ATTORNEYS FOR APPELLANTS

Theodore E. Rokita
Attorney General

Benjamin M.L. Jones
Deputy Attorney General
Indianapolis, Indiana

ATTORNEY FOR APPELLEES

Eric A. Frey
Frey Law Firm
Terre Haute, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Seth Mann, Steven E. Hillman, Douglas Carter, and the Indiana State Police,

Appellants-Defendants,

v.

Catherine J. Arnos, as Personal Representative of the Estate of Lucius D. Washington, Deceased, and Cameron Deshonta Washington,

Appellees-Plaintiffs

March 21, 2022

Court of Appeals Case No. 21A-CT-1634

Interlocutory Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-1705-CT-20795

Crone, Judge.

Case Summary

[1] In 2012, Lucius D. Washington was shot and killed by an Indiana State Police trooper. In 2017, Catherine J. Arnos, the personal representative of Washington's estate, and Washington's minor son Cameron Deshonta Washington (collectively the Estate) filed claims for wrongful death and federal civil rights violations against Seth Mann, Steven E. Hillman, Douglas Carter, and the Indiana State Police (the ISP) (collectively the State Defendants). The State Defendants moved for summary judgment on the basis that the complaint was untimely filed and that the federal civil rights claims also failed as a matter of law. The trial court denied summary judgment. The State Defendants appeal, arguing that the trial court erred in concluding that there were genuine issues of material fact as to whether the statutory limitation period should be tolled by the doctrine of fraudulent concealment. They also assert that the trial court erred in denying summary judgment on the federal civil rights claims. We agree on both matters and therefore reverse.

Facts and Procedural History

[2] The evidence most favorable to the Estate shows that on May 18, 2012, around 2:52 a.m., then-Indiana State Police Trooper Seth Mann was on patrol in uniform and driving a marked car in Fort Wayne near the intersection of Main and Cherry Streets. Mann saw three individuals striking a person on the ground. Mann did a U-turn, and when he pulled up to the group, the men started walking away. Mann exited his vehicle and said, "Hey, come here, man." Appellants' App. Vol. 2 at 82. Mann pursued the individual, later

identified as Washington, that he saw striking the victim's head. Washington picked up his pace and ran to a fence about a hundred feet away from Mann's vehicle and started to climb it. Mann attempted to put a choke hold on Washington and pulled him off the fence. *Id*. at 86. They fell to the ground, with Mann landing on his back and Washington landing on top of Mann, chest to chest. *Id*. Mann felt Washington's hand in the area of the left side of his gun belt. *Id*. at 87, 212, 216. Mann's gun was located on the right side of his gun belt. *Id*. at 212, 216. Washington did not strike or hit Mann. *Id*. at 88. Mann punched Washington's midsection three or four times and then pushed him off to Mann's right. *Id*. at 89. Washington landed seven or eight feet away. It was very dark, and all Mann could see was Washington's white shirt. *Id*. at 90. Mann drew his handgun and rapidly fired five shots, followed by two "controlled pairs" for a total of nine shots. *Id*. at 89-90. Washington died as a result of the shooting.

[3] On May 24, 2012, the ISP issued a one-page news release information form to notify the public that an investigation of Washington's fatal shooting had been opened. This form provided the investigation case number, the name of the victim, the date and location of the incident, the name of the investigating police officer, and the following summary: "Ongoing investigation into a police involved shooting. Investigation continues." *Id*. at 237. The form had sections for the method of operation, type of physical force used, and type of weapon used, but these were empty.

[4] Arnos was not married to Washington, but she is the mother of his child Cameron, who was then four years old. Arnos contacted the Allen County Coroner's Office but was denied any information relating to or involvement in the investigation of Washington's death because they were not married. Appellants' App. Vol. 3 at 241-42. Arnos also contacted the Allen County Prosecutor's Office, which advised her that the matter was under investigation and that she would be contacted when the investigation was concluded. *Id*. No one ever contacted Arnos. *Id*. at 242.

[5] While the prosecutor's office was investigating the matter, then-ISP Superintendent Paul Whitesell informed ISP Training Division Commander Major Brent Johnson that a Firearms Review Board (the Board) would be appointed to review Mann's shooting of Washington after the prosecutor's office concluded its investigation. Appellants' App. Vol. 2 at 134. In January 2013, Douglas Carter was appointed ISP superintendent.

[6] On February 22, 2013, the Allen County prosecutor announced the results of the investigation into Washington's death:

> The Allen County Prosecutor's Office has announced the results of an investigation into a police shooting that happened last spring. Lucius Washington was shot and killed by Indiana State Police Trooper Seth Mann during an altercation on May 18th, at the intersection of Main and Cherry Streets. The Prosecutor's Office says that no charges will be filed as a result of the shooting and that there is insufficient evidence of any criminal liability on the part of Trooper Mann.

Appellants' App. Vol. 3 at 244. Other than hearing this news in the press, Arnos had no knowledge of the circumstances of Washington's death. *Id*. at 242.

[7] In March 2013, Superintendent Carter ordered that the Board would be convened to review Washington's shooting. Appellants' App. Vol. 2 at 135. Pursuant to ISP Standard Operating Procedure ENF-048 (the SOP), the Board was to consist of five members appointed by the superintendent. *Id*. at 235. These five members were the chief council or a staff attorney, an area captain, a firearms instructor, a defensive tactics instructor, and the training division commander, who would serve as the Board's chairperson. *Id*. The chairperson was authorized to replace a member of the Board if a conflict of interest arose. *Id*. The SOP required that the chairperson issue a statement of finding to the superintendent at the conclusion of each Board hearing. *Id*. According to Major Johnson, the primary intent of the Board was to determine if "there is a training deficiency in the actions that the employee took" and whether there is "something there that [the Board] need[s] to identify that … can maybe prevent a … similar incident[.] *Id*. at 135-36.

[8] Superintendent Carter appointed the following people to the Board: Lieutenant Pete Wood from the legal section, Captain Danny Price, firearms instructor Sergeant Kevin Rees, defensive tactics program coordinator Sergeant Terry Treon, and Major Johnson to serve as chairperson. *Id*. at 135; Appellees' App. Vol. 2 at 12-13. In its review of Washington's shooting, the Board reviewed photos of the scene, the autopsy report, and the dashcam video, listened to the audio from Mann's body mic, and interviewed Mann two or three times.

Appellees' App. Vol. 2 at 12, 15, 17. In one meeting, Mann demonstrated how he and Washington fell to the ground and where Washington landed after Mann pushed him off. *Id*. at 17.

[9] On April 4, 2013, the Board submitted to Superintendent Carter a statement of finding (the April 4 Finding) signed by all five members as required by the SOP.[1] Appellants' App. Vol. 2 at 145, 215-219. This is the only finding that was issued by the Board consisting of the five original members appointed pursuant to the SOP. Major Johnson did not meet with the Board again after the April 4 Finding was submitted. *Id*. at 145, 188.

[10] The April 4 Finding indicated that the Board unanimously agreed that its investigation revealed "several areas in need of attention regarding the thoroughness and conduct of the criminal investigation" of Washington's shooting, including the following:

- No quality photographs of the scene or evidence at the scene
- No details in crime scene diagram and failure to utilize any scale diagramming
- No sketch on the firearms discharge report

[1] Major Johnson prepared a draft finding on March 20, 2013, which was not signed by all five members and does not appear to have been submitted to Superintendent Carter. Appellants' App. Vol. 2 at 220-28.

- Trooper Mann was allowed to view the in car camera footage prior to his initial interview

- Trooper Mann's attorney was allowed to ask questions during the initial interview

- Trooper Mann was not asked in the interview where on his belt or in what manner Mr. Washington was grabbing the gun belt

Id. at 217.[2] In addition, "the Board identified a series of actions and inactions which ran contrary to established training and demonstrated poor judgment and decision making on the part of Trooper Mann[,]" including:

- Trooper Mann failed to take steps to identify his location while responding to the incident, and did not know his location on arrival.

- Trooper Mann failed to notify radio that he was responding to the fight in progress in which he later stated that at the time he drove by the subject appeared to have been severely beaten and perhaps deceased.

- Trooper Mann failed to assess the initial scene, including ascertaining the location or status of the victim or the existence and location of any additional potential suspects.

[2] Pursuant to the SOP, all firearms discharge incidents are required to have a firearms discharge report filed that includes "[i]n detail … the applicable case number, photographs, measurements, witness statements, diagrams, and other applicable information." Appellants' App. Vol. 2 at 234.

- Trooper Mann demonstrated a lack of firm control through appropriate verbal commands in using "Hey, come here man" upon his initial approach to the suspects.

- Trooper Mann exited his commission at night without a flashlight.

- Trooper Mann engaged in a foot pursuit while leaving his commission open, unattended, and unsecured in the immediate vicinity of other potential suspects.

- Trooper Mann ignored the two additional suspects in his pursuit of the fleeing suspect (tunnel vision).

- Trooper Mann did not attempt to gain verbal control of Mr. Washington during the foot pursuit, and did not attempt to gain verbal control of either of the additional suspects.

- Trooper Mann used an inappropriate control technique (choke hold) on Mr. Washington.

- Trooper Mann re-holstered his weapon immediately after shooting Mr. Washington without assessing the threat or the existence of any additional threats. Trooper Mann commented to [the Board] that he often trains on his own to follow up a threat with a controlled pair every time he shoots. This is not necessarily consistent with Department firearms training.

- Trooper Mann demonstrated a total lack of control of the two additional suspects after shooting Mr. Washington.

Id. at 217-18.

[11] The April 4 Finding also addressed whether Mann's shooting of Washington was objectively reasonable. ISP operating procedures restrict "the use of deadly force by employees to situations where the officer reasonably believes that the force is necessary to prevent serious bodily injury to the officer." *Id*. at 218. The Board found that Mann's shooting of Washington was "objectively reasonable with one dissenting member."[3] *Id*. Last, the Board unanimously found that Mann's actions that "[led] up to the actual shooting and actions immediately following the shooting as listed above [did] not conform to the established training and polices of the [ISP]." *Id*. The Board recommended that the "incident be referred to the Office of Professional Standards to address the issues dealing with violation of the Departmental policies and procedures." *Id*.

[12] Superintendent Carter believed that the April 4 Finding "include[d] way more than it need[ed]" and did not just focus on whether the shooting was "objectively reasonable." Appellants' App. Vol. 3 at 13-14, 185. Superintendent Carter asked Major Steve E. Hillman, the assistant chief of staff of the fiscal department, to "call the [B]oard together again, issue a new report, and bring that report more narrow into just looking at the shooting." *Id*. at 14. On April 29, 2013, Major Hillman, as chairman of the Board, and the other five members of the Board issued a statement of finding (the April 29 Finding). Appellants'

[3] The dissenting member was Sergeant Rees, who believed that the autopsy report and the direction of the rounds indicated that the shooting was not objectively reasonable. Appellees' App. Vol. 2 at 33.

Vol. 2 at 211-214. Major Johnson received an electronic copy of the April 29 Finding and was informed by his immediate superior, Assistant Superintendent Colonel Mark French, that the April 4 Finding had been amended, that Major Hillman had been assigned to oversee the amendment, and this amendment of the April 4 Finding was going to be submitted. *Id.* at 145-46. Colonel French told Major Johnson that Mann "had been through enough already" and that the ISP "wanted to move forward." *Id.* To the best of Major Johnson's knowledge, there were no Board meetings after Superintendent Carter appointed Major Hillman as chairman, but there could have been a meeting without Major Johnson's knowledge. *Id.* at 188, 191.

[13] The April 29 Finding contained the same factual summary as the April 4 Finding and also concluded that Mann's shooting of Washington was "objectively reasonable with one dissenting member." *Id.* at 212-13. However, the April 29 Finding omitted all the findings in the April 4 Finding that related to the deficiencies of the investigation of the shooting and Mann's violations of ISP policies and procedures. In addition, the April 29 Finding did not recommend that the incident be referred to the Office of Professional Standards to address the issues dealing with those violations. Major Johnson distributed the April 29 Finding to the Board members. Lieutenant Wood and Sergeant Rees were upset by the changes and "felt that it was unjust or improper to change the recommendation of the Board," but Major Johnson told them that "we're not the final authority on this," and "[i]t is the Superintendent who will then make a decision on the final outcome." *Id.* at 191.

[14] Subsequently, the April 29 Finding was amended, and the amended version was submitted to and accepted by Superintendent Carter on May 1, 2013 (the May 1 Finding). *Id*. at 229-233. The May 1 Finding contained photographs that were not in the April 29 Finding, and the factual summary was somewhat different. There are no other Board findings in the record before us.

[15] In March 2017, Arnos received copies of the April 4 and the April 29 Findings. Appellants' App. Vol. 3 at 241-42. From those Findings, Arnos first learned that Washington was unarmed, chased by Mann, placed in a chokehold, and shot at nine times. *Id*. In April 2017, Arnos was appointed personal representative of Washington's Estate. The Estate's counsel emailed a request to the ISP for an opportunity to review and make copies of the file of the investigation of Mann's shooting of Washington. Appellants' App. Vol. 4 at 3. In response, Cynthia Forbes of the Indiana State Police Legal Office emailed the Estate's counsel a copy of the May 2012 ISP news release information form and wrote, "The complete report is an investigatory record of our agency and is excepted from disclosure under Ind. Code 5-14-3-4(b)(1). Thank you." *Id*.

[16] On May 23, 2017, Arnos, on behalf of the Estate and Washington's son, filed a complaint asserting a wrongful death claim against Mann and the ISP and federal civil rights claims under 42 U.S.C. §§ 1981, 1985, and 1986 against

Carter, Hillman, and Mann in their individual capacities.[4] Appellants' App. Vol. 2 at 36; Appellants' App. Vol. 3 at 114.

[17] On January 17, 2020, the State Defendants filed a summary judgment motion and designation of evidence, arguing that the complaint was untimely and the federal claims failed as a matter of law. Appellants' App. Vol. 2 at 56. Arnos filed her response in opposition and her designation of evidence. Appellants' App. Vol. 3 at 93. Following a hearing, on January 27, 2021, the trial court denied summary judgment, finding that there was a genuine issue of material fact as to whether the doctrine of fraudulent concealment tolled the time period to file an action. The trial court also found that the State Defendants were not entitled to summary judgment on the federal claims because Superintendent Carter, Major Hillman, and Mann were each sued in their individual capacities and therefore were persons subject to suit under the federal civil rights laws. The trial court certified its order for interlocutory appeal, and this Court accepted jurisdiction.

Discussion and Decision

[18] The State Defendants challenge the trial court's denial of summary judgment. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be determined as a matter of law."

---

[4] The Estate initially appeared to assert federal civil rights claims against the ISP, and Carter, Hillman, and Mann in their official capacities. Later filings and the trial court's summary judgment order clarify that the civil rights claims were solely against Carter, Hillman, and Mann in their individual capacities. Appealed Order at 13; Appellants' App. Vol. 3 at 114.

Lamb v. Mid Ind. Serv. Co., 19 N.E.3d 792, 793 (Ind. Ct. App. 2014). "The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Mint Mgmt., LLC v. City of Richmond*, 69 N.E.3d 561, 564 (Ind. Ct. App. 2017); Ind. Trial Rule 56(C). Summary judgment is a "high bar" for the moving party to clear in Indiana. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014). If "the moving party satisfies this burden through evidence designated to the trial court, the non-moving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial." *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1089 (Ind. Ct. App. 2018) (quoting *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016), *trans. denied*), *trans. denied* (2019). "A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (citation and quotation marks omitted).

[19] We review a court's ruling on a summary judgment motion de novo, applying the same standard as the trial court. *Hughley*, 15 N.E.3d at 1003."In conducting our review, we consider only those matters that were designated to the trial court during the summary judgment stage." *Lowrey v. SCI Funeral Servs., Inc.*, 163 N.E.3d 857, 860 (Ind. Ct. App. 2021), *trans. denied*. "In determining whether issues of material fact exist, we neither reweigh evidence nor judge

witness credibility [but] accept as true those facts established by the designated evidence favoring the non-moving party." *Id*. (citations omitted). "Any doubts as to any facts or inferences to be drawn from those facts must be resolved in favor of the nonmoving party." *Denson v. Est. of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct. App. 2018). However, "[m]ere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment." *Biedron*, 106 N.E.3d at 1089. In the summary judgment context, we are not bound by the trial court's findings of fact and conclusions thereon, but they aid our review by providing the reasons for the trial court's decision. *Howard Cnty. Sheriff's Dep't & Howard Cnty. 911 Commc'ns v. Duke*, 172 N.E.3d 1265, 1270 (Ind. Ct. App. 2021), *trans. denied*. The party that lost in the trial court bears the burden of persuading us that the trial court erred. *Biedron*, 106 N.E.3d at 1089.

[20] "The statute of limitations defense is particularly suitable as a basis for summary judgment." *Myers v. Maxson*, 51 N.E.3d 1267, 1276 (Ind. Ct. App. 2016), *trans. denied*. "The general purpose of a statute of limitation is to encourage the prompt presentation of claims." *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 689 (Ind. Ct. App. 2006). "They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Id*. A plaintiff is not required to plead matters to avoid a statute of limitations defense. *Biedron*, 106 N.E.3d at 1089. However, when the opposing party moves for summary judgment based on the statute of limitations as an affirmative defense and makes a prima facie showing

that the action was commenced after the statutory period, "the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense." *Id*. (quoting *Myers*, 51 N.E.3d at 1276).

Section 1 – The Estate has failed to establish an issue of fact material to its fraudulent concealment theory.

[21] The Estate alleged claims for wrongful death against the ISP and Mann and violations of federal civil rights under 42 U.S.C. §§ 1981, 1985(3), and 1986 against Superintendent Carter, Major Hillman, and Mann in their individual capacities. The Estate did not file its action against the State Defendants until five years after Washington's death and four years after the last Board finding was submitted to and accepted by Superintendent Carter. Wrongful death actions are governed by Indiana Code Section 34-23-1-1, which provides that "when the death of one is caused by the wrongful act or omission of another," the decedent's personal representative "shall" commence an action within two years. Ind. Code § 34-23-1-1. 42 U.S.C. § 1981 does not state a cause of action against public employees independent from § 1983. *Barnes v. Bd. of Trs. of Univ. of Illinois*, 946 F.3d 384, 389 n.1 (7th Cir. 2020) ("§ 1983 is 'the exclusive remedy for violations of § 1981 committed by state actors.'") (quoting *Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, 752 F.3d 665, 671 (7th Cir. 2014)). Assuming that the Estate had properly brought its § 1981 claim as a § 1983 claim, we apply the statute of limitations for a cause of action under § 1983. Claims under §§ 1983 and 1985(2) and 1985(3) are essentially actions in tort and thus borrow the forum state's limitation period for personal injury actions.

Id. at 667. In Indiana, the statutory limitation for personal injury claims is two years. *Riddle v. Khan*, 168 N.E.3d 1017, 1023 (Ind. Ct. App. 2021); *Parks v. Madison Cnty.*, 783 N.E.2d 711, 718 (Ind. Ct. App. 2002), *trans. denied* (2003); Ind. Code § 34-11-2-4. Claims under § 1986 must be brought within one year. 42 U.S.C. § 1986 ("But no action under the provision of this section shall be sustained which is not commenced within one year after the cause of action has accrued."). "Civil rights claims … accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992); *see also Convention Hdqtrs. Hotels, LLC v. Marion Cnty. Assessor*, 132 N.E.3d 77, 82 (Ind. T.C. 2019) ("Although Indiana law determines the applicable statute of limitations, federal law determines when a Section 1983 claim … accrues."). The State Defendants assert that the Estate's federal civil rights actions accrued when Arnos learned that Washington had been shot. The State Defendants further assert that the Estate filed its action after the limitation periods had run on its wrongful death and civil rights claims. The Estate argues that the applicable limitation periods were tolled based on the doctrine of fraudulent concealment.

[22] Under the doctrine of fraudulent concealment, a person is estopped from asserting the statute of limitations as a defense if that person, "by deception or violation of a duty, has concealed material facts from the plaintiff thereby preventing discovery of a wrong." *Hughes v. Glaese*, 659 N.E.2d 516, 519 (Ind. 1995). In *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1264-65 (Ind. 2014), our supreme court held that the fraudulent concealment statute, Indiana

Code Section 34-11-5-1, may apply to toll the limitation period for a wrongful death action.[5] The statute of limitations for the Estate's federal civil rights claims may also be tolled by Indiana's fraudulent concealment law. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992).

[23] Section 34-11-5-1 provides, "If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action." "The fraudulent concealment statute operates to delay accrual of an action and the commencement of the limitations period when the defendant has concealed the existence of the cause of action from the plaintiff." *Farmers Elevator Co. of Oakville v. Hamilton*, 926 N.E.2d 68, 79 (Ind. Ct. App. 2010), *trans. denied*. If a plaintiff proves that Section 34-11-5-1 applies, "it effectively moves the date on which the statute of limitation begins to run forward from the date of the alleged tort to the discovery date."[6] *Alldredge*, 9

---

[5] In *Alldredge*, our supreme court recognized that Indiana Code Section 34-23-1-1 is a nonclaim statute, rather than a statute of limitation. 9 N.E.3d at 1261, 1264-65. We note that a "nonclaim statute creates a right of action if commenced within the statutory period, whereas a statute of limitation creates a defense to an action brought after the expiration of the statutory period." *Biedron*, 106 N.E.3d at 1090 n.6. Because fraudulent concealment may toll the limitation period of a wrongful death claim, we use the terms interchangeably here.

Our supreme court has acknowledged "an ostensible tension" between *Alldredge* and cases that have stated that nonclaim statutes are not subject to equitable exceptions. *Blackford v. Welborn Clinic*, 172 N.E.3d 1219, 1225 n.3 (Ind. 2021) (citing *Est. of Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997)). The *Blackford* court did not have to resolve that potential conflict, and our supreme court has yet to consider it. The parties rely on *Alldredge* as the most recent statement of the law, as do we.

[6] Section 34-11-5-1 codified the common-law fraudulent concealment doctrine. *Alldredge*, 9 N.E.3d at 1261. Although neither party cites this statute, the trial court found that the Estate relied on it, Appealed Order at 10, and the Estate relies on *Alldredge*, which dealt with the application of the statute to wrongful death claims, in support of its argument. Appellees' Br. at 23.

N.E.3d at 1262. Our supreme court has explained the statute's application as follows:

> Usually, to invoke the protection provided by this statute, the wrongdoer must have actively concealed the cause of action and the plaintiff is charged with the responsibility of exercising due diligence to discover the claims. The affirmative acts of concealment must be calculated to mislead and hinder a plaintiff from obtaining information by the use of ordinary diligence, or to prevent inquiry or elude investigation. There must be some trick or contrivance intended by the defrauder to exclude suspicion and prevent inquiry. But if the parties are in a fiduciary relationship such that the defendant had a duty to disclose the existence of the claim to the plaintiff, the concealment need not be active; the defendant's failure to fulfil that duty may be sufficient to invoke the protection of the statute.

Id. (citations and quotation marks omitted).

[24] "There are two types of fraudulent concealment, active and passive." *GYN-OB Consultants, LLC v. Schopp*, 780 N.E.2d 1206, 1210 (Ind. Ct. App. 2003), *trans. denied*. Although the Estate does not specifically identify in its brief which type of fraudulent concealment it is relying on, it appears to be active fraudulent concealment. *See* Appellants' App. Vol. 3 at 111 (the Estate's summary judgment response describing what trial court should consider in determining whether active concealment occurred). "Active concealment involves affirmative acts of concealment intended to mislead or hinder the plaintiff from obtaining information concerning the [wrongful act]." *Schopp*, 780 N.E.2d at 1210. "[T]here must be some affirmative act which amounts to more than passive silence." *French v. Hickman Moving & Storage*, 400 N.E.2d 1384, 1389

(Ind. Ct. App. 1980). To establish active fraudulent concealment, the plaintiff must show that "the defendant (1) had actual knowledge of the alleged wrongful act and (2) intentionally concealed it from the plaintiff (3) by making some statement or taking some action calculated to prevent inquiry or to mislead (4) upon which the plaintiff reasonably relied." *Lyons v. Richmond Cmty. Sch. Corp.*, 19 N.E.3d 254, 260-61 (Ind. 2014) (citations and quotation marks omitted). "For the doctrine of fraudulent concealment to apply, Indiana law requires … a showing of reasonable care and due diligence on the part of the plaintiff." *Doe v. United Methodist Church*, 673 N.E.2d 839, 844 (Ind. Ct. App. 1996), *trans. denied* (1997).

[25] The State Defendants contend that the Estate cannot rely on fraudulent concealment to toll the limitation periods because the undisputed facts show that the Estate failed to exercise due diligence to investigate a possible claim, and the Estate has not designated evidence showing that the State Defendants intentionally concealed Mann's shooting of Washington from the Estate by making some statement or taking some action calculated to prevent inquiry or to mislead upon which the Estate reasonably relied. The Estate asserts that the State Defendants took two affirmative actions that were intended to conceal any wrongdoing and were misleading: the prosecutor's public announcement that no criminal charges would be filed against Mann and Superintendent Carter's appointment of a new chairman to the Board to amend the April 4 Finding, which was not authorized by the SOP. Our review of the record does not reveal any designated evidence that indicates that the ISP's actions misled

Arnos or prevented her from inquiring into the possibility of a claim or that Arnos reasonably relied on any of the ISP's actions.

[26] The designated evidence shows that in May 2012, ISP issued a news release information form that announced to the public that Washington was shot and killed by a trooper, the date and location of the shooting, and that the shooting was under investigation. This was an accurate statement, and the Estate does not allege otherwise. Arnos learned of the shooting in the news media. She contacted the coroner's and prosecutor's offices to obtain information about the shooting, to no avail. In February 2013, the prosecutor's office then announced the results of its investigation of the shooting, stating that an "altercation" between Washington and Mann occurred that resulted in Washington's death and that no charges would be brought because there was insufficient evidence of criminal liability. Appellants' App. Vol. 3 at 244. Arnos did not follow up with the prosecutor or ever contact the ISP. The Estate asserts that "[b]ased upon these reports and the lack of any factual basis to make a complaint for wrongful death, Arnos did not file a claim against Mann or the [ISP] at the time of Washington's death or within two years thereafter." Appellees' Br. at 19. The Estate contends that the prosecutor's description of the interaction between Mann and Washington as an "altercation" was false, and that "the ISP caused the news media to publish a report that there was an altercation." *Id*. at 23.

[27] The designated evidence may support different conclusions as to whether characterizing Mann and Washington's interaction as an "altercation" is accurate, but the Estate does not direct us to any evidence that the ISP "caused"

the prosecutor's office to describe the incident in this way. For the Estate to rely on fraudulent concealment, there must be some evidence that *the State Defendants* made a statement or took some action to mislead her, and there is no designated evidence showing or supporting an inference that the State Defendants had any involvement in the prosecutor's announcement. Any of the ISP's actions related to the organization of the Board occurred after the prosecutor's announcement and therefore could not have had any effect on the prosecutor's investigation. Moreover, fraudulent concealment requires that the plaintiff reasonably rely on the defendant's statement or conduct, and the Estate provides no cogent argument or case law to support the novel notion that the doctrine applies to statements or conduct by third parties. Therefore, this argument is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (failure to present cogent argument waives issue for appellate review), *trans. denied*.

[28] In March 2013, after the prosecutor's announcement, Superintendent Carter convened the Board to review Washington's shooting. The primary intent of the Board was to determine whether "there is a training deficiency in the actions that the employee took" and whether there is "something there that [the

Board] need[s] to identify that can may prevent a … similar incident[.]"[7] Appellants' App. Vol. 2 at 135-36. In the April 4 Finding, the five Board members appointed pursuant to the SOP concluded that Mann had not followed ISP policies and procedures in the moments before and after the shooting and that he should be referred for possible disciplinary action. The April 4 Finding was the only finding submitted to Superintendent Carter that was issued by a Firearms Review Board that was properly organized pursuant to the SOP. Superintendent Carter removed the Board's chairperson and replaced him with Major Hillman to rewrite the Board's finding to narrow the focus of the finding to the shooting. The SOP does not specifically authorize this procedure. The April 29 Finding issued by the unauthorized Board omitted all the findings related to Mann's violations of ISP policy and procedure. Major Johnson and two other Board members did not agree that the original finding should be amended.

[29] The Estate contends that this evidence supports an inference that Superintendent Carter intentionally took these unauthorized actions "to avoid disciplinary action against Mann, which could result in public disclosure of his wrongful action." Appellees' Br. at 24. According to the Estate, as a result of the unauthorized actions, the facts of Mann's violations of procedure and policy

[7] The State Defendants argue that "the purpose of the [Board] is to determine whether or not [the shooting] was objectively reasonable," and Mann's actions before and after the shooting "had nothing to do with that moment in time." Appellant's Br. At 9-10 (citing Appellants' App. Vol. 3 at 220-21). However, we must consider the evidence favorable to the Estate as the non-movant.

were concealed from Arnos and the public. Regardless of the ISP's alleged motive in taking allegedly unauthorized actions, the designated evidence shows that Arnos was not misled or prevented from investigating the possibility of a wrongful death claim by these actions. Arnos makes no assertion that the ISP was required to provide public notice of the Board's activities, and she does not argue that passive fraudulent concealment applies, which would require that there be a fiduciary relationship between her and the ISP. *See Alldredge*, 9 N.E.3d at 1262 ("[I]f the parties are in a fiduciary relationship such that the defendant had a duty to disclose the existence of the claim to the plaintiff, the concealment need not be active)." And Arnos never contacted the ISP or requested records regarding the shooting.[8] Because she did not contact the ISP, the ISP could not have intentionally concealed information from her by making a statement or taking an action to mislead her upon which she reasonably relied. *Cf. Lyons*, 19 N.E.3d at 261 (concluding summary judgment inappropriate on parents' claims of negligence, wrongful death, and federal civil rights violations against school for child's choking death where parents designated evidence that assistant school principal told parents that child had

[8] The Estate asserts that any inquiry by Arnos would have been a useless act because no information could or would have been provided. Presumably, this assertion is based on counsel's request for records of the investigation and the denial of that request pursuant to Indiana Code Section 5-14-3-4(b)(1), which provides that "investigatory records of law enforcement agencies" are excepted from the Access to Public Records Act in Section 5-14-3-3. We observe that law enforcement recordings are not excepted from the Access to Public Records Act. Ind. Code § 5-14-3-4. In addition, a public agency's denial of disclosure of an exception to Section 5-14-3-3 may be challenged pursuant to Indiana Code Section 5-14-3-9. The Estate did not pursue any of these avenues.

been deprived of oxygen for a very short time when it may have been as long as twenty minutes).

[30] The Estate failed to file its complaint within the applicable limitation periods. In response to the State Defendants' summary judgment motion that its complaint was untimely, the Estate was required to designate evidence showing that there was an issue of material fact regarding whether State Defendant's fraudulently concealed material facts from Arnos that prevented her discovery of a claim. However, the Estate failed to designate evidence to show that the State Defendants took an affirmative act upon which Arnos reasonably relied intended to mislead her or prevent her inquiry into the possibility of a claim and that Arnos exercised due diligence to investigate the possibility of a claim. Accordingly, the trial court erred by denying the State Defendants' summary judgment based on fraudulent concealment.[9]

Section 2 – The Estate's federal civil rights claims also fail on the merits.

[31] In its complaint, the Estate alleged two counts of federal civil rights violations against Superintendent Carter, Major Hillman, and Mann in their individual capacities. First, citing 42 U.S.C. § 1981, the Estate alleged that the killing of

---

[9] The case relied on by the Estate, *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), is distinguishable. There, after the police shot the decedent, they placed a knife in the decedent's hand. *Id*. at 1215-16. When the decedent's sister learned about the shooting on the news, she and the decedent's other siblings went to the police station, and the police told them that the decedent was armed with a knife and showed them the knife. *Id*. at 1217. Police also told reporters that the decedent had "slashed" at the officer with the knife, and this account was reported. *Id*. at 1219.

Washington and concealment of facts surrounding his death constituted discrimination on the basis of race and were part of a pattern and practice of Superintendent Carter demonstrating his disparate treatment of black citizens and employees and that this pattern discriminated against Arnos and Cameron by denying them equal protection and due process of law. Appellants' App. Vol. 2 at 36-37. In addition, under 42 U.S.C. §§ 1981, 1985, and 1986, the Estate alleged that the actions of Superintendent Carter and other state officials and officers of the ISP to cover up the truth about Washington's death constituted a conspiracy based in part "on racial bias and discrimination against blacks" and denied Arnos and Cameron the equal protection of the laws. *Id*. at 38.

[32] Turning first to the Estate's claim based solely on § 1981, we observe that § 1981 "prohibits racial discrimination in the making and enforcement of private as well as public *contracts*." *Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, 752 F.3d 665, 668 (7th Cir. 2014) (emphasis added); *see also Brant Constr. Co. v. Lumen Constr. Co.*, 515 N.E.2d 868, 873 (Ind. Ct. App. 1987) (finding cause of action where plaintiff alleged that defendant's performance on construction project and refusal to offer required assistance prevented plaintiff from making and enforcing contracts), *trans. denied* (1988). Section 1981 also "affords a federal remedy against discrimination in private employment on the basis of race." *Campbell*, 752 F.3d at 668 (quoting *Runyon v. McCrary*, 427 U.S. 160, 172 (1976)). Significantly, § 1981 does not provide a remedy against state actors independent of § 1983. *Id*. ("The fact that Congress has created a specific

remedy against state actors under § 1983 … counsels against inferring a remedy against them under § 1981, even after the Civil Rights Act of 1991."); *see also Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731 (1989) ("Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981."). Therefore, the Estate's § 1981 claim against Carter, Hillman, and Mann fails on the merits as a matter of law, and therefore the trial court erred when it denied the State's motion for summary judgment on this claim.

[33] Even if we were to assume that the Estate had properly sought a remedy pursuant to § 1983 for alleged violations of the rights protected under its § 1981 claim, it would still fail. Section 1983 provides a civil remedy against any "person who, under color of state law, subjects a United States citizen to the deprivation of any rights, privileges, or immunities secured by the federal Constitution or federal laws." *City of Warsaw v. Orban*, 884 N.E.2d 262, 267 (Ind. Ct. App. 2007), *trans. denied* (2008). "[A] state official may be sued in his

or her individual capacity for retrospective relief under § 1983."[10] *Bd. of Trs. of Purdue Univ. v. Eisenstein*, 87 N.E.3d 481, 495 (Ind. Ct. App. 2017) (quoting *Chang v. Purdue Univ.*, 985 N.E.2d 35, 49 (Ind. Ct. App. 2013), *trans. denied* (2014)), *trans. denied* (2018); *Crawford v. City of Muncie*, 655 N.E.2d 614, 620 (Ind. Ct. App. 1995) ("A claimant may impose personal liability on a government official under § 1983 by demonstrating that the official, acting under color of state law, caused the deprivation of a federal right.") (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). "To prevail on a Section 1983 claim, 'the plaintiff must show that (1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under the color of state law.'" *Melton v. Ind. Athletic Trainers Bd.*, 156 N.E.3d 633, 649 (Ind. Ct. App. 2020) (quoting *Myers v. Coats*, 966 N.E.2d 652, 657 (Ind. Ct. App. 2012)), *trans. denied* (2021).

[34] As mentioned, § 1981 prohibits racial discrimination in the making and enforcement of contracts and private employment. However, the police shooting of Washington and the investigation and review of the shooting do not

---

[10] Five general rules have emerged regarding whether an entity is a "person" who may be sued within the meaning of § 1983:

> 1) a municipality, municipal official, or other local governmental unit or political subdivision may be sued for retrospective or prospective relief; 2) a state or state agency may not be sued under section 1983 regardless of the type of relief requested; 3) a state official cannot be sued in his official capacity for retrospective relief but can be sued for prospective relief; 4) a state official can be sued in his individual capacity for retrospective relief; and 5) an entity with Eleventh Amendment immunity in federal court is not considered a section 1983 "person" in state court.

Ross v. Ind. State Bd. of Nursing, 790 N.E.2d 110, 117 (Ind. Ct. App. 2003).

involve a contract with or employment of Washington. The Estate baldly contends that the SOP is a contract, but it provides no cogent argument or authority to support that contention. Therefore, this contention is waived. *See* Ind. Appellate Rule 46(A)(8)(a); *Loomis*, 764 N.E.2d at 668. We conclude that any claim that Washington's rights under § 1981 were violated fails on the merits.[11]

[35] As for the Estate's conspiracy claim under §§ 1981, 1985 and 1986, that also fails on the merits. Section 1985(3) is "a remedial statute that prohibits conspiracies to deprive a person of rights guaranteed by the Constitution or federal laws."[12] *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 641-42 (7th Cir. 2006), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013). It provides:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

---

[11] Based on the language of the Estate's complaint, it might appear that the Estate was not alleging any violation of rights under § 1981 but was alleging violations of equal protection and due process rights and simply mistakenly cited § 1981 instead of § 1983. However, the Estate does not make this argument.

[12] Subsections (1), which establishes a cause of action for conspiracy to interfere with the execution of an official's duties as an officer of the United States, and (2), which establishes a cause of action for conspiracy to obstruct justice or to intimidate a party, witness, or juror, are inapplicable.

42 U.S.C. § 1985(3). Four elements are required to establish a valid case under § 1985(3):

> (1) a conspiracy; (2) a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to his person or property or a deprivation of any right or privilege of a citizen of the United States.

Keri, 458 F.3d at 642 (quoting *Quinones v. Szorc*, 771 F.2d 289, 291 n.1 (7th Cir. 1985)). A violation of § 1986 requires a violation of § 1985. *Id*.

[36] The State Defendants assert that the Estate's claims are barred by the intracorporate conspiracy doctrine. Under this doctrine, "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (considering § 1985(3) claim against officers in the Department of Justice). The rationale for this principle is that "[w]hen two agents of the same legal entity make an agreement in the course of their official duties, ... their acts are attributed to their principal," and thus "there has not been an agreement between two or more separate people." *Id*. The United States Supreme Court "has not given its approval to this doctrine in the specific context of § 1985(3), [and t]here is a division in the courts of appeals … respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies." *Id*. at 1868. Given that the federal courts are divided as to whether a § 1985(3) conspiracy can arise from official discussions between or

among agents of the same entity, the *Ziglar* court observed that until it rules definitively on the issue, "a reasonable official lacks the notice required before imposing liability." *Id*. at 1868-69 (concluding that officers in Department of Justice would not have known with any certainty that § 1985(3) prohibited their alleged agreements).

[37] Here, Superintendent Carter, Major Hillman, and Mann all worked for the ISP, and therefore if the intracorporate conspiracy doctrine applies to public entities, they would not be subject to a § 1985(3) claim. Indiana courts have not addressed whether the intracorporate conspiracy doctrine applies to federal civil rights claims.[13] We need not decide whether the doctrine applies because, due to the division of the federal courts on this issue, Superintendent Carter, Major Hillman, and Mann lacked the notice required to subject them to liability. Accordingly, the § 1985(3) fails on the merits, as does the § 1986 claim. Therefore, the trial court erred by denying summary judgment to the State Defendants on the Estate's conspiracy claim.

---

[13] The Seventh Circuit Court of Appeals has held that the intracorporate doctrine applies to § 1985(3) claims. *See Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (conspiracy requirement in § 1985(3) "is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm."); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 109 (7th Cir. 1990) (extending *Dombrowski* to § 1985(2) claims); *Hartman v. Bd. of Trs. of Cmty. Coll. Dist. 508*, 4 F.3d 465, 470-71 (7th Cir. 1993) (extending *Dombrowski* to bar § 1985(2) claim against individual members of single government entity at least to extent that plaintiff "does not claim that the conspiracy was part of some broader discriminatory pattern ... or that it in any way permeated the ranks of the organization's employees."); *Wright v. Ill. Dep't of Child. & Fam. Servs.*, 40 F.3d 1492, 1508-09 (7th Cir. 1994) (affirming dismissal of plaintiff's claim and concluding that "except in egregious circumstances, intra-entity discussions that result in discriminatory or retaliatory actions lie outside the scope of § 1985.").

[38] We rule in favor of the State Defendants in all respects. Accordingly, we reverse.

[39] Reversed.

Bradford, C.J., and Tavitas, J., concur.