STATE OF MICHIGAN

COURT OF APPEALS

KENNETH CUTWAY,

Plaintiff-Appellant,

v

EQUIPMENT DEVELOPMENT COMPANY and AMERICAN FAN COMPANY,

Defendants-Nonparties,

and

EDCO, INC.,

Nonparty,

and

J. KELLY COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
February 25, 2000

No. 213439
Washtenaw Circuit Court
LC No. 96-003016-NP

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant J. Kelly Company, Inc. pursuant to MCR 2.116(C)(7). Under theories of negligence and implied warranty, plaintiff sought to recover for personal injuries he received from an allegedly unsafe shop blaster machine he rented from defendant. We affirm.

The first issue is whether the trial court erred in holding that plaintiff's claim was barred by the "waiver" and "hold harmless" provisions of the rental agreement plaintiff signed. Plaintiff contends that the trial court erred because the relevant provisions were located on the back of the rental agreement, whereas plaintiff's signature was on the front. There is no merit to this claim.

This Court reviews a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted pursuant to MCR 2.116(C)(7), this Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the plaintiff. *Romska v Opper*, 234 Mich App 512, 515; 594 NW2d 853 (1999). A motion under this subrule should be granted only if no factual development could provide a basis for recovery. *Id.*

It is a well established principle that a party signing an agreement is deemed to know its contents, and may not claim ignorance to avoid the instrument. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 92; 468 NW2d 845 (1991); *Cleaver v Traders' Ins Co*, 65 Mich 527, 533; 32 NW 660 (1887). Moreover, plaintiff testified that, before he rented the equipment, he read the agreement and was aware that there was a Hold Harmless and Indemnity clause on the back.

Plaintiff further contends that he believed that the provisions did not apply to him because he was a regular customer with an account. It is well settled that a party's failure to obtain an explanation of a contract is ordinary negligence, and estops the party from avoiding the contract on grounds of ignorance regarding its provisions. *Scholz, supra* at 92. Plaintiff does not contend that he was advised that the provisions were not applicable to him. As such, plaintiff cannot reasonably contend that the provisions on the back side of the agreement, which he conceded that he was aware of at the time of execution, should be severed from those on the front.

Regarding plaintiff's argument that the provisions are contrary to public policy, this Court has repeatedly held that it is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence. *Skotak v Vic Tanny Int'l*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994).

In the instant matter, plaintiff does not allege that he was dazed, in shock, under the influence of drugs, or subjected to any fraudulent or overreaching conduct. *Id.* Moreover, plaintiff testified that he was not tricked into signing the agreement, and that he was never told that the provisions were inapplicable to him. Rather, plaintiff suggests that defendant's failure to explain that the provisions applied to him constitutes misrepresentation. This Court has held, however, that mere silence regarding exculpatory provisions does not equate to misrepresentation. *Dombrowski v City of Omer*, 199 Mich App 705, 711-712; 502 NW2d 707 (1993). Therefore, plaintiff's argument that his assent to the provisions was not "fairly and knowingly made" is without merit. As a result, plaintiff's broader contention that the provisions are contrary to public policy is rejected.

Finally, plaintiff contends that the rental agreement is an unconscionable contract of adhesion. We do not agree. Generally, there are two requirements to be met for a contract to be deemed one of adhesion. First, the party must agree to the contract because he or she has no "meaningful choice" to obtain the desired goods or services elsewhere. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 157 n28; 596 NW2d 208 (1999) (citing *Morris v Metriyakool*, 418 Mich 423, 440; 344 NW2d 736 (1984)). Second, to be invalidated, the challenged provision must also be substantively unreasonable. *Rembert, supra* at 157 n28 (citing *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 43-44; 466 NW2d 325 (1991), and *Ryoti v Paine, Webber, Jackson & Curtis,*

Inc, 142 Mich App 805; 371 NW2d 454 (1985)). Therefore, unless the rental agreement satisfies both of these conditions, it is reasonable as a matter of law and not an adhesion contract.

Here there was no evidence suggesting that the machine was only available by lease and could not be obtained outside of the rental industry. Nor were the provisions substantially unreasonable. We note at the onset that, in the instant matter, plaintiff rented the shop blaster machine for use in his subcontracting business, rather than for personal, family or household use, placing the transaction outside the statutory realm of consumer goods or use. MCL 440.9109(1); MSA 19.9109(1); MCL 440.2803(e); MSA 19.2A103(e). While a limitation of liability for consequential damages for personal injury in the case of consumer goods is prima facie unconscionable, such limitations are not prima facie unconscionable in the case of commercial goods. MCL 440.2953(3); MSA 19.2A503(3).

Here, the exclusion of the implied warranty of merchantability is in writing, mentions "merchantability," and is conspicuous, MCL 440.1201(10); MSA 19.1201(10), and is, therefore, substantively reasonable under MCL 440.2864(2); MSA 19.2A214(2). Moreover, the exclusion of the implied warranty of fitness contains language very similar to the language suggested by the statute. MCL 440.2864(2); MSA 19.2A214(2). Therefore, the exculpatory provisions here are not unconscionable on the basis of substantive reasonableness, and, the rental agreement is not an unconscionable contract of adhesion.

Next, plaintiff argues that the trial court erred in refusing to grant plaintiff leave to amend his complaint to allege a claim of gross negligence. This Court reviews a trial court's refusal to allow a plaintiff leave to amend the underlying complaint under an abuse of discretion standard. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Generally, an abuse of discretion occurs only where the trial court's error is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

A motion to amend is properly denied where the amendment would be futile. *Clark v Grover*, 132 Mich App 476, 484; 347 NW2d 748 (1984) (citing *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988). Along the same lines, an amendment is properly deemed futile if it is legally insufficient on its face, without considering the substantive merits. *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 783; 421 NW2d 289 (1988).

In the instant matter, in making its request for leave to amend, plaintiff added no new allegations and merely sought to characterize the existing factual allegations as gross negligence. Moreover, the trial court concluded that the testimony received did not suggest any likelihood that discovery would reveal facts supporting gross negligence. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 600.2945(d); MSA 27A.2945(d). To the extent that plaintiff suggests that absence of a

warning decal or protective guard might constitute negligence, plaintiff has cited no authority suggesting that this automatically equates to recklessness sufficient for gross negligence. The trial court did not abuse its discretion in denying plaintiff's request for leave to amend.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald