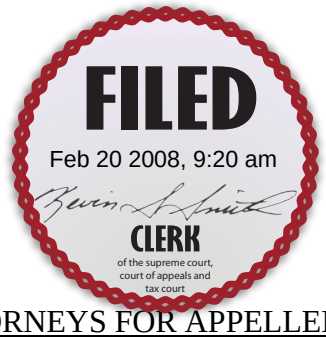

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IN THE
COURT OF APPEALS OF INDIANA

MIDWEST PSYCHOLOGICAL CENTER, INC., and SHELVY KEGLAR,	)	
Appellants - Plaintiffs,	)	
vs.	)	No. 49A02-0706-CV-468
INDIANA STATE DEPARTMENT OF ADMINISTRATION and/or the DIVISION OF DISABILITY, AGING and REHABILITATIVE SERVICES, DISABILITY DETERMINATION BUREAU, and SILVIA FUNK, DENNIS OSBORNE, CHARLOTTE ALLSTATT, PATRICIA CAREW-CEESAY, SHELLY HARRIS, and SHARI E. KINNAIRD, individually,	)	
Appellees - Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0307-MI-1212

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Midwest Psychological Center, Inc. and Dr. Shelvy Keglar (collectively, "Midwest") appeal the dismissal of their racial discrimination claims against the Indiana Division of Disability, Aging and Rehabilitative Services, Disability Bureau, and Department of Administration, Silvia Funk, Dennis Osborne, Charlotte Allstatt, Patricia Carew-Ceesay, Shelly Harris, and Shari E. Kinnaird, (collectively, the "State"). Midwest raises several issues, which we consolidate and restate as: whether the trial court erred in granting the State's motion to dismiss because Midwest's claims were barred by the two-year statute of limitations applicable to actions brought under 42 U.S.C. § 1981 and § 1983.

We reverse.

FACTS AND PROCEDURAL HISTORY

Midwest is an African-American owned business. This appeal arises from Midwest's bid for a state psychological service contract known as RFP-41. Three entities, Indiana Disability Determination Consultants ("IDDC"), Metro RPL, Inc, and Midwest, submitted competing bids for psychological work to be performed for the State. The State reviewed the bids and, on February 28, 2003, recommended IDDC, a non-minority-owned business, be awarded the RFP-41. On April 2, 2003, the State notified Midwest that the RFP-41 had been awarded to IDDC.

Midwest sent a "Letter of Protest" to the Indiana Department of Administration ("IDA"). The State denied the protest. Midwest then requested an appeal from the IDA. David Perlini, commissioner of the IDA and a member of the Commission on Minority and Women's Business Enterprises, informed Midwest that he was without authority to

provide a remedy. On July 7, 2003, Midwest petitioned the trial court to review the administrative decisions. In its petition, Midwest alleged that the RFP-41 was awarded in violation of 42 U.S.C. § 1981. Particularly, Midwest alleged that RFP-41 would be paid with State monies and that those entities awarding the contract acted under the color of state law. Midwest contended that its bid was superior to and less costly than that of IDDC. Midwest further complained that its staff had experience in the psychiatric field and, yet, the State evaluators gave a zero out of a possible twenty-five percentage points in the area of experience.

The State filed a motion to dismiss Midwest's petition. On February 25, 2005, Midwest filed a motion for leave to amend its complaint to dismiss the claims and to state a claim against the State evaluators in their individual capacity. On March 2, 2005, before any ruling on its first motion, Midwest again moved for leave to amend its complaint to add other State evaluators. On March 4, 2005, without a ruling from the trial court, Midwest filed an amended complaint for damages with the required summonses to the added parties. The State moved to strike the amended complaint, and three days later, the trial court heard argument on the issue. On May 17, 2005, the trial court struck the March 4, 2005 amended complaint as premature and granted Midwest thirty days to file an amended complaint and perfect service. Three days later, Midwest filed its amended complaint and summonses. On September 12, 2005, the State filed its motion to dismiss contending that the plaintiff's claim was barred by the two-year statute of limitations applicable to § 1983 claims. On May 18, 2007, the trial court dismissed

Midwest's amended complaint. Midwest now appeals.

DISCUSSION AND DECISION

Midwest argues that the statute of limitations should have begun to run when Midwest discovered or reasonably should have discovered any wrongdoing and not when the actual wrongdoing occurred. Midwest further asserts that its amended complaint was timely filed after the running of the statute of limitations under the relation back doctrine.

Midwest claims that April 2, 2003, the date Midwest discovered the contract had been awarded to IDDC, was the first day that it could reasonably have discovered any wrongdoing and that the statute of limitations began to run on that date.

"The statute of limitations for a § 1983 action is governed by the personal injury statute of the state where the alleged injury occurred." *Parks v. Madison County*, 783 N.E.2d 711 (Ind. Ct. App. 2002) (citing *Wilson v. Garcia*, 471 U.S. 261, (1985)). The personal injury statute, IC 34-11-2-4, governs the statute of limitations for § 1983 claims in Indiana. *Hondo, Inc. v. Sterling*, 21 F.3d 775, 778 (7th Cir. 1994). IC 34-11-2-4 provides, "An action for: (1) injury to person or character[;] (2) injury to personal property; (3) a forfeiture of penalty given by statute[;] must be commenced within two (2) years after the cause of action accrues. "A § 1983 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Hondo*, 21 F.3d at 778; *see also Porter County Sheriff's Dept. v. Guzorek*, 857 N.E.2d 363, 366-67 (Ind. 2006).

We reject the State's argument that Midwest should have kept itself aware of the RFP-41 award, and should have discovered the alleged injury on February 28, 2003, the

date the State recommended the contract be awarded to IDDC. Although the State recommended the RFP-41 be awarded to IDDC on February 28, 2003, notice of denial was not given to Midwest until April 2, 2003, and the contract was not formally awarded to IDDC until May 9, 2003. There was no reason why Midwest should have known of the RFP-41 award prior to receiving notice that its bid had been denied. Therefore, Midwest's § 1983 claim was subject to a two-year statute of limitation that accrued on April 2, 2003.[1] *See Hardin v. CNA Ins. Cos.*, 103 F.Supp.2d 1091, 1097 (S.D. Ind. 1999) (action accrued on date when plaintiff was denied interview).

Because we conclude that Midwest's claim was subject to a two-year statute of limitations, we must now determine whether Midwest's amended complaint adding new parties should relate back to the date that Midwest filed its petition. Indiana Trial Rule 15(A) governs the amendment of pleadings and provides that a party may amend its pleading as a matter of course so long as no responsive pleadings have been filed, and if they have, then, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires." *See MAPCO Coal, Inc. v. Godwin*, 786 N.E.2d 769, 777 (Ind. Ct. App. 2003) (amendments are to be liberally permitted). We review a trial court's grant or denial of a pleading amendment for an abuse of discretion. *Id.* In determining whether the trial court abused its discretion, we analyze a number of factors including: "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiency by

[1] Midwest's § 1983 claim is not governed by § 1658 because that section only provides a four-year statute of limitation to new claims created by the legislature after the 1991 Act, and a claim like Midwest's § 1983 claim was viable prior to the 1991 Act. *See Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 372 (2004).

amendment previously allowed, undue prejudice to the opposing party by virtue of the amendment, and futility of amendment." *Palacios v. Kline*, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991).

"Generally, a new defendant to a claim must be added prior to the running of the statute of limitations; however, Trial Rule 15(C) provides an exception to this rule." *Crossroads Serv. Ctr., Inc. v. Coley*, 842 N.E.2d 822, 824 (Ind. Ct. App. 2005), *trans. denied* (quoting *Diversified Health Servs., L.P. v. Wiley*, 790 N.E.2d 1056, 1059 (Ind. Ct. App. 2003), *trans. denied*). Indiana Trial Rule 15(C) states:

> Relation back of amendments: 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 [120] days of commencement of the action, the party to be brought in by 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. . . .

Therefore, in order for an amended complaint changing the party against whom the claim is brought to relate back it must meet the following requirements: (1) the claim in the amended complaint must have arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint; (2) within 120 days after the commencement of the action, the party to be brought into the action must have received notice of the institution of the action that it will not be prejudiced in maintaining

a defense on the merits; and (3) within 120 days after commencement of the action, the party 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 to be brought in by the amendment. *Crossroads*, 842 N.E.2d at 824-25.

Here, the accrual date of Midwest's claim has been determined to be April 2, 2003. Within two years from that date, all the defendants knew or should have known that Midwest was asserting § 1981 and § 1983 actions against them by reason of the amended complaint Midwest filed on March 4, 2005. *See Appellant's App.* at 71-76. Although the amended complaint was later struck by the trial court as being premature, it was sufficient to put all defendants on notice of Midwest's claims within the statute of limitation period. Indiana Trial Rule 15(C) provides for relation back of amendments under these circumstances, and the trial court allowed the amended complaint on April 12, 2005, struck it on May 18, 2005, and allowed Midwest to amend its complaint once more and file it within 30 days. Midwest followed the trial court's instruction and filed its amended complaint within two days of the May 18, 2005 order and within 120 days of the expiration of the statute of limitations. Beyond the filing dates, the State has failed to show any factors that would undermine the court's discretion to grant an amendment. Therefore, we find the trial court's dismissal of this action to be error.

Reversed.

RILEY, J., and MAY, J., concur.