

STATE OF MICHIGAN  
COURT OF APPEALS

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RAYMOND G. MARTENS,

Plaintiff-Appellant,

v

ROCHESTER COMMUNITY SCHOOLS,

Defendant,

and

JEFF ZURKAN,

Defendant-Appellee.

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UNPUBLISHED

July 16, 2009

No. 282706

Oakland Circuit Court

LC No. 2007-080171-NI

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

In this action for gross negligence, plaintiff Raymond Martens appeals as of right from the trial court's grant of summary disposition to defendant Jeff Zurkan under MCR 2.116(C)(10) and denial of plaintiff's motion for leave to amend the complaint. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff (who is legally and totally blind) and his wife delivered two digital archivists machines (i.e., recording music stands) to Hart Middle School, where defendant Zurkan worked as the choral director. In attempting to assist plaintiff with the unloading of these heavy machines, defendant Zurkan opened the back hatch door of plaintiff's van and asked whether it was necessary to first move the boxes and other equipment stored in the back of the van before unloading the archivists. In the meantime, plaintiff had exited his seat on the passenger side of the vehicle and was walking toward the back of the van. In doing so, plaintiff placed his right hand on the back corner of the car about 12 or 14 inches down the side, with his index finger<sup>1</sup> wrapped around the side. When plaintiff told defendant Zurkan that the archivists needed to be unloaded from the side of the van, defendant Zurkan shut the back hatch door without warning

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<sup>1</sup> Plaintiff had lost his thumb and three other fingers on his right hand in a woodshop accident that occurred 33 years before, and the index finger was his only remaining digit on that hand.

plaintiff that he was doing so and without first checking on plaintiff's safety. Plaintiff's finger was severed by the door, and its fingertip and top knuckle were subsequently amputated, thus eliminating a critical sensory source for plaintiff. Plaintiff alleged that defendant Zurkan was in a hurry to complete the unloading process before the school buses arrived at the end of the school day since those buses parked in the same proximate area as where the van was being unloaded.

Plaintiff's original complaint alleged one count of gross negligence. After discovery was closed, defendant Zurkan moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). In plaintiff's answer to that motion, plaintiff requested leave to amend the complaint to include three additional claims based on trespass, disability discrimination, and breach of contract.<sup>2</sup> Following a hearing, the trial court granted defendant Zurkan's motion under MCR 2.116(C)(10) and denied plaintiff's motion, thereby dismissing plaintiff's complaint with prejudice.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim and may be granted if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006).

Under the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, defendant Zurkan was immune from tort liability as long as his conduct did not amount to gross negligence that was the proximate cause of plaintiff's injury. MCL 691.1407(2). Gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(7). This definition suggests almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Id.*

Plaintiff argues that defendant Zurkan knew that plaintiff was blind and willfully disregarded the safety measures of which he was aware or which would ordinarily be expected of a person shutting a van door in the presence of a nearby blind man. However, viewing the evidence in a light most favorable to plaintiff, there was nothing to indicate that defendant Zurkan had any special knowledge about assisting a blind person or should have known to double check on plaintiff's safety before shutting the van door. Furthermore, plaintiff did not attempt to inform or educate defendant Zurkan about any special considerations of which defendant Zurkan should be aware when working with plaintiff. Plaintiff also did not object to, or express any displeasure about, defendant Zurkan's assistance or his efforts to hurry the

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<sup>2</sup> This answer was filed by plaintiff's new counsel since his prior counsel had been allowed to withdraw because of a breakdown in the attorney-client relationship.

unloading process. Therefore, defendant Zurkan could not be charged with the knowledge that certain precautions or measures were necessary to attend to plaintiff's safety or that there were possible substantial risks involved in assisting plaintiff while unloading the archivists. As such, defendant Zurkan did not willfully disregard those risks, and reasonable minds could not have differed in concluding that defendant Zurkan was not grossly negligent when he shut the van door on plaintiff's finger without first checking on plaintiff's safety. The trial court did not err when it granted defendant Zurkan's motion for summary disposition.

Next, plaintiff argues that the trial court should have allowed him to amend his complaint before granting summary disposition in favor of defendant Zurkan. This Court reviews a trial court's decision regarding leave to amend for an abuse of discretion. *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998). MCR 2.116(I)(5) states, "If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Under MCR 2.118(A)(2), a court should freely grant a party leave to amend a pleading when justice so requires. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

In denying plaintiff's motion for leave to amend his complaint, the trial court described the motion as "untimely" and stated that the proposed additional claims would be "futile." Although the remedy for delayed<sup>3</sup> requests for amendments is not to deny the amendment but to sanction the offending party to reimburse the opponent for the additional expenses and attorney fees incurred because of the inexcusable delay,<sup>4</sup> the trial court did not abuse its discretion when it held that the proposed amendment would have been futile.<sup>5</sup> The evidence did not support plaintiff's proposed common law trespass claim since plaintiff never objected to defendant Zurkan's opening of the back van door, even after the fact when plaintiff had the opportunity to do so. In fact, rather than objecting, plaintiff answered defendant Zurkan's question about whether to move the boxes in the back of the van. As such, plaintiff implicitly endorsed defendant Zurkan's assistance in unloading and his operation of the van door. Plaintiff also failed to state a valid discrimination claim under either the Americans with Disabilities Act ("ADA"), 42 USC 12101 *et seq.*, or the Michigan Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq.* Plaintiff alleged that defendant Zurkan treated plaintiff as though plaintiff was "a person in need of special accommodation or assistance" due to defendant Zurkan's presumption about plaintiff's blindness. However, defendant Zurkan may have offered assistance because the archivists were heavy machines and not because plaintiff was blind. Even if defendant Zurkan's alleged solicitous conduct was due to plaintiff's blindness, plaintiff fails to explain how such conduct qualified as discrimination under either the ADA or the PWDCRA,

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<sup>3</sup> At the motion hearing, plaintiff's attorney explained the lateness of the motion for leave to amend on the ground that the proposed additional claims were discerned only after plaintiff became dissatisfied with his initial counsel and retained new counsel.

<sup>4</sup> MCR 2.118(A)(3); *Traver Lakes Community Maintenance Assoc v Douglas Co*, 224 Mich App 335, 344; 568 NW2d 847 (1997).

<sup>5</sup> See *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (leave to amend a party's pleadings is properly denied if amendment would be futile).

which prohibit public entities from denying services to, excluding, or discriminating against a disabled person because of his or her disability. See 42 USC 12132 or MCL 37.1302. Finally, plaintiff alleged that he had a written contract to deliver the archivists to the school but that defendant Zurkan preempted plaintiff's right to fulfill the terms of the contract and, as such, defendant Zurkan's actions constituted a breach of contract. Plaintiff's argument fails since the damages claimed by plaintiff for his injury did not arise directly, naturally, or proximately from the alleged breach of contract. Accordingly, any amendment would have been futile, and the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend the complaint. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter  
/s/ Deborah A. Servitto