STATE OF MICHIGAN

COURT OF APPEALS

IRA LEE TODD, JR., BERNICE TODD, and IRA LEE TODD, JR., as Next Friend of IRA LEE TODD, III, and IRA LEE TODD, JR., as Next Friend of BRIAN E. J. TODD,

Plaintiff-Appellants,

v

CITY OF DETROIT, CITY OF DETROIT CHIEF OF POLICE, RICO HARDY, DETROIT POLICE OFFICERS ASSOCIATION, TOM SCHNEIDER, CHAD OPOLSKI, DERRICK ROYAL, and RONALD RUPERT,

Defendant-Appellees.

UNPUBLISHED
July 17, 2001

No. 212272
Wayne Circuit Court
LC No. 95-506846-NO

Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants[1] on multiple counts of plaintiffs' complaint.[2] We affirm.

This case arises from a police shooting of an unarmed person. According to plaintiff Ira Lee Todd, Jr.,[3] a police officer with the Detroit Police Department (DPD), he and his partner,

[1] For ease in reference, defendants the City of Detroit (the City), the City of Detroit Police Department (DPD), the City of Detroit Chief of Police, and police officer Rico Hardy (Officer Hardy) will be collectively referred to as "the City defendants". Similarly, the Detroit Police Officers Association (DPOA), DPOA representatives Tom Schneider, Chad Opolski, Derrick Royal and Ronald Rupert will be collectively referred to as "the Union defendants".

[2] The trial court granted summary disposition in favor of defendants on all counts except the malicious prosecution count against defendant police officer Rico Hardy. That count went to trial and because the jury found no cause of action, the trial court entered judgment in favor of Hardy.

[3] Because the other plaintiffs' claims are derivative, for ease in reference we use the term "plaintiff" throughout the remainder of the opinion to refer to Ira Lee Todd, Jr., individually and

(continued…)

defendant Rico Hardy, were responding to a complaint when the victim approached Officer Hardy. Plaintiff observed that the victim was gesturing wildly with his hands and speaking loudly, and plaintiff also saw the victim remove from his coat an object that appeared to be a gun. Plaintiff then heard a shot and saw Officer Hardy fall backwards. Believing his partner to have been shot and fearing for his own life and for Officer Hardy's life, plaintiff drew his pistol and fired several shots into the victim. The victim died from gunshot wounds. The events that transpired thereafter, including Officer Hardy's version of the shooting and how defendants handled the situation, led to the filing of the instant case, in which plaintiff sought relief under multiple theories of recovery. The trial court granted summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendants on all but one of his claims and plaintiff now appeals that decision.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). In evaluating a motion under MCR 2.116(C)(8), a court considers only the complaint and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is appropriate under this subsection "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

"In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden, supra* at 120. If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 455-456, n 2; 597 NW2d 28 (1999).

I. Plaintiff's Claims Against the City Defendants

Plaintiff argues[4] that the trial court erred in dismissing plaintiff's claims against Officer Hardy for tortious interference with plaintiff's employment relationship with the DPD.

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to refer to all plaintiffs collectively.

[4] Plaintiff first argues in his appellate brief that the trial court erred in dismissing plaintiff's constitutional tort claims against the City of Detroit and the City of Detroit Chief of Police. However, at oral argument plaintiff conceded that this claim is not actionable on the basis of a Michigan Supreme Court decision released after the parties' briefs were filed, that being *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000) ("We agree with the Court of Appeals majority that our decision in *Smith [v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989),] provides no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee.").

According to plaintiff, "Hardy tortiously interfered with [plaintiff's] employment relationship with the [DPD] by deliberately lying about the facts surrounding the [at issue] shooting so as to shift blame onto [plaintiff] and away from himself." Plaintiff further claimed that Officer Hardy tampered with evidence.

The elements of tortious interference with a business relationship include 1) the existence of a valid business relationship or expectancy; 2) knowledge of the relationship or expectancy on the part of the defendant; 3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy; and 4) resultant damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), citing *Lakeshore Community Hospital v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995); see also *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296 (1978). Liability may be imposed for improper conduct that prevents either party to a business relationship from continuing the relationship. *Winiemko v Valenti*, 203 Mich App 411, 416-417; 513 NW2d 181 (1994), discussing 4 Restatement Torts, 2d, § 766B, p 20. According to this Court in *Feaheny v Caldwell*, 175 Mich App 291, 303; 437 NW2d 358 (1989), "the third party must intentionally do an act that is per se wrongful or do a lawful act with malice and that is unjustified in law for the purpose of invading the contractual rights or business relationship of another." A "wrongful act" includes illegal, unethical or fraudulent conduct. *Id.* at 304; see also *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992) ("A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.").

Here, there is no evidence to support plaintiff's claim that Officer Hardy acted with the intent to interfere with plaintiff's employment relationship with the DPD. Rather, the facts indicate that Officer Hardy was attempting to protect his own interests by his actions. Viewed most favorably to plaintiff, the evidence failed to demonstrate that Officer Hardy acted out of a personal motive to harm plaintiff. At most, Officer Hardy's actions had an incidental impact on the employment relationship. Plaintiff's assertions of what Officer Hardy "must have been aware of" are insufficient to withstand summary disposition; plaintiff may not rely upon mere allegations to establish a genuine issue for trial. *Maiden, supra* at 121; MCR 2.116(G)(4). Accordingly, the trial court properly disposed of plaintiffs' tortious interference with employment relationship claim through summary disposition in favor of the City defendants.

Moreover, assuming arguendo that Officer Hardy intentionally engaged in a wrongful act, plaintiff cannot show causation. Because plaintiff was arrested, charged with second-degree murder, and bound over for trial, he would have been suspended in any event. In other words, suspension was inevitable and plaintiff cannot prove the causation necessary to establish the tort. Thus, summary disposition was appropriate.

Next, plaintiff argues that the trial court abused its discretion in denying leave to allow plaintiff to amend his complaint to allege a race discrimination claim under the Civil Rights Act, MCL 37.2101 *et seq*., against the City of Detroit and the City of Detroit Chief of Police and to add a "false light" claim against Officer Hardy. We disagree. Whether to grant or deny leave to amend is within the sole discretion of the trial court. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Knauff v Oscoda County Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d

1 (2000). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Detroit/Wayne County Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

"Leave [to amend a pleading] shall be freely given when justice so requires." MCR 2.118(A)(2). In *Knauff, supra*, this Court explained:

> The rules pertaining to amendment of pleadings are liberally construed and are designed to facilitate amendment except when prejudice would result to the opposing party. Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial. The prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. [*Knauff, supra* (citations omitted).]

Further, reasons that justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Weymers, supra* at 658. Although delay can cause circumstances that result in prejudice justifying denial of leave to amend, mere delay is alone an insufficient reason to deny leave. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 663-664; 213 NW2d 134 (1973); *Terhaar v Hoekwater*, 182 Mich App 747, 752; 452 NW2d 905 (1990). In *Weymers, supra*, our Supreme Court quoted with approval the following passage from *Feldman v Allegheny Int'l, Inc*, 850 F2d 1217, 1225-1226 (CA 7, 1988):

> [The federal rule favoring amendments] is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense.
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> Defense of a new claim obviously will require additional rounds of discovery, in all probability interview of new witnesses, gathering of further evidence, and the identification of appropriate legal arguments. All this necessarily takes time. The parties must have an opportunity for preparation if trial is to be meaningful and clear. Some delay of trial therefore is inevitable--a natural consequence of allowing claims to be brought at all. In this sense, delay alone is not a sufficient basis for refusing an amendment. On the other hand, amendments near the time set for trial may require postponement when the same allegations made earlier would have afforded ample time to prepare without delay. Plaintiff is not entitled to impede justice by imposing even reasonable preparation intervals seriatim. . . . . *Whether it results from bad faith or mere absentmindedness, a district judge may act to deter such artificial protraction of litigation, and its costs to all concerned, by denying the amendment.* [*Weymers, supra* at 661 (emphasis supplied).]

"If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 10; 614 NW2d 169 (2000).

In the present case, plaintiff's delay in seeking the proposed amendments clearly resulted from either bad faith or absentmindedness. Plaintiff had to have been aware earlier of the basic facts supporting the additional claims. As the trial court pointed out, more than half a year had passed since the discrimination claim became a possible additional claim and any discovery with regard to the false light claim could have occurred earlier in the process. Moreover, contrary to plaintiff's argument, our review of the record reveals that the trial court did not deny amendment on the basis of mere delay, but considered the further extension of the case and the reopening of discovery even though mediation had been completed. The trial court stated that "[t]his case has become expanded in an extraordinary fashion." Further, the trial court recognized that amendment should be freely given where justice so requires, but found that justice does not require amendment in this case. Here, because the case was complex, required extensive and extended discovery, including completion of forty depositions, and already had mediated, we cannot say that there was no justification or excuse for the trial court's ruling denying leave to amend the complaint. We find no abuse of discretion.

II. Plaintiff's Claims Against the Union Defendants

Next, plaintiff argues that he has a common law negligence claim against Union defendants and that the trial court erred in granting summary disposition in favor of Union defendants on this claim. Plaintiff explains that he is not alleging that the Union breached its duty of fair representation under the collective bargaining agreement;[5] rather, plaintiff argues that the Union defendants breached their duties under the DPOA constitution by failing to properly represent him in his criminal case and by creating a subversive group within the Union. In making these arguments, plaintiff relies on *Cortez v Ford Motor Co*, 349 Mich 108; 84 NW2d 523 (1957), *Demmings v City of Ecorse*, 127 Mich App 608; 339 NW2d 498 (1983), aff'd in part, 423 Mich 49; 377 NW2d 275 (1985), and *Lowe v Hotel Employees Union*, 389 Mich 123; 205 NW2d 167 (1973). However, we conclude that even if the alleged duty exists, plaintiffs have failed to show a breach of that duty because no genuine issue of material fact exists regarding plaintiff's claims.

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[5] To the extent that plaintiff claims that the Union breached its duty under the constitution and its fiduciary duty in failing to pursue a Chief's hearing, we decline to reach this argument. Because this claim arises from the collective bargaining agreement, which provides for a Chief's hearing, plaintiffs cannot genuinely argue that the collective bargaining agreement is not at issue.

Further, we need not reach plaintiff's argument that the trial court erred in determining that plaintiff's failure to exhaust internal Union remedies barred his claims. We need not belabor this argument because the Union defendants argued exhaustion under the statutory duty of fair representation theory and the trial court granted summary disposition on that theory. Thus, any relief granted to defendant on appeal with regard to his negligence claim based on the Union's constitution and bylaws would not be affected by the trial court's ruling regarding exhaustion with respect to a statutory duty of fair representation claim.

With regard to representation for his criminal case, plaintiff claims that Union defendants "breached their duty to properly represent [plaintiff] in his criminal case in a non-discriminatory, fair, loyal, economic and united way" and "breached DPOA guidelines for representation of attorneys in retaining outside counsel for Union members." However, nothing in the record indicates that the Union defendants had a duty to do something different than what they did in offering the stipend to plaintiff for attorney fees provided for in the guidelines for representation in criminal cases. The guidelines provide a maximum amount of money that the Union will provide to the member for attorney fees if the member does not utilize DPOA retained counsel. The record reveals that plaintiff chose to personally select and retain an attorney rather than utilize a Union-retained attorney for representation in his criminal case. Not only did the Union defendants meet the guidelines' requirements in providing $1000 toward plaintiff's attorney's legal fees when plaintiff himself retained outside counsel, they exceeded their requirement by actually contributing $5000 toward plaintiff's attorney's fees. Although plaintiff claims that the Union defendants paid for outside counsel in a different case, the Union defendants explained that the Union's regular law firm retained another attorney in that case because one of their attorneys was tied up in another matter. Further, the Union defendants provided a copy of a letter to plaintiff's attorney explaining that plaintiff was aware of the guidelines and chose to retain outside private counsel and that the Union complied with its guidelines. As the trial court stated, "there is nothing on the record to support the notion that the Union thwarted plaintiff's election or forced plaintiff to elect the cash remedy rather than the representation remedy." Nothing in the record demonstrates that the Union handled the criminal matter in a discriminatory, unfair, disloyal, noneconomic or disunited way. On this record, even if some duty existed, plaintiff failed to come forth with admissible evidence showing that any duty of the Union relating to the criminal representation matter was breached, and therefore summary disposition was appropriate pursuant to MCR 2.116(C)(10) because plaintiffs failed to show a genuine issue of material fact.

With regard to the claim about the Union creating a subversive group, plaintiff argues that the Union defendants breached their fiduciary duties under the bylaws and constitution by creating a subversive group in that the Union used its own letterhead and other Union documents and Union members to solicit funds for other Union members in a high profile case, but did not help plaintiff to the same extent. These allegations are insufficient to raise a genuine issue of material fact. Plaintiffs fail to cite any provision in the constitution or bylaws requiring exact equal treatment for all members, nor have plaintiffs cited any law or any Union policy limiting Unions from giving more attention to high profile cases. In reality, a union may choose, and is at liberty to choose if not prohibited by law or union documents, to deal with situations as they arise. Summary disposition was properly granted.

Finally, plaintiffs claim that they had a viable cause of action under the Civil Rights Act because ample evidence, both through deposition testimony and documentary evidence, showed that white officers of the Detroit Police Officers Association (DPOA) board and elected officials of the DPOA board were discriminating against plaintiff by treating him differently than they treated two white officers involved in another high profile case. We disagree.

The Civil Rights Act, MCL 37.2101 *et seq.*, prohibits a labor organization from discriminating against a member "because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2204; MSA 3.548(204). To establish a prima facie

case of disparate treatment race discrimination under the Civil Rights Act, a plaintiff must show that he was a member of the class entitled to protection under the act and that he was treated differently than one who was a member of a different race for the same or similar conduct. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994); *Donajkowski v Alpena Power Co*, 219 Mich App 441, 449; 556 NW2d 876 (1996), aff'd 460 Mich 243 (1999). "[I]n cases brought under the Civil Rights Act alleging disparate treatment on the basis of membership in a protected class, the overall burden of proving the elements of a discrimination claim always remains with the plaintiff." *Chambers v Trettco, Inc*, 463 Mich 297, 316; 614 NW2d 910 (2000). In cases of disparate treatment, a plaintiff must prove a discriminatory motive in order to establish a prima facie case. *Donajkowski, supra*; *Department of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 439; 431 NW2d 65 (1988); *Farmington Educ Ass'n v Farmington School Dist*, 133 Mich App 566, 572; 351 NW2d 242 (1984).

Upon review of the record, we conclude that nothing in the record points to the Union handling plaintiff in a manner based on race discrimination. Plaintiffs point out the race makeup of the DPOA board of directors and the executive board, but this allegation does nothing to demonstrate discrimination. Further, the alleged five instances of discriminatory treatment are all bald assertions that the DPOA treated plaintiff differently than two white police officers involved in a different case because of plaintiff's race, but do not bring forth any evidence that the deciding factor was race. Plaintiffs failed to bring forth any evidence of motive on the part of the Union. We find that summary disposition pursuant to MCR 2.116(C)(10) was appropriate because plaintiffs did not produce evidence sufficient to allow a jury to conclude that the Union treated plaintiff differently from white members because of his race.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage