STATE OF MICHIGAN

COURT OF APPEALS

GERALD ROBINSON,

Plaintiff-Appellant,

v

LARRY FORD and DEPARTMENT OF CORRECTIONS,

Defendants-Appellees,

and

JAMES YARBOROUGH and JANET PRICE,

Defendants.

UNPUBLISHED
September 10, 1999

No. 207241
Ionia Circuit Court
LC No. 97-018284 NO

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

PER CURIAM.

Plaintiff Gerald Robinson appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(7). We reverse and remand.

On May 19, 1997, plaintiff initiated this cause of action by filing a three-count complaint. Count I asserted a claim of Intentional Infliction of Emotional Distress. Counts II and III were racial discrimination claims predicated on the Elliot-Larsen Civil Rights Act.[1] Defendants Ford and Department of Corrections (hereinafter defendants) responded by filing a motion for summary disposition. Defendants argued that because the incidents alleged in the complaint occurred in March or April 1989, plaintiff's claims were barred by the applicable three-year statutes of limitation.[2] Then on July 22, 1997, without seeking leave of the court, plaintiff filed an amended complaint. Plaintiff also filed his brief in opposition to defendants' summary disposition motion on this same day. In both documents, plaintiff alleged instances of actionable misconduct that occurred in May 1994, January 1995, December 1996, May 1997, and June 1997. In his brief in opposition to the summary disposition

motion, plaintiff asserted that because defendants' motion was not a responsive pleading, under MCR 2.118(A)(1) he was authorized to file an amended complaint without first seeking leave of the court.

A hearing was held on defendants' motion for summary disposition on July 28, 1997. At that hearing, plaintiff informed the court that he would be seeking leave to amend the complaint to allege further incidents of misconduct, some of which plaintiff then outlined. The court took the matter under advisement. On July 29, 1997, the court granted summary disposition to defendants "based on the failure of plaintiff to file the action within the statute of limitations." No further explanation was offered by the court. Subsequently, plaintiff's motions for reconsideration and for leave to file a second amended complaint were denied without explanation.

Plaintiff first argues that the trial court erred in granting summary disposition to defendants and in denying his motion for reconsideration. Defendant asserts that in both his original and first amended complaints, he alleged actionable conduct by defendants that fell well within the three-year statutes of limitation. Plaintiff also reaffirms his claim that given the circumstances, he was authorized to file his first amended complaint without first seeking leave of the court. This Court reviews an order granting a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Lindsey v Harper Hospital*, 213 Mich App 422, 425; 540 NW2d 477 (1995). "When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff." *Michigan Millers Mutual Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 370; 494 NW2d 1 (1992). A trial court's rulings on both a motion for reconsideration and a motion to amend a complaint are reviewed for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989).

In order for plaintiff to bring a claim within the statutes of limitations, he must have alleged actionable conduct by defendants that occurred on or after May 19, 1994. In his original complaint plaintiff generally alleged that defendants committed actionable conduct within the three-year statute of limitations. However, these allegations were not supported by factual assertions and, therefore, were not "well-pleaded" for the purpose of deciding the motion for summary disposition. See *Stann v Ford Motor Co*, 361 Mich 225, 231-232; 105 NW2d 20 (1960).

Conversely, plaintiff's first amended complaint is much more factually specific with respect to misconduct occurring within the applicable three year period. The issue, then, is whether the first amended complaint was properly before the court. As he did below, plaintiff asserts that he was authorized to file the first amended complaint without first seeking leave of the court. We disagree. MCR 2.118(A) reads in pertinent part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.

> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Read together, these two subrules clearly indicate that a party's ability to amend a pleading by right is limited to the two situations outlined in subrule (A)(1). Subrule (A)(2) specifically states that "[*e*]*xcept as provided in subrule (A)(1)*," a pleading may be amended by leave only.

We thus examine the circumstances to determine if either of the two exceptions set forth in subrule (A)(1) are applicable. Because plaintiff had filed a complaint, defendants were required to file a responsive pleading. MCR 2.110(B)(1). Accordingly, the second exception does not apply. Further, because a motion for summary disposition is not a responsive pleading, MCR 2.110(A); *City of Huntington Woods v Ajax Paving Industries, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989), the first exception is not applicable.

Next, because defendants responded to plaintiff's complaint with a motion for summary disposition, we examine MCR 2.116 to see if it grants plaintiff the right to amend his complaint without first obtaining leave of the court. MCR 2.116(I)(5) states that "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." (Emphasis added.) Because defendants' summary disposition motion was based on subrule (C)(7), the mandatory language of (I)(5) does not apply.

Nevertheless, we do not believe that subrule (I)(5) should "be read to imply that there is no opportunity to amend to avoid summary disposition based upon . . . [subrule (C)(7)]. . . . [T]he controlling rule with respect to amendments in general is MCR 2.118, and amendments should always be granted if warranted under that rule." Dean & Longhofer, Michigan Court Rules Practice, (4th ed, 1998), § 2.116.18, pp 384-385. As we have just concluded, the clear language of MCR 2.118(A) indicates that under the circumstances of the case, plaintiff was required to seek leave of the court to amend. Because plaintiff never brought such a motion, his first amended complaint was never properly before the court.[3] Therefore, we find no error in the grant of summary disposition to defendants or in the denial of plaintiff's motion for reconsideration.

Plaintiff next argues that the lower court abused its discretion in denying his motion for leave to file a second amended complaint. We agree.

> A court should freely grant leave to amend a complaint when justice so requires. The rules governing the amendment of pleadings are intended to facilitate amendment except when prejudice to the opposing party would result. Thus, amendment is generally a matter of right, rather than grace. Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the

> amendment. Absent bad faith or actual prejudice to the opposing party, delay, alone, does not warrant denial of a motion to amend. [*Lane v KinderCare Leaning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) (citations omitted).]

As previously noted, the trial court did not set forth any reasons for its denial of plaintiff's motion to amend. It's failure to do so "constitutes error requiring reversal unless such amendment would be futile." *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990). We conclude that under the circumstances of this case, amending plaintiff's complaint would not have been futile. In the document entitled "second amended complaint," which was filed at the same time as his motion to amend, plaintiff realleged the instances of actionable misconduct that occurred in May 1994, January 1995, December 1996, May 1997, and June 1997. Plaintiff further alleged facts concerning an incident that occurred in August 1997, as well as a general allegation that plaintiff was harassed by defendant Ford in a control office "once or twice a week over the next several years." Accepting as true the factual allegations set forth in plaintiff's second amended complaint, we believe that plaintiff could have presented a cognizable claim had he been so allowed.[4]

We also reject defendants' assertion that summary disposition was properly granted because the circuit court lacked jurisdiction to hear the case against defendant MDOC, and because plaintiff has not pleaded facts to establish that his tort claim is not barred by governmental immunity. We conclude that plaintiff's Elliot-Larsen cause of action against defendant MDOC is properly maintained in the circuit court, *Walters v Dep't of Treasury*, 148 Mich App 809, 815; 385 NW2d 695 (1986), and that defendants have failed to establish that no factual development could possibly furnish a basis for recovery on plaintiff's tort claim, *Stoick v Caro Community Hosp*, 167 Mich App 154, 160; 421 NW2d 611 (1988).

Finally, we note that there is nothing in MCR 2.116 forbidding a court from granting a motion to amend even after summary disposition has been granted. See *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 783; 421 NW2d 289 (1988); *Midura v Lincoln Consolidated Schools*, 111 Mich App 558, 561; 314 NW2d 691 (1981); Dean & Longhofer, *supra* at § 2.116.18, p 384.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

[2] MCL 600.5805(8); MSA 27A.5805(8). See also *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995); *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986).

[3] During the summary disposition hearing, plaintiff responded to defendants' motion by first recounting the specific allegations of misconduct contained in his original complaint. Those instances all occurred in 1989. Plaintiff then made the following statement:

> After that time, we would like to amend the complaint to raise further allegations concerning things that transpired after that time. And I would seek to amend the complaint to further allege that after this point in time, [followed by a series of alleged actionable behavior on the part of defendant Ford].

Although this oral motion satisfied the rule regarding motion practice inasmuch as it was made during a hearing, MCR 2.119(A)(1), the allegedly actionable behavior recounted did not include the specific instances set forth in the first amended complaint. Rather, the incidents were ones that plaintiff later repeated in his second amended complaint.

[4] After reviewing the record, we also do not believe that the denial was justified by any of the five particularized reasons outlined in *Lane, supra*.