

STATE OF MICHIGAN
COURT OF APPEALS

AROZE ALI,

Plaintiff-Appellant,

v

LORRAINE CAB CO., JOHN CLARK and
CADILLAC PLASTIC & CHEMICAL CO.,

Defendants-Appellees.

UNPUBLISHED
March 10, 2000

No. 211022
Wayne Circuit Court
LC No. 96-621687 NO

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order entered by the trial court granting summary disposition in favor of defendants Lorraine Cab Co. and John Clark,¹ and denying plaintiff's motion to amend the complaint in this negligence action. We affirm.

I.

Plaintiff was a taxicab driver with nine years of experience. He entered into an agreement with Clark, the sole proprietor of Lorraine Cab, which agreement provided that plaintiff would rent a Lorraine cab licensed to operate in Dearborn and Detroit. The agreement clearly set forth that plaintiff would be driving the cab as an independent contractor, not as an employee. In accordance with Detroit Ordinances, § 58-2-392², the taxicab was equipped with a partition across the back of the front seat dividing the driver's compartment from the passenger compartment. On August 25, 1995, plaintiff picked up a fare in Detroit, and the passenger brandished a gun. Plaintiff immediately locked the small window in the partition for passing fares and attempted to drive to a more populated area a few blocks away. The passenger fired through the partition, striking plaintiff in the right side of his face.

Plaintiff brought this action claiming that defendants breached the duty owed lessee drivers to protect them from criminal acts of third parties. In short, plaintiff alleged that defendants were obligated to equip their cabs with bulletproof partitions. Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that they had no duty to protect lessees from third-party criminal acts. Plaintiff responded to the motion arguing that the lessor-lessee relationship was a special relationship

that imposed a duty on defendants because plaintiff had lost the ability to protect himself, and that defendants had a duty to warn that the partition in the cab was not bulletproof. Plaintiff also sought leave to amend the complaint to specifically allege a breach of common law duty to warn.

The trial court granted defendants' motion ruling that defendants were under no legal duty to protect plaintiff from the criminal acts of unknown third parties. Additionally, the court ruled that defendants were under no duty to warn that the partition in the cab was not bulletproof. We agree.

II.

This Court reviews decisions on motions for summary disposition de novo. *Spiak v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court did not indicate under which subrule it was granting summary disposition. A motion under MCR 2.116(C)(8) tests the legal sufficiency based on the pleadings alone. *Id.* A motion under MCR 2.116(C)(10) tests the factual support for a claim and requires consideration of proofs submitted or filed in the action to determine if a genuine issue of material fact exists to warrant a trial. *Id.* In this case, the trial court looked beyond the pleadings in rendering its decision. For purposes of our review, we will treat the motion as having been decided under MCR 2.116(C)(10). *Swan v Wedgwood Christian Youth and Family Services, Inc.*, 230 Mich App 190, 194; 583 NW2d 719 (1998).

III.

In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). Generally, an individual has no duty to protect another who is endangered by a third person's conduct. *Id.* at 54. An exception has developed where a special relationship exists between the persons. *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 499; 418 NW2d 381 (1988).

The relationship of an independent contractor is not a "special relationship" triggering liability for passive negligence or "nonfeasance." *Madley v The Evening News Ass'n*, 167 Mich App 338, 341; 421 NW2d 682 (1988). Plaintiff has not shown the existence of any other recognized special relationship that would impose a duty on defendants to protect its cab drivers from criminal acts of third persons.

Plaintiff's complaint did not allege that defendants created or maintained the criminal activity, or that defendant failed to act to end criminal activity that took place in its presence. *Gouch v Grand Trunk WR Co.*, 187 Mich App 413, 416-417; 468 NW2d 68 (1991). Absent any grounds for imposing a duty, summary disposition was appropriate.

IV.

The decision whether to grant or deny leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Ordinarily, leave to amend a complaint should be "freely given

when justice so requires." MCR 2.118(A)(2). Leave to amend may be denied when amendment would be futile. *Weymers, supra* at 658. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

Plaintiff argued in support of his motion for leave to amend that one of defendants' representatives had expressed the opinion that the partitions should have protected drivers from gun shots. The representative admitted, however, that she was not responsible for ordering the partitions and she did not know whether the partitions were made of safety glass. The trial court concluded that, although interesting, the fact that the representative may have thought the partition was bulletproof was insufficient to support plaintiff's belief that the partitions were bulletproof.

The trial court also concluded that plaintiff would not be successful under a failure to warn theory because there was still no evidence supporting the imposition of a duty. We agree. The partition satisfied the requirements of the city ordinance, which required a partition that would prohibit passengers from reaching the driver, not from shooting him. There was no evidence that the partition was defective. Plaintiff having failed to present any basis for the imposition of a duty to warn that the partition was not bulletproof, we agree that amendment to add such a count to the complaint would have been futile. There was no abuse of discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

¹ Defendant Cadillac Plastic & Chemical Co. was dismissed from this action, and a default judgment was entered against defendant Secure Partitions. Neither of those defendants is participating in this appeal.

² The ordinance provides in part: "Such partition shall be of such material and shall be installed so as to prevent any passenger from reaching the driver . . . from . . . the rear seat."