

IN THE COURT OF APPEALS OF IOWA

No. 8-434 / 07-1257

Filed July 16, 2008

LYNNEA MAE CLARK,
Plaintiff-Appellee,

vs.

KLK CONSTRUCTION CORP.,
Defendant-Appellant,

and

CABLE CONSTRUCTION SPECIALISTS,
INC., MICHAEL E. KIRKENDALL,
INDIVIDUALLY, TOM GEORGES,
INDIVIDUALLY, ANGEL GEORGES,
INDIVIDUALLY, AND IOWA TELECOM,
CCS, INC., THOMAS A. GEORGES,
INDIVIDUALLY, AND JOSHUA W. GEORGES,
INDIVIDUALLY.
Defendants.

Appeal from the Iowa District Court for Monroe County, Daniel P. Wilson,
Judge.

On interlocutory appeal, KLK Construction Corp. challenges the district
court's denial of its motion for summary judgment. **REVERSED AND
REMANDED.**

William L. Dawe and Apryl M. DeLange of Hopkins & Huebner, P.C. , Des
Moines, for appellant KLK Construction Corp and defendant Iowa Telecom, CCS,
Inc.

Randall C. Stravers of Clements, Pothoven, Stravers & Yates, Oskaloosa,
for remaining defendants.

Ryan J. Mitchell of Orsborn, Milani & Mitchell, L.L.P., Ottumwa, for
appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

On interlocutory appeal, KLK Construction Corp. challenges the district court's denial of its motion for summary judgment. We reverse.

I. Background Facts and Prior Proceedings

The record on summary judgment, when viewed in the light most favorable to the non-moving party, see *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000), reveals the following: Iowa Telecom, CCS, Inc. hired KLK to remove old telephone cable in Albia and replace it with new cable. KLK, in turn, subcontracted the job to Cable Construction Specialists, Inc. (hereinafter CSC).

On July 28, 2004, Lynnea Mae Clark was struck in the head by a piece of debris in downtown Albia as she loaded groceries into her car. The debris had apparently fallen from above where CSC workers were removing cable. Clark called a police officer to report the incident. The officer met with Clark and filled out a report. The officer spoke with Michael Kirkendall—one of the workers at the scene. Kirkendall told the officer that he worked for CSC and that CSC was replacing cable for Iowa Telecom. He also told the officer that his manager's name was Tom Georges. In his report, the officer noted there were no visible signs of injury to Clark's head.

On July 25, 2006, Clark filed a petition seeking damages against CSC, Iowa Telecom, Michael Kirkendall, Tom Georges, and Angel Georges alleging negligence and intentional infliction of emotional duress and distress. Iowa Telecom was served notice of this petition on August 16, 2006.

Pursuant to an indemnification provision in the contract between KLK and Iowa Telecom, KLK procured attorney William Dawe to defend Iowa Telecom in this matter. Dawe prepared and filed an answer for Iowa Telecom.

On March 23, 2007, Clark filed an amended petition naming KLK as an additional defendant.¹ KLK, through Dawe, filed an answer raising the statute of limitations as an affirmative defense. KLK then filed a motion for summary judgment claiming the action against it was barred by the applicable two-year statute of limitations. See Iowa Code § 614.1(2) (2005) (establishing a two-year statute of limitations for actions founded on injuries to person or reputation).

Clark resisted the motion for summary judgment by arguing the March 23, 2007 amended petition related back to the date of the original petition because: (1) the claim in the amended petition arose out of the conduct, transaction, or occurrence set forth in the original pleading, (2) Dawe had already tendered a defense for Iowa Telecom and therefore KLK was not prejudiced in anyway, (3) KLK knew or should have known that, but for a mistake concerning KLK's identity, the action would have been brought against KLK, and (4) that KLK had received sufficient notice of the institution of the action during the statute of limitation period.

In a brief written ruling, the district court found that the "relation back rule" applied to this situation because:

KLK was not taken by surprise, nor did it have its ability to defend this case prejudiced by the timing of the suit against KLK. KLK had reason to know of the cause of action filed by Clark, prior to the lapse of the two-year statute of limitations.

¹ This amended petition also named Thomas Georges and Joshua Georges as additional defendants.

Accordingly, the court denied KLK's motion for summary judgment. Our supreme court granted KLK's application for interlocutory appeal and transferred the matter to this court for disposition.

II. Standard of Review

We review rulings on motions for summary judgment for correction of errors at law. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005). A motion for summary judgment should be granted when there is no genuine issue of material fact for trial, and the movant is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). In ascertaining whether there is a genuine issue of material fact, we review the record in the light most favorable to the non-moving party. *Schoff v. Combined Ins. Co.*, 604 N.W.2d 43, 45 (Iowa 1999).

III. Merits

The sole issue we must decide on appeal is whether an amendment to Clark's petition, which added KLK as a defendant more than seven months after the expiration of the applicable two-year statute of limitations for these claims, relates back to the time the original petition was filed.

Iowa Rule of Civil Procedure 1.402(5) outlines the circumstances when an amendment that adds an additional party to the lawsuit relates back to the date of the original petition. Rule 1.402(5) states, in pertinent part,

Whenever 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, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment 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 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.

(Emphasis added.)

Significant to this appeal is that an amendment will relate back only if the added defendant receives notice of the institution of the action “within the period provided by law for commencing the action against [the added defendant].” Iowa R. Civ. P. 1.402(5). Also significant is our supreme court’s holding in a similar “relation back” case, *Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863, 865-66 (Iowa 1992), where the court explicitly found that the period to commence the action against the new defendant is not extended by the time it takes to serve the original defendant.

Despite the district court’s conclusory statement that “KLK had reason to know of the cause of action filed by Clark, prior to the lapse of the two-year statute of limitations,” we find nothing in the record to prove that KLK had notice of Clark’s petition prior to the lapse of the two-year statute of limitations or had reason to know of the cause of action. Clark does not cite to any portion of the record to show how KLK had notice or reason to know of the cause of action prior to the lapse of the two-year statute of limitation. Instead, Clark contends that because the petition against Iowa Telecom was filed within the statute of limitations period, this provided sufficient notice to KLK to satisfy the relation back requirement because Iowa Telecom was represented by KLK’s attorney. We disagree.

The period provided by law for commencing the action against KLK began on July 28, 2004, the day the cause of action accrued, and ended two years

later, on July 28, 2006. Clark filed the original petition on July 25, 2006, with three days remaining in the two-year statute of limitations period for personal injury claims. Iowa Telecom was not served with notice of the lawsuit until August 16, 2006, more than three weeks after the lapse of the two-year statute of limitations. Even if we were to assume Iowa Telecom immediately contacted KLK about the lawsuit in order to invoke the aforementioned indemnification provision in their contract, by this time, the period for commencing an action against KLK had ended. Because Iowa Telecom did not receive notice of the lawsuit until *after* the limitations period had lapsed, any argument that this somehow imputed notice on KLK *before* the expiration of the limitations period is meritless.

Accordingly, we find the district court erred when it determined the March 23, 2007 amended petition related back to the July 25, 2006 petition. We therefore reverse the district court's summary judgment ruling and remand this case to the district court for entry of summary judgment in favor of KLK.

REVERSED AND REMANDED.