 246 (1997) ("This Court believes that the appellant should reasonably have known of the existence of his claim long before May 1989, when he was notified by the appellee. The appellant knew of his father's death in 1970. At that time or any time thereafter, an inquiry into the nature of his father's estate would have disclosed the existence and the terms of the trust. The appellant would have immediately discovered (continued...)

The third and final element of *Gaither* requires Kimberly and Teresa to establish that they neither knew nor by the exercise of reasonable diligence, should have known that the conduct of DHHR had a causal relation to their physical and emotional injuries. Kimberly and Teresa essentially argue that, prior to intensive therapy, they did not comprehend the causal connection between their injuries and the actions of DHHR during the time in which they were being sexually abused by their father.[16] However, the only evidence presented to the circuit court on this issue by Kimberly and Teresa was their

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[15](...continued)
that he was excluded as a beneficiary of the trust, and he could have asserted his claim in a timely manner. Because the appellant neglected to make such an inquiry, he cannot now benefit from the discovery rule.").

[16]Kimberly and Teresa argue that their case is legally and factually similar to *Miller v. Monongalia County Board of Education*, 210 W. Va. 147, 556 S.E.2d 427. We disagree. The plaintiff in *Miller* alleged that

> the Board had actual or constructive notice that McIntosh was a sexual predator who was engaging in inappropriate sexual conduct with female school children. She alleged that the Board had reasonable cause to suspect that, prior to becoming a victim herself, another child was being abused by McIntosh but the Board failed to report the abuse to the appropriate officials or to take any action to stop McIntosh. She also alleged that the Board fraudulently concealed material facts regarding its own involvement in and knowledge of the sexual misconduct of McIntosh in an effort to prevent the victims from instituting civil actions. We believe these allegations are sufficient to withstand the motion to dismiss based upon the statute of limitations.

210 W. Va. at 151, 556 S.E.2d at 431. Unlike *Miller*, there is no evidence in this case that DHHR attempted in any way to conceal its involvement in this case in order to prevent the institution of a civil action, or failed to report the abuse to proper officials.

respective affidavits. In this regard, Kimberly stated in her affidavit:

> 7. As adults, both my sister and I sought counseling and therapy for severe emotional problems, difficulty maintaining relationships and severe depression which we learned through therapy stemmed from the past physical, sexual and emotional abuse by my father.
>
> 8. The therapy helped me remember more fully the incidents of sexual assault by my father; and to discover the fact that the DHHR was involved.
>
> 9. During the therapy in early to mid-2000, I mentioned to my counselor, Melanie Rogers, that I had been in foster care. This triggered her to realize that the Department of Health and Human Resources had been involved, and she thought it would be helpful for me to review the DHHR records concerning my case.
>
> . . . .
>
> 13. I did not discover until after I underwent therapy and reviewed the DHHR records on October 2, 2000 that the DHHR failed to protect my sister and I from my father and that this failure caused the damages we have suffered and continue to suffer. . . .

Teresa's affidavit contained paragraphs identical to paragraphs 7 and 8 of Kimberly's affidavit, and further stated:

> 13. I did not discover until after I had a conversation with my sister Kimberly after she had reviewed the DHHR records on October 2, 2000 that the DHHR failed to protect my sister and I from my father and that this failure caused the damages we have suffered and continue to suffer. . . .

The record does not contain any corroborating affidavits from any counselors

who treated Kimberly or Teresa, nor do Teresa and Kimberly direct our attention to any other evidence in the record supporting their allegations of the reasonableness of a delay of over seventeen years for Kimberly,[17] and more than thirteen years for Teresa,[18] in discovering the causal connection between their injuries and the actions of DHHR. This Court has repeatedly explained that "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-59 (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).[19]

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[17]Kimberly reached the age of eighteen on May 3, 1983; thus, unless tolled by application of the discovery rule, the statute of limitations expired on May 3, 1985.

[18]Teresa reached the age of eighteen on March 11, 1987; thus, unless tolled by application of the discovery rule, the statute of limitations expired on March 11, 1989.

[19]*See also Toth v. Board of Parks & Rec. Comm'rs*, 215 W. Va. 51, 56, 593 S.E.2d 576, 581 (2003) (quoting *Painter v. Peavy*); *Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W. Va. 490, 493, 590 S.E.2d 683, 686 (2003) (per curiam) (same); *Allstate Wrecker Serv. v. Kanawha County Sheriff's Dep't*, 212 W. Va. 226, 230-31, 569 S.E.2d 473, 477-78 (2002) (per curiam) ("It is well-settled that 'the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.' *Painter*, 192 W. Va. at 192 n.5, 451 S.E.2d at 758 n.5. The quantity of evidence necessary to defeat a motion for summary judgment is 'more than a mere "scintilla of evidence."' *Id.* at 192, 451 S.E.2d at 758."); *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 62, 543 S.E.2d 338, 343 (2000) (per curiam) (quoting *Painter*); *Bowers v. Wurzburg*, 207 W. Va. 28, 41, 528 S.E.2d 475, 488 (1999) (quoting *Painter*); *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 365, 465 S.E.2d 628, 636 (1995) ("To meet its burden [of responding to a properly supported motion for summary judgment], the nonmoving party must offer 'more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.'" (quoting *Anderson v. Liberty Lobby*)).

Moreover, we have explained that "self-serving assertions without factual support in the record will not defeat a motion for summary judgment." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995). *See also Dunn v. Watson*, 211 W. Va. 418, 421, 566 S.E.2d 305, 308 (2002) (same, citation omitted); *Coleman v. Sopher*, 201 W. Va. 588, 612, 499 S.E.2d 592, 616 (1997) (same). Indeed, we have elaborated that

> The movant's burden is "only [to] point to the absence of evidence supporting the nonmoving party's case." *Latimer v. SmithKline & French Laboratories*, 919 F.2d 301, 303 (5th Cir. 1990). . . . If the movant . . . make[s] this showing, the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a "trialworthy" issue. *To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims.* As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted. *See Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L. Ed. 2d 317, 328 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695, 713 (1990).

Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996) (emphasis added). In this case, Kimberly and Teresa have utterly failed to provide any supporting affidavits to corroborate their self-serving statements, and have further failed to "identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims" of delay in discovering the causal connection

between their injuries and DHHR's actions. *Id.* Accordingly, they have not established the existence of a genuine issue of material fact with respect to their knowledge of a causal connection between their injury and DHHR's actions.

Kimberly and Teresa have failed to establish the existence of a genuine question of material fact with respect to any of the factors set out in Syllabus point four of *Gaither*.[20] "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 4, *Painter*.[21] Because the statute of limitations was not tolled

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[20]Kimberly and Teresa argue that the question of when they knew, or by reasonable diligence should have known, of their claims was a question of fact for the jury. However, we have previously held that

> [t]he mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e. a genuine issue of material fact, is present.

Syl. pt. 1, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). Here, Kimberly and Teresa have failed to discharge their duty of establishing the presence of a genuine issue of material fact.

[21]If Kimberly and Teresa had needed to conduct additional discovery in order to resist the motion for summary judgment, they could have tendered to the circuit court an affidavit stating their need for additional discovery under Rule 56(f) of the West Virginia (continued...)

under *Gaither*, Kimberly and Teresa were required to bring their cases within two years of turning eighteen. Their claims were not filed within that period and, therefore, summary judgment was proper under a *Gaither* analysis.

B. Discovery Rule Under Cart v. Markham

We next examine the applicability to this case of the version of the discovery rule announced in *Cart v. Markham*, 188 W. Va. 241, 423 S.E.2d 644, which states:

> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

Syl. pt. 3, *Cart*. Thus, under *Cart*, Kimberly and Teresa are required to make a strong showing that some action by DHHR prevented them from knowing of the wrong at the time of their injury. In *Miller v. Monongalia County Board of Education*, 210 W. Va. 147, 556

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[21](...continued)
Rules of Civil Procedure, which states:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

There has been no representation to this Court that any Rule 56(f) motion was made to the circuit court, and we find none in the record.

S.E.2d 427, this Court additionally held that

> Fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any act or omission tending to suppress the truth is enough.

Syl. pt. 3, *id.*

Before this Court, Kimberly and Teresa argue that an omission on the part of DHHR prevented them from knowing of their claims. Specifically, Kimberly and Teresa contend that

> there was unrefuted evidence that the Appellants had difficulty in acquiring their records from the DHHR once they were requested and that, had such delay not occurred, the statute of limitations would have been preserved. . . . Even when the records were produced by DHHR, there is a substantial factual issue as to whether all their records were provided. The Petitioners [Kimberly and Teresa], in their affidavits submitted in opposition to the Motion for Summary Judgment both maintained that it was not until they sought the assistance of counsel that a process began which eventually provided them with copies of all of their records. Further, . . . the Petitioners contend that they were entitled to full information about their case which was never provided them by any of those who bore a fiduciary obligation to them.

The best that we are able to discern from this argument is that Kimberly and Teresa assert that if DHHR had not delayed in turning over the requested records, "the statute of limitations would have been preserved." This argument has no merit. It is undisputed that no records were requested from DHHR until sometime in the year 2000, long after the expiration of the statute of limitations. As our *Gaither* analysis above demonstrates,

Kimberly and Teresa possessed knowledge of the critical facts necessary to bring their lawsuit at the time they each turned eighteen. Thus, any facts that may have been revealed in the requested DHHR records were irrelevant to tolling the statute of limitations.[22] Accordingly, the circuit court did not err in granting summary judgment.

IV.

CONCLUSION

For the reasons stated in the body of this opinion, the September 27, 2004, order of the Circuit Court of Kanawha County granting summary judgment in favor of DHHR is affirmed.

Affirmed.

[22]Assuming, for the sake of argument, that records were timely requested, the mere fact of some delay by DHHR in turning over the records does not, in and of itself, constitute fraudulent concealment.