

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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I. MARSHALL STERN and JILL STERN,  
  
Plaintiffs-Appellants,

v

WALLED LAKE CONSOLIDATED SCHOOLS,  
STEVEN A. GAYNOR, and MARY BIZIOREK,

Defendants-Appellees,

and

BASSAM SHINA, HANA SHINA, WISAM  
MUKHTAR, and FATINA MUKHTAR,

Defendants.

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UNPUBLISHED  
July 20, 2001

No. 220044  
Oakland Circuit Court  
LC No. 98-007438-NO

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I. MARSHAL STERN and JILL STERN,  
  
Plaintiffs-Appellees-Cross-  
Appellants,

v

WALLED LAKE CONSOLIDATED SCHOOLS,  
STEVEN A. GAYNOR, and MARY BIZIOREK,

Defendants-Appellants-Cross-  
Appellees,

and

BASSAM SHINA, HANA SHINA, WISAM  
MUKHTAR, and FATINA MUKHTAR,

Defendants.

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No. 220766  
Oakland Circuit Court  
LC No. 98-007438-NO

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition and denying plaintiff's motion for leave to amend their complaint. Defendants appeal by leave granted from an order granting in part and denying in part their motion for mediation sanctions. We affirm the trial court's order granting defendants' motion for summary disposition and denying plaintiff's motion to amend the complaint, but reverse the trial court's order regarding mediation sanctions and remand for further proceedings consistent with this opinion.

Plaintiff<sup>1</sup> served as a chaperone on a sixth grade field trip to Chicago, Illinois. Plaintiff was assigned to a group of four children that included his son and three other boys.<sup>2</sup> After returning from the school trip, the school principal, Mary Biziorek, received complaints regarding plaintiff's conduct during the field trip from a parent of a child in his group and from the principal of another elementary school that had taken the same trip. As a result of the complaints, an investigation was conducted by Biziorek. During the investigation, plaintiff was allowed to give his version of events orally, was represented by counsel, and prepared a written summary of events that occurred on the trip. In the written summary, plaintiff admitted that he smoked near the children and lost control of the group on numerous occasions. One occasion involved plaintiff observing a boy in his group nearly fall into the water while plaintiff rested approximately one hundred feet away. Following the investigation, Dr. Steven Gaynor, then Assistant Superintendent of the District, concluded that plaintiff would not be asked to chaperone any school sponsored field trips for the next three years. In reaching this conclusion, Dr. Gaynor disregarded disputed facts and relied on the admissions contained in plaintiff's written summary of events.

Plaintiff filed a complaint alleging "constitutional violations," defamation and slander, "discrimination," and "consortium." Plaintiff requested damages in excess of \$25,000 and injunctive relief to preclude further dissemination of the allegations raised against him. In discovery, plaintiff admitted that he had no evidence to indicate that defendants disseminated information regarding the trip. Additionally, plaintiff admitted that he had no evidence that Dr. Gaynor's decision to limit his participation was based on his religion. The trial court granted defendants' motion for summary disposition and denied plaintiff's motion to amend the complaint. The trial court granted defendants' motion for mediation sanctions only in part because settlement negotiations addressed injunctive relief.

Plaintiff first argues that the trial court erred in granting summary disposition because he was denied due process when he was deprived of a meaningful opportunity to respond to the allegations raised against him. We disagree. Constitutional issues are reviewed de novo as

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<sup>1</sup> Jill Stern, I. Marshall Stern's wife, joins him as plaintiff. Because her loss of consortium claim is derivative and dependent on his claim, we will refer only to I. Marshall Stern as plaintiff.

<sup>2</sup> Plaintiff is Jewish, and two of the boys assigned to his group are Chaldean.

questions of law. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Id.* at 381-382. Procedural due process serves as a limitation on government action and requires it to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept that applies to any adjudication of important rights. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). It calls for procedural protections as the situation demands, including fundamental fairness. *Id.* Fundamental fairness involves: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Id.*

Review of the proceedings held in the present case reveals that plaintiff was afforded due process. The individuals involved in the dispute were given a chance to provide their version of events. Plaintiff was represented by counsel and given the opportunity to provide an oral statement of facts and written summary of events. All facts were forwarded to Dr. Gaynor for resolution. Dr. Gaynor gave plaintiff the benefit of any doubt by disregarding factual allegations that were in dispute. Instead, Dr. Gaynor relied on admissions of inappropriate conduct contained within plaintiff's written summary of events. Accordingly, plaintiff's allegation that he was deprived of due process is without merit.

Plaintiff next argues that the trial court erred in granting summary disposition of his defamation claim. We disagree. Our review of a trial court's grant or denial of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A plaintiff may establish a defamation claim by showing: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). In the present case, plaintiff failed to provide any evidence of publication, unprivileged or otherwise, to a third party. Accordingly, the trial court properly granted summary disposition of this claim.<sup>3</sup>

Plaintiff next argues that the trial court erred in granting summary disposition of his discrimination claim when "a prima facie case of disparate and unequal treatment" was presented. We disagree. Our review of this issue is de novo. *Spiek, supra*. Review of the complaint reveals that plaintiff failed to plead, with specificity, the basis of his discrimination claim. Rather, in support of this issue, plaintiff argues that a prima facie case of discrimination was demonstrated because he was a member of a protected class and was treated differently than persons of a different class for the same or similar conduct. Plaintiff's reliance on the test applied to the Civil Rights Act, MCL 37.2202(1), is erroneous because the act precludes

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<sup>3</sup> Because of our disposition of this issue, we need not address the sufficiency of the pleading of the affirmative defense of governmental immunity or the ultimate application of the doctrine.

discrimination by employers. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). There is no employment relationship between plaintiff and defendants.

Even assuming that plaintiff amended his complaint to allege discrimination based on a denial of equal protection, summary disposition nonetheless was properly granted. The United States Constitution, US Const Am XIV, and the Michigan Constitution, Const 1963, art 1, § 2, guarantee equal protection of the law. The equal protection guarantee requires that persons similarly situated be treated the same. *Citizens for Uniform Taxation v Northport Public School District*, 239 Mich App 284, 289; 608 NW2d 480 (2000). The standard of review to be applied depends on the classification scheme of the *challenged legislation*. *Id.* Strict scrutiny of a legislative classification occurs when the classification impermissibly interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class. *Id.* The rational basis test applies to challenges of social or economic legislation. *Stevenson v Reese*, 239 Mich App 513, 517; 609 NW2d 195 (2000). In the present case, plaintiff's complaint does not challenge the impact and classification of *legislation* on different classes, but rather challenges an individual decision based on plaintiff's conduct on a sixth grade field trip. Accordingly, summary disposition of the claim of discrimination was proper.

Plaintiff next argues that the trial court committed reversible error by denying his motion to amend the complaint. We disagree. We review the denial of a motion to amend a complaint for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment is futile if it adds allegations that still fail to state a claim. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). In the present case, the trial court did not abuse its discretion by denying the motion to amend. The Federal Educational Rights and Privacy Act, 20 USC § 1232g, fails to create a private right of action. *Smith v Duquesne University*, 612 F Supp 72, 78-80 (WD Pa 1985), *aff'd* 787 F2d 583 (CA 3 1986).

Defendants correctly argue that the trial court erred by considering the equitable nature of plaintiff's claim in determining the appropriate amount of mediation sanctions. *Bien v Venticinque*, 151 Mich App 229, 232-233; 390 NW2d 702 (1986). Plaintiff never sought to amend his complaint to remove the claim for monetary relief in the lower court. We note that plaintiff challenges the amount of mediation sanctions requested by defendants. The propriety of the amount of mediation sanctions requested was never reached by the trial court. We will not address an issue that was not decided below unless it is one of law for which all necessary facts were presented. *Camden v Kaufman*, 240 Mich App 389, 399; 613 NW2d 335 (2000). Accordingly, we remand the issue of the propriety of the amount of mediation sanctions to the trial court.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Harold Hood  
/s/ Jessica R. Cooper