STATE OF MICHIGAN

COURT OF APPEALS

ANDREA GOLDBAUM and STUART GOLDBAUM,

Plaintiffs-Appellants,

v

VIKRAM PRASAD, OAKLAND COUNTY ROAD COMMISSION, and WEST BLOOMFIELD TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
December 1, 1998

No. 200450
Oakland Circuit Court
LC No. 94-487191 NO

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action in favor of defendant Vikram Prasad based on a jury's determination that Prasad was not negligent. Plaintiffs also challenge an order granting summary disposition in favor of defendant Oakland County Road Commission, and an order denying their motion to set aside the dismissal of defendant West Bloomfield Township. We affirm.

I

Having considered the evidentiary issues raised by plaintiffs with regard to the jury trial of their negligence claim against Prasad, we conclude that plaintiffs have not demonstrated any basis for relief.

Initially, we reject plaintiffs' claim that the trial court's decision to admit various Township and Road Commission records under MRE 803(6) was improper for the reason that the purpose of MRE 803(8) was thereby frustrated. While both evidentiary rules share the overall objective of hearsay exceptions, i.e., that evidence offered to prove the truth of the matter asserted be reliable, MRE 803(6) is rooted in its own common-law rules and must be evaluated according to its own foundational requirements. Compare *Solomon v Shuell*, 435 Mich 104, 117-118; 457 NW2d 669 (1990), and *Bradbury v Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984). Hence, the trial court's

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

rejection of this argument when ruling on the motions in limine was not an abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991).

Further, we find that plaintiffs failed to preserve their challenge to the admission of the records introduced by Prasad based on the regularly conducted business activity and trustworthiness requirements of MRE 803(6), because plaintiffs did not timely object to the evidence on this ground at trial and no plain error affecting substantial rights has been shown. *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997); MRE 103(a)(1) and (d). Indeed, although not dispositive of our decision, we note that plaintiffs themselves introduced one of the Township records (a complaint with a file date of April 8, 1994) as a trial exhibit, without objection, before the other Township complaints and Road Commission records were offered into evidence by Prasad. The arguments subsequently raised by plaintiffs pertained to the relevancy of the evidence and whether the records themselves contained inadmissible hearsay.

With regard to this latter argument, we agree that the trial court should have entertained plaintiffs' claim regarding whether the records contained hearsay within hearsay. Moreover, we do not agree with Prasad's contention that the parties agreed to the admissibility of the records. The trial record reveals only an agreement on authenticity. The authenticity of a document and the hearsay problem presented by it are separate issues. *Meagher, supra* at 724. A business record is admitted for all purposes only in the absence of another basis for the challenge or a limiting instruction. *Lopez v General Motors Corp*, 224 Mich App 618, 626; 569 NW2d 861 (1997). Under MRE 805, hearsay within hearsay "is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule."

Nevertheless, an appellate court's job is not done until a determination is made whether there is any legitimate basis for admitting the evidence. *People v Tanner*, 222 Mich App 626, 630 n 2; 564 NW2d 197 (1997). Because plaintiffs have briefed only the issue of the admissibility of Township Code Enforcement Officer Charlie Reid's statements in Road Commission service report no. 212849, we will limit our review to that report. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We agree that Officer Reid's statements in the report constituted hearsay if offered to prove the truth of the matter asserted. MRE 801(c). However, upon considering the entire record, including the fact that Officer Reid testified at trial, we find that any error was harmless. MRE 103(a); MCR 2.613(A); *People v Smith*, 456 Mich 543, 555; 562 NW2d 781 (1998).

The other two evidentiary issues raised by plaintiffs also fail to demonstrate grounds for vacating the judgment. Even if the trial court erred in admitting Jacqueline Rivard's testimony to the effect that she had heard that Prasad told other people about cutting the line, the error was harmless. MRE 103(a); MCR 2.613(A); *Smith, supra* at 555. Further, to the extent that plaintiffs suggest error based on the closing argument of Prasad's attorney about Jayanei Shah's testimony, we deem this issue abandoned because it is not raised in the statement of questions presented. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Finally, we decline to consider plaintiffs' claim that the trial court abused its discretion in ruling in limine to allow cross-examination of one of their proposed witnesses because the issue is given only cursory treatment in plaintiffs' brief. *Mitcham, supra* at 203; *Community Nat'l Bank of Pontiac v Michigan Basic Property Ins Ass'n*,

159 Mich App 510, 520-521; 407 NW2d 31 (1987). Moreover, plaintiffs are unable to show that their substantial rights were affected by the trial court's ruling, as required by MRE 103(a), because the witness did not testify at trial. Cf. *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988).

II

Next, plaintiffs challenge the trial court's decision granting summary disposition in favor of the Road Commission pursuant to MCR 2.116(C)(8). The order granting summary disposition expressly provided that plaintiffs could file an amended complaint, but they never did so.

Our review of a grant of summary disposition is de novo because we must determine if the prevailing party was entitled to judgment as a matter of law. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings based on the pleadings alone. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). The motion may only be granted where claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id* at 163. All well-pleaded allegations are accepted as true and construed most favorably to the non-moving party. *Id.* at 162-163. However, a "mere statement of a pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *Kramer v Dearborn Heights*, 197 Mich App 723, 725; 496 NW2d 301 (1993). Further, "[d]ecisions concerning the meaning and scope of pleading, and decisions granting or denying motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The Road Commission's motion focused on whether plaintiffs pleaded facts in avoidance of governmental immunity under the highway exception, MCL 691.1402; MSA 3.996(102). Although immunity granted by law, such as governmental immunity under MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*., is an affirmative defense that must be pleaded by the defendant in order to survive summary disposition, the plaintiff must allege facts justifying application of an exception to governmental immunity. *Wade, supra* at 163.

Here, plaintiffs' complaint pleaded a hazard posed by an unnatural accumulation of ice on the roadway allegedly caused by a sump pump discharge hose connected to defendant Prasad's house. However, plaintiffs' attorney stated at the motion hearing, "Make no mistake about it, the Oakland County Road Commission is being sued for the condition of the roadway which aggravated the hazard posed by the drainage from the individual defendant. It is the hazard in the roadway for which they are being sued and I believe that is adequately pleaded." Plaintiffs' attorney further identified the alleged road defect at the motion hearing as one based on improper grading (i.e., the road was flat).

Because it is apparent from the record that plaintiffs abandoned any theory of liability against the Road Commission other than the road design claim discussed at the motion hearing, and because the complaint contained insufficient allegations to plead this claim, *Kramer, supra* at 725, we hold that the trial court properly granted summary disposition under MCR 2.116(C)(8) in favor of the Road Commission, subject to plaintiffs' opportunity to amend their complaint to allege specific facts supporting their defective road design claim.[1] Any error committed by the trial court at the hearing in

evaluating the notice issue based on considerations outside of the pleadings was harmless because the dispositive issue did not involve notice, but rather the failure to sufficiently plead a cause of action based on a design defect. Hence, the correct result was reached when summary disposition was granted under MCR 2.116(C)(8). Cf. *Riesman v Regents of Wayne State Univ*, 188 Mich App 526, 530; 470 NW2d 678 (1991).

Furthermore, we reject plaintiffs' argument that their failure to file an amended complaint can be excused based on futility. First, plaintiffs' argument is not properly before this Court because it lacks citation to supporting authority. *Mitcham, supra* at 203. In any event, futility is the justification for a trial court not granting a party an opportunity to amend the complaint. MCR 2.116(I)(5); *Weymers, supra* at 658. Based on our review of the record, we conclude that plaintiffs must be deemed to have abandoned any issue associated with the filing of an amended complaint because they failed to act on the opportunity afforded them by the trial court. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

III

Plaintiffs' sole claim with regard to the Township is that the trial court erred in denying their motion to set aside the October 23, 1995, order of dismissal, which was entered in the case pursuant to the parties' stipulation. Plaintiffs contend that the stipulation was based on this Court's decision in *Listanski v Canton Charter Twp*, 206 Mich App 356; 523 NW2d 229 (1994). Plaintiffs moved to set aside the dismissal after this Court's decision in *Listanski* was reversed by our Supreme Court in *Listanski v Canton Twp*, 452 Mich 678; 551 NW2d 98 (1996). However, we find that plaintiffs abandoned this issue by failing to provide the transcript of the hearing on their motion, despite a request from this Court. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 304-305; 486 NW2d 351 (1992); *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991).

In any event, we note that plaintiffs' reliance on MCR 2.604 to argue that the order of dismissal was subject to revision by the trial court is misplaced. Rule 2.604(A) applies to an order *adjudicating* a claim. The word "adjudicate" means "[t]o settle or determine (an issue or dispute) judicially" and to "sit in judgment; act as judge." *Random House Webster's College Dictionary* (1992), p 17. Voluntary dismissals under MCR 2.504 that are based on stipulations do not adjudicate claims because the merits of the cause of action are not judicially determined. "Once received and approved, stipulations are sacrosanct," and a judge may not alter them. *Nuriel v Young Women's Christian Ass'n*, 186 Mich App 141, 147; 463 NW2d 206 (1990). However, "a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes," and, being a type of contract, certain defenses, such as mistake, fraud or unconscionable advantage, may provide grounds for a judge to set aside the stipulation. *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 394-395; 573 NW2d 336 (1997). See also *People v Williams*, 153 Mich App 582, 588; 396 NW2d 805 (1986). Furthermore, whether or not a court were to treat an order of dismissal based on the parties' stipulation as an adjudication for purposes of MCR 2.604(A), or were to apply another procedural rule governing relief from a judgment or order, e.g. MCR 2.612(C), the trial court's decision whether to grant relief would be discretionary. See *Limbach, supra* at 393-394; *Fireman's Fund Ins Co v Harold Turner, Inc*, 159 Mich App 812, 818; 407 NW2d 82 (1987).

Hence, the dispositive question here would not concern the legal question whether the Supreme Court's decision in *Listanski, supra,* could be judicially applied to plaintiffs' cause of action, but rather, whether it would be an abuse of discretion to order the stipulation set aside. Examined in this context, and upon giving due consideration to the fact that our Supreme Court in *Listanski, supra* at 681-682, adopted and affirmed the rule of law for townships established by a special panel of this Court in *Williams v Redford Twp,* 210 Mich App 60; 533 NW2d 10 (1995), and the fact that *Williams* was binding precedent under Administrative Order No. 1994-4, now MCR 7.215(H)(1), when the order of dismissal was entered in this case, we find no basis in the record to support plaintiffs' claim that the trial court's refusal to grant their motion constituted an abuse of discretion. In view thereof, we do not address the alternative arguments presented by the Township for affirming the trial court's decision.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof

[1] We note that our Supreme Court's decision in *Suttles v Dep't of Transportation*, 457 Mich 635; 578 NW2d 295 (1998), raises some question as to a pedestrian's ability to proceed with a cause of action based on a design defect under the highway exception, but that such a cause of action was recognized by this Court in *Sweetman v State Hwy Dep't*, 137 Mich App 14; 357 NW2d 783 (1984), with regard to a case involving "significantly aggravated" icing of a natural accumulation. We need not address this issue because plaintiffs' complaint does not set forth any allegations on a road condition aggravating icing. The complaint, construed most favorably to plaintiffs, alleges only a hazard posed by an unnatural accumulation of ice in the roadway formed by a discharge from Prasad's sump pump and the following breach of duty on the part of both the Township and the Road Commission: "Defendants breached their respective duties in failing to avoid or correct the hazard, or otherwise mitigate the hazard, to the public posed by the unnatural accumulation of ice in the roadway." Construed most favorably to plaintiffs, there is no allegation that the Road Commission aggravated an icing hazard caused by Prasad or any other source by designing a flat roadway.