

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DALLAS BURTON,

Plaintiff-Appellant/  
Cross Appellee,

v

ESTATE OF JAMES BEATTY and AMERICAN  
STATES INSURANCE CO.,

Defendants-Appellees/  
Cross Appellants.

UNPUBLISHED  
May 30, 1997

No. 190244  
Macomb Circuit Court  
LC No. 94-005750 CZ

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Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

This is the latest in a series of lawsuits and counterlawsuits arising from damage to plaintiff's rental home during the course of repairs being performed under the supervision of James Beatty, now deceased. Plaintiff appeals as of right from the trial court order dismissing his complaint on the bases of res judicata and the statute of limitations. Defendants filed a cross appeal from that same order. We affirm.

Plaintiff first argues that the trial court abused its discretion in setting aside an entry of default taken against the estate and in allowing defendants to file an amended answer and affirmative defenses. We disagree. The trial court did not abuse its discretion in setting aside the default against the estate, represented by American States, because it showed a reasonable excuse for its delay in answering and a meritorious defense so that manifest injustice would have resulted had the default been allowed to stand. See *Park v American Casualty Ins*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996). Similarly, the trial court did not abuse its discretion in allowing defendants to amend their answer and affirmative defenses because plaintiff did not show particularized reasons warranting denial of the motion nor did he prove that allowing the amendment would prejudice his right to a fair trial. See *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656-659; 213 NW2d 134 (1973).

Plaintiff next argues that the trial court erred in finding that his claim of violation of his civil rights under 42 USC § 1983 was barred by the statute of limitations. We disagree. As a matter of federal law, the applicable statute of limitations is that for personal injury actions. *Wilson v Garcia*, 471 US 261, 268-270, 272-276, 280; 105 S Ct 1938; 85 L Ed 2d 254 (1985). The trial court correctly concluded that plaintiff's claim is clearly barred because it was filed more than three years after entry of the amended judgment against plaintiff. See MCL 600.5805(8); MSA 27A.5805(8).

Plaintiff further argues that the trial court erred in finding that his fraud and conversion claims were barred by res judicata arising from the first lawsuit between the parties. We disagree. Although plaintiff did not counterclaim for fraud or conversion in the first lawsuit, his claims are barred because he *could have* asserted them once he realized (during trial) that Beatty's testimony may have been fraudulent and that Beatty's claim against plaintiff may have been barred by a release. See *Schwartz v Flint*, 187 Mich App 191, 193-196; 466 NW2d 357 (1991).

In light of our decisions on the issues raised on direct appeal, we find it unnecessary to address defendants' claims on cross appeal urging other grounds for affirming the trial court's decision.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy