IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KAREN L. DOBSON, individually and as Administratrix of the Estate of ERLE FREDERICK DOBSON, Plaintiff,	)	
v.	)	
JASON R. MCKINLEY, Defendant/Third-Party Plaintiff,	)	C.A. No. 07C-06-088 PLA
v.	)	
JAMES RYAN, TOWN OF NEWPORT, and TOWN OF NEWPORT POLICE DEPARTMENT, Third-Party Defendants.	)	

Submitted: March 9, 2009
Decided: March 31, 2009

UPON PLAINTIFF DOBSON'S MOTION TO AMEND
GRANTED.

Louis B. Ferrara, Esquire, FERRARA & HALEY, Wilmington, Delaware, Attorney for Plaintiff.

Michael I. Silverman, Esquire, SILVERMAN, MCDONALD & FRIEDMAN, Wilmington, Delaware, Attorney for Defendant/Third-Party Plaintiff.

Bruce C. Herron, Esquire, AKIN & HERRON, P.A., Wilmington, Delaware, Attorney for Third-Party Defendants.

ABLEMAN, JUDGE

Plaintiff Karen L. Dobson brought this action, individually and as administratrix of the Estate of Erle Frederick Dobson, for damages as a result of a motor vehicle collision at the intersection of Routes 9 and 141 in New Castle, Delaware, on April 8, 2006. Plaintiff's husband Earle Frederick Dobson was fatally injured when the car he was driving was struck during the high-speed pursuit of defendant Jason L. McKinley's vehicle by Officer James Ryan of the Town of Newport Police Department. The chase terminated when McKinley's vehicle struck Mr. Dobson's vehicle, causing a spectacular fire that resulted in Mr. Dobson's death.

On June 6, 2007, Dobson filed a complaint against defendant McKinley, who, in turn, filed a third-party complaint against the Town of Newport, the Town of Newport Police Department, and Officer James Ryan on August 8, 2007.[1] In the Third-Party Complaint, McKinley alleged that Dobson's death was caused by the gross negligence of Officer Ryan in pursuing McKinley's vehicle at a high rate of speed on Route 141.

After the Newport Third-Party Defendants filed an Answer to the Third-Party Complaint on October 2, 2007, depositions were taken in early 2008. Beginning in January 2008, Dobson's counsel and counsel for Newport engaged in settlement discussions, which included a written

[1] The Town of Newport, the Town of Newport Police Department, and Officer Ryan will be referred to collectively as "Newport" or "the Newport Third-Party Defendants."

demand for settlement by Dobson on February 5, 2008, and a February 14, 2008 letter acknowledging receipt of the demand. Shortly thereafter, counsel for Newport inquired about the possibility of a structured settlement of Dobson's claim. Then, on March 20, 2008, Dobson's counsel wrote to Newport requesting copies of any applicable insurance policies. About a month later, the Newport Third-Party Defendants identified "two potentially applicable policies for plaintiff's claim."

Dobson filed the instant Motion to Amend the Complaint to add a direct claim against the Newport Third-Party Defendants on August 21, 2008, which was more than four months after the expiration date of the two-year statute of limitations on April 7, 2008. The Motion is opposed by the Newport Third-Party Defendants. At the Court's request, the matter has been fully briefed by all parties. This is the Court's decision on Plaintiff's Motion to Amend the Complaint to add a direct claim against the third-party defendants.

Statement of Facts

At approximately 11:00 p.m. on the night of April 8, 2006, a Saturday, Officer James Ryan of the Town of Newport Police Department, while monitoring traffic in Newport, began to follow McKinley's vehicle in an effort to make a traffic stop. A chase ensued in which Corporal Henry Brown of the Town of Newport Police Department joined. Both officers chased McKinley for approximately four and a half miles, at speeds as

high as 90 to 100 miles per hour. Officer Ryan's pursuit of McKinley lasted for approximately eight miles despite the presence of civilian traffic, and without regard for several traffic control devices. At one point Officer Ryan's vehicle followed McKinley's vehicle so closely that he "could have pushed him along." Recording the vehicle's license tag number, although feasible at that distance, never "crossed [Ryan's] mind."[2] Despite the fact it appeared to the officer that the possibility of actually stopping McKinley was "very remote," at no point did Officer Ryan discontinue the pursuit. The fatal accident occurred minutes after 11:00 p.m. at the five-way intersection of Basin Road, Washington Street, Delaware Street, Fourteenth Street, and Frenchtown Road. McKinley's vehicle ran a red light and collided with the decedent's vehicle, which immediately burst into flames, resulting in the death of Mr. Dobson.

It is alleged that Officer Ryan's decision to initiate and continue the high-speed pursuit was in direct violation of the Town of Newport Police Department's Pursuit Policy, with which Ryan acknowledged he was familiar.[3] Specifically, the policy provides that when a violation is for a traffic offense only, "pursuit will not continue beyond the officer positioning himself so that he can secure the registration number and general description of the vehicle and operator."[4] The policy further

[2] Docket 27, Ex. K (Dep. Tr. of James T. Ryan, Sr.), at 70.

[3] *See* Docket 27, Ex. L (Pursuit Policy).

[4] *Id.*

directs that pursuit is to be discontinued when the possibility of a successful conclusion is "futile."[5] Throughout the entire chase, Ryan and the other officers kept their warning lights illuminated and visible to McKinley, rather than turning them off as a signal that they were abandoning the pursuit.

The Parties' Contentions

Dobson is now faced with the dilemma that the statute of limitations has run as of April 2008, and unless the Court grants the Motion to Amend, Plaintiff's claim against Newport will be time-barred, thus prohibiting her from joining a direct claim against the third-party defendants. Dobson argues that, pursuant to Rule 15 of the Superior Court Civil Rules, the Court should exercise its discretion to grant the Motion to Amend the Complaint, and allow the amendment to relate back to April 8, 2008, the date that McKinley timely filed his Third-Party Complaint. At that time, Newport was made fully aware of the facts and circumstances surrounding Dobson's potential claim. Dobson submits that there is no prejudice to the third-party defendants because they received notice of the claim against them when they were served with the Third-Party Complaint and have had the opportunity to mount a defense on the merits since that time. She further asserts that, but for her

[5] *Id.*

counsel's dilatoriness in failing to name the Newport Third-Party Defendants, she would have filed a direct action against them.

Relying upon a literal interpretation of the rule in *Walley v. Harris*,[6] Newport opposes the motion to amend, arguing that there was no mistake on Dobson's part concerning the identity of the Newport Third-Party Defendants, and that Dobson thus cannot satisfy the third requirement of Rule 15(c). They further allege that the identity of the third-party defendants has been available to the plaintiff since the day of the accident and that Dobson deliberately chose to sue one defendant while being fully aware of the existence and identity of another potential defendant.

For obvious reasons, defendant McKinley has joined in support of Dobson's Motion to Amend, using the purpose and intent of the relation back provision of Rule 15(c) as authority for the Court to allow the amendment. Comparing the policy underlying statutes of limitations to the primary purpose of Rule 15(c), McKinley argues that the rule makes an accommodation for these competing interests so as to allow relation back of claims where the party to be joined has had a fair opportunity to prepare an adequate defense, even when the statute of limitations has already run. Since the proposed amendment arose out of facts and circumstances identical to those asserted in McKinley's claims against the Newport Third-Party Defendants, the purpose of the rule has been

[6]1997 WL 817867 (Del. Super. Nov. 24, 1997)

satisfied. McKinley submits that since the date of the filing of the third-party complaint on August 8, 2007 — and more than likely even earlier, since the accident occurred on April 6, 2006 — Newport has been reviewing and gathering evidence and preparing a defense to claims that are identical to those sought to be asserted in the amended complaint. Not only will they not be prejudiced by Dobson's direct claim against them but, so the argument goes, the Newport Third-Party Defendants have been fully engaged in settlement discussions with Dobson, even going so far as to provide information on the limits of the town's available insurance coverage directly to her. Under these circumstances, both the notice requirement of Rule 15(c)(3)(A) and its purpose — to provide a fair opportunity to prepare an adequate defense — have been fully satisfied in this case.

As an additional basis to support her Motion to Amend, Dobson argues that, even if the relation back provision of Rule 15(c) does not apply, the failure of the Newport Third-Party Defendants and their insurance carrier to forward timely written notice of the applicable statute of limitations, as required by 18 *Del. C.* § 3914, tolls the statute for the benefit of the claimant. Since it is undisputed that neither Newport nor their insurers gave written notice to Dobson during the pendency of her claims, she asserts that the Newport Third-Party Defendants are precluded from arguing the untimeliness of the amended complaint as a bar to their joinder.

Again, defendant McKinley joins in asserting that the failure by Newport to comply with 18 *Del. C.* § 3914 has the effect of tolling the statute of limitations. McKinley agrees with Dobson that this statutory section operates as an estoppel, precluding the third-party defendants from raising the statute of limitations to bar the amended complaint.

While acknowledging the existence of the requirements under Section 3914, the Newport Third-Party Defendants argue that because Dobson's counsel never filed a proper claim in this case, did not identify a claimant or insured, and failed to describe the nature of or basis for a claim against Officer Ryan or the Town of Newport, the statutory obligation of Section 3914 is not triggered.

Analysis

I. Rule 15(c) Relation Back Allows Filing of the Amended Complaint

Rule 15 of the Superior Court Civil Rules is based upon its counterpart in the Federal Rules of Civil Procedure.[7] Although Rule 15(a) allows a party to amend a pleading without leave of Court in certain narrow circumstances, when Court approval is required, the Rule directs the liberal granting of amendments "when justice so requires." In the

[7] *See Parker v. State*, 2003 WL 24011961, at *13 (Del. Super. Oct. 14, 2003).

absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend.[8]

The reach of Rule 15(a) may extend to bring in an additional party, not originally named as a defendant, and to permit amendment even after the statute of limitations has expired, provided the requirements of Rule 15(c) are satisfied.[9]

Superior Court Rule 15(c) provides for relation back of amendments as follows:

> (c) Relation back of amendments -- An amendment of a pleading relates back to the date of the original pleading when
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> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) 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 (B) 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.

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[8] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993); *Dunfee v. Blue Rock Van & Storage, Inc.*, 266 A.2d 187, 188 (Del. Super. 1970).

[9] *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398-99 (Del. 1975); *Annone v. Kawasaki Motor Corp.*, 316 A.2d 209, 210-11 (Del. 1974).

Thus, while Rule 15(c) neither extends nor limits the scope of amendments available under Rule 15(a),[10] it does set forth a series of prerequisites if the movant wishes to render the amendment effective as of the time of the filing of the original complaint — all of which, in the Court's judgment, have been satisfied here.

With respect to the first condition set forth in the statute, the parties do not dispute that the claim asserted in the amended complaint "arose out of the same, conduct, transaction, or occurrence" set forth in the Third-Party Complaint that was filed within the period of the statute of limitations on April 8, 2008.

The second requirement is also clearly satisfied because the third-party defendants have been on notice since at least August 8, 2007, if not before, of the pendency of this litigation and were clearly cognizant of their potential liability. The Third-Party Complaint is in all aspects identical to the amended complaint insofar as the third-party defendants' ability to mount a defense is concerned. Since August 8, 2007, the Newport Third-Party Defendants have been on notice that they needed to engage in discovery and invest in a defense of this lawsuit, irrespective of whether their ultimate liability, if any, would be to plaintiff Dobson or to defendant McKinley.

Indeed, by the third-party defendants' own actions in corresponding with Dobson, they have made it known that they were

[10] *Mullen*, 625 A.2d at 263.

anticipating a direct claim by Plaintiff and an obligation to defend against it. On February 5, 2008, Dobson's counsel sent the third-party defendants a written settlement demand, which they expressly acknowledged in their responsive letter of February 14, 2008. Plaintiff's attorney requested copies of applicable insurance policies, by letter dated March 20, 2008, prior to the expiration of the statute of limitations. Counsel for Newport thereafter advised Dobson that the available coverage for this claim is one million dollars. Under these circumstances, Newport Third-Party Defendants have had, for at least eighteen months, a "fair opportunity to present an adequate defense," sufficient to satisfy the liberal construction of Rule 15(c)(2).

The final element in the relation back analysis is whether the Newport Third-Party Defendants knew, or should have known, that they would have been sued as a primary defendant, rather than as just a third-party defendant, but for Dobson's mistake concerning the identity of the party. To be sure, Plaintiff cannot now claim that the identity of the third-party defendants was not known to her. Since the accident, and certainly by the filing of the Third-Party Complaint, Plaintiff knew that her husband's death was the tragic result of a high-speed chase involving Newport police. While the case law on the interpretation of this subsection is somewhat muddled in Delaware,[11] I am convinced by both

[11] *Compare Lavin v. Silver*, 2003 WL 21481006 (Del. Super. June 2, 2003) (denying amendment of complaint to add direct claim against third-party defendant where amendment was not sought until the close of evidence at trial), *and Walley v. Harris*,

the language and the holding of the Supreme Court decision in *Mullen v. Alarmguard of Delmarva, Inc.*, as well as the myriad of cases from other jurisdictions that interpret the rule, that the mistake requirement should be viewed more liberally when the amendment seeks to add a direct claim against a third-party defendant, so as to give effect to its underlying rationale. Where, as here, the party to be added is no stranger to the litigation, is actively involved in defending a third-party complaint, and is thus already a party in the case, the purpose of the rule is satisfied.

Newport may not have considered Dobson's failure to join them as defendants to be the result of a mistake as to their identity, but they were certainly aware by the time they received Plaintiff's correspondence of their potential liability to Plaintiff as primary defendants. Thus, they clearly received "notice of the mistake" before the statute of limitations expired.

Moreover, knowledge of Dobson's oversight concerning the status of the third-party defendants *vis-à-vis* Plaintiff must be imputed to the Newport Third-Party defendants by virtue of the correspondence wherein Dobson suggested that they begin negotiations. If nothing else, Newport's response to Plaintiff's settlement demand and inquiry

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1997 WL 817867 (Del. Super. Nov. 24, 1997), *with Wilson v. Consumer Life Ins. Co.*, 2000 WL 1211169 (Del. Super. Aug. 1, 2000) (permitting joinder of third-party defendant as direct defendant, despite lack of "good reason" for plaintiff's failure to join within statute of limitations, where no new claims were raised and no prejudice would result).

regarding insurance coverage not only constitutes sufficient evidence of their knowledge of her claim, but could even be interpreted as an effort to mislead her into believing that they would not contest their ultimate joinder as primary defendants.[12]

The Newport Third-Party Defendants rely upon Superior Court decisions as support for their opposition to this motion.[13] While those decisions appear to require a literal interpretation of the "but for a mistake concerning the identity of the proper party" language, this Court respectfully disagrees with that analysis. For one thing, Judge Quillen actually abandoned his prior interpretation of the phrase "mistake concerning the identity of the proper party" in his decision in *Wilson v. Consumer Life Insurance Co.*[14] In *Wilson*, the Court allowed the plaintiff to amend the complaint despite the fact that it appeared that the plaintiff had made a conscious choice not to sue the third-party defendant and there was no apparent reason for plaintiff's delay in asserting the claims. The Court reasoned as follows:

> I guess I come down in favor of giving the Plaintiff his full day in Court, *so long as* there are no new factual obligations or additional theories of liability against the Third Party Defendant in the Amended Complaint. It will actually simplify the case for trial, make the presentation to the jury more sensible, help prevent a verdict based on hyper-

[12] *Cf. Moorehead v. City of Wilm.*, 2003 WL 23274848 (Del. Super. Dec. 17, 2003) (denying joinder where there was no mistake as to the party's identity or role and no evidence of any attempt to obscure its identity or mislead plaintiff's in any way).

[13] *See Walley*, 1997 WL 817867; *Lavin*, 2003 WL 21481006.

[14] 2000 WL 1211169.

> technical form grounds, and give a genuine focus to the substance of the dispute. But, new claims should not be intertwined into the case at this late date.[15]

In so ruling, Judge Quillen expressly retreated from his earlier ruling in the *Walley v. Harris* case in favor of late joinder by the plaintiff, so long as there are no new factual or assertions or additional theories of liability in the Amended Complaint. The *Walley* decision is therefore somewhat suspect as to its precedential value.

Similarly, the New York Court of Appeals in *Duffy v. Horton Memorial Hospital* held that the amended complaint asserting claims against a third-party defendant relates back to the date of the filing of the third-party complaint for purposes of the statute of limitations, provided the complaints are based on the same transaction or occurrence. The *Duffy* Court provided a cogent analysis of the rationale of Rule 15(c):

> [I]f the new defendant has been a complete stranger to the suit up to the point of the requested amendment, the bar of the Statute of Limitations must be applied. But where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations. In such cases, there is room for the exercise of a sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment.
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> It is evident that when a third party has been served with the third-party complaint, and all prior pleadings in the

[15] *Id.* at *3; *see also Duffy v. Horton Mem'l Hosp*, 488 N.E.2d 820 (N.Y. 1985).

> action . . . the third-party defendant has actual notice of the plaintiff's potential claim at that time. The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose. Consequently, an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint.[16]

The purpose of the rule is more than served here because the third-party defendants have already been named as parties and have had ample time prior to the running of the statute of limitations to prepare a defense.

II. Notice Requirement of 18 *Del. C.* § 3914

Even if the Court did not conclude that relation back was proper under Rule 15(c), the Newport Third-Party Defendants would be precluded under 18 *Del. C.* § 3914 from asserting the untimeliness of the amended complaint as a bar to their joinder. Section 3914 imposes the following obligation on an insurer:

> An insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages.

In order for the statute of limitations to be tolled, Plaintiff must meet all of the four conditions: "1) there must be notice of the claims to the 'insurer;' 2) the claims must be pursuant to a 'casualty insurance policy;'

[16] *Duffy*, 488 N.E.2d at 823 (citations omitted).

3) there must be the pendency of claims; and 4) the insurer must have failed to give notice of applicable statute of limitations."[17]

The third-party defendants agree that neither they nor their insurer provided notice of the statute of limitations, and they do not dispute that their liability insurance constitutes a casualty insurance policy subject to the provisions of Section 3914. They submit, however, that a "claim" was never received by their insurer, since the plaintiff failed to tell the insurer what happened. Thus, they submit no claim by plaintiff was pending against them. The Court disagrees.

Notice of Dobson's claim was given by counsel to third-party defendants orally in January 2008, and in the February 2008 demand letter, and again in the plaintiff's request for the applicable insurance policies in March of 2008. In fact, the third-party defendants expressly acknowledged the claim in their letter to Dobson of April 21, 2008. Nor can it be seriously argued that the third-party defendant's insurer was unaware of "what happened." Since the filing and service of the third-party complaint in August of 2007, the Newport Third-Party Defendants were on notice of the nature of the occurrence and were in fact preparing a defense.[18] Additionally, correspondence between Plaintiff's counsel

[17] *Harris v. Cochran Oil Co.*, 2006 WL 3842164, at *2 (Del. Super. Dec. 21, 2006).

[18] *See Murphy v. Lucas*, 2006 WL 1173893, at *2-3 (Del. Super. Apr. 28, 2006) (holding that a claim was "pending" for purposes of Section 3914 where "the clear evidence in the record [showed] that Defendants' insurance company was aware that at least a provisional claim was pending. Although no formal claim was filed, Plaintiff informed the insured that an accident occurred . . . .").

and the third-party defendants beginning in January 2008 gave ample notice of Plaintiff's claim. Since the statute is to be given a "broad interpretation for the benefit of claimants,"[19] I hold that the failure of the third-party defendants' insurer to provide the notice required by Section 3914 precludes them from raising the statute of limitations as a bar to this claim.

Conclusion

While there is no apparent reason for Plaintiff's delay in asserting direct claims against the Newport Third-Party Defendants, other than perhaps dilatoriness on the part of counsel, the Court is persuaded that Plaintiff should be permitted to assert her claims against Newport. The reason for this decision is simple: the Newport Third-Party Defendants cannot be prejudiced in defending claims for which they have already been preparing a defense, and which have even been the subject of settlement discussions. Furthermore, the Newport Third-Party Defendants are precluded from asserting the statute of limitations as a bar to their joinder as direct defendants because of their failure to comply with the requirements of 18 *Del. C.* § 3914.

[19] *Brown v. State of Delaware*, 900 A.2d 628, 633 (Del. 2006).

The Court therefore concludes that Plaintiff Dobson's Motion to Amend should be granted.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Louis B. Ferrara, Esquire
Michael I. Silverman, Esquire
Bruce C. Herron, Esquire