UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-1704

(Summary Calendar)

NOBLE LEE CLARK,

Plaintiff-Appellant,

versus

LESLIE W. HAWKINS and STEPHEN ZIEGLER,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(3:89 CV 0053 AJ)

(November 25, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Noble Lee Clark, proceeding *pro se*, sued Bedford Police Officer L.W. Hawkins, alleging a civil rights violation under 42 U.S.C. § 1983 (1988). Clark later added Hurst Police Officer Stephen Ziegler as a defendant, but the district court granted summary judgment in Ziegler's favor based on the applicable statute

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of limitations. After a bench trial, the court issued a take nothing judgment in favor of Hawkins. Clark appeals both rulings against him.[1] We AFFIRM.

I

Seven months after his arrest for theft, Clark filed a § 1983 civil rights complaint against Hawkins, alleging excessive use of force. The complaint's recitation of facts refers to "another police officer, presently unknown to [Clark]," but Clark did not name the unknown officer as a defendant. During discovery, four months after the complaint was filed, Hawkins answered Clark's interrogatories, and his answers identified Ziegler as a key witness.

Over sixteen months after he filed his complaint (and more than fourteen months after Hawkins' interrogatory answers), Clark moved to add Ziegler as a defendant, claiming that Ziegler was the "unknown officer" to whom Clark had referred in the statement of facts of his original complaint. The district court granted the motion, and Clark amended his complaint to add Ziegler several weeks later.

Ziegler moved for summary judgment, asserting that Clark's action against him was barred by the statute of limitations. The

[1] Both Hawkins and Ziegler assert that this Court does not have jurisdiction because Clark filed his brief after the date appointed by the court. However, Clark filed his brief in compliance with this Court's order granting him an additional thirty days to file.

magistrate[2] agreed and granted Ziegler's motion. After a bench trial, the magistrate found in Hawkins' favor and entered a take nothing judgment against Clark. Clark now appeals, listing the following items as appealable issues: 1) the magistrate erroneously failed to take his original complaint as true, 2) the magistrate erroneously granted Ziegler's summary judgment based on the statute of limitations, 3) the magistrate improperly overruled the district judge by granting the summary judgment based on the statute of limitations after the district judge had granted leave to add Ziegler, and 4) the magistrate erroneously held Clark, as a *pro se* plaintiff, to the same drafting standards as licensed attorneys. Because Clark has failed to appeal properly any issues concerning the judgment in favor of Hawkins,[3] we confine our discussion and review to Clark's appeal of the grant of summary judgment to

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[2] Upon agreement of the parties, the district court entered an order, in accordance with 28 U.S.C. § 636(c) (1988), referring the case to a magistrate judge for all further proceedings and entry of final judgment, with any appeal to be taken to this Court.

[3] Clark did not brief or argue the first, third, and fourth issues. "`Although [this Court] liberally construe[s] the briefs of pro se appellants, we also require that arguments must be briefed to be preserved.'" *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (quoting *Price v. Digital Equip. Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988). Therefore, even a *pro se* appellant "abandon[s] [his] arguments by failing to argue them in the body of his brief." *Id.* at 224-25. We hold that Clark has abandoned the issues he failed to brief or argue, and we do not address them on the merits.

Clark also advanced several new issues in his reply brief pertaining to the district court's alleged failure to subpoena witnesses and refusal to allow Clark's impeachment of Hawkins. This Court has repeatedly declined to address issues first raised in a reply brief. *See, e.g., Yohey*, 985 F.2d at 225 (court will not consider issues newly raised in reply brief). Accordingly, we do not review the new issues raised in Clark's reply brief.

Ziegler.

II

Clark argues that the district court erred in granting Ziegler's motion for summary judgment based on the statute of limitations. "Summary judgment is reviewed *de novo*, under the same standards the district court applies to determine whether summary judgment is appropriate." *Voinche v. Federal Bureau of Investigation*, 999 F.2d 962, 963 (5th Cir. 1993). Summary judgment is proper when all the evidence viewed in the light most favorable to the non-movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the moving party carries its burden of showing that there is no genuine issue of material fact, the burden shifts to the non-movant to introduce specific facts or produce evidence that shows the existence of a genuine issue of fact that prevents the grant of summary judgment in the movant's favor. Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) (mandating grant of summary judgment against party with burden of proof at trial when, after time for discovery and upon motion, party fails to establish an element essential to its case); *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 126 (5th Cir. 1994) (forcing non-movant to come forward with competent summary judgment evidence sufficient to establish a genuine issue of material fact after movant has carried his burden of proof).

Congress has not provided a statute of limitations in § 1983

cases; therefore, federal courts borrow the forum state's general personal injury limitations period. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S. Ct. 573, 581-82, 102 L. Ed. 2d 594 (1989) (equating § 1983 claims with personal injury actions because both remedy injuries to personal rights). In Texas, the pertinent limitation period is two years from the day the cause of action accrues. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986) ("A person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."); *see also Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992) (borrowing two-year statute of limitations from Texas law for § 1983 case). Clark acknowledges that the alleged injury underlying his suit occurred when he was arrested by Officers Hawkins and Ziegler. However, Clark did not join Ziegler as a defendant until 26 months later, after the two-year statute of limitations had expired.

Clark contends that even if the statute of limitations had expired, his amendment naming Ziegler "relates back" to his original complaint. Two options under Federal Rule of Civil Procedure 15(c)[4], provides that an amendment to a pleading "relates

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[4] Rule 15(c) permits the relation back of amendments when:

> (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

back" to the original pleading, potentially apply to this case.[5] First, an amendment relates back if the law providing the statute of limitations applicable to the action permits it. Fed. R. Civ. P. 15(c)(1). The advisory committee notes accompanying the 1991 amendment to Rule 15(c)(1) explain that if the forum providing the statute of limitations "affords a more forgiving principle of relation back than the one provided in th[e] rule," the state rule should be used to save the amendment. Fed. R. Civ. P. 15 advisory committee's note (1991 amendment). However, Texas law does not permit relation back of an amendment when, as here, the plaintiff attempts to add a new party after the expiration of the statute of limitations. *Kirkpatrick v. Harris*, 716 S.W.2d 124, 125 (Tex. App.))Dallas 1986, no writ).

Second, under Rule 15(c)(3) an amendment that changes the party named in the original complaint relates back if (a) the new claim arose from the same transaction or occurrence alleged in the

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> (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 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).

[5] Rule 15(c)(2) addresses only new claims or defenses and not the addition of new parties.

initial pleading, and (b) the new party to be brought in by amendment, during the 120 day period provided in Rule 4(m),[6] (i) had notice of the claim against him; and (ii) knew or should have known that, except for a mistake concerning the identity of the proper party, he would have originally been named as defendant. Fed. R. Civ. P. 15(c)(3); *see also Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 545 (5th Cir. 1992) (requiring notice to intended defendant within 120 days of the filing of the complaint). Assuming, *arguendo*, that 15(c)(3) applies to Clark's amendment,[7] his addition of Ziegler does not relate back to his original complaint. Ziegler testified by affidavit that he had no knowledge

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[6] Rule 4(m) provides a time limit for service of process on a defendant. Fed. R. Civ. P. 4(m).

[7] This Court has not addressed the question of whether Rule 15(c)(3) encompasses more than only amendments correcting mistakes in the original complaint. It is unclear from the text of the rule whether an actual mistake must exist in the original pleading or if the failure to name a potential defendant is sufficient to bring an amendment within 15(c)(3)'s scope. Most courts require a plaintiff to have mistakenly named the defendant before an amendment changing the name of the defendant can relate back to a timely pleading. *See*, *e.g.*, *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1181 (7th. Cir. 1989) (prohibiting relation back when plaintiff lacked knowledge of prospective defendant's identity); *Anderson v. Deere & Co.*, 852 F.2d 1244, 1248 (10th Cir. 1988) (requiring actual mistake within limitations period before amendment can relate back to earlier pleading); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 857-58 (9th Cir. 1986) (holding that while Rule 15(c)(3) is designed to protect plaintiffs who mistakenly name a defendant, it is not intended to assist one who fails to act promptly after being notified of a potential defendant), *cert. denied*, 480 U.S. 934, 107 S. Ct. 1575, 94 L. Ed. 2d 766 (1987); *Wandrey v. Service Business Forms, Inc.*, 762 F. Supp. 299, 302 (D. Kan. 1991) (purposefully omitting defendants known to plaintiff does not constitute mistake within the definition of rule); *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 746 F. Supp. 40, 42-43 (D. Kan. 1990) (failing to sue one of two possible defendants because of misgivings about that person's liability is not a "mistake concerning the identity of the proper party"); *Harris v. E.F. Hauserman Co.*, 575 F. Supp. 749, 752-53 (N.D. Ohio 1983) (finding that conscious choice not to sue one of two known parties is not a Rule 15(c) mistake). *But see Advanced Power Systems, Inc. v. Hi-Tech Systems, Inc.*, 801 F. Supp. 1450, 1457 (E.D. Pa. 1992) (finding "mistake" whenever the party makes an error in legal judgment or in form by failing to join a particular party, and permitting relation back if added party received proper notice). We do not resolve this conflict here, however, because we hold that Clark's amendment does not relate back under 15(c)(3). *See infra* p.7-8.

of Clark's claim against him until he was served with a summons more than 15 months after the Rule 4(m) period for notice and service had expired. Ziegler's affidavit also shows that he had no reason to acquire any knowledge, actual or constructive, that he would be added as a defendant because he and Hawkins worked for different police departments and were represented by different counsel. Consequently, Ziegler presented evidence sufficient to show that no "genuine issue of material fact" existed, and the burden shifted to Clark to show a material fact in controversy.

In his response to Ziegler's motion for summary judgment, Clark did not claim that Ziegler had actual notice of the suit. Instead, he sought to impute Hawkins' knowledge to Ziegler. Referring to Hawkins' interrogatory answers, Clark contends that because Hawkins named Ziegler as a key witness, Ziegler must have known as of the date of the interrogatory answers that he would have originally been named as a defendant if Clark had known his name. We see no reason to impute Hawkins' knowledge to Ziegler. That *Hawkins* knew that Ziegler was the other officer involved in Clark's arrest does not mean that *Ziegler* knew or should have known that he might be named as a defendant. Therefore, Clark has presented no competent summary judgment evidence that Ziegler knew or should have known of the claim against him under Rule 15(c)(3). As Clark's amendment does not relate back to his original § 1983 complaint, it was time-barred. Consequently, the magistrate

properly granted Ziegler's motion for summary judgment.[8]

III

For the foregoing reasons, we **AFFIRM**.

[8] Clark also contends that his motion to amend adding Ziegler as a defendant complied with the district judge's scheduling order. We have found no authority to support the conclusion that compliance with a scheduling order immunizes an amendment against a statute of limitations defense.