STATE OF MICHIGAN

COURT OF APPEALS

KEVIN DAUGHERTY, a Minor, by his next friend, JANICE DAUGHERTY,

Plaintiff-Appellant,

v

WILLIAM LEGROS,

Defendant,

and

CAPAC SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant-Appellee.

UNPUBLISHED
April 25, 2000

No. 208127
St. Clair Circuit Court
LC No. 96-001274-NO

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

PER CURIAM.

Plaintiff appeals by leave granted from an order granting defendant Capac School District Board of Education's motion for summary disposition, and from an order denying plaintiff's motion to file an amended complaint. We affirm.

This case arises out of defendant William Legros, a fourth grade teacher at Capac elementary school, sexually assaulting a student during class. Plaintiff filed suit against defendant Board of Education, claiming that it was vicariously liable for Legros' conduct. Defendant contended that governmental immunity precluded any liability, and the trial court agreed, granting summary disposition in defendant's favor. On appeal, plaintiff contends that the trial court erred as a matter of law in granting defendant Board of Education's motion for summary disposition. We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff contends that the trial court should have concluded that defendant Board of Education was not entitled to governmental immunity under MCL 691.1407(1); 3.996(107)(1) in this case because Legros sexually assaulted the student during class, an action which is not the exercise or discharge of a governmental function. In addition, plaintiff contends that the trial court should have ruled that the Board of Education was vicariously liable for Legros' acts of sexually assaulting the student during class because the boy believed that Legros was acting within his apparent authority. We reject both arguments.

MCL 691.1407(1); MSA 3.996(107)(1) states:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function.

There is no intentional tort exception to governmental immunity. *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995). Therefore, if a plaintiff brings a cause of action against a governmental agency for an intentional tort, a court must analyze whether the governmental agency or its employees were engaged in the exercise or discharge of a governmental function at the time the intentional tort was committed to determine whether the governmental agency is entitled to governmental immunity. See *id.*

A governmental function "is an activity expressly or impliedly mandated or authorized by the constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). In a lawsuit alleging vicarious liability, when determining whether an employee was engaged in the exercise or discharge of a governmental function at the time he committed the intentional tort, a court must analyze the general activity of the employee, and not his specific conduct. *Payton, supra* at 392; see also *Smith v Dep't of Public Health*, 428 Mich 540, 608; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). As the *Smith* Court noted, "to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature . . . . [I]t would be difficult to envision a tortious act that is a governmental function." *Id.* at 609.

Accordingly, to decide whether defendant was entitled to governmental immunity pursuant to MCL 691.1407(1); MSA 3.96(107)(1), it must be determined whether Legros was engaged in the exercise or discharge of a governmental function at the time he sexually assaulted the student. Because the appropriate inquiry involves the general activity that Legros was performing at the time he sexually assaulted the student, and not the intentional tort itself, we conclude that Legros was indeed engaged in the exercise or discharge of a governmental function. The general activity that Legros was performing at the time he sexually assaulted plaintiff was teaching elementary school students, which is expressly authorized by statute. MCL 380.1 *et seq.*; MSA 15.4001 *et seq*. An activity that is expressly authorized by statute is a governmental function. MCL 691.1401(f); MSA 3.996(101)(f). Therefore, the trial court reached the right result in concluding that defendant Board of Education was immune from liability in this case.

The trial court correctly ruled that defendant Board of Education was not vicariously liable under a theory of respondeat superior for Legros' sexual assaults during class because the assaults were outside the scope of his employment and his apparent authority. In *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 355; 288 NW2d 424 (1979), this Court held that a teacher's homosexual assaults on his student constituted conduct that was clearly outside the scope of the teacher's employment and the teacher's apparent authority. *Id.* Applying *Bozarth*, we conclude that because Legros was acting outside the scope of his employment and his apparent authority when he sexually assaulted plaintiff during class, the trial court did not err in ruling that defendant could not be held vicariously liable for Legros' conduct under a theory of respondeat superior.

Plaintiff also contends that the trial court abused its discretion by not allowing plaintiff to amend the complaint to add a hostile work environment sexual harassment claim against defendant Board of Education under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, for Legros' sexual assaults during class. Specifically, plaintiff contends that it would not have been futile to allow plaintiff to amend the complaint because plaintiff can establish a prima facie case of hostile work environment sexual harassment. We review a trial court's decision to grant or deny a motion to amend a complaint for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 548 NW2d 345 (1998).

The general rule is that, when a plaintiff is seeking to amend a complaint, a trial court should freely grant leave to amend the complaint when justice so requires. MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, a trial court may deny leave to amend a complaint for the following reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party, or (5) where an amendment would be futile. *Lane v Kindercare Learning Centers, Inc,* 231 Mich App 689, 687; 588 NW2d 715 (1998). An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. *Id.*

Plaintiff suggests proof indicating only that some other school teachers, none of them administrators, managers, school board members, or other persons with the power to take disciplinary action had notice of Legros' improprieties. While it would seem that such teachers, if identifiable, were in violation of the Child Sexual Abuse Reporting Act, MCL 722.623(1) *et seq.*. such teacher indiscretions do not make the school district liable in tort for Mr. Legros' actions. Since plaintiff made the same allegations in the motion to amend the complaint that were made in opposition to defendant's motion for summary disposition, it would have been futile to allow plaintiff to amend the complaint. See *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). The trial court did not abuse its discretion.

Affirmed.

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

/s/ Jeffrey G. Collins