STATE OF MICHIGAN

COURT OF APPEALS

DAVID BELL,

Plaintiff-Appellee,

V

OFFICER DEL KOSTANKO, OFFICER JOHN SELLECK, and OFFICER BRENT ERK,

Defendant-Appellants,

and

LANSING POLICE DEPARTMENT and CITY OF LANSING,

Defendants.

UNPUBLISHED
July 6, 2004

No. 241647
Ingham Circuit Court
LC No. 00-092105-NO

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants Brent Erk, Del Kostanko, and John Selleck[1] appeal by leave granted from the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7). We reverse and remand.

Plaintiff filed a complaint on July 14, 2000, alleging that unidentified officers committed various torts against him when they mistook him for an armed robbery suspect on July 15, 1998. Plaintiff named the city under a respondeat superior theory and designated the unidentified officers "John Doe." Some of plaintiff's claims had a two-year period of limitations, while plaintiff's remaining claims had a three-year period of limitations.[2] A summons was issued with

[1] Defendants City of Lansing and Lansing Police Department are not parties to this appeal. For ease of reference, the city and its police department will be referred to as the city and the individual officers will be collectively referred to as the officers.

[2] Although not specifically delineated by the parties in their respective briefs, it appears that a two-year period of limitation applies to plaintiff's claims of assault and battery and false
(continued…)

an October 13, 2000 expiration date. Plaintiff served the summons and a copy of the complaint on the city on July 14, 2000.

After the summons expired, plaintiff learned the identities of the previously unnamed officers, and, on April 2, 2001, by stipulated order plaintiff filed an amended complaint naming the three individual officers as defendants. In June 2000, plaintiff mailed a copy of the amended complaint to counsel then representing the city, requesting that defense counsel accept service on behalf of the newly identified officers. Counsel for the city neither acknowledged receipt of the complaint nor acceptance of service before July 15, 2001, and plaintiff sought no acknowledgement of receipt or confirmation that service would be accepted before that date.

In September 2001, plaintiff asked counsel for the city to sign an "acknowledgement of service" that plaintiff had prepared. Counsel advised plaintiff that he had no authority to acknowledge or accept service on behalf of the officers. Plaintiff then requested the clerk of the court to issue a summons to accompany the recently initiated claims against the officers, but the clerk refused because the original summons had expired. Plaintiff attempted to file a motion requesting that the trial court issue new summonses in the case, but the clerk would not accept the pleadings because the actions against the officers had been dismissed on September 14, 2001, for lack of service. Plaintiff filed a new complaint naming solely the officers as defendants, and a summons was issued with this complaint. The officers moved for summary disposition in the new action, asserting that the complaint was time-barred by the applicable periods of limitation. Plaintiff requested that the trial court dismiss the new action without prejudice, and the trial court granted this request. Thereafter, plaintiff moved the trial court to reinstate the claims asserted in the first amended complaint in the original action and to order the clerk to issue new summonses to the officers. The trial court granted these motions, and a summons to the officers was issued on January 9, 2002. This Court granted the officers' application for leave to appeal. On appeal, the officers contend that the trial court abused its discretion by reinstating plaintiff's claims despite the expiration of the relevant periods of limitation, and that it also acted without authority when it ordered the new summons to be issued.

We review a trial court's decision on a motion to reinstate a claim for an abuse of discretion. *Wickings v Arctic Enterprises*, 244 Mich App 125, 138; 624 NW2d 197 (2000). An abuse of discretion occurs when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but

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imprisonment, MCL 600.5805(2), while a three-year period of limitation applies to plaintiff's claims of intentional infliction of emotional distress, *Lemmerman v Fealk*, 449 Mich 63-64; 534 NW2d 695 (1995); MCL 600.5805(10)); civil conspiracy to commit intentional infliction of emotional distress, see *Detroit Bd of Ed v Celotex (On Remand)*, 196 Mich App 694, 713; 493 NW2d 513 (1992), citing *Roche v Blair*, 305 Mich 608; 9 NW2d 861 (1943)); violation of the Elliott-Larsen Act, *Womack-Scott v Dept of Corrections*, 246 Mich App 70, 74; 630 NW2d 650 (2001); MCL 600.5805(10); violations of 42 USC 1983-1985, MCL 600.5805(10); *Owens v Okure*, 488 US 235, 249-250; 109 S Ct 573; 102 L Ed 2d 594 (1989); and violation of plaintiff's Fourteenth Amendment rights, see *Lee v Grand Rapids Bd of Ed*, 148 Mich App 364, 369; 384 NW2d 165 (1986).

defiance thereof, not the exercise of reason but rather of passion or bias.'" *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2002), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), in turn quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). A trial court's interpretation of a court rule is reviewed de novo. *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002), citing *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999).

It is well-settled that the statute of limitations does not toll while a plaintiff attempts to discover the identity of an alleged tortfeasor. *Thomas v Process Equipment Corp*, 154 Mich App 78, 89-91; 397 NW2d 224 (1986), citing *Reiterman v Westinghouse, Inc*, 106 Mich App 698, 704; 308 NW2d 612 (1981), *Taulbee v Mosley*, 127 Mich App 45, 47-48; 338 NW2d 547 (1983), *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 843; 325 NW2d 602 (1982), *Thomas v Ferndale Laboratories, Inc*, 97 Mich App 718, 720; 296 NW2d 160 (1980). Moreover, the statute of limitations does not toll when the complaint is filed; rather, it tolls when the court obtains jurisdiction over the defendant or when the complaint is filed and a copy of the summons and complaint are served on the defendant or placed in the hands of a process server for immediate service.[3] MCL 600.5856; *Gladych v New Family Homes*, 468 Mich 594, 598-599; 664 NW2d 705 (2003). Here, no complaint had been filed against the officers as of July 15, 2000. Accordingly, as of that date, the two-year period of limitations expired as to several of plaintiff's claims against the officers, and these claims became time-barred. Similarly, when the officers had not been served with the amended complaint by July 15, 2001, and the trial court had not otherwise acquired jurisdiction over the officers, the remaining claims also became time-barred.

Plaintiff argues that the officers had notice of the charges against them by virtue of the service of the original complaint, naming John Doe officers as defendants, on their employer, and that, therefore, the amended complaint should be deemed to have related back to the filing date of the original complaint. We disagree. The relation-back rule does not extend to the addition of new parties. *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). More specifically, as it relates to this case, an amendment to a "John Doe" complaint that seeks merely to add a specifically named defendant does not relate back to the original filing of the complaint for the purpose of tolling the statute of limitations. *Thomas v Process Equip Corp*, 154 Mich App 78, 84-85; 397 NW2d 224 (1986); citing *Meda v City of Howell*, 110 Mich App 179, 185-186; 312 NW2d 202 (1981); *Fazzalare v Desa Industries, Inc*, 135 Mich App 1, 6; 351 NW2d 886 (1984); *Browder v Int'l Fidelity Ins Co*, 98 Mich App 358, 361; 296 NW2d 60

[3] The Legislature recently amended MCL 600.5856 to omit the provision tolling the statute of limitations upon placing the summons and complaint "in good faith . . . in the hands of an officer for immediate service" and changed one of the remaining points of tolling from "the time the complaint is filed and a copy of the summons and complaint are served on the defendant" to "the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." The above discussion regarding tolling provisions concerns the version of MCL 600.5856 in effect at the times relevant to this case.

(1980). Accordingly, the trial court erred by reinstating claims that were time-barred by the applicable periods of limitation.[4]

Finally, the trial court also abused its discretion by setting aside the clerk's dismissal of the case. Plaintiff contends that the trial court had discretion to set aside the clerk's dismissal and reinstate the case under the provisions of MCR 2.612(C)(1)(f), which permit the trial court to relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." However, where the court rules or case law do not authorize a particular action—here, the relation back of an amended complaint naming new parties in order to avoid the expiration of the statute of limitations—the inability to pursue that course of action cannot then constitute the "other reason justifying relief" from the judgment of dismissal. See *Alken-Ziegler Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7; 600 NW2d 638 (1999). Thus, because the trial court acted outside its authority, it abused its discretion. *Kurtz*, *supra* at 193; *Spalding*, *supra* at 384.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[4] We need not decide whether the trial court erred by granting plaintiff's motion to direct the clerk of the court to issue a summons because the claims against the officers were already time-barred by the time the trial court ordered the summons to be issued. The trial court's directive could not serve to enable the amended complaint to relate back to the original summons and complaint. *Hurt*, *supra*.