IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

RYLAN BRANTL,	)	
	)	
Appellant,	)	
v.	)	**WD83667**
	)	
	)	**OPINION FILED:**
THE CURATORS OF THE	)	**December 22, 2020**
UNIVERSITY OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Jodie C. Asel, Judge

Before Division One: Thomas N. Chapman, Presiding Judge, and Mark D. Pfeiffer and W. Douglas Thomson, Judges

Dr. Rylan Brantl ("Dr. Brantl") appeals from the judgment of the Circuit Court of Boone County, Missouri ("trial court"), granting the motion of The Curators of the University of Missouri ("University") to dismiss Dr. Brantl's first amended petition and dismissing the petition with prejudice. We affirm.

Factual and Procedural Background[1]

Dr. Brantl was employed as a neurosurgery resident at the University of Missouri-Columbia School of Medicine beginning on July 1, 2008. On January 27, 2013, Dr. Brantl filed a grievance after receiving notice that his residency would be terminated. June 30, 2013, was Dr. Brantl's final day of employment as a neurosurgery resident.

On June 28, 2018, Dr. Brantl filed a complaint against the University in the United States District Court for the Western District of Missouri, asserting state-law claims for breach of contract based on diversity jurisdiction. Dr. Brantl amended his complaint to include a federal claim under 31 U.S.C. § 3730(h). The University filed a motion to dismiss solely based on Eleventh Amendment immunity. On June 3, 2019, the federal court dismissed Dr. Brantl's first amended complaint, finding that his state-law claims were barred by Eleventh Amendment immunity and that the court lacked subject matter jurisdiction to hear them.

On July 2, 2019, Dr. Brantl filed a petition against the University in the Circuit Court of Boone County, alleging his state-law claims of breach of contract, breach of covenant of good faith and fair dealing, and promissory estoppel. He alleged that 28 U.S.C. § 1367(d) provided for a tolling of applicable state-law limitations period for thirty days after dismissal of a claim under § 1367(a). Pursuant to Missouri Rule of Civil Procedure 57.27(a)(6), the University moved to dismiss Dr. Brantl's petition for failure to state a claim upon which relief may be granted on the grounds that it was barred by the five-year statute of limitations set forth in section 516.120(1). The trial court granted the University's motion to dismiss. Thereafter, Dr. Brantl filed a motion

[1] "In reviewing the dismissal of a petition for failure to state a claim, including a dismissal due to the bar of a statute of limitations, we assume as true every fact pleaded and construe the allegations favorably to the petitioner." *McCormick v. Centerpoint Med. Ctr. of Indep., LLC*, 534 S.W.3d 273, 277 (Mo. App. W.D. 2017) (internal quotation marks omitted).

for reconsideration and to set aside the judgment. The trial court set aside the dismissal and gave Dr. Brantl leave to amend his petition.

On December 11, 2019, Dr. Brantl filed a first amended petition, alleging that dismissal of his complaint by the federal district court was a dismissal without prejudice under Fed. R. Civ. P. 41(b)'s lack of jurisdiction exception and that the savings statute found in section 516.230 allowed a lawsuit to be re-filed within one year after a dismissal without prejudice of the first suit. The University moved to dismiss Dr. Brantl's first amended petition for failing to state a claim upon which relief may be granted on the grounds that it was barred by the statute of limitations set forth in section 516.120(1). The University also asserted that Dr. Brantl could not take advantage of the one-year savings statute in section 516.230 because the tolling provision in 28 U.S.C. § 1367(d) did not apply to his claims. After a hearing on the motion, on February 26, 2020, the trial court entered its judgment, finding that Dr. Brantl's petition failed to state a claim upon which relief may be granted in that it was barred by the applicable statute of limitations in section 516.120(1) and dismissing his case with prejudice.

Dr. Brantl timely appealed.

Standard of Review

We review the trial court's grant of a motion to dismiss *de novo*. *McCormick v. Centerpoint Med. Ctr. of Indep., LLC*, 534 S.W.3d 273, 277 (Mo. App. W.D. 2017). Whether a statute of limitations bars an action is a question of law, which is subject to *de novo* review. *Id.* "If it clearly appears from the petition that a cause of action is barred by a statute of limitations, a motion to dismiss on that ground is properly sustained." *Id*. (citing *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997)).

Analysis

Point I

In Dr. Brantl's first point, he asserts that the trial court erred in dismissing his first amended petition on the grounds that it was barred by Missouri's five-year statute of limitations.

In Missouri, the period of limitations for a contract action is five years. § 516.120(1).[2] Accrual of a cause of action under section 516.120(1) is governed by section 516.100. The statutory time limit begins to run "when the damage resulting [from the wrong] is sustained and is capable of ascertainment." § 516.100. Under section 516.100, "*the statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury*." *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 582 (Mo. banc 2006) (internal quotation marks omitted). "'[A]ll possible damages do not have to be known, or even knowable, before the statute accrues.'" *Id*. at 584 (quoting *Klemme*, 941 S.W.2d at 497). Claims accrue "when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages." *Id*. "At that point, the damages would be sustained and capable of ascertainment as an objective matter." *Id*. at 584-85 (footnote omitted).

Dr. Brantl contends that the statute of limitations did not begin to run until his residency was terminated on June 30, 2013. We disagree. In *Kesler v. Curators of the University of Missouri*, 516 S.W.3d 884 (Mo. App. W.D. 2017), Mr. Kesler argued that his claims did not accrue until his one-year terminal contract expired because, until that time, he was still employed, had lost no compensation, and his terminal contract could have been vacated. *Id*. at 893. We concluded otherwise, finding that Mr. Kesler was put on notice of a potentially actionable injury by findings

[2] All statutory references are to the REVISED STATUTES OF MISSOURI 2016, as supplemented.

of unacceptable behavior and the denial of his tenure. *Id*. "While all of his alleged damages may not have been known or knowable at that time, . . . he was on notice that an injury and substantial damages may have occurred . . . ." *Id*. Upon the denial of his tenure, Mr. Kesler received a one-year terminal contract. "Thus, he was on notice at that time that his employment with the University would end . . . and he reasonably should have known that an injury and substantial damage may have occurred." *Id*. at 893-94. "The expiration of Kesler's terminal contract . . . did not cause any of his claims to accrue; it simply made his alleged damages more knowable." *Id*. at 894 (citing *Farrow v. St. Francis Med. Ctr*., 407 S.W.3d 579, 599-600 (Mo. banc 2013)).

On January 27, 2013, Dr. Brantl filed a grievance after receiving notice that his residency would be terminated. Dr. Brantl was on notice at that time "that his employment with the University would end . . . and he reasonably should have known that an injury and substantial damage may have occurred." *Id*. at 893-94. The termination of his residency on June 30, 2013, "did not cause any of his claims to accrue; it simply made his alleged damages more knowable." *Id*. at 894. Thus, the statutory time limit on Dr. Brantl's claims began to run on January 27, 2013. Dr. Brantl filed his complaint in federal court on June 28, 2018, which was beyond the five-year limitation period, and section 516.120(1) bars his claims. The trial court did not err in dismissing Dr. Brantl's first amended petition on the grounds that it was barred by Missouri's five-year statute of limitations.

Even assuming, *arguendo*, that Dr. Brantl's claim did not accrue until, as Dr. Brantl argues, the date his residency was formally terminated (*i.e*., June 30, 2013), his action filed in the circuit court would still be time-barred.

Under 28 U.S.C. § 1367(a), a federal district court has supplemental jurisdiction over state-law claims that are so related to claims in the action within the court's original jurisdiction

"that they form part of the same case or controversy under Article III of the United States Constitution." "[S]ome claims asserted under § 1367(a) will be dismissed because the district court declines to exercise jurisdiction over them and, if they are to be pursued, must be refiled in state court." *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 459, 123 S.Ct. 1667, 1669, 155 L.Ed.2d 631 (2003). "To prevent the limitations period on such supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court, § 1367(d) provides a tolling rule that must be applied by state courts[.]" *Id*. Subsection (d) tolls the limitations period for a state-law claim asserted under the supplemental jurisdiction statute "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d). In *Artis v. District of Columbia*, 138 S.Ct. 594, 199 L.Ed.2d 473 (2018), the Supreme Court held that "§ 1367(d)'s instruction to 'toll' a state limitations period means to hold it in abeyance, *i.e.*, to stop the clock." *Id.* at 598. Section 1367(d) "suspends the statute of limitations for two adjacent time periods: while the claim is pending in federal court and for 30 days postdismissal." *Id*. at 603. Nevertheless, in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002), the Supreme Court held that "§ 1367(d) does not toll the period of limitations for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds." *Id*. at 548. The Eleventh Amendment guarantees sovereign immunity and is "an explicit limitation on federal jurisdiction." *Id.* at 541 (internal quotation marks omitted). Congress did not abrogate the states' Eleventh Amendment sovereign immunity from suit in federal court in its codification of supplemental jurisdiction.

Here, Dr. Brantl's first amended petition stated that the University "filed a motion to dismiss solely based on 11th [A]mendment immunity. . . . On June 3, 2019, the federal court

dismissed plaintiff's first amended complaint for lack of subject matter jurisdiction on plaintiff's state law claims."[3] Dr. Brantl also alleged: "Under section 172.010 *et seq*., RSMo., and pursuant to sections 9(a) and 9(b) of Article IX of the Missouri Constitution, the University of Missouri, an institution of higher education, was incorporated and created as a body politic to be known by the name 'The Curators of the University of Missouri . . . .'"

"The Curators of the University of Missouri is a public entity with the status of a governmental body . . . ." *Reed v. Curators of Univ. of Mo.*, 509 S.W.3d 816, 823 (Mo. App. W.D. 2016) (internal quotation marks omitted). The University is considered an instrumentality of the State of Missouri and, therefore, is entitled to Eleventh Amendment immunity. Federal courts have consistently determined that the University is entitled to Eleventh Amendment immunity on numerous occasions. *See Keselyak v. Curators of the Univ. of Mo*., 200 F.Supp.3d 849, 855 (W.D. Mo. 2016) (finding plaintiff's claims against the University were barred by Eleventh Amendment immunity and the court lacked subject matter jurisdiction to hear them); *Sherman v. Curators of Univ. of Mo*., 871 F.Supp. 344, 346, 348 (W.D. Mo. 1994) (determining the University is a state instrumentality acting as an arm of the State of Missouri and enjoys Eleventh Amendment protection); *Ormerod v. Curators of Univ. of Mo*., 97 F.App'x 71, 72 (8th Cir. 2004) (noting "the University of Missouri-Columbia was entitled to Eleventh Amendment immunity"); *Scherer v. Curators of Univ. of Mo.*, 49 F.App'x 658, 658 (8th Cir. 2002) (citing *Sherman* and affirming

[3] *See Brantl v. Curators of Univ. of Mo*., Case No. 2:18-CV-04130-MDH, 2019 WL 2344131, at *2 (W.D. Mo. June 3, 2019):

> Here, the University is entitled to Eleventh Amendment immunity. . . . This Court has previously determined that the University of Missouri is considered an instrumentality of the State of Missouri and is entitled to Eleventh Amendment immunity. *Sherman v. Curators of Univ. of Missouri*, 871 F.Supp. 344, 348 (W.D. Mo. 1994) (assessing University of Missouri on the basis of its own particular circumstances and determining it is a state instrumentality acting as an arm of the State of Missouri and enjoys Eleventh Amendment protection); *see also Scherer v. Curators of Univ. of Missouri*, 49 F.App'x 658, 658 (8th Cir. 2002) (citing *Sherman* and affirming dismissal of ADA claim based on Eleventh Amendment immunity).

dismissal of ADA claim based on Eleventh Amendment immunity). These federal court rulings are persuasive as they are grounded in sound legal application of the Eleventh Amendment.

Accordingly, under *Raygor*, § 1367(d) does not toll the period of limitations for state-law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds. 534 U.S. at 548. Dr. Brantl filed his petition in state court on July 2, 2019, well beyond the limitations period that would have accrued on June 30, 2013—even if we agreed with Dr. Brantl (which we do not) that his action accrued only after the formal termination date of his medical residency.

Dr. Brantl also argues that the trial court erred in finding that Missouri's savings statute, § 516.230, "does not provide the 'savings' sought by [Dr. Brantl]." Section 516.230 provides for further savings in case of nonsuits and states in pertinent part: "If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein suffer a nonsuit, . . . such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered . . . ." "It is well-settled that the saving[s] statute does not 'save' actions that are time-barred. Instead, the saving[s] statute provides a one-year grace period for actions that are [1] timely filed and [2] suffer a nonsuit." *Sofia v. Dodson*, 601 S.W.3d 205, 209 (Mo. banc 2020) (internal quotation marks omitted).

The savings statute cannot save Dr. Brantl's time-barred action. As we explained, the statutory time limit on Dr. Brantl's claims began to run on January 27, 2013; Dr. Brantl filed his complaint in federal court on June 28, 2018, which was beyond the five-year limitation period, and section 516.120 bars his claims. Even assuming, *arguendo*, that Dr. Brantl's claim accrued on his final day of employment on June 30, 2013, and that he timely filed his complaint in federal court prior to the running of the statute of limitations, 28 U.S.C. § 1367(d) did not toll the period

of limitations for Dr. Brantl's claims against the University for the reasons stated earlier in our ruling. Because the state limitations period continued to run during the pendency of the federal action, when Dr. Brantl refiled his state claims in state court, his state court action was untimely, and the trial court did not err in dismissing it.

Point I is denied.

Point II

In Dr. Brantl's second point, he asserts that the trial court erred in dismissing his first amended petition because his claims should have been equitably tolled by the trial court since the five-year statute of limitations had run before he became aware that the University was asserting Eleventh Amendment immunity in the federal court action.

Dr. Brantl did not raise the equitable tolling argument in his first amended petition, or in his suggestions in opposition to the University's motion to dismiss, or at the hearing on the University's motion to dismiss. "Arguments not raised before the trial court . . . are not preserved for review on appeal because [w]e will not convict a trial court of error on an issue that was not put before the trial court to decide." *Bartsch v. BMC Farms, LLC*, 573 S.W.3d 737, 743 (Mo. App. W.D. 2019) (internal quotation marks omitted).

Ex gratia, we note that even if Dr. Brantl had raised the equitable tolling argument with the trial court, it would not have saved his time-barred claims. "The doctrine of equitable tolling permits a plaintiff to toll a statute of limitations where 'the defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.'" *Adams v. Div. of Emp't Sec.*, 353 S.W.3d 668, 673 (Mo. App. E.D. 2011) (quoting *Ross v. Union Pac. R.R. Co*., 906 S.W.2d 711, 713 (Mo. banc 1995)).

"'[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.'" *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)).

"Statutes of limitation may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions." *State ex rel. Church & Dwight Co. v. Collins*, 543 S.W.3d 22, 26 (Mo. banc 2018) (internal quotation marks omitted). Dr. Brantl has not alleged any "specific disabilities or exceptions enacted by the legislature" that would allow him to evade section 516.120(1)'s five-year statute of limitations.

Dr. Brantl's belated claim that he was not "aware" that the University would assert Eleventh Amendment immunity is an unreasonable and illogical statement that ignores the undisputed circumstances his federal lawsuit presented. As we pointed out in our discussion of Point I, Missouri's federal courts have uniformly held that the University is a state instrumentality acting as an arm of the State of Missouri and enjoys Eleventh Amendment protection.

Furthermore, Dr. Brantl has not alleged any extraordinary circumstances that prevented him from asserting his rights in a timely filed state court action. Dr. Brantl filed his federal complaint against the University on June 28, 2018. The University filed a motion to dismiss solely based on Eleventh Amendment immunity. Despite federal case law holding that the University enjoys Eleventh Amendment protection, Dr. Brantl continued to pursue his federal action until it was dismissed on June 3, 2019, rather than diligently pursuing his claims in state court.

Point II is denied.

Conclusion

The trial court's judgment is affirmed.

/s/ *Mark D. Pfeiffer*
Mark D. Pfeiffer, Judge

Thomas N. Chapman, Presiding Judge, and W. Douglas Thomson, Judge, concur.