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IN THE
COURT OF APPEALS OF INDIANA

Lake County, Indiana, et al.,
Appellants-Defendants,

v.

John Klisurich, et al.,
Appellees-Plaintiffs.

January 20, 2022

Court of Appeals Case No. 21A-CT-1335

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-1612-CT-10950

Altice, Judge.

Case Summary

[1] In this discretionary interlocutory appeal, Lawrence Obregon, Lake County Sheriff's Department (LCSD), and Lake County Indiana appeal the trial court's

denial of their motion to dismiss the Amended Complaint filed by John, Kathy, Brandin, Blake, and Kari Klisurich (collectively, the Plaintiffs), by which the Plaintiffs added LCSD and Lake County as defendants and asserted federal claims against Obregon for the first time nearly four years after their original complaint was filed. Two issues are presented for our review:

> 1. Whether the addition of LCSD and Lake County in the Amended Complaint relates back to the date of the original complaint and is therefore not barred by the statute of limitations?
>
> 2. Whether the constitutional claims asserted in the Plaintiffs' Amended Complaint against Obregon relate back to the Plaintiffs' original complaint?

[2] We affirm in part and reverse in part.

Facts & Procedural History

[3] On December 27, 2014, John was stopped by two security officers while driving home within the subdivision where he lived. The security officers summoned help after John fled from the traffic stop and returned to his home. Obregon, a deputy with LCSD, and Brandon Henderson, an officer with the Indiana State Police, arrived and assisted with the apprehension of John in his home. On June 23, 2015, the Plaintiffs mailed an Indiana Tort Claims Notice (the Notice) to the Indiana Political Subdivision Risk Management Commission, the Superintendent of the Indiana State Police, the Indiana Attorney General, the Lake County Sheriff, the President of the Lakes of the Four Seasons Property

Owners Association, Inc. (the Association), and the President of the Hebron Town Council, alleging that Obregon, who they identified as "responding" on behalf of LCSD, and the other officers "invaded" their home without a warrant and "assaulted and used firearms to intimidate them." *Appellants' Appendix Vol. 2* at 131. The Plaintiffs further alleged in the Notice that Obregon "administered corporal punishment by intentionally and maliciously tasering" John after he was handcuffed. *Id*.

[4] On December 5, 2016, the Plaintiffs filed a complaint naming as defendants Obregon, Henderson, the Association, and the two security officers and asserting claims for negligence, battery, trespass, negligent hiring, retention, training and control, and malicious prosecution. The Plaintiffs alleged that the actions of Obregon and the other officers were "malicious and reckless," and they requested punitive damages. *Id*. at 3. In the complaint the Plaintiffs did not identify Obregon as a deputy with LCSD or allege that he was acting within the scope of his employment.

[5] On January 31, 2017, Obregon, by counsel Casey McCloskey, filed his answer, denying the allegations set forth in the complaint and requesting attorney's fees, in part, in accordance with the Indiana Tort Claims Act (the Act), Ind. Code § 34-13-3-21. Obregon also asserted several affirmative defenses pursuant to the

Act.[1] Over the next eighteen months, the parties engaged in discovery and unsuccessfully attempted mediation on two separate occasions. In December 2019, the Plaintiffs' discharged their attorney. On April 15, 2020, new counsel entered an appearance on the Plaintiffs' behalf.

[6] On July 22, 2020, the Plaintiffs, with leave of the court, filed an Amended Complaint[2] in which they identified Obregon as a law enforcement officer with LCSD and alleged that he was acting within the scope of his employment at the time of the incident. The Plaintiffs named LCSD and Lake County as defendants and asserted claims for negligence, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and trespass against them. As against Obregon, the Plaintiffs asserted claims for violations of the Fourth Amendment and 42 U.S.C. § 1983.

[7] On August 11, 2020, Obregon filed a motion to dismiss the Amended Complaint. In the memorandum in support of the motion to dismiss, McCloskey argued that the new federal claims were untimely. And, although McCloskey had not entered an appearance on behalf of LCSD and Lake County, he argued in support of dismissal of the Amended Complaint as against them, claiming that the action was barred by the statute of limitations.

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[1] Specifically, Obregon claimed that he was immune from liability under the Act, *see* I.C. § 34-13-3-3(1), (3), (7), (8), and (10), that the damages the Plaintiffs sought to recover were limited by the Act, *see* I.C. § 34-13-3-4(a)(1)(c), and that punitive damages were not recoverable under the Act, *see* I.C. § 34-13-3-4(b).

[2] Prior to the Amended Complaint, the parties filed a Stipulation of Dismissal whereby they agreed to dismiss Henderson from the lawsuit with prejudice.

The trial court held a hearing on the motion to dismiss on April 6, 2021. At the hearing, Obregon was represented by McCloskey, and LCSD and Lake County were represented each by separate counsel. On April 26, 2021, the trial court issued an order denying the motion to dismiss. Obregon, LCSD, and Lake County, by Attorney Alfredo Estrada, filed a motion asking the trial court to certify its ruling for interlocutory appeal, which the trial court granted. This court accepted jurisdiction on July 26, 2021.

Discussion & Decision

[8] This court applies a de novo standard of review to a trial court's ruling on a motion to dismiss. *Shi v. Yi*, 921 N.E.2d 31, 36 (Ind. Ct. App. 2010). That is, we owe no deference to the trial court's decision as the grant or denial of a motion to dismiss turns only on the legal sufficiency of the complaint and does not require determinations of fact. *Id*. at 36-7. We will accept as true the facts as alleged in the complaint and will not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the nonmoving party. *Id*. at 37.

[9] The issues presented concern the rule governing relation back of amended pleadings. Ind. Trial Rule 15(C) sets forth three requirements for an amended complaint to relate back to the original complaint. A threshold requirement is that the claim asserted in the amended complaint arise "out of the conduct, transaction, or occurrence set forth" in the original complaint. T.R. 15(C).

Where the amendment changes a party against whom a claim is asserted,[3] the rule further requires that:

> within 120 days of commencement of the action, the party to be brought in by the amendment:
>
> > (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

The party who seeks the benefit of the relation back doctrine bears the burden of proving the requirements of T.R. 15(C) are met. *Raisor v. Jimmie's Raceway Pub, Inc.*, 946 N.E.2d 72, 76 (Ind. Ct. App. 2011).

[10] "This doctrine of relation back under current T.R. 15(C) seeks to strike the proper balance between the basic goal of the Trial Rules to promote decisions on the merits and the policies underlying statutes of limitations, the most significant of which are to provide fairness and finality to defendants." *Guzorek*, 857 N.E.2d at 368. "The rule therefore liberally allows amendments of pleadings but also seeks to ensure that defendants 'receive notice of claims

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[3] Changing a defendant can take place either by substitution or addition of a new defendant. *Porter Cty. Sheriff Dep't v. Guzorek*, 857 N.E.2d 363, 368 (Ind. 2006) (citing *State ex rel. Young v. Noble Cir. Ct.*, 263 Ind. 353, 359, 332 N.E.2d 99, 102 (1975)), *aff'd on reh'g*.

within a reasonable time, and thus are not impaired in their defense by evidence that is lost or diminished in its clarity because of the undue passage of time.'" *Id*. (quoting *Olech v. Vill. of Willowbrook*, 138 F.Supp.2d 1036, 1041 (N.D. Ill. 2000)).

1. Addition of LCSD and Lake County as Defendants

[11] An action for injury to a person must be commenced "within two (2) years" after a cause of action accrues. Ind. Code § 34-11-2-4(a)(1). The incident occurred in December 2014 and the Plaintiffs filed their original complaint nearly two years later in December 2016. In July 2020, five and one-half years after the incident and three and one-half years after the original complaint, the Plaintiffs filed their Amended Complaint naming LCSD and Lake County as defendants for the first time. There is no dispute that the statute of limitations expired before the Amended Complaint was filed. Therefore, in order to survive a motion to dismiss, the claims asserted against LCSD and Lake County must relate back to the filing of the original complaint.

A. Notice

[12] LCSD and Lake County do not dispute that the claims asserted against them in the Amended Complaint arise "out of the conduct, transaction, or occurrence set forth" in the original complaint. They argue that they did not have notice of the institution of the action. Although T.R. 15(C) does not require service of process on the new defendant, notice of the pending claim must be such that the added party received either actual or constructive notice of the legal action

within the allotted time period. *Guzorek*, 857 N.E.2d at 368. Constructive notice "may be inferred based on either the identity of interest between the old and new parties or the fact that they share attorneys." *Id*. at 369.

> An identity of interest may permit notice to be imputed to the added party when the original and added party are so closely related in business or other activities that it is fair to presume that the added part[y] learned of the institution of the action shortly after it was commenced. Similarly, notice may be imputed based on shared legal counsel if it is reasonable to infer that the attorney for the initial party will have communicated to the added party that he, she or it may be joined in the action.

Id. (quotations and citations omitted). However, notice that an injury has occurred or that the plaintiff has retained counsel is not sufficient to establish notice for purposes of T.R. 15(C). *Id*. at 369. Thus, our courts have held that a tort claim notice does not satisfy the T.R. 15(C) notice requirement because it informs a municipality that an injury may have occurred, but it does not advise that a lawsuit has been filed against a particular party. *Id*. The purpose of the notice requirement is to ensure that the defendant will not be prejudiced in maintaining its defense on the merits. *Red Arrow Stables, Ltd. v. Velasquez*, 725 N.E.2d 110, 113 (Ind. Ct. App. 2000), *trans. denied*.

[13] We are guided by our Supreme Court's holding in *Guzorek*. In that case, Guzorek's car was struck by a vehicle driven by a deputy with the Porter County Sheriff's Department (PCSD). Guzorek timely filed a notice pursuant to the Act, and five days before the expiration of the statute of limitations, she filed a complaint naming the officer as the sole defendant. The complaint did

not mention PCSD or the deputy's employment therewith. In his answer, however, the deputy stated that at the time of the accident he was employed by PCSD and was acting within the course and scope of his employment. The deputy also asserted the affirmative defense that he could not be personally liable under the Act and subsequently sought summary judgment on that basis.

[14] While the summary judgment motion was pending, Guzorek sought to amend the complaint to add PCSD as a defendant, which amendment was approximately eighteen months after the limitations period had run. The trial court permitted the amendment. PCSD moved for summary judgment contending that the amended complaint did not relate back to the original complaint under T.R. 15(C) and that the claim against PCSD was therefore barred by the two-year statute of limitations.

[15] In holding that PCSD had the requisite notice, the *Guzorek* majority considered the employment relationship between PCSD and the deputy and the fact that the Act imposed a statutory duty on PCSD to provide counsel for him. 857 N.E.2d at 369 (citing Ind. Code § 34-13-3-5(e)). The majority held: "Given that PCSD was required to defend the officer, it seems fair, indeed obvious, to infer that PCSD was aware of the claim against the officer from the outset." *Guzorek*, 857 N.E.2d at 369 (cleaned up). The majority also determined that PCSD was not prejudiced by the amendment because PCSD, as the indemnitor of the officer, had an incentive to "marshal the facts and evaluate [the officer's] defense." *Id*. at 370.

[16] The same circumstances are present here. The Plaintiffs filed suit against only Obregon. Although they did not identify Obregon as a police officer or allege that he was acting within the scope of his employment, Obregon, in his answer, did so. Obregon also asserted affirmative defenses in accordance with the Act. Thus, like the officer in *Guzorek*, for Obregon to receive the representation to which he was entitled based on his answer and affirmative defenses, he necessarily had to inform LCSD and Lake County of the lawsuit. Further, for the reasons stated in *Guzorek*, there is no prejudice to LCSD and Lake County.

[17] The fact that Obregon, LCSD, and Lake County were each represented by separate counsel does not change this conclusion. Although the majority in *Guzorek* stated that its conclusion was "fortified" by the fact that PCSD appeared by the same counsel as the officer, the majority emphasized that its conclusion was based on the "unity of interest" created by the duty imposed by the Act. *Id*. at 369, 370. Indeed, the majority explained that, given his answer and affirmative defenses under the Act, for the officer to receive the representation to which he was entitled, he necessarily had to inform PCSD of the lawsuit. The majority did not hold that the parties had to be represented by the same counsel for a finding of notice.

B. Mistake

[18] Having found that LCSD and Lake County had notice and were not prejudiced, we turn to the mistake requirement in T.R. 15(C)(2). LCSD and Lake County claim that the Plaintiffs did not make a mistake by omitting them as defendants in the original complaint. In support of their argument, LCSD

and Lake County point out that in the original complaint, the Plaintiffs did not identify Obregon as a police officer or state that Obregon was acting within the scope of his employment. They also note the Plaintiffs' allegations that Obregon's conduct was malicious and their request for punitive damages, both of which take the action out of the Act. LCSD and Lake County thus assert that "a reasonable interpretation" of the original complaint is that the Plaintiffs "made a conscious choice" to sue Obregon in his individual capacity so they could seek punitive damages. *Appellants' Brief* at 21.

[19] In *Guzorek*, PCSD argued that it had a "reasonable belief that it had been deliberately omitted as part of the plaintiffs' legal strategy" given that in the complaint Guzorek did not identify the defendant as a deputy with PCSD or allege he was acting within the course and scope of his employment. *Id*. at 372. The majority acknowledged that "when a party makes a conscious choice of whom to sue, that party cannot seek to add another party under 15(C) after the statute of limitations had run." *Id*.

[20] The majority, however, rejected PCSD's claim, concluding that because Guzorek alleged in the tort claims notice that the deputy was acting within the scope of his employment, thereby bringing his actions within the purview of the Act, PCSD could not reasonably assume that Guzorek's legal strategy was to sue "a clearly immune party" and omit the party designated as the proper defendant. *Id*. Considering the underlying circumstances, the majority explained that there was "no plausible basis to conclude that the deputy was

outside the scope of his employment when he collided with Guzorek." *Id*. (cleaned up).

[21] *Guzorek* is distinguishable from the circumstances that we are presented with here. In addition to not identifying Obregon as a police officer or alleging that he was acting within the scope of his employment, the Plaintiffs expressly claimed that Obregon's actions were "malicious." *Appellants' Appendix* at 3. Under the Act, if a plaintiff alleges that "an act or omission of the employee that causes a loss is . . . malicious," the claimant may file a lawsuit against a government employee personally. Ind. Code § 34-13-3-5(c)(3). Further, here, the Plaintiffs expressly requested punitive damages. Under the Act, if a claimant files an action against an employee of a governmental entity who was acting within the scope of employment, punitive damages are not recoverable. *See* I.C. § 34-13-3-4(b). Clearly, Plaintiffs made every effort to take the action out of the Act.

[22] We also observe that "where there is a basis for the plaintiff to assert liability against the party named in a complaint, and there is no reason for another party to believe that the plaintiff did anything other than make a deliberate choice between potential defendants, the mistake requirement is not met." *Id*. In *Guzorek*, the court noted that a claimant may "choose to sue an individual employee rather than the government to avoid contending with the contributory negligence rule that governs Tort Claims Act suits against government units." 857 N.E.2d at 372. Such a strategic decision might also be made in order to seek punitive damages.

[23] Here, unlike in *Guzorek*, the underlying circumstances are such that it is not unreasonable to conclude that Plaintiffs were trying to avoid the Act's limitations on damages or its harsh contributory negligence rule and proceed against Obregon personally. Although all of the facts are not before us, there appears to be some question as to John's involvement in the situation that ultimately led to his apprehension in his home. Any determination of negligence on John's part would preclude liability under the Act. Also, pursuing a claim against Obregon personally would have left the door open for a possible award of punitive damages that could not be awarded if the action were to proceed under the Act.

[24] Here, the Plaintiffs alleged that Obregon's actions were "malicious" and that he "unlawfully battered and assaulted them by using firearms, threats of lethal force, intimidation, and actual force" and otherwise engaged in conduct that "unnecessarily endangered them." *Appellants' Appendix Vol. 2* at 2, 3 (cleaned up). Considering the original complaint in its entirety and the circumstances giving rise to the action, it is not unreasonable to conclude that the Plaintiffs, in their original complaint, sought to impose liability on Obregon personally and avoid application of the Act.

[25] Further, we note that the Plaintiffs filed their Amended Complaint five years, six months, and twenty-five days after the incident and three years, six months, and twenty-five days after the statute of limitations had run. Even after Obregon answered the original complaint and claimed immunity under the Act, the Plaintiffs did not attempt to bring LCSD or Lake County into the action.

Thereafter, the parties engaged in discovery and attempted mediation on two occasions. We agree with LCSD and Lake County that these circumstances fortify the conclusion that the Plaintiffs made a "conscious and tactical choice" of whom to sue and what allegations to present. *Appellants' Brief* at 21. Plaintiffs had the burden of demonstrating otherwise, and they have not done so. Thus, notwithstanding our conclusion above that LCSD and Lake County had notice of the lawsuit, the Plaintiffs did not meet their burden of demonstrating that the failure to name LCSD and Lake County in the original complaint was a mistake. Our review leads us to conclude that Plaintiffs made a strategic decision to omit LCSD and Lake County from the original complaint. The Amended Complaint, filed after the expiration of the statute of limitations, does not relate back and thus, is untimely. We reverse and remand with instructions for the trial court to dismiss LCSD and Lake County from the litigation.

2. Federal Claims against Obregon

[26] The statute of limitations for claims brought pursuant to 42 U.S.C. § 1983 is determined by the statute of limitations for personal injury actions in the state where the incident occurred. *King v. One Unknown Fed. Corr. Officer*, 201 F.3d 910, 913 (7th Cir. 2000) (applying two-year statute of limitations from I.C. § 34-11-2-4 to plaintiff's § 1983 claim). In the original complaint, the Plaintiffs asserted, among other things, claims of negligence, battery, and trespass against Obregon. In the Amended Complaint, Plaintiffs asserted two § 1983 claims against Obregon, claiming that during the incident on December 27, 2014,

Obregon's use of unreasonable force caused injury to John and damage to his home. The Plaintiffs filed their original complaint against Obregon on December 5, 2016, well within the limitations period. However, the Plaintiffs did not amend their complaint to include § 1983 claims against Obregon until July 2020. Thus, the federal claims in the Amended Complaint are time-barred unless they relate back to the earlier, timely-filed complaint.

[27] "An amendment stating an entirely new claim for relief is permissible so long as it arises from the same factual circumstances pled in the initial complaint." *McCarty v. Hosp. Corp. of Am.*, 580 N.E.2d 228, 231 (Ind. 1991). Obregon does not challenge that the constitutional claims arise out of the factual circumstances giving rise to the claims in the original complaint. Rather, he argues that the federal claims asserted in the Amended Complaint do not relate back because in the original complaint the Plaintiffs failed to state that Obregon was acting within the scope of his employment with LCSD or that Obregon was acting under color of state law. As such, he argues that he was not on notice of potential claims of constitutional violations under § 1983.

[28] Obregon's claim is not well taken. Although the original complaint did not identify him as a deputy acting in the scope of employment, we note that in his answer to the original complaint, Obregon asserted affirmative defenses under the Act thereby affirmatively acknowledging his position as a police officer and suggesting that his actions occurred within the scope of his employment. Obregon was on notice of potential constitutional claims. The trial court

properly determined that the constitutional claims set out in the Amended Complaint relate back to the original complaint.

[29] Judgment affirmed in part, reversed in part, and remanded for dismissal of the Amended Complaint as against LCSD and Lake County.

Bailey, J. and Mathias, J., concur.