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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SANDRA SPENCER, an individual, Plaintiff/Appellant, v. JOHN ULREICH and JUDITH ULREICH, a married couple, Defendants/Appellees.	2 CA-CV 2008-0144 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20073961

Honorable Paul Tang, Judge

AFFIRMED

Law Offices of Thrush, Clark & Associates, P.L.L.C.
By Neil A. Clark — Tucson
Attorneys for Plaintiff/Appellant

Barassi, Curl & Abraham, PLC
By David L. Curl and Katrina M. Conway — Tucson
Attorneys for Defendants/Appellees

H O W A R D, Presiding Judge.

¶1 Appellant Sandra Spencer appeals from the trial court's order dismissing her complaint against John and Judith Ulreich. Spencer argues the court erred in determining that her amended complaint, which added the Ulreichs as defendants, did not relate back to her original complaint against a different defendant and was therefore barred by the statute of limitations. Because the trial court did not err, we affirm.

¶2 The parties do not dispute the relevant facts. Spencer's lawsuit arose from a multi-car collision that occurred on September 14, 2005. The collision involved Spencer, John Ulreich, Renee Sherman and other individuals who are not part of this case. Ulreich was cited for failure to control his vehicle. In a letter dated October 13, 2005, Spencer notified Ulreich's liability insurance carrier of her intent to file a claim for damages resulting from the accident. In another letter to Ulreich's insurance carrier, dated June 28, 2006, Spencer made a demand for compensation for her injuries. On July 13, 2007, Spencer filed a complaint naming Sherman and "John Does 1-10 and Jane Does 1-10" as defendants. On November 8, 2007, Spencer moved to dismiss the case as to Sherman and filed an amended complaint naming John Ulreich and Jane Doe Ulreich as defendants. Spencer served the complaint on John Ulreich on January 23, 2008. John and Judith Ulreich subsequently moved to dismiss the complaint on the ground that it was barred by the statute of limitations. The trial court agreed and granted the motion to dismiss.

¶3 On appeal, Spencer argues the trial court erred in concluding her amended complaint did not relate back to her original complaint pursuant to Rule 15(c), Ariz. R. Civ.

P. We review de novo a trial court's dismissal of a complaint based on a statute of limitations. *Andrews ex rel. Woodard v. Eddie's Place, Inc.*, 199 Ariz. 240, ¶ 1, 16 P.3d 801, 802 (App. 2000). Section 12-542(1), A.R.S., provides a two-year limitations period for causes of action involving injury to a person. When a plaintiff seeks to change a party against whom a claim is asserted, the amended pleading will relate back if the new claim arises "out of the conduct, transaction, or occurrence set forth . . . in the original pleading" and if within the statutorily prescribed limitations period,

> plus the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment, (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Ariz. R. Civ. P. 15(c).

¶4 The time period for service provided by Rule 4(i), Ariz. R. Civ. P., is 120 days. The requirement regarding mistake in Rule 15(c)(2) "excludes from relation back tactical, strategic, although erroneous, decisions regarding whom to sue." *Pargman v. Vickers*, 208 Ariz. 573, ¶ 25, 96 P.3d 571, 576 (App. 2004). Thus, Rule 15(c)(2) does not apply to a "'deliberate decision not to sue a party whose identity plaintiff knew from the outset.'" *Tyman v. Hintz Concrete, Inc.*, 214 Ariz. 73, ¶ 21, 148 P.3d 1146, 1149 (2006), *quoting Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000). Likewise, the rule does not apply to "'a mistake of law by counsel regarding whom to name in a lawsuit,'" *id.*, *quoting O'Keefe v.*

Grenke, 170 Ariz. 460, 465, 825 P.2d 985, 990 (App. 1992). Nor does the rule apply to defendants the plaintiff seeks to add because of a new legal theory or to replace fictitious defendants. *Servs. Holding Co. v. Transamerica Occidental Life Ins. Co.*, 180 Ariz. 198, 209, 883 P.2d 435, 446 (App. 1994). Spencer had the burden of showing the required elements for relief. *See Tyman*, 214 Ariz. 73, ¶ 22, 148 P.3d at 1149.

¶5 Spencer has failed to sustain her burden of showing that Ulreich had received notice of the institution of the action within the required time period and knew that, but for Spencer's mistake concerning Ulreich's identity, he would have been added. Because the accident in this case occurred on September 14, 2005, the statute of limitations expired on September 14, 2007.[1] § 12-542(1). The 120-day period for service provided by Rule 4(i), elapsed on January 14, 2008.[2] Spencer filed her amended complaint on November 8, 2007, fifty-five days after the statute of limitations period ended. She served that complaint on Ulreich on January 23, 2008, nine days after the time period for service in Rule 4(i).

¶6 Spencer argues the letters to Ulreich's insurance carrier constituted sufficient notice to Ulreich. But Rule 15(c)(1) requires "notice of the institution of the action." The letters to Ulreich's insurance carrier preceded the institution of the action and could not serve as notice of it. And Spencer has not offered any other evidence that Ulreich was on notice

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[1]"[T]he time in which an act is required to be done shall be computed by excluding the first day and including the last day." A.R.S. § 1-243(A); *see also* Ariz. R. Civ. P. 6(a).

[2]The 120 days actually ended on January 12, 2008, but because that day was a Saturday, the time period for service did not expire until January 14. *See* Ariz. R. Civ. P. 6(a).

of the action before he was served with the amended complaint. Thus, Spencer has failed to satisfy the notice requirement of Rule 15(c)(1).

¶7 Spencer's failure to satisfy the notice requirement is sufficient reason to affirm the trial court. But Spencer also failed to satisfy the mistake requirement. Spencer argues "there can be no question that Ulreich knew that his joinder was a distinct possibility," and that the mistake in not naming Ulreich was the product of "excusable neglect" by Spencer's counsel. But Spencer provides no explanation as to why her counsel's failure to name Ulreich as a defendant was an excusable omission. *Cf. Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 341, 884 P.2d 217, 227 (App. 1994) (mistake of taxpayer's counsel regarding proper party to name in complaint was "excusable neglect" given "stew of confusion" in applicable statute). And the letters to Ulreich's insurance carrier were sent by Spencer's counsel, indicating counsel knew of Ulreich's identity and knew he was potentially liable for Spencer's injuries. Additionally, the police accident report listed Ulreich's name and contact information and noted that Ulreich was cited for failure to control his vehicle. Further, Spencer described Ulreich's role in the accident in her original complaint against Sherman. Thus, the evidence supports the trial court's finding that Spencer—through counsel—had "made a conscious and deliberate decision not to name the Ulreichs" as defendants in the original complaint. Although that strategic decision may have been erroneous, it does not constitute a mistake of identity or show Ulreich's knowledge of any

mistake, as contemplated in Rule 15(c)(2). *See Pargman*, 208 Ariz. 573, ¶ 25, 96 P.3d at 576; *O'Keefe*, 170 Ariz. at 466, 825 P.2d at 991.

¶8 Because Spencer has not met the requirements of Rule 15(c), her amended complaint does not relate back to her original complaint. The trial court did not err in dismissing, with prejudice, Spencer's claim against John and Judith Ulreich as time-barred. Therefore, we affirm.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge