

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>MARTIN DALE FITZPATRICK,</b>	)	
	)	
Plaintiff,	)	Case No. 1:00CV00127
	)	
v.	)	<b>OPINION</b>
	)	
<b>MARION CORRECTIONAL</b>	)	By: James P. Jones
<b>TREATMENT CENTER, ET AL.,</b>	)	United States District Judge
	)	
Defendants.	)	

*Martin Dale Fitzpatrick, Pro Se; Mark R. Davis, Assistant Attorney General of Virginia, Richmond, Virginia, for Defendant.*

The question in this case is whether the addition of a new defendant “relates back” to the filing of the initial complaint within the meaning of Federal Rule of Civil Procedure 15(c), in order to escape the bar of the statute of limitations. Under the circumstances, where there was no mistake as to the identity of the new party, I hold that the amendment does not relate back and the action is barred.

The plaintiff in this action seeks damages for injuries he claims he suffered while an inmate in a state prison facility in Virginia. He claims that as a result of negligence

and deliberate and wanton indifference, he was required to engage in physical activity that permanently injured his back. Subject matter jurisdiction is based on both the presence of a federal question and diversity of citizenship. *See* 28 U.S.C.A. §§ 1331, 1332 (West 1993 & Supp. 2001).

The complaint was filed September 21, 2000, and signed by the plaintiff, followed by the words “pro se.” He named as the defendants Marion Correctional Treatment Center and Commonwealth of Virginia Department of Corrections.

Service on the defendants was not obtained until January 10, 2001, and thereafter a motion to dismiss was filed, seeking dismissal of the action on the ground that those defendants were not amenable to suit.

I granted the plaintiff’s motion for additional time to respond to the motion to dismiss. On April 27, 2001, the plaintiff filed a motion seeking leave to file an amended complaint, “identif[ying] by name the officer employee of [the] defendant who required the pro se plaintiff to engage in activities which proximately caused him injury . . . .”

By order entered May 10, 2001, I directed the filing of the amended complaint, but granted the motion to dismiss as to Marion Correctional Treatment Center and Commonwealth of Virginia Department of Corrections.

The plaintiff's amended complaint names as defendants individually and in their official capacities, Mike Osborne, a correctional officer at Marion Correctional Treatment Center, John Doe #1, an employee of Commonwealth of Virginia Department of Corrections or Marion Correctional Treatment Center, who changed the plaintiff's medical classification while in prison, and John Doe #2, whose alleged activities are not identified.<sup>1</sup>

The plaintiff alleges that while he was a state prisoner, a doctor at Powhatan Correctional Center Complex restricted him from lifting more than twenty-five pounds because of back pain. (Am. Compl. at ¶ IV.) The plaintiff was then transferred to Marion Correctional Treatment Center on or about April 3, 1998, and his medical classification was allegedly wrongly changed by John Doe #1 from C-3 to B-3. (*Id.* at ¶ V, VI).

Soon after his arrival at the Marion facility, the plaintiff worked as a "house man," whose duties "included sweeping and mopping floors, cleaning the shower and bathroom and carrying an ice cooler to and from the kitchen." (*Id.* at ¶ VI). The plaintiff alleges that the cooler weighed forty pounds or more. The plaintiff told the defendant Osborne and the prison medical staff that the cooler was too heavy for him

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<sup>1</sup> The amended complaint also named Marion Correctional Treatment Center as a defendant. However, that defendant was dismissed by the order entered May 10, 2001.

to lift and requested a transfer to a different job. The plaintiff was transferred to a tutor position on June 6, 1998. The plaintiff alleges that his back “hurt very badly” until his duties were changed. (*Id.*)

At some point between October 1 and November 1, 1998, Osborne, allegedly knowing the plaintiff’s physical limitations, required the plaintiff and others to move bunk beds in order to strip and wax the floors of the building in which they were housed. (*Id.* at ¶ IX-X.) The plaintiff claims that the beds weighed approximately 350 pounds each and moving them “damaged his back worse.” (*Id.* at ¶ X.)

In his motion to dismiss Osborne contends that any action against him is barred by the applicable two-year statute of limitations. The plaintiff was given a *Roseboro*<sup>2</sup> notice and has filed a memorandum in opposition to the motion to dismiss, in which he argues that the addition of Osborne should relate back to the filing of the original suit, in accord with Federal Rule of Civil Procedure 15(c)(3).

Although all of the pleadings submitted by the plaintiff indicated that he was proceeding pro se, the plaintiff made reference in a letter to the clerk of the court to an “Attorney/Client Agreement” between himself and an attorney in West Virginia. Because the resolution of the present motion to dismiss might involve the plaintiff’s pro se status, I directed the plaintiff to state in writing whether the complaint and all other

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<sup>2</sup> *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975).

pleadings and motions in this case were prepared by an attorney and whether the decision as to the persons or entities named as defendants was made by an attorney.

In response, the plaintiff has explained that “[c]ounsel . . . has fully prepared all of my legal motions and pleadings [in this case]. . . . [I] did not prepare part of any motion or pleading that has been filed in said court.” He also avers that his attorney made the decision to include only the original defendants in the complaint.

The motion to dismiss is now ripe for decision.<sup>3</sup>

### III

Osborne argues that the amended complaint should be dismissed because it was filed after the running of the statute of limitations. Because no federal statute of limitations exists for the present federal claims, the applicable limitations period is determined by the statute of limitations for personal injury in the state where the alleged injury occurred. *See Garrett v. Angelone*, 940 F. Supp. 933, 939 (W.D. Va. 1996) (citing *Burnett v. Grattan*, 468 U.S. 42 (1984)). In Virginia, a personal injury action must be brought within two years after the claim accrued. *See Va. Code. Ann. § 8.01-243(A)* (Michie 2000). Accrual of a federal action is governed by federal law, under

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<sup>3</sup> I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

which the action accrues when the “plaintiff knows or has reason to know of the injury.” *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975).

The alleged events involving the ice cooler took place between April 3 and June 6, 1998, and the bunk bed event took place between October 1 and November 1, 1998. The original complaint was filed on September 21, 2000, and the amended complaint was filed on May 10, 2001.

The plaintiff does not contest that the amended complaint was filed after the two-year statute of limitations had run, but argues that the amended complaint should relate back to the date the original complaint was filed pursuant to Federal Rule of Civil Procedure 15(c)(3).<sup>4</sup> For the reasons stated below, I find that the amended complaint does not relate back and accordingly I will grant the defendant’s motion to dismiss.

Federal Rule of Civil Procedure 15(c) allows amendments to a pleading to relate back to the date of the original pleading when:

(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 Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such

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<sup>4</sup> The claim involving the ice cooler, having occurred more than two years before the filing of the original complaint, would be likely barred in any event.

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.

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

Because the amended complaint changes the defendants, in order for the amended complaint to relate back in this case, the plaintiff must meet the requirements of 15(c)(3). The amended complaint clearly arises out of the same transaction or occurrence as the original complaint, but the plaintiff must also show that he made a mistake concerning the identity of the proper party and Mike Osborne must have known or should have known that but for that mistake, the action would have been brought against him.

The Fourth Circuit has narrowly construed a “mistake” within the meaning of Rule 15(c)(3), ruling that a mistake refers to a “misnomer” and not to the situation where the plaintiff chooses to sue the wrong party. *See Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir. 1989). As stated in *Rennie v. Omniflight Helicopters, Inc.*, No. 97-1524, 1998 WL 743678, at \*2 (4th Cir. Oct. 23, 1998) (unpublished): “Rule 15(c)(3) permits an amendment to relate back only where there had been an error made concerning the identity of the proper party, and where that party is not chargeable with knowledge of the mistake.”

The plaintiff argues that the amended complaint should relate back under the rationale of *Phillips v. United Fixtures Co.*, 168 F.R.D. 183 (W.D. Va. 1996). In that case, the plaintiff sued the party whom she thought had manufactured part of a shelf that had fallen on her. *See id.* at 184. She filed an amended complaint after the statute of limitations period adding the actual manufacturer as a defendant, which the court allowed to relate back. *See id.* at 186.

However, *Phillips* distinguished the “mistake” in the present situation, stating that relation back was allowed because the plaintiff was not at fault in delaying to add the proper defendant and there was no showing that the plaintiff made a “tactical decision” to not sue the added defendant in the original complaint. *See id.* at 187.

*Phillips* cited *Keller v. Prince George’s County*, 923 F.2d 30 (4th Cir. 1991), in comparison. In *Keller*, the plaintiff incorrectly sued a local department of social services and the State of Maryland instead of the responsible individual public employees. *See id.* at 31. The Fourth Circuit held that there was no “mistake” sufficient to allow an amended complaint to relate back under Rule 15(c)(3), because the individuals not originally sued “could reasonably assume that . . . [the plaintiff] had made a conscious decision to proceed [solely] against the Department.” *Id.* at 34.

The plaintiff in this case named Commonwealth of Virginia Department of Corrections and Marion Correctional Treatment Center as defendants in his original

complaint. These parties are not amenable to suit and were incorrectly sued. *See* U.S. Const. amend. XI; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). The plaintiff, after the statute of limitations had run, amended the complaint to substitute Mike Osborne and two John Does as defendants. The plaintiff did not misname these defendants in the original complaint—rather, he sued the wrong parties. This “mistake” is not the kind contemplated by Rule 15(c)(3) and therefore the amended complaint does not relate back to the filing of the original complaint.<sup>5</sup> Under the same rationale, the plaintiff may not hereafter file another amended complaint to name specific John Does as defendants.

Because no mistake was made, it is not necessary to determine whether Mike Osborne received adequate notice under Rule 15(c)(3).

#### IV

For the reasons stated, the defendant’s motion to dismiss will be granted. An appropriate judgment will be entered.

DATED: November 30, 2001

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United States District Judge

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<sup>5</sup> This result may have been different had the plaintiff in fact prepared the suit papers himself, without the assistance of an attorney. *See, e.g., Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555-56 (7th Cir. 1996).

