

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BRENDA BOHANAN,

Plaintiff,

v.

DOUGLAS COUNTY COMMISSIONER
KELLY G. ROBINSON,
in his individual and official capacities,

Defendant.

CIVIL ACTION
NO. 1:20-cv-02641-JPB

**DEFENDANT KELLY G. ROBINSON'S
MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT
AND MOTION TO STRIKE PLAINTIFF'S PUNITIVE DAMAGES CLAIM**

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INTRODUCTION

Defendant Kelly G. Robinson (“Robinson”) moves pursuant to Federal Rule of Civil Procedure 12(b)(1) and, alternatively, Rule 12(b)(6), for the Court to dismiss all claims asserted in Plaintiff Brenda Bohanan’s (“Bohanan”) Complaint. Bohanan alleges that Robinson violated her First and Fourteenth Amendment rights under the United States Constitution, as prohibited under 42 U.S.C. § 1983, because Robinson declined to grant Bohanan access to his personal Facebook page located at <https://www.facebook.com/kellyrobinsonsr> (“Personal Facebook Page”). Bohanan improperly seeks access to Robinson’s personal—and private—Facebook page by brashly asserting that she purportedly “has a constitutional right and desire to use the interactive features of [Robinson’ Personal Facebook Page] to engage in protected speech within this designated or limited public forum.” (Compl. ¶ 8-10.) But, Bohanan’s claims against Robinson—whether asserted in his individual or “official” capacity—must fail in their entirety for multiple reasons.

First, Bohanan lacks standing to bring this action because her claims are moot. As Bohanan admits, the Facebook page that is the subject of the Settlement Agreement, and which Bohanan asserts that she was entitled to access has been “shut down.” (*Id.* ¶ 53.) Thus, the Court cannot grant Bohanan access to that page, or provide “meaningful relief” in that regard. *See Al Najjar v. Ashcroft*, 273 F.3d

1330, 1336 (11th Cir. 2001) (if court cannot grant the plaintiff “meaningful relief”, the case is moot and must be dismissed for lack of subject matter jurisdiction).

Moreover, Bohanan’s attempt to gain access to Robinson’s Personal Facebook Page should similarly be dismissed as moot because Robinson’s Personal Facebook Page is not a “public forum.” Indeed, contrary to Bohanan’s false allegation¹ that Robinson undertook “a deliberate attempt to avoid compliance with the terms of the Settlement Agreement”, counsel for Robinson informed Bohanan’s counsel *before* Bohanan filed suit that Robinson intended to maintain a wholly personal Facebook account, and that any posts by Robinson directed at his role as a public official were being removed from the Personal Facebook Page. (*Id.* ¶¶ 58-59.; *see* Ex. 1., Correspondence Between S. Olens, C. Norins and G. Weber (“Correspondence”).² Counsel for Robinson also explained

¹ Pursuant to Rule 11(c)(2), counsel for Robinson has served counsel for Bohanan, Clare Norins (“Norins”) and Gerald Weber (“Weber”), with notice that the Complaint sets forth false allegations in violation of Rule 11(b)(3), and that Plaintiff’s suit was filed for an improper purpose in violation of Rule 11(b)(1). Despite counsel for Robinson raising the false allegations during a meet-and-confer with Norins and Weber on July 21, 2020, as of the date of this filing, Norins and Weber have failed to correct the pleading.

² The Court can consider the correspondence in this motion because the Complaint refers to the parties’ communications (Compl. ¶ 59.) and the authenticity of the document is not challenged. *See Lowman v. Platinum Prop. Mgmt. Servs., Inc.*, 166 F. Supp. 3d 1356, 1358 (N.D. Ga. 2016) (Where the complaint refers to a document, the extrinsic evidence of that document may be considered on a motion to dismiss); *see also U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 906 F. Supp. 2d 1264, 1271 (N.D. Ga. 2012) (same)).

that—to ensure that all items were removed—Robinson would cull through more than ten-years-worth of Facebook data, and that such an undertaking would take time to complete. (*Id.*) Indeed, counsel for Bohanan agreed that it was a “cumbersome process.” (*Id.*) Nevertheless, as Robinson was diligently, and in good faith, undertaking a review of his Facebook account, pursuant to the parties’ discussions, Bohanan filed the instant action falsely alleging that Robinson acted in “bad faith”, despite knowledge of facts refuting such assertions. (*Id.*; Compl. ¶ 68.)

Despite the false narrative that Bohanan puts before the Court—and the public, through her filing—the facts are markedly different. Robinson’s counsel expressly informed Bohanan’s counsel that Robinson was removing any postings related to his official duties. (*See* Ex. 1., Correspondence.) Robinson has now completed that process. (*See* Ex. 2., Declaration of Kelly G. Robinson (“Dec.”) ¶ 12.) Accordingly, Bohanan’s claims regarding access to Robinson’s Personal Page must also be dismissed as moot.

Second, Plaintiff’s claims are barred by equitable estoppel because Bohanan’s counsel acquiesced to the changes which Bohanan now impetuously, and wrongly, asserts violate her constitutional rights. (*See* Ex. 1., Correspondence) Robinson reasonably relied on discussions with Plaintiff’s counsel in continuing to search for, locate, and remove Facebook data to locate posts directed at his official role. Plaintiff cannot now seek damages for conduct her counsel acquiesced to.

Third, Bohanan has failed to state a claim upon which relief can be granted because Robinson's Personal Facebook Page is not a public forum—let alone a forum designated as such—limited or otherwise. Bohanan has no right to access Robinson's Personal Facebook Page as a matter of law. Accordingly, Bohanan cannot prevail on her claims, all of which allege a purported violation of Bohanan's constitutional rights stemming from Bohanan's incorrect assertion that she is entitled to access Robinson's Personal Facebook Page—unconnected to his role as commissioner, and limited to friends and family. Moreover, counsel for Bohanan's post-settlement statements waived any all such claims.

Finally, Bohanan is not entitled to declaratory relief because Bohanan cannot allege facts establishing an actual controversy, and Bohanan cannot plead facts showing that she is entitled to relief. Bohanan similarly cannot establish that she is entitled to injunctive relief because, among other reasons, Bohanan cannot prevail on the merits. As Bohanan is not entitled to access Robinson's Personal Facebook Page, she simply cannot establish the requisite harm.

In sum, Bohanan's claims should be dismissed for lack of subject matter jurisdiction. Independently, Bohanan's claims should also be dismissed because Bohanan cannot show that she is entitled to relief. Further, the Court should strike Bohanan's claim for punitive damages pursuant to Rule 12(f) because Bohanan has no reasonable basis to allege that Robinson acted in bad faith.

STATEMENT OF FACTS³

I. Background Facts

Bohanan is a citizen and resident of Douglas, Georgia. (Compl. ¶¶ 1, 7). Bohanan asserts that she wishes to engage in political speech via social media, such as Facebook, and that she has a constitutional right “to use the interactive features of [Robinson’s Personal Facebook Page] to express her own beliefs and viewpoints relating to matters of public concern.” (*Id.* ¶¶ 1,7, 10).

II. Robinson’s Facebook Pages.

Robinson currently maintains three separate Facebook accounts. The Complaint centers on three different Facebook accounts having belonged to Robinson.⁴ First, is Robinson’s Facebook account for his official duties as a Douglas County Commissioner (“Official Facebook Page”). (*Id.*; Dec. ¶ 7.) The Official Facebook Page is located at <https://www.facebook.com/commissionerkellyrobinsonofficial>. (*Id.*) The Official Facebook Page is a designated or limited public forum, that Robinson uses to communicate, or otherwise share information about his official duties. Bohanan admits that she has access to the Official Facebook Page. (Compl. ¶ 11.)

³ Unless otherwise contradicted, Robinson takes the well pleaded facts in the Complaint as true, for purposes of the present motion to dismiss only.

⁴ Robinson also maintains another Facebook page located at <https://www.facebook.com/reelectkellyrobinson>, (“Re-Elect Facebook Page”), that is not the subject of this lawsuit, and from which Bohanan is not blocked. (Dec. ¶ 18.)

Second, is Robinson's former Facebook page located at <https://www.facebook.com/commissionerkelly.robinson>, which he has since shut down ("Old Facebook Page"). (Compl. ¶ 12.; Dec. ¶¶ 9-10.) The Old Facebook Page initially contained only personal information related to Robinson's non-public life. But, over time, Robinson shared information related to his public office on the Old Facebook Page. (*Id.* ¶¶ 12-14).

Third, is Robinson's new Facebook created to interact with his friends and family ("Personal Facebook Page"). (Dec. ¶ 11.) The Personal Facebook Page is located at <https://www.facebook.com/kellyrobinsonsr>. (*Id.*) The Personal Page was created to draw a clear distinction between the limited or designated public forum on the Official Facebook Page and the Re-Elect Facebook Page, while still allowing Robinson to exercise his privacy rights, as a private citizen, and maintain a Facebook account for personal social purposes. (*Id.* ¶¶ 11, 16.) Bohanan is not blocked from Robinson's Personal Facebook Page, but Robinson and Bohanan are not connected as "friends" on his Personal Facebook Page. (*Id.* ¶¶ 16-17.)

III. Bohanan's Inappropriate Interactions with Robinson.

According to Bohanan, this case arises from comments posted to the "Douglasville & Douglas County for Civic Action" Facebook Group ("the Group"). (*Id.* ¶ 18-21). In 2015, Robinson engaged in a dialogue with several citizens the Group's Facebook page in an effort to respond to concerns raised by citizens.

(Compl. ¶¶ 18-24.; Doc. 1-4). Bohanan took issue with Robinson's comments, labelling them "dismissive," "clueless," "condescending." (Compl. ¶ 26). In response, the Commissioner suggested that if the Group or Bohanan did not wish to hear his legitimate responses to the Group's concerns they could delete his comments and block him. (*Id.* ¶ 28).

Bohanan alleges that thereafter, Robinson blocked her from his Old Facebook Page. (*Id.* ¶ 31.) According to Bohanan, in early 2020, new case law began addressing the issue of whether there is a constitutional right to access public officials' social media accounts. (*Id.* ¶ 33). In March 2020, Bohanan sent Robinson a demand letter seeking access to Robinson's Old Facebook Page. (*Id.* ¶ 37.)

Despite Bohanan's assertion that she was blocked from Robinson's Old Facebook Page stemming from discussions regarding an increased budget for a new animal shelter and tax implications for MARTA and GRTA measures, (*Id.* ¶ 22–25; *see also* Doc. 1-4), Bohanan's Complaint tellingly omits crucial facts.

Robinson, who is African-American, is legally blind. (Dec. ¶ 3.) In or around June 2015, Bohanan was the Administrator of a public Facebook group called the "Douglasville & Douglas County for Civic Action" ("the Group").⁵ (Dec. ¶ 19.) The Group's page, with Bohanan as Administrator, made veiled

⁵ The Group's Page was located at <https://www.facebook.com/groups/douglasco4civicaction/permalink/2538324246285186>, but the Group's page is no longer publically accessible.

comments about the growing African-American population in Douglas County and its government. (Dec. ¶ 20.) The type of language used on the Group’s page, and allowed by Bohanan as the Group’s Administrator, is what is sometimes referred to as “dog-whistle language.” (*Id.*) That is language that, while not overtly racist, is designed to stoke and foment the same racist sentiment and ideals in a more palatable or seemingly innocuous way. Such language is nonetheless hate speech under Facebook’s governing Community Standards. Facebook’s Community Standards addressing Hate Speech states:

We do not allow hate speech on Facebook because it creates an environment of intimidation and exclusion and in some cases may promote real-world violence. We define hate speech as a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability . . . We define attack as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, or calls for exclusion or segregation.

Under this definition of “Hate Speech,” Facebook instructs users: “Do not post.”⁶

Contrary to Facebook’s Community Standards addressing Hate Speech, overtly racist posts were also posted and allowed to remain on the Group’s page.

Bohanan is also a member of a group on Facebook called The Authority.⁷

⁶ Facebook Community Standards governing Hate Speech are available at https://www.facebook.com/communitystandards/hate_speech (last visited August 19, 2020.)

⁷ The Authority’s Facebook page is publically accessible at <https://www.facebook.com/The-Authority-298695796887002>.

(Dec. ¶ 23.) The Authority, and Bohanan, also post and maintain Hate Speech on their pages. Bohanan, or The Group, and the Authority also posted Hate Speech on Robinson’s Old Facebook Page—which Robinson deleted—or alternatively, Bohanan, or the groups, tagged Robinson in such posts making them visible on his Facebook timeline. (*Id.*) In or around 2015, after growing increasingly concerned by Bohanan, and her groups’, continued use of Hate Speech, Robinson blocked Bohanan from his Old Facebook Page. (*Id.* ¶¶ 23-24.)

IV. Douglas County Paid Bohanan \$750 to Avoid Litigation Expenses Associated With Defending Legally Deficient Claims.

In March 2020, Bohanan, through counsel, sent Robinson a demand letter. (Compl. ¶ 37.) In May 2020, despite the fact that the purported violation alleged by Bohanan occurred in or around 2015—three years after the statutory limitations period—Robinson and Douglas County entered into a settlement agreement and release with Bohanan (“Settlement Agreement”), to avoid the costs associated with defending against the legally deficient claims. (Compl. ¶ 39; Dec. ¶ 26.)

Pursuant to the terms of the Settlement Agreement, Douglas County paid Bohanan \$750.00; whereas Bohanan’s attorneys received \$1,750.00. (Doc. 1-3, Settlement Agreement, at 1.) Robinson expressly denied any liability to Bohanan and also affirmed that “there is no factual or legal basis for the allegations and claims.” (*Id.*) Nevertheless, Robinson agreed to provide Bohanan with access to “the Facebook Account ‘commissionerkelly.robinson.’” (*Id.*) The parties also

agreed that the Settlement Agreement was not an “admission” that Robinson had “acted contrary to the law or violated the rights of [Bohanan].” (*Id.*)

V. Robinson’s Current Use of Facebook.

Robinson ultimately determined that it was prudent to have a clear demarcation between his personal social media pages, and those that could be associated with his role as a public official. (Dec. ¶ 11.) He elected to maintain his Official Facebook Page and Re-Elect Facebook Page for use in his role as a public official. (*Id.* ¶¶ 7-11, 18.) Thus, Robinson shut down his Old Facebook Page, and created a new Personal Facebook Page to interact with his friends and family. (*Id.*)

Robinson’s Official Facebook Page and Re-Elect Facebook Page are used to communicate, or otherwise share information about his official duties as a Douglas County Commissioner, and Bohanan has access to the Official Facebook Page and Re-Elect Facebook Page. (*Id.*; Compl. ¶ 11.) The Official Facebook Page and the Re-Elect Facebook Page are limited or designated public forums to engage Robinson’s constituents.

Robinson’s Personal Facebook Page was created to draw a clear line between the limited or designated public forum found on the Official Facebook Page and Re-Elect Facebook Page, while still allowing Robinson to exercise his privacy rights as a private citizen in maintaining a Facebook account for social purposes. (Dec. ¶ 11.) Although Robinson’s Personal Facebook Page initially

contained some “public” content because material was migrated from his Old Facebook Page, Robinson undertook the laborious task of culling through his entire Facebook account, through inception, to remove any posts he had made that related to his public office. (*Id.* ¶¶ 12-14.) As of the date of this filing, there is nothing on Robinson’s Personal Facebook Page that relates to his official duties as a Commissioner. (*Id.*) Instead, Robinson uses his Personal Facebook Page solely to interact with friends and family. (*Id.*) Public forum discussions are maintained on Robinson’s Official Facebook Page and Re-Elect Facebook Page. (*Id.* ¶¶ 7, 18.)

LEGAL STANDARD

I. Dismissal for Lack of Subject Matter Jurisdiction.

A court must dismiss a complaint pursuant to Rule 12(b)(1) when the court lacks jurisdiction to consider the claims. “Federal courts are courts of limited jurisdiction.” *Gardner v. Mutz*, 962 F.3d 1329, 1336 (11th Cir. 2020) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). “The most notable—and most fundamental—limits on the federal ‘judicial Power’ are specified in Article III of the Constitution, which grants federal courts jurisdiction only over enumerated categories of ‘Cases’ and ‘Controversies.’” *Gardner* 962 F.3d at 1336 (citing U.S. Const. art. III, § 2).

The case-or-controversy requirement comprises the following “strands”: (1) standing, (2) ripeness, and (3) mootness. *Id.* (citing *Christian Coal. of Fla., Inc. v.*

United States, 662 F.3d 1182, 1189 (11th Cir. 2011)). A mootness argument is “properly brought under Rule 12(b)(1),” and the Court may consider extrinsic evidence in determining mootness. *Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1308-09 (11th Cir. 2011).

“Because standing to sue implicates jurisdiction, a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting.” *Gardner*, 962 F.3d at 1338-39.

II. Dismissal for Failure to State a Claim.

A court must dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the facts alleged do not entitle the plaintiff to relief. “[A plaintiff’s] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1333 (11th Cir. 2011) (first quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008); then quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the well pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). “Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250 (11th Cir. 2004) (citing *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT AND CITATION TO AUTHORITY

The Court lacks subject matter jurisdiction over Bohanan's claims because Bohanan has failed to present a justiciable controversy. To the contrary, the allegations in the Complaint show that Bohanan's claims are moot. Bohanan plainly pleads that Robinson has denied her access to a Facebook page that has been "shut down." (Compl. ¶ 53.) Clearly, neither the Court, nor Robinson, can grant Bohanan access to a defunct Facebook page, thereby mooting Bohanan's claims. Moreover, Bohanan's attempt to forcibly gain access to Robinson's Personal Facebook Page is similarly mooted because Robinson's Personal Facebook page is not a designated or limited public forum. (Dec. ¶¶ 12, 15-16.)

Moreover, and as independent grounds for dismissal, the Complaint fails to plead a cognizable claim. Bohanan's Complaint contains conclusory assertions of a purported breach of Bohanan's First and Fourteenth Amendment rights, but the facts pleaded belie Bohanan's claims. The purportedly offending content from Robinson's Personal Page, which Bohanan alleges she has a "constitutional right and desire to receive", is no longer there. (*Id.*; Compl. ¶ 9.) In short, Bohanan cannot show that she has a constitutional right to access Robinson's Personal Facebook Page. Bohanan has also failed to plead a legally cognizable breach of contract claim. Therefore, pursuant to Rules 12(b)(1), and alternatively, 12(b)(6) this Court should dismiss the Complaint in its entirety.

I. The Court Lacks Subject Matter Jurisdiction to Consider Bohanan's Claims.

This Court should dismiss the Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Dismissal is proper because Bohanan's claims are moot. "A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief." *Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1308. "In order for there to be a real case or controversy, ... the issues in play at the outset must remain alive." *Gagliardi v. TJC Land Trust*, 889 F.3d 728, 733 (11th Cir. 2018). The "mootness doctrine ensures that a justiciable case or controversy is present 'at all stages of review.'" *Id.* "One 'event' that may moot a claim is when the defendant [voluntarily] ceases the behavior on which a claim is based." *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1270 (N.D. Ga. 2019).

Here, the Facebook page that is the subject of the Settlement Agreement, and which Bohanan sought access to pursuant to that agreement, is no longer operational. (Compl. ¶ 53; Dec. ¶ 9.) Thus, the Court cannot afford Bohanan with access. *See e.g. Keevan v. Smith*, 100 F.3d 644, 646 (8th Cir. 1996) (Court vacated as moot the district court's order addressing prisoner access to the educational programs because the Bureau of Prisons closed the program, therefore, the court could no longer order equitable access to a program that did not exist). Thus,

Bohanan's claims stemming from her inability to access Robinson's Old Facebook Page must be dismissed as moot.

Moreover, Bohanan's attempt to forcibly gain access to Robinson's Personal Facebook Page must also be dismissed as moot. Robinson's Personal Page is not a public forum, in any fashion or form. (Dec. ¶¶ 11-16.) Rather, it is personal page to communicate on personal and social matters with friends and family. (*Id.*) Indeed, not only was Bohanan informed that Robinson's Personal Page is intended for private and personal use *before* filing suit, but Bohanan admits that Robinson "is free to create a new Facebook page on which he only posts content unrelated to his activities as a Douglas County Commissioner." (Compl. ¶ 67.)

Further, Robinson's affirmance that his Personal Facebook Page does not contain his postings related to his public role warrants dismissal. *See Al Najjar*, 273 F.3d at 1336 (holding, if events subsequent to the filing of a lawsuit deprive the court of the ability to give the plaintiff meaningful relief, the case is moot and must be dismissed for lack of subject matter jurisdiction.) Thus, Bohanan's claims stemming from Robinson's purported refusal to grant Bohanan access to his Personal Facebook Page must be dismissed as moot.

II. Bohanan's Complaint Should Be Dismissed Failure to State a Claim

A. Bohanan's Claims Are Barred by the Statute of Limitations.

Bohanan's claims brought pursuant to 42 U.S.C. § 1983 are barred by the statute of limitations. Section 1983 claims must be brought within two years from when the Bohanan learned or the purported injury, or had reason to know of the purported injury. *See e.g. Blue Ridge Mountain Fisheries, Inc. v. Dept. of Nat. Resources*, 217 Ga. App. 89, 94 (1995) (“In Georgia, OCGA 9-3-33 provides the period of limitation for § 1983 claims” and “allows two years after the right of action accrues, which occurs upon the infliction of injury.”)

Robinson blocked Bohanan from his Old Facebook Page in or around 2015. (Compl. ¶¶ 21-31, Dec. ¶ 24.) Bohanan filed her Complaint on June 22, 2020. Accordingly, any purported violations of section 1983 occurring before June 22, 2018 are time barred. *See Blue Ridge Mountain Fisheries*, 217 Ga. App. at 94 (§ 1983 claims have a two year statute of limitations). Thus, Bohanan's section 1983 claims stemming from Robinson's conduct in 2015 are barred by operation of law.

B. Plaintiff's Claims Are Barred By the Doctrine of Equitable Estoppel.

Plaintiff's claims are barred by equitable estoppel because Bohanan's counsel acquiesced to the changes which Bohanan now impetuously, and wrongly, asserts violate her constitutional rights, and purportedly breached the Settlement Agreement. “[T]he elements of federal common law equitable estoppel in this circuit are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended

that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.”). *Dawkins v. Fulton Cty. Gov't*, 733 F.3d 1084, 1089 (11th Cir. 2013). Misrepresentation can be in the form of “misleading words, conduct, or silence.” *Harod v. Sage Prod., Inc.*, 188 F. Supp. 2d 1369, 1379 (S.D. Ga. 2002).

Here, Bohanan’s counsel, through her words, conduct and silence, acquiesced to Robinson’s post-settlement remediation. Bohanan cannot now take a contrary position to that of her counsel. (Ex. 1., Correspondence.); *see In re Pullen*, 451 B.R. 206, 210 (Bankr. N.D. Ga. 2011) (finding that letters from attorney could be basis for equitable estoppel argument in FDCPA suit).

Robinson relied on the discussions with Bohanan’s counsel in continuing the labor intensive task of reviewing more than ten-years-worth of Facebook data to locate posts directed at his official role. (Dec. ¶ 14.) Bohanan knew that Robinson would rely on such discussions, because Robinson’s counsel affirmed that Robinson was continuing to undertake a review of his Personal Facebook Page. (*See* Correspondence.) Robinson’s reliance was reasonable because an ordinary person would have no basis to believe that an academic professional, such as Bohanan’s counsel, would file suit asserting that the same conduct acquiesced to,

is violative of the Constitution just nineteen days later. Robinson's reliance on Bohanan's counsel has been to his detriment as it has not only subjected him to the instant action, but the associated negative press, including public commentary from Bohanan's counsel, that fails to disclose the true nature of the parties' discussions, has caused him harm.⁸ Thus, as a matter of fairness, the Court should dismiss Plaintiff's Complaint in its entirety under the doctrine of equitable estoppel.

C. Bohanan's Claims Against Robinson in His Official Capacity Are Barred By Qualified Immunity.

Bohanan's damages claims are independently barred by the doctrine of qualified immunity. "Qualified immunity shields public officials from liability ... when their conduct does not violate a constitutional right that was clearly established at the time of the challenged action." *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019). A qualified immunity arises when a public official

⁸ See e.g. Clinic files lawsuit for Douglas County resident blocked from County Commissioner's Facebook page after Commissioner breaches settlement agreement (updated June 2020), available at <https://firstamendment.law.uga.edu/clinic-wins-settlement-for-douglas-county-resident-blocked-from-county-commissioners-facebook-page/>; Blocked On Facebook, Douglasville Woman Sues County Commissioner, available at <https://news.yahoo.com/blocked-facebook-douglasville-woman-sues-185613952.html>; Federal lawsuit filed against Robinson: Bohanan: Commissioner still violating First Amendment, breached contract, available at https://www.douglascountysentinel.com/newsletter/federal-lawsuit-filed-against-robinson-bohanan-commissioner-still-violating-first-amendment-breached-contract/article_b12cca82-7517-5e9d-8c5b-a06ed26f83f0.html. (last visited August 21, 2020.)

establishes that his or her actions, as alleged in the complaint, were within the scope of his or her discretionary authority. *Mathews v. Crosby*, 480 F.3d 1265, 1269 (11th Cir. 2007); *Mercado v. City of Orlando*, 407 F.3d 1152, 1156 (11th Cir. 2005) (same). Once it has been established that the official was engaged in a discretionary duty, the burden shifts to the plaintiff to establish “[1] that the defendant committed a constitutional violation and [2] that the law governing the circumstances was already clearly established at the time of the violation.” *Youmans v. Gagnon*, 626 F.3d 557, 562 (11th Cir. 2010); see *Grider v. City of Auburn*, 618 F.3d 1240, 1254 (11th Cir. 2010) (same). Bohanan must satisfy “[b]oth elements of [the two-pronged analysis] for [Robinson] to lose qualified immunity.” (*Id.*)

Here, Robinson was acting in his discretionary authority when he operated the Old Facebook Page. The Old Facebook Page was not a “government” Facebook page; and was created by Robinson using his personal email address. (Dec. ¶ 10.) Robinson had access to the Old Facebook Page in his capacity as a private citizen, and used the Old Facebook Page to express his own views. (*Id.*) Also, the Old Facebook Page was not endorsed, sanctioned, monitored or otherwise affiliated with Douglas County. (*Id.*) In short, Robinson ran and maintained the Old Facebook Page entirely within his personal discretion. Accordingly, Robinson’s actions are subject to qualified immunity.

Bohanan cannot overcome Robinson’s qualified immunity because the purported illegality of the conduct was not clearly established in 2015. To be clearly established, a rule must “have a sufficiently clear foundation in then-existing precedent” such that it would be “clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.” *D.C. v. Wesby*, 138 S. Ct. 577, 589–90 (2018). To demonstrate that a constitutional right is “clearly established,” the party opposing qualified immunity must identify “a controlling case or robust consensus of cases” finding a constitutional violation “under similar circumstances.” *Id.* at 591 (citation omitted). In other words, “existing precedent must have placed the constitutional question beyond debate.” *Beckman v. Hamilton*, 731 Fed. App’x 737, 740 (11th Cir. 2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Bohanan clearly fails this inquiry. By her own admission, the applicable body of law is just recently “growing.” (Compl. ¶ 33.) There exists no precedent of the Supreme Court, Eleventh Circuit, or Georgia Supreme Court addressing the constitutionality of the conduct challenged here. *See Santana v. Miami-Dade County*, 688 F. App’x 763, 773 (11th Cir. 2017) (finding “fair warning [may be] provided by materially similar precedent from the Supreme Court, [the Eleventh Circuit], or the highest state court in which the case arose.”) (citing *Terrell v. Smith*, 668 F.3d 1244, 1256 (11th Cir. 2012)). Indeed, the most widely reported

decision addressing public access of non-government social media accounts of elected officials—that is inapposite and not controlling here—was decided in 2019, four years after Robinson blocked Bohanan. *See Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019) (finding President Trump violated the First Amendment when he blocked the plaintiffs for posting messages critical of him and his policies).⁹ Therefore, Robinson is entitled to qualified immunity.

Finally, and independently dispositive on this issue, Bohanan cannot establish a constitutional violation. *See Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009) (a court need not determine whether a constitutional violation occurred where it is shown that the alleged constitutional right was not clearly established). As discussed above, Robinson’s Personal Page is not a public forum. *Supra* at 14-15. Accordingly, Robinson cannot establish a constitutional violation. Thus, Bohanan’s claims against Robinson in his official capacity, and against the Douglas County Commissioners, are barred by qualified immunity.

⁹ On August 20, 2020, the U.S. Department of Justice filed a Petition for Writ of Certiorari asking the Supreme Court of the United States to review the decision, explaining that “[t]he result of the court of appeals’ novel ruling will be to jeopardize the ability of public officials—from the President of the United States to a village councilperson—to insulate their social-media accounts from harassment, trolling, or hate speech without invasive judicial oversight.” Available at https://www.supremecourt.gov/DocketPDF/20/20-197/150726/20200820102824291_Knight%20First%20Amendment%20Inst.pdf. (last visited August 24, 2020).

D. Bohanan Has Failed to Establish That Robinson Breached the Settlement Agreement.

Bohanan has failed to plead a cognizable breach of contract claim. Bohanan must show “(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken.” *Norton v. Budget Rent a Car Sys.*, 307 Ga. App. 501, 502 (2010). Bohanan has not—and cannot—allege facts establishing a breach of the Settlement Agreement. The Settlement Agreement only governed Robinson’s Old Facebook Page, but that page is no longer operational. (Doc. 1-3 at 2.; see also Ex. 1., Correspondence (Bohanan’s counsel acknowledged that the Settlement Agreement does not encompass the new page, and requested “an addendum to the settlement agreement stating that it’s terms apply to the new url.”))

Nevertheless, consistent with the spirit of the Settlement Agreement, and by Bohanan’s own admission, Bohanan has access to Robinson’s Official Facebook Page—an account that concerns Robinson’s official duties as a Commissioner. (*Id.* ¶ 11; Dec. ¶¶ 7-8.) Bohanan also has access to Robinson’s Re-Elect Facebook Page, that similarly relates to his official duties. (Dec. ¶ 18.) Thus, Bohanan can “use the interactive features of [Robinson’s Official Facebook Page and Re-Elect Facebook Page] to engage in protected speech within th[at] designated or limited public forum”, should she so desire. (*Id.* ¶ 10.) Bohanan is not entitled—by virtue of the Settlement Agreement, or otherwise—to compel access to a personal and

private Facebook account, like Robinson's Personal Facebook Page, that does not engage in public discourse related to an elected official.

Moreover, even if Bohanan could plead facts establishing a breach of the Settlement Agreement, the post-settlement communications with Bohanan's counsel waived any such claims. *See Ansley v. Ansley*, 307 Ga. App. 388, 393 (2010) ("waiver may be express, or may be inferred from actions, conduct, or a course of dealing. Waiver of a contract right may result from a party's conduct showing his election between two inconsistent rights.") Simply put, Bohanan cannot show that she is entitled to relief on her breach of contract claims.

E. Bohanan is Not Entitled to Declaratory or Injunctive Relief.

Bohanan is not entitled to declaratory relief because she cannot demonstrate as a matter of law that she is entitled to access Robinson's Personal Page. "[A] declaratory judgment is available only in cases involving an actual case or controversy, where the issue is actual and adversarial (as opposed to hypothetical and contrived). It may not be made the medium for securing an advisory opinion in a controversy which has not arisen." *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807, 817 (N.D. Ga. 1982) (citing *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316 (1945)). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* (citing *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1937) (same)).

Here, no such controversy exists. As discussed above, Bohanan admits Robinson's Old Facebook Page—that is the subject of the Settlement Agreement—has been shut down, and that Robinson is free entitled to utilize a personal Facebook page. (Compl. ¶¶ 53, 67.) Put simply, “[t]he mootness problem remains the same.” *Gagliardi*, 889 F.3d at 735 (refusing to grant declaratory relief because the “case is moot and therefore nonjusticiable”). Moreover, there is no immediacy to Bohanan's section 1983 claims, because Robinson denied Bohanan access in or around 2015. *see id.* (“A declaratory judgment devoid of “sufficient immediacy and reality” cannot render a case justiciable.”) (citing *Preiser v. Newkirk*, 422 U.S. 395, 402, (1975)).

Bohanan's claims for injunctive relief similarly fail because such relief “is designed to bar someone from engaging in some unlawful act or series of acts in the future, or alternatively, to compel someone to undertake some act or series of acts in the future.” *Gagliardi*, 889 F.3d at 734. As Bohanan cannot establish a legally cognizable claim, Bohanan is not entitled to injunctive relief. Accordingly, Bohanan is not entitled to declaratory or injunctive relief.

III. This Court Should Strike Bohanan's Request for Punitive Damages

The Court should strike Bohanan's punitive damages claim because they are based on Bohanan's false assertions regarding Robinson's conduct. *See Fed. R. Civ. P. 12(f)* (“The court may strike from a pleading an insufficient defense or any

redundant, immaterial, impertinent, or scandalous matter.”) Bohanan brazenly, and falsely asserts that Robinson undertook “a deliberate attempt to avoid compliance with the terms of the Settlement Agreement”, and that Robinson acted in bad faith “with respect to [Robinson’s Personal Facebook Page].” (Compl. ¶¶ 58, 68.) But, Bohanan’s counsel acquiesced to the changes which Bohanan now asserts violate her constitutional rights. (*Id.* ¶ 59.; *see* Ex. 1., Correspondence.)

Robinson relied on the discussions with Bohanan’s counsel in continuing the labor intensive task of reviewing more than ten-years-worth of Facebook data to locate posts directed at his official role. (Dec. ¶ 14.) Robinson’s reliance was reasonable as he had no basis to believe that an academic professional, such as Bohanan’s counsel, would file suit asserting that the same conduct, involving the same parties, that she acquiesced to, is violative of the U.S. Constitution just nineteen days later.

In short, in light of the prior discussions with her counsel, Bohanan has no basis to seek punitive damages against Robinson. Thus, the Court should strike all such claims.

CONCLUSION

For all of the foregoing reasons Robinson respectfully requests that the Court dismiss Bohanan’s Verified Complaint, with prejudice.

Respectfully submitted, this 24th day of August, 2020.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BRENDA BOHANAN,

Plaintiff,

v.

DOUGLAS COUNTY COMMISSIONER
KELLY G. ROBINSON,
in his individual and official capacities,

Defendant.

CIVIL ACTION
NO. 1:20-cv-02641-JPB

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on August 24, 2020, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record. I also certify this date that the foregoing was prepared in accordance with N.D. Ga. L.R. 5.1, using Times New Roman font, 14 point.

/s/ Samuel S. Olens
Samuel S. Olens
An Attorney for Defendant
Kelly G. Robinson