STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA RADUC, Individually and as Next Friend of JOVICA RADUC,

Plaintiffs-Appellants,

v

ST. LAWRENCE KNIGHTS OF COLUMBUS and ST. LAWRENCE KNIGHTS OF COLUMBUS BUILDING CORPORATION,

Defendants/Third-Party Plaintiffs-Appellees,

and

B.S.K.,

Third-Party Defendant.

UNPUBLISHED
February 25, 2000

No. 213379
Macomb Circuit Court
LC No. 97-002568-NO

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order denying their motion to amend their complaint and granting defendant's motion for summary disposition. We affirm.

Plaintiffs' first issue on appeal is that the trial court erred in granting defendant's motion for summary disposition. We disagree. A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR

> 2.116(C)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

See also *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

Premises liability is conditioned upon both possession and control of property. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). These possessory rights can be loaned or transferred, conferring upon a lessee the duty to make a premises safe while simultaneously absolving the lessor of this responsibility. *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). A lease is considered the equivalent of a sale of the property throughout the lease term. *McCurtis v Detroit Hilton*, 68 Mich App 253, 255; 242 NW2d 541 (1976). The landlord, who relinquishes control and possession of the premises, likewise relinquishes the duty to maintain the premises in a reasonably safe condition and incurs no liability to persons injured on the premises. *Id*.

Defendant relinquished control and possession of the premises during the lease term and cannot be held liable for Jovica's injuries. The teeter-totter was located entirely within the premises leased to third-party defendant, and defendant was not free to access the teeter-totter or any other area located within the premises throughout the duration of the lease. The lease was considered the equivalent of a sale; therefore, third-party defendant had the duty to ensure that the premises was safe and defendant was absolved of this responsibility. *McCurtis, supra* at 255-256.

Plaintiffs next argue that the trial court erred in denying their motion to amend their complaint. We disagree. A trial court's decision regarding a motion to amend a complaint is reviewed for an abuse of discretion:

> The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Ordinarily, leave to amend a complaint should be "freely given when justice so requires." MCR 2.118(A)(2). The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). Leave to amend may be denied for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *Weymers, supra* at 658; *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Delay, alone, does not warrant denial of a motion to amend. *Weymers, supra* at 659. However, a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Id*. Prejudice to a defendant that will justify denial of leave to

> amend is the prejudice which arises when the amendment would prevent the defendant from having a fair trial; the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. *Id*. at 659. [*Amburgey v Sauder*, 238 Mich App 228, 246-247; ____NW2d ____ (1999).]

Plaintiffs sought to change their theory of recovery from negligence to nuisance, after defendant's motion for summary disposition had been filed, after the close of discovery, and after mediation had taken place. A nuisance claim would require plaintiffs to prove that

> (1) at the time the premises is transferred to the tenant a hidden dangerous condition exists, the landlord knows or should have known of the condition and fails to apprise the tenant of it, or (2) the premises is leased for a purpose involving public admission and the landlord fails to exercise reasonable care to inspect and repair the premises before possession is transferred. . . . In the above two situations, a party is allowed to recover from a landlord on a nuisance as opposed to negligence theory. [*McCurtis, supra* at 256.]

In moving to amend their complaint, plaintiffs apparently advanced the second proposition as the basis for their nuisance claim and argued that the premises in this case was leased for the purpose of public admission. Although there is some overlap in the proofs required under a nuisance theory and plaintiffs' original negligence claim, i.e., plaintiffs would still have to demonstrate that defendant failed to exercise reasonable care in inspecting and repairing the premises prior to the transfer to third-party defendant, plaintiffs would have to further prove that the premises was leased for the purpose of public admission – proof unique to the nuisance theory of recovery. *Id*. Cf. *Paisley v United Parcel Service, Inc*, 14 Mich App 301; 165 NW2d 299 (1968). The parties did not engage in any discovery relevant to this latter issue prior to mediation or the discovery cutoff date.

Defendant contends that it would suffer undue prejudice if plaintiffs are allowed to amend their complaint and it is required to engage in additional discovery on this issue at this point in the proceedings. We agree. "A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint. . . ." *Weymer, supra* at 661, quoting *Priddy v Edelman*, 883 F2d 438, 446-447 (CA 6, 1989). Although plaintiffs argue that even though the discovery cutoff has passed, the parties are still involved in ongoing discovery, thus minimizing any prejudice from the amendment, a review of the record indicates that the nature and extent of the post-cutoff discovery is minimal and involves the tangential issue of witness interrogatories that were submitted by defendant to the third-party defendant, B.S.K. Moreover, it is significant in this case that a mediation panel has already rendered an award based on plaintiffs' allegations of negligence, not nuisance. Defendant's decision to reject the mediation evaluation necessarily took into account the nature of the allegations set forth in plaintiffs' *original* complaint. Were we to allow plaintiff to amend at this point in the proceedings, the mediation would be essentially nullified. Clearly, under the circumstances, defendant would be prejudiced if this Court were to allow an amendment asserting an entirely new theory of recovery after mediation and discovery had run their course. We therefore

conclude that the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint on the basis of undue delay and the resultant prejudice.[1] Compare *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344; 568 NW2d 847 (1997); *Davis v Chrysler Corp*, 151 Mich App 463, 474-475; 391 NW2d 376 (1986).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] To the extent that the trial court held, in ruling on plaintiffs' motion for reconsideration, that the motion to amend would be denied on the additional basis of futility because defendant "did not have possession or control of the premises at the time of [plaintiff's] accident," we conclude that the trial court abused its discretion. According to *McCurtis, supra* at 256, possession and control are not required to establish a prima facie case of nuisance, and the trial court, therefore, erred in so finding.