COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0012

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CONNIE G. POWELL,

PLAINTIFF-RESPONDENT,

V.

ARLENE M. COOPER AND CALVIN STOUDT,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Doctors Arlene Cooper and Calvin Stoudt appeal from an order of the circuit court denying their motion to dismiss an amended complaint filed by Connie Powell. We conclude that Cooper and Stoudt are not entitled to dismissal based on qualified immunity because Powell

sufficiently alleged a 42 U.S.C. § 1983 claim grounded in procedural and substantive due process violations, bottomed on a clearly established property interest in continuing a course of study and a clearly established liberty interest in refusing to unnecessarily disclose her mental health history. Regarding Powell's claim of negligent infliction of emotional distress, we conclude that the statute of limitations precludes this claim as presently pled. Therefore, we affirm in part; reverse in part and remand for further proceedings.

BACKGROUND

In the fall of 1987, Powell was admitted to the graduate program in guidance and counseling at the University of Wisconsin-Stout.[1] At that time, Dr. David Cook was assigned as her academic advisor. Powell told Cook that she had a history of manic-depressive disorder, and Cook advised her that it would not affect her completion of the graduate program at Stout. At that time and until December 1990, no UW-Stout staff member told Powell that her mental health history would affect the completion of her graduate work.

By December 1990, Powell had completed all of the course work required for a Master's Degree in guidance and counseling, with the exception of the practicum and Master's thesis. She spoke with Cooper to schedule her practicum for the spring of 1991. Upon telling Cooper of her manic-depressive condition, Cooper refused to assign Powell to a practicum.

[1] All of the facts in this opinion are taken from the amended complaint, which facts, and the reasonable inferences therefrom, are presumed to be true for purposes of this motion. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis.2d 458, 463, 565 N.W.2d 521, 526 (1997).

On January 28, 1991, Cooper and Stoudt held a meeting with Powell during which Cooper told her she would be allowed to participate in the practicum necessary to completion of the masters degree program, only if she disclosed her manic-depressive condition to her practicum site supervisor. Stoudt knew about and approved of this requirement and supervised Cooper in offering it to Powell at the meeting. Powell refused to disclose her mental health history to her site supervisor and as a result, Cooper and Stoudt refused to permit her to participate in the practicum necessary to continuing her course of study. Prior to being refused admission to the practicum, Powell had a grade point average of 3.887 in all completed classes, had paid all tuition and fees, and was a graduate student in good standing.

On January 24, 1997, Powell filed suit under 42 U.S.C. § 1983 alleging that she had constitutionally protected rights: (1) to continue her graduate program at UW-Stout; (2) to refuse to unnecessarily reveal her manic-depressive condition to her practicum site supervisor; and (3) to a hearing to determine the necessity of the disclosure prior to precluding her from participating in the practicum. She also claimed Cooper and Stoudt's decision was arbitrary and capricious and she alleged the negligent infliction of emotional distress.

On December 23, 1997, the circuit court denied Cooper and Stoudt's motion to dismiss Powell's amended complaint, holding that the defendants were not entitled to qualified immunity because the law was clearly established in January of 1991 that Powell had a constitutionally protected property interest in continuing her graduate school education, which could not be denied without a hearing. The circuit court also concluded that Cooper and Stoudt's actions in refusing to permit Powell to participate in the practicum were arbitrary and capricious. Additionally, the circuit court declined to apply the state law defense

of discretionary act immunity and held that the discovery rule tolled the running of the three-year statute of limitations under § 893.54(1), STATS. Cooper and Stoudt petitioned for leave to appeal and we granted their request.

DISCUSSION

Standard of Review.

Whether a complaint states a claim upon which relief can be granted is a question of law, which we review without deference to the circuit court's decision. ***Heinritz v. Lawrence Univ.***, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). Whether immunity lies because of qualified immunity, or whether the complaint provides a statute of limitations defense on its face, are also questions of law which we review *de novo*. ***Arneson v. Jezwinski***, ___ Wis.2d ___, 592 N.W.2d 606, 613 (1999) (citations omitted); ***Barry v. Maple Bluff Country Club***, 221 Wis.2d 707, 714, 586 N.W.2d 182, 185 (Ct. App. 1998) (citations omitted).

Introduction.

Cooper and Stoudt raise eight issues in their appellate brief; however, the fourth issue was not raised in their petition for leave to appeal under § 808.03(2), STATS., nor is it a subpart of any issue that was set forth in the petition approved for appeal in our March 23, 1998 order. Because this issue was not specifically raised and approved for appeal, we will not consider it in this discretionary appeal. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992); ***Power Sys. Analysis, Inc. v. City of Bloomer***, 197 Wis.2d 817, 821 n.2, 541 N.W.2d 214, 215 n.2 (Ct. App. 1995).

Qualified Immunity.

Qualified immunity is a doctrine that protects government officials from civil liability, if the complained of conduct does not violate constitutional rights which were clearly established. It may be invoked when a federal claim is made. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis.2d 458, 469, 565 N.W.2d 521, 528 (1997) (citing ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982)). Even though qualified immunity is an affirmative defense, a plaintiff must be able to demonstrate by closely analogous case law that the defendant's alleged conduct constituted a clearly established constitutional violation at the time the acts occurred. ***Penterman***, 211 Wis.2d at 470, 565 N.W.2d at 529.

When we conduct a qualified immunity analysis presented through a motion to dismiss, we accept the facts pled in the complaint as true. ***Id.*** at 463, 565 N.W.2d at 526. Therefore, at this stage in the litigation, our analysis requires us to construe Powell's allegations liberally and to view them in the light most favorable to her. ***Triad Assocs., Inc. v. Robinson***, 10 F.3d 492, 495 (7th Cir. 1993). Further, the "possibility that [a defendant] will claim immunity does not require [a] plaintiff to anticipate and plead around that defense." ***Elliott v. Thomas***, 937 F.2d 338, 345 (7th Cir. 1991).

1. Clearly Established Constitutional Violation.

Powell's constitutional claim invokes 42 U.S.C. § 1983.[2] Section 1983, in and of itself, does not create substantive constitutional rights; rather, it

[2] 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of

(continued)

provides a remedy for the deprivation of rights established elsewhere. ***Chapman v. Houston Welfare Rights Org.***, 441 U.S. 600, 617-18 (1979). To state a cause of action under § 1983, a party must allege that a person acting under the color of state law deprived that party of rights, privileges, or immunities protected by the Constitution or laws of the United States. ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980).

Powell's amended complaint alleges that Cooper was an assistant professor of counseling and psychological services at UW-Stout and that Stoudt was the program director for the School of Guidance, Counseling and Psychological Services at UW-Stout. Further, she alleges they "act[ed] under color of statutes, regulations, custom, policy, and usage of the State of Wisconsin and the University of Wisconsin system" and that "[e]ach of the defendants herein acted under color of law in depriving the plaintiff of her rights under the Constitution of the United States, causing the plaintiff to suffer damage and injury." Based on these allegations, we conclude that Powell has satisfied the "under the color of state law" requirement. We therefore focus our inquiry on whether Powell has sufficiently alleged a deprivation of any right, privilege, or immunity secured by the Constitution or laws of the United States, which right and the deprivation thereof were clearly established when Cooper and Stoudt's actions occurred.

Powell claims that her right to due process was violated. In a § 1983 claim, alleging a violation of due process that is either procedural or substantive, a

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> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

plaintiff must show a deprivation of a constitutionally protected interest in life, liberty, or property. U.S. CONST. amend. XIV, § 1; ***Penterman***, 211 Wis.2d at 473, 565 N.W.2d at 530. Powell alleges she had a property interest in continuing the course of study she had begun, and she also alleges what we construe to be a liberty interest in not unnecessarily disclosing her mental health history.

a. Property interest.

Property interests are not created by the Constitution, but rather, are determined exclusively under state law. ***Arneson***, ___ Wis.2d at ___, 592 N.W.2d at 613. Therefore, we must determine whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program at UW-Stout. ***Penterman***, 211 Wis.2d at 480, 565 N.W.2d at 533 (citing ***Riedy v. Sperry***, 83 Wis.2d 158, 164, 265 N.W.2d 475, 478-79 (1978)).

In support of her contention, Powell has alleged that at the beginning of her graduate course of study she disclosed her mental health history to Cook, her academic advisor, and was told that it would not affect her completion of the program; that she achieved a 3.887 grade point average for all courses taken; that she paid all tuition and fees; that she was a student in good standing; and that she borrowed substantial sums of money to enable her to pursue her course of study. She alleges that Cooper and Stoudt wrongfully denied her the opportunity to continue in the graduate program when they refused to assign her to a practicum, which was necessary to completion of her course of study. We conclude that Powell's complaint contains more than mere conclusory allegations that she had a property right. And as was done in ***Riedy***, Powell has alleged particularized facts demonstrating a property right. That property interest could have arisen through promissory estoppel or a contract with UW-Stout.

Several cases interpreting Wisconsin law had clearly established a constitutionally protected property interest in continuing a course of study prior to the conduct of which Powell complains. As early as 1932 in ***Frank v. Marquette Univ.***, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932), the supreme court recognized a property interest in the continuance of a college education, holding that

> [t]he law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein. So long as they act in response to sufficient reasons and not arbitrarily or capriciously their acts may not be interfered with by the courts.

Id. While not specifically referred to as a property interest in ***Frank***, the court phrased the claim as one "to compel the defendant university specifically to perform its contract with [Frank]." ***Id.*** at 377, 245 N.W.2d at 126. Based upon that claim, the court held that Frank had the right to continue in a course of study, a right that was protected from arbitrary and capricious state action.

In ***Martin v. Helsted***, 578 F. Supp. 1473 (W.D. Wis. 1983), the Federal District Court for the Western District of Wisconsin addressed a § 1983 action alleging that the University of Wisconsin Law School violated Martin's due process and equal protection rights by dismissing him for lying about criminal convictions on his law school application. In analyzing the procedural due process claim, the court concluded that "[c]ourts and state law recognize a property interest in continuing education once a student has begun a course of study." ***Id.*** at 1480. Even though Martin had only recently been accepted into law school, the court nevertheless concluded that he enjoyed a property interest in continuing his education, that was protected by some degree of due process. ***Id.*** at 1482. Additionally, in ***Anderson v. University of Wisconsin***, 665 F. Supp. 1372, 1396

(W.D. Wis. 1987), *aff'd*, 841 F.2d 737 (7th Cir. 1988), the court confirmed that a student has a property interest in continuing education once the student has begun a course of study. We therefore conclude that Powell alleged sufficient facts to establish that she had a clearly established property interest in continuing her course of study.

b. Liberty interest.

Powell alleges a constitutional violation because Cooper and Stoudt required her to disclose her mental health history to her practicum supervisor as a condition precedent to continuing in her graduate course of study. We construe this to be a claimed violation of a liberty interest.[3]

Liberty interests may arise under either federal or state law. For example, the Fourteenth Amendment of the United States Constitution protects an "individual interest in avoiding disclosure of personal matters." ***Hillman v. Columbia County***, 164 Wis.2d 376, 400, 474 N.W.2d 913, 922 (Ct. App. 1991) (citing ***Whalen v. Roe***, 429 U.S. 589, 599-600 (1977)). This personal liberty interest arises from a "guarantee" under federal law, of certain areas or "zones of privacy." ***Borucki v. Ryan***, 827 F.2d 836, 839 (1st Cir. 1987) (citing ***Roe v. Wade***, 410 U.S. 113, 152 (1973)). The privacy rights that are protected by the Constitution are "limited to those which are 'fundamental' or 'implicit within the concept of ordered liberty' …." ***Borucki***, 827 F.2d at 839 (citations omitted).

[3] The dissent takes issue with our giving a label to what has been alleged, but in a motion to dismiss, the movant can prevail only if there is no way in which the pleadings can be construed to state a claim for relief. ***Heinritz v. Lawrence Univ.***, 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct. App. 1995). Therefore, in order to analyze the motion before us, we must articulate in terms of potential legal claims the facts which have been pled.

In Wisconsin, the legislature has also recognized a right of privacy by creating § 895.50, STATS. Wisconsin courts have reviewed claims for relief based on alleged violations of that statute and on alleged violations of substantive due process grounded in the right of privacy protected by the Fourteenth Amendment. *See* ***Zinda v. Louisiana Pacific Corp.***, 149 Wis.2d 913, 440 N.W.2d 548 (1989); ***Hillman***, 164 Wis.2d at 400, 474 N.W.2d at 922. Furthermore, courts in other jurisdictions have recognized a constitutionally protected privacy right in not unnecessarily disclosing mental health information. *See* ***Daury v. Smith***, 842 F.2d 9, 13-15 (1st Cir. 1988) (recognizing the right of privacy in avoiding disclosure of psychiatric records); ***National Transp. Safety Bd. v. Hollywood Mem'l Hosp.***, 735 F. Supp. 423, 424 (S.D. Fla. 1990) (concluding that avoiding disclosure of psychiatric records falls within the sphere of constitutionally protected privacy); ***McKenna v. Fargo***, 451 F. Supp. 1355, 1379-81 (D.N.J. 1978) (recognizing a constitutional privacy right extends to emotional and mental conditions). Therefore, we conclude that Powell had a clearly established liberty interest in not unnecessarily disclosing her mental health history.[4]

[4] The dissent disputes that Powell has any such privacy right because she filed this lawsuit, thereby making her mental health history public. However, the same statement could be made about any plaintiff who seeks to protect a personal right of privacy. Additionally, the dissent's position is undermined by the legislature's enactment of § 895.50, STATS.; this court's decision in ***Hillman v. Columbia County***, 164 Wis.2d 374, 400, 474 N.W.2d 913, 922 (Ct. App. 1991); and the United States Supreme Court's decision in ***Whalen v. Roe***, 429 U.S. 589, 599-600 (1977).

2. *Procedural Due Process.*

Once a property or a liberty interest has been established, it may not be denied without procedural due process. ***Goss v. Lopez***, 419 U.S. 565, 577 (1975); ***Arneson***, __Wis.2d at __, 592 N.W.2d at 619. However, dismissal of Powell's procedural due process claims are appropriate if "the procedures attendant upon the deprivation of [her] interest were [not] clearly established …, such that reasonable officials in the defendants' positions would [not] have been aware their actions violated" Powell's rights. ***Arneson***, ___ Wis.2d at ___, 592 N.W.2d at 615-16.

In determining what procedure was clearly due in 1991, we examine United States Supreme Court, United States Circuit Court and United States District Court opinions because, even though only Supreme Court opinions can establish the law, the opinions of the circuit and district courts give us the shape of the law that has been established. "'A 'sufficient consensus based on all relevant case law, indicating that the officials' conduct was unlawful' is required.'" ***Arneson***, __Wis.2d at __, 592 N.W.2d at 615 (quoting ***Henderson v. DeRobertis***, 940 F.2d 1055, 1058-59 (7th Cir. 1991) (further citations omitted)). The determination of what type of process should have been accorded requires the balancing of three factors:

> 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'

Arneson, ___ Wis.2d at __, 592 N.W.2d at 620-21 (quoting ***Mathews v. Eldridge***, 424 U.S. 319, 335 (1976). Furthermore, a determination of what kind of process is due depends on whether Cooper and Stoudt's refusal to assign Powell to a

practicum was an academic decision, grounded in Powell's failure to meet one of the academic criteria for continuing in graduate school, or whether it was a disciplinary action, imposed as a consequence of Powell's refusal to disclose her mental health history to her practicum site supervisor, as she was asked to do. *See* ***Board of Curators of Univ. of Mo. v. Horowitz***, 435 U.S. 78, 87 (1978).

Here, Powell alleges she was given no oral or written notice of the basis, whether academic or disciplinary, for refusing to permit her to participate in the practicum, or for requiring the disclosure of her mental health history to the practicum supervisor. Additionally, she was not given a hearing. Therefore, because there is no showing in the amended complaint of any procedural due process accorded Powell and because there are too many factual inquiries that must be concluded before we can determine what procedure was due, we conclude Powell's procedural due process claims should not be dismissed based on qualified immunity.

3. *Substantive Due Process.*

Powell also alleges a violation of substantive due process, claiming that Cooper and Stoudt's actions were arbitrary and capricious. As in claims of procedural due process violations, substantive due process claims must be bottomed on an alleged deprivation of a liberty or a property interest protected by the Constitution. ***Penterman***, 211 Wis.2d at 480, 565 N.W.2d at 533. However, substantive due process protects individuals from arbitrary, wrongful actions regardless of the process afforded prior to the deprivation. ***Id.*** As the Supreme Court has said "the exercise of power without any reasonable justification in the service of a legitimate governmental objective" is the touchstone of a substantive

due process violation. ***County of Sacramento v. Lewis,*** 118 S.Ct. 1708, 1716 (1998).

The criteria used to decide what is impermissibly arbitrary differ, depending on whether the complained of action is legislative or the specific act of a governmental officer. ***Id.*** When it is the act of government officers, as in the case at bar, "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' … or [conduct which] interferes with rights 'implicit in the concept of ordered liberty.'" ***Id.*** at 1717 (quoting ***Rochin v. California***, 342 U.S. 165, 172 (1952) and ***Palko v. Connecticut***, 302 U.S. 319, 325-26 (1937)).

Here, the liberty interest that Powell asserts in refusing to unnecessarily disclose her mental health history is based upon her personal right of privacy, which the Supreme Court has established is grounded in the right of privacy, implicit in the concept of ordered liberty. *See* ***Whalen***, 429 U.S. at 599. Therefore, Cooper and Stoudt may not interfere with Powell's liberty interest by requiring disclosure of her mental health history unless, on balance, the government's interest in disclosure outweighs Powell's interest in maintaining the privacy of this personal information. *See* ***Hillman***, 164 Wis.2d at 401, 474 N.W.2d at 922 (citations omitted). When the balancing of interests is required, a plaintiff faces a high, but not an insurmountable, hurdle in meeting the burden that a defense of qualified immunity invokes. ***Arneson***, __Wis.2d at __, 592 N.W.2d at 621. Because we review only the amended complaint in this motion to dismiss, we have no information before us on the governmental interest in disclosure and whether that interest would be sufficient to override Powell's liberty interest. Because this is a fact-intensive determination not appropriately made in a motion

to dismiss, we conclude Powell's substantive due process claim relative to her liberty interest should not be dismissed.

On the other hand, the property right Powell asserts in continuing her course of study would be subject to the "shocks the conscience" standard in a substantive due process challenge. Negligent conduct is insufficient, as a matter of law, to shock the conscience, but conduct that is intended to injure in some way "unjustifiable by any government interest" will generally be sufficient to satisfy that standard. ***County of Sacramento***, 118 S.Ct. at 1718. The third category of conduct, that of deliberate indifference, falls in between the two extremes, and many substantive due process claims are analyzed with reference to this category of conduct. ***Id.*** However, the Supreme Court has instructed that:

> Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.

Id. at 1718-19.

A substantive due process claim, based on a property right which arose in an academic setting, was examined in ***Regents of Univ. of Mich. v. Ewing***, 474 U.S. 214 (1985). There, Ewing had been enrolled in a special six-year program known as "Inteflex," which was designed to lead to a Doctor of Medicine degree, as well as an undergraduate degree. Part of the program required students to pass a test known as the NBME Part I, which Ewing failed. Ewing asked to repeat the exam, but after repeated hearings, the University remained firm in its decision denying his request. There was no question that the record conclusively showed Ewing had received ample procedural due process. Rather, the question

was whether "the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination." Because Ewing had failed an exam and because the University had thoroughly reviewed his entire academic record and based its decision refusing to permit him to retake the exam on his overall academic performance, the Court characterized the decision as a "genuinely academic decision." Once that determination had been made the Court opined:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225 (citation and footnote omitted). However, if the decision is disciplinary, a substantive due process claim may stand on different footing in an academic setting, as does a claim of the denial of procedural due process. *See* ***Board of Curators of Univ. of Mo.***, 435 U.S. at 87.

There is no allegation in the amended complaint that would cause us to conclude that Cooper and Stoudt intended to harm Powell when they refused to assign her to a practicum. Therefore, in order for a substantive due process claim to lie in regard to Powell's asserted property right to continue in her graduate course of study, Powell must be able to prove that Cooper and Stoudt's refusal to assign her to a practicum was done with deliberate indifference to her rights. *See* ***County of Sacramento***, 118 S.Ct. at 1718-19. However, this is not a determination that can be made in the course of a motion to dismiss because it is fact-driven. Therefore, we conclude that Powell's substantive due process claim

grounded in her property interest in continuing in her graduate course of studies should not be dismissed.[5]

Statute of Limitations.

Cooper and Stoudt argue that Powell's claim for negligent infliction of emotional distress is barred by the statute of limitations because she did not plead that she discovered her emotional injury within three years of the filing of this lawsuit, and in the alternative, because the discovery rule does not apply to Powell's claim. Powell contends that the discovery rule applies to the accrual of her claim, and that there is no reason not to infer from the pleadings that her claim accrued within three years of the commencement of this action.

Because this affirmative defense is presented to us on a motion to dismiss, the only facts we consider are those presented on the face of the amended complaint,[6] and the reasonable inferences therefrom. ***Peters v. Peters Auto Sales, Inc.***, 37 Wis.2d 346, 348, 155 N.W.2d 85, 86 (1967). The statute of limitations for a claim of negligent infliction of emotional distress is three years. Section

[5] When Cooper and Stoudt brought their petition for interlocutory review, Powell agreed that we were obliged to grant it for the issue of qualified immunity due to the supreme court's decision in ***Arneson v. Jezwinski***, 206 Wis.2d 216, 556 N.W.2d 721 (1996)(***Arneson I***). Additionally, when we granted the petition, we too read ***Arneson I*** as requiring us to grant the petition in regard to the issue of qualified immunity. However, upon further reflection, we read ***Arneson I***, as clarified by a subsequent discussion in ***Penterman***, 211 Wis.2d at 463, 565 N.W.2d at 526, as requiring us to grant such petitions only when they follow a summary judgment motion, and that in our discretion, we may grant them after a motion to dismiss, if we determine that a decision on the issue of qualified immunity is not premature. We note that in most cases it is better to have the trial court decide such a defense through a motion for summary judgment, after the facts have been further developed, as it would have been in this case. However, because the parties have briefed the issues, because Powell has never argued that the appeal of the issue of qualified immunity is premature, and because the statute of limitations question was ripe for review, we have decided the appeal rather than dismissing it as improvidently granted.

[6] Because Powell filed a complaint and an amended complaint, we have reviewed both documents.

893.54(1), STATS. The three-year period begins on the date that the cause of action accrues. ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 312, 533 N.W.2d 780, 784 (1995). "[A] cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." ***Id.*** at 315, 533 N.W.2d at 785 (citations omitted). "A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future." ***Id.***

While the cause of action usually accrues on the date of the alleged negligent conduct, "under some circumstances, public policy dictates that the date that a cause of action accrues [may] be well after the date of the act that caused harm." ***Id.*** at 312, 533 N.W.2d at 784. Those circumstances are outlined in the judicially created discovery rule which "tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Id.*** at 315, 533 N.W.2d at 785. Further, a "cause of action does not accrue until the nature of the injury *and* the cause—or at least a relationship between the event and injury—is or ought to have been known to the claimant." ***Borello v. U.S. Oil Co.***, 130 Wis.2d 397, 406-07, 388 N.W.2d 140, 144 (1986); *see also* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 632, 517 N.W.2d 432, 434 (1994); ***Hammer v. Hammer***, 142 Wis.2d 257, 264, 418 N.W.2d 23, 26 (Ct. App. 1987).

The record reflects that Powell commenced this action by the filing of a summons and a complaint on January 24, 1997. An amended complaint was filed June 30, 1997. In the amended complaint, she alleges that, "as a result of the defendants' conduct in denying plaintiff the opportunity to complete her graduate

school program" she "did suffer physical injury and emotional distress causing a disabling emotional response to defendants' conduct, resulting in the plaintiffs' (sic) inability to function in other relationships, which was a direct and proximate result of the defendants conduct herein." Powell does not identify when she discovered her emotional injury or even that its discovery was delayed beyond January 28, 1991, when Powell states Cooper and Stoudt refused to permit her to participate in the practicum necessary to the completion of her graduate course of study.

The circuit court inferred from the amended complaint that Powell's emotional distress did not become apparent to her or she did not connect her emotional distress to the alleged wrongs of Cooper and Stoudt until some time after she left the university. However, there is nothing within the four corners of the amended complaint which so states, or even so implies. After reviewing the amended complaint, one could not reasonably believe that Powell's injury, or knowledge of the cause of her injury, was delayed until at least January 25, 1994,[7] or was delayed at all. Therefore, because § 893.54(1), STATS., requires that actions for negligent infliction of emotional distress be commenced within three years of the date when the claim arose, and because the amended complaint alleges that the last wrongful act occurred on January 28, 1991 and does not allege any delay in Powell's discovery of her tort claim, we conclude that it establishes a statute of limitations defense on its face and her tort claim must be dismissed. If, however, there are any facts within Powell's knowledge which could have been pled which would show that her tort claim accrued no earlier than three years

[7] This is the earliest date on which Powell's claim could have accrued and still be preserved by the commencement of this action on January 24, 1997.

before she commenced this action, the circuit court may, in the exercise of its discretion, permit her to amend the pleadings. Accordingly, we reverse the circuit court's determination on this issue. Additionally, because of our decision in this regard, it is not necessary for us to address the defense of discretionary act immunity which was also aimed at Powell's tort claim.

CONCLUSION

Cooper and Stoudt are not entitled to dismissal of Powell's 42 U.S.C. § 1983 claims based on qualified immunity because Powell has sufficiently alleged a § 1983 claim grounded in procedural and substantive due process violations, including a clearly established property interest in continuing a course of study and a clearly established liberty interest in refusing to unnecessarily disclose her mental health history. Regarding Powell's claim of negligent infliction of emotional distress, we conclude that the statute of limitations precludes this claim as presently pled. Therefore we affirm in part; reverse in part and remand for further proceedings.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Recommended for publication in the official reports.

DYKMAN, P.J. *(dissenting).* In a case which all panel members agree should not have been taken on interlocutory appeal because of incomplete facts, we learn that the United States Constitution prohibits schools from requiring students to tell a teacher about a personal matter the student has already voluntarily divulged to others at the school. This result is much influenced by procedure—we are reviewing the denial of a motion to dismiss. As a result, we consider only whether Powell's complaint states a claim. On the thin record presented, and without the reasons for the school's direction to the student, the majority concludes that Powell's complaint survives the school's motion to dismiss. The lesson to be learned is that we should usually deny requests for interlocutory appeals from orders denying motions to dismiss, and wait until the matter is more completely presented on summary judgment. Having so concluded, I would dismiss this appeal as improvidently granted.[8]

Failing to attract a second vote to dismiss, I will consider the issues on the record presented. I agree with the general principles from which the majority reasons. The Federal Constitution recognizes a right of privacy. *See*

[8] I agree with the majority's conclusion that ***Arneson v. Jezwinski***, 206 Wis.2d 217, 556 N.W.2d 721 (1996), as clarified in ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis.2d 458, 565 N.W.2d. 521 (1997), only requires us to grant petitions for interlocutory review of qualified immunity issues when they follow a summary judgment motion. Although we have the discretion to grant such petitions after a motion to dismiss, to do so here was premature. Neither the majority nor I can predict the result when the reasons for requiring Powell to divulge her bipolar disorder to another are known. There is nothing stopping the State from now bringing a motion for summary judgment, alleging those reasons, and if unsuccessful, bringing another interlocutory appeal, which we must accept. I do not interpret ***Arneson*** and ***Penterman***, read together, as permitting the State to take two interlocutory appeals in cases such as this.

Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). The Due Process Clause protects students' rights to continue their education once they have begun a course of study. *See* ***Goss v. Lopez***, 419 U.S. 565, 574 (1975). But the cases upon which the majority relies involve students who have been expelled or disciplined by the schools they attended. Nothing of the sort happened to Powell. The University of Wisconsin did not discipline Powell or expel her. She quit the University. She failed to complete a practicum, and she did not write a Master's thesis. Quitting a teaching position and then suing for damages was an unsuccessful tactic in ***Lyons v. Sullivan,*** 602 F.2d 7 (1st Cir. 1979), and it should fare no better here.

The majority deems the issue in this case to be "whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program." If that were the real issue, this case would be decided by a unanimous panel. ***Goss*** recognizes that right. The real issue is whether Powell has a constitutional right not to divulge the existence of her bipolar disorder to her practicum instructor, though she revealed the illness to others at the university. Thus, for me, cases such as ***Frank v. Marquette University***, 209 Wis. 372, 245 N.W. 125 (1932), ***Martin v. Helstad***, 578 F. Supp. 1473 (W.D. Wis. 1983) and ***Anderson v. University of Wisconsin***, 665 F. Supp. 1372 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737 (7th Cir. 1988), are unhelpful. In ***Frank***, the plaintiff was expelled. ***Frank***, 209 Wis. at 374, 245 N.W. at 125. He sued the university, and attempted to discover other students' records to see if he was expelled for actions for which others were not expelled. *See* ***id.*** at 373, 245 N.W. at 125. The court considered Frank's contention that he was entitled to the equality provisions of the federal and state constitutions, and concluded: "Counsel cites no authority to support his contention, and we doubt that any court has ever substantially so held." ***Id.*** at 378, 245 N.W. at 127. In ***Martin***, a student expelled

for lying on his application to the school sued, claiming violations of his due process and equal protection rights. ***Martin***, 578 F. Supp. at 1475-79. The court concluded that the plaintiff had a property interest in continuing his education, and therefore a procedural due process right to explain his side of the situation. *See* ***id.*** at 1481-82. I agree with this settled law, but it hardly helps decide whether Powell has a constitutional right not to divulge her bipolar disorder to her practicum instructor. ***Anderson*** is similar to ***Martin***, except that the plaintiff in ***Anderson*** asserted a constitutional right to be re-admitted to the University of Wisconsin Law School after being told that he could not be re-admitted because of his poor grades. ***Anderson***, 665 F. Supp. at 1390. The plaintiff in ***Anderson*** asserted much of what Powell asserts; that she has a constitutional right to continue her education. The district court in ***Anderson*** responded to this assertion:

> The Court does not argue with the plaintiff's contention that a student has a property interest in continuing education once the student has begun a course of study. However, the Court believes that plaintiff's contention misses the point.
>
> The issue in this case is whether a student who is expelled from school for failing to maintain a required grade average has a property interest in being readmitted to school. Plaintiff has submitted no state statute, university rule, or any other basis that would suggest that a student who is expelled from school for failing to maintain a required grade average has a property interest in a continuing education.

Id. at 1396.

I believe that the majority opinion should analyze whether Powell has a property right to refuse to tell her practicum instructor of her bipolar disorder. Instead, the majority analyzes whether a student has a property right in

continuing his or her education. Of course, the answer to that is "Yes," but that leaves the real question unanswered.

Next, the majority inquires whether Powell has a liberty interest in not disclosing mental health information. This is the first mention of a liberty interest that has occurred in this case. Powell's complaint nowhere asserts anything concerning a liberty interest, though it spends three paragraphs asserting the existence of a property right, the deprivation of a property right and the violation of a property right. There is no indication that anyone asserted or even discussed liberty interests in the trial court. The trial court's decision fails to mention the term "liberty," though the words "property interest" are used thirteen times in its thirteen-page decision. "Liberty" is absent from the words found in the appellant's brief, and the respondent never uses that word or analyzes an alleged liberty interest in the brief she filed. However, her brief uses the term "property interest" or "property right" eighteen times in its twenty-three pages. The majority "construes" Powell's complaint to allege a liberty interest in not unnecessarily disclosing her mental health history. One could construe a hot dog to be a porterhouse steak by saying so, but I cannot see how Powell's total indifference for liberty interests in the trial court and here can be construed as an assertion that she has been deprived of a liberty interest.

Appellate courts do not ordinarily become advocates for either side of a case. We are ill advised to perform counsel's task. *See* ***Zintek v. Perchik***, 163 Wis.2d 439, 482, 471 N.W.2d 522, 539 (Ct. App. 1991), *overruled on other grounds by* ***Steinberg v. Jensen***, 194 Wis.2d 439, 534 N.W.2d 361 (1995). "We cannot serve as both advocate and judge." ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). We are not to develop an appellant's argument. *See* ***State v. West***, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct.

App. 1993), *aff'd*, 185 Wis.2d 68, 517 N.W.2d 482 (1994). We have been told that "[o]ne of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal." ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 802 (1990) (quoting ***Cappon v. O'Day***, 165 Wis. 486, 490, 162 N.W. 655, 657 (1917)). And "skewing normal procedure to protect … *pro se* litigants from inadvertently forfeiting their rights" is a procedure which applies only to *pro se* prisoners. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). Clearly, we should not do so when a party is represented by counsel.

I agree that motions to dismiss are to be liberally construed, and that a claim will only be dismissed if the plaintiff cannot recover under any circumstances. *See* ***Heinritz v. Lawrence University***, 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct. App. 1995). I do not agree that this makes us a surrogate for plaintiff's counsel. I know of no case holding that a plaintiff may file a complaint, and when faced with a motion to dismiss, ask the trial court to find him or her a cause of action, and if unsuccessful, ask this court and the supreme court to do likewise. We expect a litigant faced with a motion to dismiss to tell the court by brief or oral argument what claims he or she is making. Neither trial nor appellate courts should be required to search all possible areas of Wisconsin law to see whether a plaintiff might have pled a cause of action. Concepts of waiver should and do prevent this from becoming a successful maneuver.

This is what we concluded in ***State v. Bollig***, 222 Wis.2d 558, 587 N.W.2d 908 (Ct. App. 1998). There, Bollig filed a motion to dismiss the civil commitment proceedings against him. *See* ***id.*** at 562, 587 N.W.2d at 909. The State failed to make two arguments in the trial court which it made for the first

time on appeal. *See* ***id.*** at 564, 587 N.W.2d at 910. We gave the State's newly made arguments no credence:

> Arguments that are raised for the first time on appeal by an appellant are deemed waived….
>
> The State did not … contend that Mochalski was a de facto special prosecutor…. De facto authority was not argued or even mentioned until the State submitted its brief to this court. Therefore, we must conclude that the State has waived [its] argument[].

Id. at 564-65, 587 N.W.2d at 910.

There is no difference between the State's failure to make an argument in ***Bollig*** and Powell's failure to make an argument in this case, except that here, Powell *never* made the argument that she has a liberty interest in not further revealing her bipolar disorder. That is hardly cause to depart from our reasoning in ***Bollig.***

One of the risks of *sua sponte* consideration of an issue is that we will not have the benefit of a true advocate's view of the issue and his or her research, and we are deprived of the informed thinking of the trial judge. This can, and often does result in hardship for one of the parties. *See* ***Vollmer***, 156 Wis.2d at 11, 456 N.W.2d at 802. When we later review a case in which this was done, we often regret our decision to strike out on our own. When we raise an issue sua sponte and then decide it, we are often surprised to first read of contrary authority in a petition for review. Still, a dissent responds to the reasoning of the majority, and I must either ignore the issue or address it. I choose the latter, though reluctantly.

Anything can fall within a concept of "ordered liberty" if a court says that it does. The majority starts by citing Powell's never-asserted contention

that she has a right of privacy in refusing to unnecessarily disclose her mental health history. This is wrong as a matter of fact. The trial court noted that Powell's complaint alleges that she voluntarily told two individuals at the University about her bipolar disorder. What Powell really asserts is that although she had no objection to two individuals knowing of this, she draws the line at three. Moving then from Powell's non-asserted assertion, the majority concludes: "Therefore, Cooper and Stoudt may not interfere with Powell's liberty interest by requiring disclosure of her mental health history…." Cooper and Stoudt did no such thing. Powell had already disclosed her mental health history. If a constitutional right must be found on the facts of this case, it has to be a right not to tell too many people of one's bipolar disorder.

The Supreme Court has recently cautioned against expanding the Due Process Clause into new areas. In ***Washington v. Glucksberg***, 117 S. Ct. 2258 (1997) the Court said:

> But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.
>
> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal

> traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" that direct and restrain our exposition of the Due Process Clause.

Id. at 2267-68 (alteration in original) (citations omitted).

The cases the majority cites as authority for its conclusion are not persuasive to me. ***Whalen v. Roe***, 429 U.S. 589, 599 (1977), indeed acknowledges an individual interest in avoiding disclosure of personal matters. That interest was articulated in ***Griswald v. Connecticut***, 381 U.S. 479 (1965), where the Court invalidated a Connecticut law criminalizing the use of contraceptive devices, and providing for the prosecution of doctors who prescribed them. Visualizing police searches of marital bedrooms for signs of the use of contraceptives, the Court concluded that a right of privacy older than the Bill of Rights prevented Connecticut from interfering with a married couple's decision to use contraceptives. *See* ***id.*** at 515-16. But neither ***Griswold*** nor ***Whalen*** suggested that *any* information pertaining to a person, whether known by others or not, was constitutionally protected from revelation beyond the persons with whom one chooses to share one's secrets.

Whalen held that the State of New York could require doctors to reveal to the state the names and addresses of patients for whom they had prescribed drugs which had both legal and illegal uses. ***Whalen***, 429 U.S. at 605. The Court spoke of a "host of other unpleasant invasions of privacy that are associated with many facets of health care." ***Id.*** at 602. It concluded that the slight risk inherent in revealing private health information was not a reason to invalidate New York's requirement. *See* ***id.*** at 601-02. I view the university's requirement that Powell reveal her bipolar disorder to one more person similarly.

This is not a significant enough intrusion into a private matter to entitle Powell to the protection of the United States Constitution.

The other case upon which the majority relies to conclude that the United States Constitution prohibited Cooper and Stoudt from requiring that Powell tell her practicum instructor of her bipolar disorder is ***Hillman v. Columbia County***, 164 Wis.2d 376, 474 N.W.2d 913 (Ct. App. 1991), *review granted*, 482 N.W.2d 105 (1992).[9] In ***Hillman***, the plaintiff, a jail inmate, asserted that some jail employees had told other jail employees and jail inmates that Hillman was HIV positive. ***Id.*** at 384, 474 N.W.2d at 916. We quoted ***Woods v. White***, 689 F. Supp. 874 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990), for its observation that the AIDS virus is closely related to sexual activity and intravenous drug use, and that this is information of the most personal kind. *See* ***id.*** at 401, 474 N.W.2d at 923. We cited two other cases coming to the same conclusion, both dealing with the AIDS virus. *See* ***id.*** at 401-02, 474 N.W.2d at 923. In ***Hillman***, the persons allegedly receiving the private information were fellow prisoners and jail employees. Hillman's HIV positive status was therefore known by persons who could hardly be expected to keep this information confidential. AIDS is unique in that the attitude of some about this disease is extreme and rejecting. I find no analogy between the revelation of Hillman's illness to persons who at best didn't care and at worst could be expected to berate or injure Hillman, and the revelation of a bipolar disorder to one more person—a professional who would be expected to keep this information confidential.

[9] I question whether today, ***Hillman*** would withstand the analysis set out in ***Washington***, 117 S. Ct. 2258. And it is strange to charge Cooper and Stoudt with knowledge of ***Hillman*** in January of 1991, when the court of appeals did not decide ***Hillman*** until August 1991. ***Hillman***, 164 Wis.2d at 376, 474 N.W.2d at 913.

My examination of the cases upon which the majority relies is not just to show that they do not support the majority's conclusion. Qualified immunity provides government officials performing discretionary functions with protection, shielding them from civil damage liability if "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." ***Anderson v. Creighton***, 483 U.S. 635, 638 (1987).[10] The plaintiff must prove that the right he or she asserts was "clearly established" at the time it was allegedly violated. Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." ***Malley v. Briggs***, 475 U.S. 335, 341 (1986). Generalized assertions of a constitutional right are insufficient.

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right…. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of ***Harlow*** [***v. Fitzgerald***, 457 U.S. 800 (1982)]. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights…. It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say

[10] ***Anderson v. Creighton***, 483 U.S. 635, 638 (1987), is not the only case to identify and discuss this requirement. *See also* ***Davis v. Scherer***, 468 U.S. 183 (1984); ***Lojuk v. Johnson***, 770 F.2d 619 (7th Cir. 1985); ***Colaizzi v. Walker***, 812 F.2d 304 (7th Cir. 1987) and a couple of others.

> that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40 (citation omitted).

The majority has done what ***Anderson*** warns we should avoid. By using a degree of generality ("whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program") instead of the proper "particularized, and hence more relevant sense" (whether Powell has a constitutional right not to be required to tell an instructor of a mental disorder), the majority has transformed the guarantee of immunity into a rule of virtually unqualified liability. Cooper and Stoudt certainly should have known that they could not lawfully dismiss Powell from her graduate program; that question is similar to requiring them to know that they could not deprive her of due process of law. But ***Anderson*** explains that this is not the question to ask. When the correct question is asked, the majority cites no case which answers the question affirmatively, and I have found none. If both the majority and I have found no cases upholding Powell's alleged right, Cooper and Stoudt certainly should not be held to be aware of the right in January of 1991, long before ***Hillman*** was decided in August 1991. ***Hillman***, 164 Wis.2d at 376, 474 N.W.2d at 913.

As ***Whalen*** recognizes, there are a host of unpleasant invasions of privacy which do not automatically amount to an impermissible invasion of privacy. The "right of privacy is a narrow right." ***Safe Water Ass'n v. City of Fond du Lac***, 184 Wis.2d 365, 376, 516 N.W.2d 13, 17 (Ct. App. 1994). Under some circumstances, the unauthorized revelation of a person's bipolar disorder might be a violation of a person's right to due process but it is not here. Powell is not seeking re-admission to the University or a declaration that she need not reveal

her bipolar disorder to anyone. She wants money. She is now willing to reveal her bipolar disorder to the world through this lawsuit. I am not willing to join in the majority's *sua sponte* determination that Powell has a liberty interest in not disseminating to one more person the information she voluntarily provided to the University. In my view, Powell does not have either a liberty or property interest in not further revealing the fact of her bipolar disorder to her practicum instructor. Therefore, Cooper and Stoudt were entitled to qualified immunity and Powell's complaint should have been dismissed. Accordingly, I respectfully dissent.