# STATE OF MICHIGAN

# COURT OF APPEALS

NATALIE JONES,

Plaintiff-Appellant,

V

BAXTER COMMUNITY CENTER and CITY OF GRAND RAPIDS,

Defendants-Appellees.

UNPUBLISHED
December 13, 2002

No. 230103
Kent Circuit Court
LC No. 99-002077-NO

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In this civil action, plaintiff Natalie Jones appeals as of right from the circuit court's judgment granting summary disposition in favor of defendants Baxter Community Center and City of Grand Rapids. Plaintiff argues that summary disposition was improper because factual disputes existed as to whether defendants were engaged in a joint venture and whether defendants owed plaintiff a duty of care. Plaintiff also argues that the trial court improperly denied her motion to amend her complaint. We affirm.

## I. Facts

Defendant City of Grand Rapids ("the City") operated a program, Recreation to Reduce Risk, that was designed to reduce drug use, crime, and violence by teaching positive alternative activities and provide a variety of recreational and social services. The program was held at the Baxter Community Center. Defendant Baxter Community Center ("Baxter") provided the funding and a physical location for the program, while the City designed the program and provided the employees and supplies.

On March 4, 1999, plaintiff attended the program for the first time. Shortly after arriving, plaintiff was injured during a fight with several individuals. Plaintiff subsequently brought this suit alleging premises liability against Baxter and vicarious liability for gross negligence of its employees against the City.

Shortly after discovery began, both defendants filed motions for summary disposition. Both Baxter and the City filed MCR 2.116(C)(8) motions maintaining that plaintiff had failed to state a claim on which relief could be granted. The City also filed a motion for summary disposition under MCR 2.116(C)(7) asserting governmental immunity. The trial court denied

Baxter's motion, though the order does not specify the grounds for the denial, and took the City's motions under advisement.

Subsequently, plaintiff filed a motion to amend her complaint in order to plead that the defendants had been involved in a joint venture in the operation of the program. Both defendants opposed the motion to amend as futile on the grounds that neither party was negligent, and that there was no evidence to support the claim of joint venture. The trial court held the motion to amend under advisement and at the end of discovery, both defendants filed motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied the City's motion for summary disposition under MCR 2.116(C)(7), but granted the City's motion for summary disposition under MCR 2.116(C)(8) and (10). The trial court also granted Baxter's motion for summary disposition under MCR 2.116(C)(10). Finally, the trial court denied plaintiff's motion to amend the complaint to add a joint venture theory of liability.

## II. Analysis

Plaintiff claims that defendants' motions for summary disposition should have been denied because there was a factual dispute as to whether defendants' relationship with plaintiff was sufficient to establish a duty of care. We disagree.

Plaintiff's claim against Baxter was for premises liability. "Premises liability is conditioned upon the presence of both possession and control over the land." *Orel v Uni-Rak Sales Co*, 454 Mich 564, 568; 563 NW2d 241 (1997). "Ownership alone is not dispositive." *Id*. "Possession and control . . . can be loaned to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id*. Invitors are subject to liability only if they are possessors. *Id*. at 569.

The record establishes that Baxter loaned possession and control of the premises to the City during the times that the Recreation to Reduce Risk program was operated. Baxter's only participation was to provide the financial backing for the program and the physical space in which the program was operated. Baxter employees did not supervise the program. Also, the City maintained general liability insurance. Therefore, because Baxter did not have possession and control of the community center, Baxter did not owe plaintiff a duty of care.

Plaintiff claimed that the City was vicariously liable for the gross negligence of its employees. A governmental agency can be held vicariously liable when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity that is nongovernmental or proprietary or falls within one of the statutory exceptions to immunity. MCL 691.1407(2); *Gracey v Wayne Co Clerk*, 213 Mich App 412, 421; 540 NW2d 710 (1995), abrogated on other grounds 454 Mich 135 (1997). A governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function. The trial court concluded, and we agree, that the operation of the Recreation to Reduce Risk program was a governmental function. However, the trial court erred in concluding that the City was not entitled to governmental immunity as to plaintiff's claim that the City was vicariously liable for the gross negligence of its employees.

Vicarious liability only applies when the *activity* falls within a statutory exception. *Id*. Our Supreme Court explained that "if the *activity* in which the tortfeasor was engaged at the time

the tort was committed constituted the exercise or discharge of a governmental function . . . , the agency is immune pursuant to § 7 [MCL 691.1407] of the governmental immunity act." *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984) (Emphasis added.). The gross negligence exception applies to the individual's *conduct*, i.e., how that person carried out the activity. MCL 691.1407(2). Because the activity that the City's employees were engaged in, the operation of the Recreation to Reduce Risk program, was a governmental function, we hold that the City can not be held vicariously liable for the gross negligence of its employees. Accordingly, even if the employees were grossly negligent, summary disposition pursuant to MCR 2.116(C)(7) should have been granted in favor of the City.

Plaintiff also argues that the trial court erred in denying her motion to amend the complaint as futile, because there was a factual dispute as to whether defendants intended to enter into a joint venture. When a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the opportunity for the non-prevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified. MCR 2.116(I)(5). An amendment would not be justified if it would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). "'An amendment would be futile if, 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), quoting *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

We will not reverse a trial court's decision to deny leave to amend unless it constituted an abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000), citing *Weymers*, *supra* at 654. An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

Although governmental agencies are generally immune from tort liability, *Vargo v Sauer*, 457 Mich 49, 56; 576 NW2d 656 (1998), where a governmental agency is engaged in a joint venture, this immunity does not apply. *Id*. at 68. Whether a joint venture exists is a legal question for the court to decide. *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983). Questions of law are reviewed de novo. *People v Sierb*, 456 Mich 519, 522; 562 NW2d 781 (1998).

We find that on the facts presented here, the City was not engaged in a joint venture. A joint venture consists of six elements:

"(a) an agreement indicating an intention to undertake a joint venture;

"(b) a joint undertaking of

"(c) a single project for profit;

"(d) a sharing of profits as well as losses;

"(e) contribution of skills or property by the parties;

> "(f) community interest and control over the subject matter of the enterprise." [*Berger, supra* at 214-215, quoting *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978).]

"The key consideration is that the parties intended a joint venture." *Id*. at 215.

In *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90, 103; 295 NW 571 (1941), our Supreme Court stated that "[t]his intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts." Defendants argue that the contract they executed was clear that no joint venture was intended. We agree. The language of the contract stated in relevant part:

> The parties to this Agreement will be independent contractors under this Agreement and in no event will their relationship be deemed that of employer/employee. It is not the intent of the parties to form any partnership or joint venture . . . .

Because the contract language is clear and unambiguous, a plain reading dictates a finding that defendants did not intend to enter into a joint venture.

Plaintiff claims that the testimony of Baxter's former executive director, Gene Proctor, creates a genuine issue of material fact on this question. However, Proctor's testimony was ambiguous and we conclude that his testimony was insufficient to contradict the contract language. Amendment of the complaint, therefore, would have been futile, and the trial court did not abuse its discretion in denying the motion to amend.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra