STATE OF MICHIGAN

COURT OF APPEALS

NAACP - FLINT CHAPTER, JANICE O'NEAL, LILLIAN ROBINSON, and FLINT-GENESEE NEIGHBORHOOD COALITION a/k/a UNITED FOR ACTION,

Plaintiffs-Appellees/Cross-Appellants,

v

GOVERNOR OF MICHIGAN and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants-Appellants/Cross-Appellees,

and

GENESEE TOWNSHIP, GENESEE COUNTY SUPERVISOR, and GENESEE POWER STATION, LTD.,

Not Participating.

UNPUBLISHED
November 24, 1998

No. 205264
Genesee Circuit Court
LC No. 95-038228 CV

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right from a July 29, 1997 order of the circuit court permanently enjoining the Department of Environmental Quality "from granting air permits for major pollution sources until it has developed and adopted policies and procedures to insure that the system of environmental protection in this State is adequate to protect the public health, safety and general welfare." Plaintiffs cross appeal by leave granted from the circuit court's order granting defendants summary disposition regarding plaintiffs' equal protection claim and from the circuit court's judgment dismissing plaintiffs' claim of race discrimination under § 302 of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We affirm the trial court's orders dismissing plaintiffs' claims of violation of equal protection and race discrimination, and the order denying plaintiffs' motion to amend the

pleadings, but we vacate the trial court's issuance of the permanent injunction because the trial court had no authority to issue such an injunction.

This case arises out of the Department of Environmental Quality's (DEQ) decision to approve an application of the Genesee Power Station Unlimited Partnership for a permit to operate a wood waste incinerator in Genesee Township in 1992. The permit allowed the incinerator to emit lead in the amount of 2.2 tons per year, or 65 tons over its life span. Such emissions potentially increase the concentration of lead in the soil by ten to fifteen percent. The DEQ had determined that the incinerator could emit such quantities of lead without harming the public health and welfare.

A group who opposed the issuance of the permit appealed the DEQ's decision to the Environmental Appeals Board of the United States Environmental Protection Agency. Although the appeals board found that the record demonstrated that the emissions allowed under the permit would meet all applicable air quality regulations, it remanded the case to the DEQ to consider the best available control technology for fuel cleaning issues. After remand, the DEQ issued a revised permit on December 29, 1993 that included stronger fuel cleaning requirements to reduce or eliminate the burning of lead-contaminated fuels at the incinerator. The incinerator began operation in 1995.

On July 11, 1995, plaintiffs filed a complaint in the Genesee Circuit Court challenging defendants' decision to place the incinerator immediately adjacent to a predominantly African-American (and heavily polluted) neighborhood near Flint. Plaintiffs alleged that issuance of the permit violated Title VI of the Civil Rights Act, 42 USC 2000d, violated the Equal Protection clause of the Michigan Constitution, Const 1963, art 1, § 2, and violated the Michigan Environmental Protection Act, MCL 691.1202 *et seq.*; MSA 14.528(202) *et seq.* On July 26, 1995, plaintiffs filed an amended complaint, adding a fourth count which alleged that issuance of the permit violated provision for equal enjoyment of public services of the Civil Rights Act, MCL 37.2302; MSA 3.548(302). The amended complaint also sought broad equitable relief to enjoin operation of the incinerator and to require defendant to alter the permit.

On August 10, 1995, defendants removed the case to federal court. On September 26, 1995, the federal district court remanded all state law claims to the Genesee Circuit Court while retaining plaintiffs' Title VI claim. On October 4, 1995, the federal district court denied plaintiffs' motion for a preliminary injunction to enjoin operation of the incinerator, and on October 26, 1995, the federal district court dismissed plaintiffs' Title VI claim.

On November 1, 1995, plaintiffs moved the Genesee Circuit Court for a preliminary injunction to enjoin operation of the incinerator. Following an evidentiary hearing, plaintiffs settled with Genesee Township and the Genesee Power Station. However, the DEQ and the Governor of Michigan remained as defendants. Later, defendants moved for summary disposition. The trial court ultimately granted defendants' motion with regard to the equal protection claim, in January 1997. In the following month, the parties stipulated to a voluntary dismissal with prejudice of the claim under the Environmental Protection Act. Thus, the only claim remaining for trial was plaintiffs' claim under the state Civil Rights Act. Following a bench trial, the trial court ruled in favor of defendants and dismissed plaintiffs' claim.

Although the trial court found in defendants' favor with respect to the only claim before it, the trial court gave equitable relief to plaintiffs in the form of an injunction of July 28, 1997. Specifically, the trial court enjoined defendants from granting air permits in Genesee County for major air pollution sources until the development and adoption by the DEQ of policies and procedures to ensure the adequacy of the system of environmental protection to protect the public health, safety, and general welfare, pursuant to Const 1963, art 4, §§ 51 and 52, and Part 55 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq.*; MSA 13A.5501 *et seq.* Defendants moved for a stay of the injunction, but the trial court denied the stay. Plaintiffs also moved to amend their complaint to add the claims under Const 1963, art 4, §§ 51 and 52, and Part 55 of the NREPA, in conformance with the findings of the trial court, but the court denied the motion to amend the pleadings.

Defendants filed a claim of appeal, and plaintiffs filed a cross appeal. In an unpublished order dated October 2, 1997, this Court granted defendants' motion to stay the injunction. In their appeal as of right, defendants argue that the trial court did not have the authority to issue the injunction, that the court erred in finding that the state's air permit process was insufficiently protective of human health, and that the court abused its discretion in excluding evidence establishing that the airborne emissions of lead from the incinerator totaled less than twelve pounds a year. In their cross appeal, plaintiffs argue that the trial court erred when it granted defendants summary disposition with respect to the claim under the Civil Rights Act, that the court erred in dismissing the equal protection claim, and the court abused its discretion in denying their motion to amend the pleadings.

I

Defendants argue that the trial court erred by issuing an injunction in this case, on three grounds: (1) plaintiffs did not plead such a claim and the claim was never raised before the court, (2) there was no pending case or controversy so the claim was not ripe, and (3) the issuance of the injunction violated the doctrine of separation of powers. We hold that the trial court had no authority to issue the injunction sua sponte. Because we vacate the injunction for that reason, we need not address the constitutional separation-of-powers argument.

In this case, it is undisputed that plaintiffs did not request an injunction on the ground that the permit process violated the state constitution and the NREPA. At no time did plaintiffs plead such a theory in their complaint, nor did they argue such a theory at trial. The only claim presented to the trial court was plaintiffs' theory under the Civil Rights Act—that issuance of the permit violated the act's provision for equal enjoyment of public services. MCL 37.2302; MSA 3.548(302). MCR 2.111(B)(1) states that a complaint must contain a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." Further, MCR 2.111(B)(2) states that a complaint must contain a "demand for judgment for the relief that the pleader seeks." In this case, plaintiffs did not request a permanent injunction on the theories that issuance of the permit violated article 4, §§ 51 and 52 of the state constitution, and Part 55 of the NREPA.

The trial court had no authority to issue an injunction on those bases where the claim was neither pleaded in plaintiffs' complaint nor requested at any time before or during trial. See *Peoples Savings Bank v Stoddard*, 359 Mich 297, 325; 102 NW2d 777 (1960);[1] *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996) (the trial court, having effectively amended the plaintiff's complaint sua sponte to add an additional claim not requested by the plaintiff, exceeded the scope of the case and had to be reversed). Granting a party relief on a claim never pleaded violates principles of due process because the defending party has been given no notice of the need to defend against the claim. "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice." *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Where the pleadings do not provide reasonable notice to the defendants regarding a theory or claim, the pleadings fail to meet the standard of MCR 2.111, and the theory should be excluded. *Id.* at 327-328. Further, we reject plaintiffs' contention that the claim was "implicitly" pleaded and tried, because the lower court record does not support such a contention, and because even if it did such would nonetheless fail to fulfill the notice requirements of MCR 2.111.

"An injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996). Further, before a trial court may grant injunctive relief, the requesting parties must allege injury to their persons or property, and must satisfy the court both that without the injunction they will suffer irreparable injury and that there is no adequate remedy at law. *Barkau v Ruggirello*, 100 Mich App 617, 623; 300 NW2d 342 (1980), aff'd on rehearing 113 Mich App 642; 318 NW2d 521 (1982).

In light of these authorities, we hold that the trial court in this case was without authority to issue an injunction sua sponte based on a claim that was neither pleaded nor litigated by the parties. Accordingly, and we hereby vacate the injunction.

II

Defendants argue that the trial court erred in finding, based on the evidence presented at trial, that the state's air permit process was insufficiently protective of human health. Defendants further argue that the trial court abused its discretion in excluding evidence at trial establishing that the airborne emissions of lead from the incinerator totaled less than twelve pounds a year. In light of decision to vacate the injunction because the trial court had no authority to issue it (see Part I), these issues are moot and need not be addressed.

III

Plaintiffs argue on cross-appeal that the trial court erred in dismissing their claim under the Civil Rights Act. Plaintiffs alleged that defendants violated § 302 of the act because defendants failed to consider race when issuing the air permit. We disagree with plaintiffs' argument, although for a reason different from that given by the trial court.[2]

MCL 37.2302; MSA 3.538(302) provides as follows:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.
>
> (b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, service, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

We hold that plaintiffs failed to state a claim under this section of the Civil Rights Act. Plaintiffs alleged that defendants denied them the full enjoyment of services, privileges, and advantages provided to the public by the DEQ because it approved the permit and failed to consider the "racial cumulative effects" stemming from operation of the plant. However, allegation that the DEQ failed to consider race in issuing the permit is simply not a denial of the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of a place of public accommodation or public service. Accordingly, plaintiffs failed to allege a claim under § 302 of the Civil Rights Act, and that claim should have been dismissed under MCR 2.116(C)(8). For these reasons, we affirm on alternative grounds the trial court's dismissal of that claim.

IV

Plaintiffs next argue in their cross appeal that the trial court abused its discretion when it denied their motion for leave to amend their complaint to conform to the proofs.

Decisions on motions to amend pleadings are within the discretion of the trial court and reversal is appropriate only when the trial court abuses its discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs where an unprejudiced person, considering the facts under which the trial court acted, would conclude that there was no justification for the court's decision. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

MCR 2.118(C) provides for the amendment of pleadings to conform to the evidence introduced at trial:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In

> that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

In this case, defendants neither expressly nor impliedly consented to try the issues under Const 1963, art 4, §§ 51 and 52 and § 5510 of the NREPA, the bases of the trial court's injunction. Thus, MCR 2.118(C)(1) is not applicable. The only question to be resolved is whether the trial court erred in denying the motion to amend in light of the strictures of MCR 2.118(C)(2).

Our Supreme Court has addressed the difference between amendments before trial and amendments during trial: "MCR 2.118(C)(2) establishes strict requirements for amending a pleading during trial. Unless the party requesting amendment 'satisfies the court that . . . amendment . . . would not prejudice the objecting party,' amendment 'shall not be allowed.' This rule contrasts sharply with the free amendment allowed before trial." *Dacon v Transue*, 441 Mich 315, 333; 490 NW2d 369 (1992), citing *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973). A court denying a motion to amend the pleadings should articulate its reasons for its decision. *Weymers, supra* at 659.

In this case, the trial court apparently denied plaintiffs' motion to amend because it would be unnecessary where the court had sua sponte granted plaintiffs equitable relief. The court did not otherwise give a particularized reason for denying the motion to amend. However, because we conclude that the trial court erred in issuing its injunction, see Part I, the issue whether the court should have permitted plaintiffs to amend their pleadings to conform with that ruling stands in a different light on appeal from that prevailing at trial. We conclude that had plaintiffs been allowed to amend their pleadings to state theories and request relief consistent with the trial court's sua sponte injunction, defendants would have suffered prejudice. Accordingly, we affirm the trial court's denial of plaintiffs motion to amend.[3]

Defendants emphasize that they were deprived of the opportunity to litigate the issue because it was sua sponte raised by the trial court. Plaintiffs respond that they did not seek to add any new factual allegations, but sought merely to add new legal theories to conform to the evidence. Further, plaintiffs' second amended complaint requested broad equitable relief, including to enjoin operation of the incinerator and to require defendants to alter the permit granted to it. However, we conclude that plaintiffs' request for equitable relief did not cast a net broad enough to embrace the bases upon which the trial court took the initiative to issue an injunction, Const 1963, art 4, §§ 51 and 52, and § 5510 of the NREPA. As our Supreme Court stated, "litigation may proceed to the point where the opposing party cannot reasonably be expected to defend against the amendment; this is an especially pertinent factor on the eve of, during, or after trial." *Weymers, supra* at 659, quoting *Fyke, supra* at 663. In

this case, litigation had proceeded well past the point where defendants could reasonably have been expected to defend against plaintiffs' proposed amendment. Had plaintiffs wished to pursue the avenues of relief that the trial court sua sponte chose to put forward, plaintiffs should have raised the issues and presented pertinent argument and evidence through the course of trial, thus allowing defendants to answer in kind. Under the circumstances, it would be prejudicial to defendants to allow plaintiffs to amend their pleadings to reflect an outcome that stemmed from the trial court's improper exercise of initiative and that took both parties by surprise.

V

Finally, plaintiffs argue that the trial court erred when it dismissed their claim under the Equal Protection Clause of the state constitution, Const 1963, art 1, § 2. We disagree, and hold that the trial court correctly that claim, under MCR 2.116(C)(8), because plaintiffs failed to plead or present evidence that defendants intentionally discriminated against them in issuing the permit.

This issue is controlled by *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302; 553 NW2d 377 (1996).[4] In *Harville*, this Court held that plaintiffs are held to the same burden under art 1, § 2 as under the Fourteenth Amendment to the federal constitution. That is, plaintiffs must demonstrate intentional or purposeful discrimination. *Id.* at 311. In the present case, plaintiffs pleaded disparate impact because of the issuance of the permit, but did not allege intentional or purposeful discrimination by defendants. "In the absence of a purpose to cause racial discrimination, governmental action that has a disproportionate effect on a racial minority is not unconstitutional." *People v Ford*, 417 Mich 66, 103; 331 NW2d 878 (1982).

In light of *Ford* and *Harville*, we conclude that plaintiffs' failure to plead purposeful or intentional discrimination is fatal to their claim under the Equal Protection Clause of our state constitution. The trial court correctly concluded that defendants were entitled to summary disposition on this claim.

The trial court's injunction, and its order clarifying the order granting the injunction, both dated July 28, 1997, are hereby VACATED. The trial court's orders dismissing the claim under § 302 of the Civil Rights Act, dismissing the claim under the Equal Protection Clause of the state constitution, and denying plaintiffs' motion to amend the pleadings to conform to the proofs are AFFIRMED. No taxable costs pursuant to MCR 7.219, questions of public policy being involved.

/s/ Jane E. Markey
/s/ Peter D. O'Connell

[1] Specifically, our Supreme Court stated the following:

> We do not . . . agree with the circuit judge in planting decision of this case upon [an] issue . . . not pleaded, briefed, or argued at hearing below. It was first raised in the circuit judge's opinion after close of proofs, at which time plaintiff and the attorney general were given an opportunity to amend their pleadings. . . . [W]e believe that the

> issue was one of substance and that, if amendment were to be allowed in the interest of justice, defendants should likewise have been given opportunity to answer, reopen proofs, and brief and argue the issue prior to decision. [*Id.* at 325.]

[2] When a trial court reaches the correct result for the wrong reason, this Court will usually not reverse the trial court's decision. *Smith v Globe Life Ins*, 223 Mich App 264, 278; 565 NW2d 877 (1997).

[3] See note 2, *supra*.

[4] *Harville* is precedent that we are bound to follow pursuant to the dictates of MCR 7.215(H)(1).