

**In the Court of Common Pleas
Cuyahoga County, Ohio**

ELAINE NEW

Plaintiff,

v.

TIME WARNER CABLE, et al.,

Defendants

) CASE NO. CV-11-754112

)

) JUDGE PAMELA A. BARKER

)

) **Journal Entry:** Motions to Dismiss

) Counts I and II of Plaintiff's First

) Amended Complaint of Defendants

) Time Warner NY Cable, LLC and

) Taylor Communications, Inc. are

) granted and Motions to Dismiss Count

) III of Plaintiff's First Amended

) Complaint are denied.

On April 28, 2011 Plaintiff filed her Complaint naming Time Warner Cable ("Time Warner")¹ and Taylor Telecommunications, Inc. ("Taylor") as defendants. In her Complaint, Plaintiff alleged an assault upon her on August 5, 2008 by the agents and/or employees of the Defendants, negligent striking of her by the agents and/or employees of the Defendants and the Defendants' negligent hiring and/or training and/or supervising of their agents and/or employees that allegedly struck Plaintiff, proximately resulting in injuries and damages to her.

On October 13, 2011 Time Warner NY Cable, LLC ("Time Warner"), filed a Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Civ. R. 12(B)(6) asserting that: 1.) Counts One and Two fail to properly allege an assault and in any event are barred by the applicable one-year statute of limitations set forth in R.C. 2305.111; and 2.) Count Three should be

¹ Specifically, and as noted by Time Warner NY Cable, LLC in its Motion to Dismiss, Plaintiff named Time Warner Cable as four separate Defendants based on dissimilar statutory agents for each. It is asserted in footnote 2 of Time Warner's Motion to Dismiss that all four Time Warner Cable defendants are named improperly, as the proper entity is in actuality Time Warner NY Cable, LLC. However, Time Warner does not seek dismissal of the Complaint based upon failure to name the correct or proper entity or party.

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dismissed because the complaint fails to allege facts that meet the elements of negligent hiring, supervision, and retention.

On November 14, 2011, Plaintiff filed a Motion for Leave to File Amended Complaint and by Order dated December 27, 2011 this Court granted Plaintiff's Motion and required that the Amended Complaint be filed on or before January 6, 2012. Also on November 14, 2011, Plaintiff filed a Response to Time Warner's Motion to Dismiss. In her Response, Plaintiff requested that this Court deny only Time Warner's motion to dismiss Count III of the complaint. Plaintiff attached a copy of her Motion for Leave to File Amended Complaint and a copy of the proposed First Amended Complaint, arguing that allowance of the Motion for leave to file an Amended Complaint would cure any defects associated with Count III and provide a valid basis to deny Time Warner's motion to dismiss Count III.

On November 17, 2011 Taylor filed a Motion to Dismiss pursuant to Civ. R. 12, asserting that: Plaintiff's claims contained in Count One and Count Two are barred by the doctrine of *res judicata* because in the previously filed case, number CV-10-733548, this Court dismissed those counts with prejudice;² Plaintiff's claims for "assault" and "negligent and/or malicious, intentional, willful" conduct are barred by the applicable one-year statute of limitations set forth in R.C. 2305.111, and Plaintiff fails to state a claim for a civil assault; and as to Count III, Plaintiff fails to state a claim upon which relief may be granted for negligent "hiring and/or training and/or supervising said agents."

² Plaintiff filed a Notice of Voluntary Dismissal of Deft. Taylor on 9/17/2010, without prejudice and this Court dismissed Counts I and II of the Complaint with prejudice and dismissed Count III without prejudice, on 9/22/2010.

On December 7, 2011 Time Warner filed a Motion for Leave to File Reply in Support of Motion to Dismiss for Failure to State a Claim upon which relief can be granted, *instanter*, which was granted by this Court.

On December 20, 2011 Plaintiff filed a Response to Taylor's Motion to Dismiss and requested that this Court deny only Taylor's Motion to Dismiss Count III of the Complaint, arguing that the First Amended Complaint she sought leave to file cured any defects in Count III and adequately stated a cause of action against Taylor for negligent hiring, supervision and/or training.

Having been granted leave by this court to file a First Amended Complaint by January 6, 2012, Plaintiff did so.

The Court finds that as to both Defendants, Time Warner and Taylor, Counts I and II of the First Amended Complaint should be and are dismissed because the applicable one-year statute of limitations under R.C. 2305.111 bars the claims based upon any alleged assault and any allegation of negligent touching cannot change the nature or character of the alleged tort from an intentional one to an accidental one so as to apply the statute of limitations applicable to negligent conduct. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166. *See Saleh v. Marc Glassman, Inc.*, 8th Dist. 86010, 2005-Ohio-6127. Indeed, Plaintiff in effect acknowledges the validity of Defendants' arguments, and does not note any disagreement with, or argument in opposition to, Defendants' assertion that the one-year statute of limitations set forth in R.C. 2305.111 applies to bar Plaintiff's claims against Defendants Time Warner and Taylor contained in Counts I and II of the First Amended Complaint.

However, the Court denies the motions to dismiss Count III of the First Amended Complaint pursuant to Civ.R. 12 made by Defendants Time Warner and Taylor. The First Amended Complaint adequately sets forth the elements of the claims for negligent supervision, hiring and/or training, to include allegations of the existence of an employment relationship, the employee's incompetence, the employer's actual or constructive knowledge of the employee's incompetence, the employee's act or omission causing the Plaintiff's injuries, and the employer's negligence in hiring or retaining the employee as the proximate cause of Plaintiff's injuries. See *Collins v. Flowers*, 2005-Ohio-3797. *Williams v. Ohio Edison* (Oct. 29, 2009). 8th Dist. No. 92840, 2009 Ohio App. LEXIS 4786, cited by Time Warner at pages 3 and 4 of its Reply Brief is distinguishable, as is the Ohio Supreme Court's decision in *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584, cited and relied upon by the court in *Williams*. This case does not involve a claim for fraud, an intentional tort claim against an employer, or one brought against a religious institution for negligent hiring. *Byrd v. Faber, id.* at headnotes 7 and 8. See *Ferron v. Dish Network, L.L.C.*, 2011 WL 4790935, Ohio App. 10 Dist. 2011, at paragraph 24; and *Ryb v. Contemporary Office Products, Inc.*, 1995 WL 693164, at *4 (8th Dist. 1995).

SO ORDERED:

Pamela A. Barker
Judge Pamela A. Barker

Date: 1-10-12

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JAN 12 2012

BY Gerald E. Fuerst CLERK DEP.