

STATE OF MICHIGAN
COURT OF APPEALS

HARRY GIDCUMB,

Plaintiff-Appellant,

v

RESTAURANT CONCEPT MANAGEMENT,
INC.,

Defendant-Appellee.

UNPUBLISHED

November 22, 1996

No. 189825

LC No. 94-033025-NO

Before: Bandstra, P.J., and Neff and M. E. Dodge,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant on his claims of negligence, breach of implied warranty and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* We affirm and remand for proceedings consistent with this opinion.

On June 11, 1994, plaintiff went into a Wendy's Old Fashioned Hamburger restaurant and ordered the salad bar. After taking a third forkful of potato salad, plaintiff felt a hard object in his mouth. After removing it, he discovered that it was a piece of wood. Plaintiff filed a lawsuit against defendant claiming that he bit the wood and suffered injuries as a result of the incident. During discovery, plaintiff admitted that the only injuries he suffered were mental injuries, specifically including that the sight of potato salad now makes him ill and therefore, he can no longer enjoy it. He also claimed damages for lost enjoyment of eating at Wendy's restaurants.

Defendant filed a motion for summary disposition, arguing that mental damages alone are not compensable in Michigan. In response to the motion for summary disposition, plaintiff, for the first time, claimed that he had suffered a physical injury, namely that after he removed the wood from his potato salad, he became nauseous and lost his appetite to finish his lunch. Plaintiff claimed that nausea was a physical injury and therefore, summary disposition was inappropriate. The only support for this alleged nausea, however, was his attorney's affidavit that plaintiff had become nauseous. Plaintiff's own

* Circuit judge, sitting on the Court of Appeals by assignment.

affidavit in response to summary disposition contained no allegation of nausea or other physical harm. The trial court granted summary disposition to defendant, holding that plaintiff had not sustained compensable injuries.

I

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition and dismissing his claims. We disagree.

While the general rule instructs that we should consider all of the evidence presented when determining whether to affirm the trial court, *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993), we need not consider the affidavits of plaintiff or his attorney that were filed in response to the motion for summary disposition in this case. The lawyer's affidavit was submitted to contradict plaintiff's unequivocal deposition testimony that he suffered "just mental injuries." An affidavit submitted to contradict deposition testimony may not be used to establish a genuine issue of material fact. *Schultz v Auto-Owners Ins*, 212 Mich App 199, 202; 536 NW2d 784 (1995).

Thus we are left with plaintiff's claims that he suffered mental injuries and loss of enjoyment. As a general rule, a tortfeasor is liable for "all injuries resulting directly from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and are such as, according to common experience in the usual course of events, reasonably might have been anticipated." *Antoon v Community EMS*, 190 Mich App 592, 596; 476 NW2d 479 (1991). "A tortfeasor is excused from liability only for damages that are remote, contingent, or speculative." *Id.* Further, recovery of money damages for mental or emotional injuries alone "without accompanying physical injury or physical consequences or any independent basis for tort liability," is generally not allowed with two exceptions, the negligent mishandling of corpses and cases involving telegraphic companies. *Daley v LaCroix*, 384 Mich 4, 8; 179 NW2d 390 (1970).¹

In *Daley*, the Court noted the general rules that (1) recovery for mental disturbances alone without accompanying physical injury or consequences is not allowed; and (2) that damages for mental disturbances are always allowed where the tortfeasor inflicts immediate physical injury. *Id.* The Court then recognized an additional rule, that a person may recover damages where an emotional injury causes physical consequences or harm. *Id.* at 12. The Court did not disturb the rule that mental injuries are not compensable unless the case fits within a known exception or the law provides otherwise. We find that plaintiff's mental injuries are not compensable where there was no physical injury proceeding them or caused by them. There is no authority, and plaintiff presents none, that supports his position that his mental injuries are compensable. In addition, loss of enjoyment injuries are not compensable without the requisite true loss or physical suffering, harm or injury. *Martel v Duffy-Mott Corp*, 15 Mich App 67, 75; 166 NW2d 541 (1968). In any event, even if plaintiff had alleged some physical manifestation of his mental injuries, we would find those damages too speculative to support his claim.

Where plaintiff sustained no compensable damages, he failed to establish a prima facie case of negligence, which requires a showing of damages. *Ewing v Detroit (On Remand)*, 214 Mich App

495, 497; 543 NW2d 1 (1995). Plaintiff also failed to establish that he could sustain a claim for breach of implied warranty because of the lack of a compensable or true loss. *Piercefield v Remington Arms Co*, 375 Mich 85, 96; 133 NW2d 129 (1965). Finally, plaintiff failed to provide any authority to support his contentions that under the MCPA, MCL 445. 901 *et seq.*; 19.418(1) *et seq.*, he need not prove any damages in order to collect and that, in any event, his alleged damages are compensable. This Court will not look for authority to sustain or reject a party's position. *American Transmission Inc v Attorney General*, 216 Mich App 119, 121; 548 NW2d 665 (1996). The trial court's grant of summary disposition to defendant was appropriate where plaintiff suffered no compensable damages.

II

Plaintiff claims numerous other errors as well. First, he complains that it was error for the trial court to enter the order granting summary disposition over his substantive objections. Second, he claims that the trial court's failure to grant his motion for reconsideration was error. Because we affirm on the issue of summary disposition, these issues are moot. *Oaks v Twin City Foods*, 198 Mich App 296, 298; 497 NW2d 196 (1992).

Next, plaintiff claims that the trial court erred by not allowing him to amend his complaint to add the sole shareholder of defendant corporation as a defendant. We review the decision of a trial court to grant or deny a motion to amend for abuse of discretion. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994). MCR 2.118(A)(2) requires that leave to amend should be freely given when justice so requires. However, leave need not be granted where it would be futile. *Rathbun v Starr Commonwealth For Boys*, 145 Mich App 303, 316; 377 NW2d 872 (1985). In this case, adding the individual shareholder to whom no separate allegations or claims were to be made would have been futile. A defendant corporation and its shareholders are treated as one for purposes of liability unless there is fraud or other improper use of the corporate form or it is necessary to name the individuals for certain claims. See *Williams v American Title Ins Co*, 83 Mich App 686, 697-698; 269 NW2d 481 (1978). Where defendant admitted that it was the correct defendant and where there was no reason to add the individual shareholder as a party, the trial court did not abuse its discretion in refusing to allow the amendment.

Finally, plaintiff complains on appeal that he was not given discovery that he requested and it was an error for the trial court to refuse to order the discovery. This Court reviews a trial court's decision on a motion for discovery for abuse of discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). The record reveals that the trial court allowed plaintiff access to all of the discovery materials he wished that were still in existence and within defendant's control. Therefore, plaintiff's argument has no merit.

III

Our review of the record convinces us that sanctions should be awarded to defendant pursuant to MCR 7.216(C)(1)(b). Plaintiff misled this Court by repeatedly referring to facts outside the record, by suggesting that the trial court failed to enforce plaintiff's discovery request, and by implying that he

testified that he suffered more than mental injuries. Furthermore, plaintiff had no reasonable basis to believe that there was any meritorious issue to be determined on appeal. Accordingly, we impose sanctions in an amount equal to the actual expenses incurred by defendant on appeal, including reasonable attorney fees. This matter is remanded for a determination of actual damages and for entry of an order assessing such damages jointly against plaintiff and his counsel.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Michael E. Dodge

¹ Prosser and Keeton, Torts (5th ed), p 361, sets forth the following rationale for this rule:

Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery. The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the intentional tort context are lacking. Other unpleasant emotions, such as the distress of a mother at being given the wrong baby by a hospital, have been dealt with on the same basis. Nor may it make any difference that there has been a harmless but emotionally disturbing contact with the plaintiff's person, as where he gets a mouthful of broken glass without actually being cut.