STATE OF MICHIGAN

COURT OF APPEALS

WILLIE MURRAY and MURACK LODGE, INC.,	UNPUBLISHED December 29, 2005
Plaintiffs-Appellants,	
v	No. 257121 Jackson Circuit Court
WOLVERINE PIPE LINE CO.,	LC No. 03-002724-CZ
Defendant-Appellee.	

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting summary disposition in favor of defendant under MCR 2.116(C)(10), and denying plaintiffs' motion to file an amended complaint. We affirm.

The claims at issue here arose when a pipeline owned by defendant burst, spilling gasoline onto property owned by plaintiff Willie Murray. At the time of the spill, Murray was preparing to begin operation of a state-licensed foster care facility to be operated on the property through plaintiff Murack Lodge, Incorporated (Murack Corporation). Plaintiffs first contend that because they presented sufficient evidence to establish with reasonable certainty that Murack Corporation suffered lost profits as a result of the spill, the trial court erred in granting defendant's motion for summary disposition of their claim for lost profits. We disagree.

This Court reviews de novo a trial court's grant of summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539-540; 683 NW2d 200 (2004). "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden, supra*.

"For a plaintiff to be entitled to damages for lost profits, the losses must be subject to a reasonable degree of certainty and cannot be based solely on mere conjecture or speculation . . . ." *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). However, mathematical certainty is not required; lost profits are recoverable even if the amount is difficult to calculate or is speculative to some degree. *Id*. From its earliest days, this Court has made clear that "'where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.'" *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965), quoting 15 Am Jur, Damages, § 23, 414-416. Rather, "[t]he type of uncertainty which will bar recovery of damages is uncertainty as to the fact of the damage and not as to its amount." *Bonelli*, *supra*. (citation and internal quotation marks omitted). Thus, in *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175-176; 568 NW2d 365 (1997), and *Indemnity Marine Assurance Co, Ltd v Lipin Robinson Warehouse Corp*, 99 Mich App 6, 14-15; 297 NW2d 846 (1980), the plaintiffs were not entitled to recover claimed lost profits where their businesses were shown to be unprofitable independent of the alleged wrongdoing of the defendants. See also *Doyle Vacuum Cleaner Co v FJ Siller & Co*, 55 Mich App 601, 610-611; 223 NW2d 86 (1974) (lost profits alleged to have resulted from a delay in releasing a new product that was not in production and had not yet even been marketed at the time of the defendant's wrongdoing held to be too speculative to support recovery). The plaintiffs here have similarly failed to establish the fact of lost profits to the requisite degree of reasonable certainty.

As a new business entity, Murack Corporation lacked evidence of historic profits before the time of the spill for use as a basis for determining lost profits caused by defendant's negligence. *Id*. Furthermore, in support of their claim of lost profits, plaintiffs provided only the Murack Corporation business plan and the affidavit of a certified public accountant averring that Murack Lodge "would have been profitable" during the eighteen-month period during which its opening was allegedly delayed by defendant's negligence. The affidavit, however, is devoid of any evidence to support such a conclusion, see MCR 2.119(B)(1)(b), and plaintiffs presented no other data to support their claim that Murack Lodge would have been profitable during the period in question. In contrast, Murray's own deposition statements indicate that Murack Corporation failed to be profitable during the two years after it finally opened in January 2002. *Joerger*, *supra*; *Indemnity Marine*, *supra*. Because plaintiffs failed to provide evidence sufficient to show with reasonable certainty that Murack Corporation lost profits of any amount as a result of its delayed opening, summary disposition of their claim for such damages was proper. *Shepherd Montesorri*, *supra*.

Plaintiffs next contend that the trial court erred in granting defendant's motion for summary disposition of their claim for damages in the form of a reduction in the value of Murray's real property as a result of the spill. Again, we disagree.

> "It is the settled law of this state that the measure of damages to real property, if permanently irreparable, is the difference between its market value before and after the damage. However, if the injury is reparable, and the expense of repairs is less than the market value, the measure of damage is the cost of the repairs." [*Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 193-194; 348 NW2d 311 (1984), quoting *Bayley Products, Inc v American Plastic Products Co*, 30 Mich App 590, 598; 186 NW2d 813 (1971).]

Plaintiffs claim that Murray's property has been permanently and irreparably injured, and thus the value of the property is greatly reduced.

To support this claim of irreparable damage, plaintiffs primarily rely on an October 2000 letter from the Jackson County Health Department indicating that Murray's land might be at risk for receiving contaminated runoff from other properties affected by the gasoline spill. However, plaintiffs fail to present any evidence of a present risk of contamination from the gasoline spill. In contrast, defendant has introduced evidence of a variety of tests, including tests conducted by the Jackson County Health Department, indicating that Murray's property has been free of contamination since October 2000, and that adjoining properties affected by the gasoline spill are now also contamination-free. Plaintiffs' mere speculation that the property might still be contaminated fails to establish a genuine issue of material fact regarding whether the property is irreparably injured. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) ("parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact").

Plaintiffs have further failed to show that the present market value of Murray's property is less than it was before the gasoline spill occurred and, hence, that there are damages to be recovered. To the contrary, the record indicates that the assessed value of Murray's property has increased since the time of the spill. Moreover, regarding plaintiffs' alternative argument that, because of the contamination the property has no value at all, we note that Murray values his home at $168,000 for tax purposes, and Murack Corporation rents the property from Murray for $42,000 per year. Given these facts, we find that plaintiffs have failed to present evidence sufficient to create a genuine issue of material fact regarding permanent diminution of the value of Murray's property.

Plaintiffs finally contend that the trial court erred in denying their motion to amend their complaint, pursuant to MCR 2.118(A)(2), to add a claim for lost salary. We disagree.

"This Court will reverse a trial court's decision on a motion to amend a complaint only where the trial court abused its discretion." *Dampier v Wayne Co*, 233 Mich App 714, 721; 592 NW2d 809 (1999). "An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the trial court's ruling." *Detroit/Wayne Co Stadium Auth v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999) (citation and internal quotation marks omitted).

MCR 2.118(A)(2) allows a party to amend its pleadings only by leave of the court or written consent of the other parties. Ordinarily, such "[l]eave shall be freely given when justice so requires." MCR 2.118(A)(2). Thus, our Supreme Court has recognized that a motion to amend should usually be granted, and should only be denied for certain reasons:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" [*Ben P Fyke & Sons,*

Inc v Gunter Co, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227; 9 L Ed 2d 222 (1962).]

Though this Court has found that delay alone is insufficient to warrant denial of a party's motion to amend, it has also qualified this conclusion, stating, "a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). Such prejudice is sufficient to justify denying a plaintiff leave to amend when "the amendment would prevent the defendant from having a fair trial; the prejudice must stem from the fact that new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits." *Id*. Similarly, an amendment can be rejected for its futility when "the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

In *Amburgey*, *supra*, this Court upheld the trial court's denial of the plaintiff's motion to amend her complaint under circumstances very similar to those in the present case. There, the plaintiff sought to amend her complaint by adding a negligence claim to her strict liability action, which had been dismissed the previous day. *Id*. at 247-248. In affirming the trial court, this Court held that allowing the plaintiff to amend her complaint after dismissal of the original action would unfairly prejudice the defendant "[b]ecause plaintiff's proposed amendment would cause defendant to defend a claim that arose from the identical facts on which plaintiff's properly pleaded claim of strict liability arose . . . ." *Id*. at 248-249.

As in *Amburgey*, plaintiffs sought to amend their complaint after the trial court granted summary disposition in defendant's favor regarding all of plaintiffs' original claims, ending their opportunity to otherwise recover at the trial court level. Furthermore, plaintiffs had for some time claimed that Murray had lost salary as a result of the delay in commencing the business of Murack Corporation, and were otherwise aware of this claim for lost profits. By requiring defendant to defend the lost salary claim, defendant would essentially have to relitigate many of the issues in plaintiffs' original, and unsuccessful, lost profits claim, because these lost salary claims stem from Murack Corporation's business losses and its resulting inability to pay Murray. Consequently, the trial court did not abuse its discretion by denying plaintiffs' motion to amend their complaint.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis