DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES L. KELLY and STACY D. FORD-KELLY, husband and wife, Plaintiffs/Appellants, v. LAKE HAVASU CITY POLICE DEPARTMENT; CHIEF OF POLICE DAN DOYLE and JANE DOE DOYLE, husband and wife; DETECTIVE SCOTT CHESHIRE and JANE DOE CHESHIRE, husband and wife; DETECTIVE KARL DRELLER and JANE DOE DRELLER, husband and wife; SERGEANT N.K.A. LIEUTENANT RICHIE SLOMA and JANE DOE SLOMA, husband and wife; SERGEANT CRAIG STEFFICK and JANE DOE STEFFICK, husband and wife; CITY OF LAKE HAVASU, AZ; CITY MANAGER CHARLIE CASSENS and JANE DOE CASSENS, husband and wife; JUDGE CLYDE ANDRESS and JANE DOE ANDRESS, husband and wife, Defendants/Appellees.	No. 1 CA-CV 12-0336 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. L8015CV201107045

The Honorable Anna C. Young, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James L. Kelly — Lake Havasu City
Stacy D. Ford-Kelly
In *Propria Persona* Appellant

Potts & Associates — Phoenix
By Walter Grochowski
Attorneys for Defendants/Appellees

G E M M I L L, Judge

¶1 Appellants James L. Kelly and Stacy D. Ford-Kelly (the "Kellys") challenge the trial court's dismissal of their complaint against the City of Lake Havasu and several of its employees, the Lake Havasu City Police Department, and Judge Clyde Andress (hereinafter collectively referred to as "the Defendants"). The trial court found the entire complaint was time-barred under Arizona Revised Statutes ("A.R.S.") sections 12-821 (2003) and 12-821.01 (Supp. 2012).[1] The Kellys argue the trial court erred by applying an improper accrual date to their causes of action and by applying the one-year statute of limitations and 180-day notice of claim statute to their 42 U.S.C. § 1983 claim. For the reasons set forth below, we affirm in part, reverse in part, and remand for proceedings consistent with this decision.

[1] Unless otherwise specified, we cite current versions of statutes when no material revisions have been enacted since the events in question.

FACTUAL AND PROCEDURAL HISTORY

¶2 The Kellys filed a complaint against the Defendants on April 13, 2011, as amended August 11, 2011, which alleged malicious prosecution, a § 1983 violation, false imprisonment, abuse of process, intentional infliction of emotional distress, failure to train employees, failure to supervise employees, slander/libel, and false light invasion of privacy. On July 26, 2011, after the original complaint filing and before the first amended complaint filing, the Kellys served a notice of claim upon the Defendants.[2] The Kellys contend the claims arose from a sequence of events arising from a "bad faith search warrant and frivolous criminal indictment."

¶3 The Defendants moved to dismiss the first amended complaint for failure to state a claim, *see* Ariz. R. Civ. P. 12(b)(6), asserting the Kellys' first amended complaint was time-barred by the 180-day notice of claim statute, *see* A.R.S. § 12-821.01, and the one-year statute of limitations for actions against public entities, *see* A.R.S. § 12-821. At the conclusion of oral argument on the motion, the trial court explained it was granting the motion to dismiss and summarized its reasoning. The court again summarized its findings and ruling in a minute entry, explaining as follows:

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[2] According to the record, Judge Clyde Andress did not receive the notice of claim until October 11, 2011.

> **The Court makes the following findings:** As a matter of law the [Plaintiffs'] causes of action accrued no later than November 2009. A one year statute of limitations did apply and the one hundred and eighty day notice of claim statute applied. Plaintiffs failed to serve their notice of claim within one hundred and eighty days of the accrual of the claim as mandated by Arizona law. As a matter of law the Plaintiffs filed their first complaint outside of the one year time period set forth under Arizona law for statutes of limitation for actions against public entities, public employees and elected officials.
>
> **IT IS ORDERED** granting the Defendant's motion based upon the notice of claim statute and the statute of limitations.
>
> The Court further **finds** the Plaintiff's first amended complaint fails to state a claim upon which relief can be granted. Because of the expiration of the statute of limitations and the one hundred and eighty day notice of claim time period prior to the Plaintiff complying with those requirements, the Court will not allow the Plaintiffs to amend their complaint.[3]

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[3] It appears the trial court may have intended that the first amended complaint not be deemed properly filed by its statement that "the Court will not allow the Plaintiffs to amend their complaint." The record does not, however, reveal that the court was ruling on any pending motion for leave to amend filed by the Kellys or any motion to strike the first amended complaint filed by Defendants. Additionally, the first amended complaint was filed prior to service of the original complaint and prior to any appearance by the Defendants, and the first amended complaint — not the original complaint — was served on the Defendants. Based on this record, the first amended complaint was the operative complaint for purposes of Defendants' motion to dismiss. If the trial court was reviewing the original complaint instead of the first amended complaint in conjunction with the motion to dismiss, the court may have erred in that regard. Nonetheless, we "will affirm the trial court's decision if it is correct for any reason." *Rancho Pescado, Inc. v. Nw.*

(Emphasis in original.)

¶4 The Kellys timely appealed and we have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003) and 12-2101(B) (Supp. 2012).

ANALYSIS

¶5 We apply a de novo stardard of review to the granting of a motion to dismiss pursuant to Rule 12(b)(6). *Coleman v. City of Mesa*, ___ Ariz. ___, ___, ¶ 8, 284 P.3d 863, 867 (2012). "In reviewing the grant of a motion to dismiss a complaint, we assume the facts alleged in the complaint to be true and give plaintiffs the benefit of all inferences arising from those facts." *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, 590, ¶ 2, 58 P.3d 965, 966 (App. 2002). "However, we do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005); *see also Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (recognizing "mere

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Mut. Life Ins. Co., 140 Ariz. 174, 178, 680 P.2d 1235, 1239 (App. 1984).

conclusory statements are insufficient to state a claim upon which relief can be granted").

¶6 Within 180 days after a cause of action accrues, a person with a claim against a public entity or public employee must file a notice of claim. A.R.S. § 12-821.01(A). In addition, an action against a public entity or public employee must be filed within one year after the cause of action accrues. A.R.S. § 12-821. A cause of action accrues "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B); *Dube v. Likins*, 216 Ariz. 406, 411, ¶ 7, 167 P.3d 93, 98 (App. 2007) (noting definition of when a cause of action accrues under § 12-821.01(B) applies to limitation period in § 12-821).

¶7 On appeal, the Kellys assert the trial court erred by granting the Defendants' motion to dismiss because the cause of action for their claims did not accrue until they received their confiscated property and realized the extent of their damages on January 27, 2011. The Kellys allege the confiscated property was unlawfully modified while in the possession of the Lake Havasu Police Department, and they had no knowledge of the modification until the property was returned to the Kellys' possession. Additionally, the Kellys argue a cause of action

for malicious prosecution does not accrue until applicable proceedings are terminated in the petitioner's favor. *See Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978) (recognizing that termination of proceedings in favor of petitioner as essential element of a malicious prosecution action). Thus, the Kellys assert the cause of action for this claim cannot occur before April 14, 2010, the date the charges were dismissed against James Kelly.

¶8 The Defendants, on appeal, argue the allegations contained in the Kellys' first amended complaint from which a cause of action can arise are limited to events occurring between March 29, 2008 and November 19, 2009. During this time frame, a search warrant was obtained to search James Kelly's possessions, James Kelly's property was taken into custody, James Kelly was indicted with weapons charges, and an article was published in a Lake Havasu news outlet regarding the property seizure at the Kellys' home.

¶9 In *Walk v. Ring*, our supreme court stated that to trigger the accrual of a claim, "it is not enough that a plaintiff comprehends a 'what'; there must also be reason to connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault." 202 Ariz. 310, 316, ¶ 22, 44 P.3d 990, 996 (2002). Citing *Walk*, this court has recognized a

cause of action accrues at the time a party is put "on notice to investigate," not necessarily when an investigation has been completed. *Thompson v. Pima Cnty.*, 226 Ariz. 42, 45-46, ¶¶ 11, 243 P.3d 1024, 1027-28 (App. 2010); *see also Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998) ("A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual.") (emphasis in original).

¶10 Here, the Kellys' first amended complaint did not allege any conduct by the Defendants after November 2009 giving rise to a new cause of action. Further, regardless of whether the Kellys continued to suffer additional damages beyond November 2009, it is clear from the first amended complaint that as of November 2009, the Kellys were aware of the damage related to their claims, knew the cause or source of their damages, and had notice to investigate. *See Walk*, 202 Ariz. at 316, ¶ 22, 44 P.3d at 996; *Thompson*, 226 Ariz. at 45-46, ¶¶ 11-12, 243 P.3d at 1027-28. Although the Kellys may not have known the extent of their damages as of November 2009, this is not a prerequisite for their causes of action to accrue. Therefore, no issue of fact existed as to when their causes of action accrued, and the trial court properly dismissed their claims as time-barred under A.R.S. §§ 12-821 and 12-821.01.

¶11 We agree with the Kellys' contention, however, that the malicious prosecution claim did not arise until the charges

were dismissed in April 2010. *See Cullison*, 120 Ariz. at 169, 584 P.2d at 1160. Accordingly, the trial court erred in selecting the November 2009 accrual date for the malicious prosecution claim. Nevertheless, even under an April 2010 accrual date, the notice of claim was not served within the 180-day requirement under A.R.S. § 12-821.01. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) ("We will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court."). Accordingly, we affirm the trial court's dismissal of the malicious prosecution claim.

¶12 On appeal, the Kellys additionally assert the one-year limitation under § 12-821 and the 180-day limitation under § 12-821.01 are inapplicable to their federal claim brought under § 1983. We agree.

¶13 To state a claim for relief in a § 1983 action, a plaintiff must establish a person acting under the color of law deprived him of a right secured by the Constitution or laws of the United States. 42 U.S.C. § 1983; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). In *Felder v. Casey*, the United States Supreme Court addressed the applicability of a state's procedural requirements to § 1983 claims and determined federal law preempted Wisconsin's notice of claim requirements. 487 U.S. 131, 134, 138 (1988). In light of *Felder*, Arizona has

acknowledged the one-year statute of limitations does not apply to § 1983 claims. *See Mulleneaux v. State*, 190 Ariz. 535, 540, 950 P.2d 1156, 1161 (App. 1997); *Morgan v. City of Phoenix*, 162 Ariz. 581, 584, 785 P.2d 101, 104 (App. 1989).

¶14 Instead, we have held that the purpose of § 1983 is best served by applying the two-year limitations period found in Arizona's general personal injury statute, A.R.S. § 12-542 (2003). *Madden-Tyler v. Maricopa Cnty.*, 189 Ariz. 462, 466, 943 P.2d 822, 826 (App. 1997) ("[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.") (citation omitted).

¶15 The Defendants did not bring to the trial court's attention the well-established law that the 180-day notice of claim requirement and the one-year statute of limitations do not apply to § 1983 claims. Neither did the Kellys bring this specific point to the court's attention in their response to the motion (although we note that Mrs. Kelly did, at oral argument, contend that the § 1983 claim was subject to a two-year statute of limitations and was not barred by either the 180-day notice of claim requirement or the one-year statute of limitations). It appears the trial court was led into error by the parties when it found that the Kellys' causes of action "accrued no later than November 2009" and the "one year statute of

limitations did apply and the one hundred and eighty day notice of claim statute applied."

¶16 On appeal from the granting of a motion to dismiss, we may affirm on any applicable basis, *see Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 403, ¶ 25, 10 P.3d 1181, 1190 (App. 2000), but we are reluctant to affirm on grounds not addressed by the trial court. *Cf. Drew v. United Producers & Consumers Coop.*, 161 Ariz. 331, 335, 778 P.2d 1227, 1231 (1989) ("We do not believe it proper for an appellate court to affirm a dismissal on grounds pertaining to the technical sufficiency of the pleadings when such grounds had not been argued in the trial court and the insufficiency may have been cured if the problem had been properly and timely raised."); *Rhoads v. Harvey Publ'ns, Inc.*, 131 Ariz. 267, 269, 640 P.2d 198, 200 (App. 1981) (noting that the power to affirm a summary judgment on grounds not considered by the trial court "must be exercised with extreme caution").

¶17 Because this is an appeal from the granting of a motion to dismiss at an early point in the action, we decline in the exercise of our discretion to reach issues pertaining to the Kellys' § 1983 claim, except to reverse the incorrect granting of dismissal based on a November 2009 accrual date coupled with the 180-day notice of claim requirement and the one-year statute of limitations. On this record, it is best to remand the § 1983

claim for further consideration by the parties and the court as may be appropriate.

CONCLUSION

¶18 For the foregoing reasons, we reverse the trial court's dismissal of the Kellys' § 1983 claim and remand for further proceedings consistent with this decision. Regarding all remaining claims of the Kellys, we affirm the trial court's dismissal because of non-compliance with the 180-day notice of claim requirement. We need not consider further the one-year statute of limitations for the dismissed claims.

____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

____/s/_____
JON W. THOMPSON, Judge

____/s/_____
DONN KESSLER, Judge