STATE OF MICHIGAN

COURT OF APPEALS

GWENDOLYN NEILL, Personal Representative of the Estate of WILLIAM JOHN NEILL, IV,

Plaintiff-Appellant,

v

STEEL MASTER TRANSFER, INC.,

Defendant-Appellee,

and

ROZAFA TRANSPORT, INC., and GJERGI RROGOMI,

Defendants.

UNPUBLISHED
October 21, 2008

No. 279122
Macomb Circuit Court
LC No. 06-000744-NO

GWENDOLYN NEILL, Personal Representative of the Estate of WILLIAM JOHN NEILL, IV,

Plaintiff-Appellee,

v

STEEL MASTER TRANSFER, INC.,

Defendant,

and

ROZAFA TRANSPORT, INC., and GJERGI RROGOMI,

Defendants-Appellants.

No. 281057
Macomb Circuit Court
LC No. 06-000744-NO

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In Docket No. 279122, plaintiff appeals by leave granted an order granting defendant, Steel Master Transfer, Inc.'s ("Steel Master's") motion for summary disposition. In Docket No. 281057, defendant, Rozafa Transport, Inc. ("Rozafa"), and Gjergi Rrogomi appeal by leave granted an order granting plaintiff's motion to dismiss their notice of nonparty at fault. We affirm in Docket No. 279122 and reverse in Docket No. 281057.

This case arises out of the death of William John Neill, IV ("Neill"), that occurred on February 2, 2006, when an 816-pound piece of machinery that he was unloading from a trailer fell from the trailer and crushed him. On appeal, plaintiff first argues that there exist issues of fact concerning whether Steel Master negligently prepared and loaded the machinery onto the trailer. We disagree.

The Court reviews de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, we must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show the existence of a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A plaintiff may not oppose summary disposition on the basis of unsupported speculation. *Id.*

As a preliminary matter, we note that plaintiff's first amended complaint failed to allege negligent preparation and loading. Therefore, the complaint failed on its face to satisfy MCR 2.111(B)(1) regarding this claim.[1] While plaintiff contends that the depositions served as notice to Steel Master that her claims pertained to negligent preparation and loading, plaintiff has cited no authority for the proposition that discovery may trump the rules of notice pleading. It is not this Court's responsibility to search for authority to sustain a party's position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, this argument is without merit.

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[1] MCR 2.111(B)(1) requires a complaint to 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 . . . ."

Even if plaintiff's first amended complaint had sufficiently alleged negligent preparation and loading, Steel Master was not liable in accordance with the ruling in *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953). In MCL 480.11a, Michigan adopted the federal Motor Carrier Safety regulations contained in 49 CFR 392.9. *DOT v Initial Transport, Inc*, 276 Mich App 318, 323; 740 NW2d 720 (2007), rev'd in part on other grounds 481 Mich 862 (2008). This regulation provides, in relevant part, that a driver may not operate a commercial motor vehicle unless the vehicle's cargo is properly distributed and adequately secured and requires the driver to ensure compliance with this requirement. 49 CFR 392.9(a)(1) and (b)(1). The United States Court of Appeals for the Sixth Circuit has held that "[w]hile not dispositive, [CFR 392.9(b)] is indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods." *Rector v Gen Motors Corp*, 963 F2d 144, 147 (CA 6, 1992).[2]

The United States Court of Appeals for the Fourth Circuit, however, in *Savage* enunciated the "shipper exception" to this regulation:

> The primary duty as to the safe loading of property is therefore upon the carrier [here, Rozafa and Rrogomi]. When the shipper [here, Steel Master] assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts. [*Savage Truck Line, Inc*, *supra* at 445.]

Although Michigan has not formally adopted the *Savage* rule, the Maine Supreme Court in *Decker v New England Pub Warehouse, Inc*, 2000 ME 76; 749 A2d 762, 767 (Me, 2000), noted that, as recently as 2000, the majority of state courts have adopted *Savage*. See, e.g., *Smart v American Welding & Tank Co*, 149 NH 536; 826 A2d 570 (2003); *Brashear v Liebert Corp*, 2007 Ohio 296 (Ohio Ct App 2007); *WJ Casey Trucking & Rigging Co v Gen Electric Co*, 151 NJ Super 151; 376 A2d 603 (1977). Although cases from foreign jurisdictions are not binding, they may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

Assuming without deciding that *Savage* is applicable, Steel Master is not liable for preparing and loading the conveyor parts onto the trailer. The elements of negligence are 1) duty; 2) breach of that duty; 3) causation; and 4) damages. *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). Despite plaintiff's claim to the contrary, it was undisputed below that Steel Master did not exclusively assume responsibility for loading the conveyor parts. On the contrary, Arthur Nash, a Steel Master employee, explained that loading decisions were made between both himself and Rrogomi. Although Steel Master's

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[2] Although not binding, this Court may consider federal precedents persuasive. *Rasheed v Chrysler Corp*, 445 Mich 109, 124 n 20; 517 NW2d 19 (1994).

employees loaded the conveyor parts using a hi-lo, Rrogomi strapped the conveyor parts and monitored weight distribution on the trailer. Thus, in accordance with *Savage*, Steel Master was not liable for defects in the loading process.

Plaintiff next contends that the trial court abused its discretion in denying her motion to file a second amended complaint because a causal link existed between Steel Master's negligence and Neill's death. We disagree. Where summary disposition is based on MCR 2.116(C)(8), (9), or (10), a trial court should freely provide the nonprevailing party the opportunity to amend its complaint unless such would not be justified. MCR 2.116(I)(5). "We will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004) (internal citation omitted). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (quotation and citation omitted).

Allowing plaintiff to file a second amended complaint to include allegations that Steel Master failed to "prepare, palletize, load [and] ship" the conveyor parts and failed to warn of the "defective method of loading, shipping . . . [or] inadequacies of the preparation for transport" would have been futile. Indeed, as noted *supra*, even if plaintiff's first amended complaint properly placed Steel Master on notice of plaintiff's theories of recovery, Steel Master was not liable under *Savage* because it did not assume sole responsibility for loading the conveyor parts. Consequently, the trial court did not abuse its discretion in denying plaintiff's motion to file a second amended complaint.

We note that the trial court characterized plaintiff's allegations in the proposed second amended complaint as a product liability action and denied plaintiff's motion on these grounds;[3] plaintiff, however, contested this characterization both below and does so on appeal. "This Court is not bound by a party's choice of labels for his or her action because this would put form over substance." *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988).

Under the product liability statute, MCL 600.2945(h), "'Product liability action' means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." "[P]roduction" as defined by the product liability statute includes preparation and

[3] Plaintiff's first amended complaint failed to include allegations of negligent design and manufacture as alleged in the original complaint.

packaging of a product. MCL 600.2945(i). Plaintiff's expert,[4] Paul Singh, testified that Steel Master manufactured and sold a "product-packaged system that consisted of [its] product, the conveyor, and the use of wooden materials to form a structure that was sold and is at issue in this case." This is consistent with plaintiff's allegation in her proposed second amended complaint that defendant failed to properly prepare the conveyor parts. In light of this, plaintiff's allegations in her proposed second amended complaint amounted to a product liability claim.

Had plaintiff filed her proposed second amended complaint, Steel Master would arguably have suffered prejudice. "[A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers*, *supra* at 659-660 (footnote omitted). Plaintiff sought the amendment at issue after the close of discovery. Despite Singh's testimony, Steel Master was not on notice that plaintiff would pursue a product liability claim. On the contrary, the crux of plaintiff's questioning during the depositions was to elicit evidence of negligence and not product liability, *per se*. Consequently, the court properly denied plaintiff's motion to amend the complaint on these grounds.

In Docket No. 281057, Rozafa and Rrogomi contend that the trial court erred in granting plaintiff's motion to dismiss their notice naming Steel Master as a nonparty at fault. We agree. Although the trial court characterized the notice of nonparty at fault as a motion for reconsideration of the order granting Steel Master's motion for summary disposition under MCR 2.119(F), the notice actually sought a legal determination regarding whether fault may be apportioned to Steel Master. This Court's review of questions of law, including whether a party owes another a duty in a negligence action, and issues of statutory interpretation is de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566; 702 NW2d 539 (2005); *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Michigan's 1995 tort reform legislation abolished joint and several liability except in certain, very specific instances. *Smiley v Corrigan*, 248 Mich App 51, 53; 638 NW2d 151 (2001). Regarding the allocation of fault under a comparative fault scheme of several liability, MCL 600.2957 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing

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[4] Steel Master contends that plaintiff improperly relied on her expert witnesses' depositions because the court entered a protective order restricting those depositions to discovery only. Although MCR 2.302(C)(7) permits a trial court to issue a protective order providing "that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment," the order at issue did not expressly limit the depositions to impeachment purposes. Therefore, this argument fails.

> percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
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> * * *
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> (3) . . . Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

Similarly, MCL 600.6304(1)(b) provides that in personal injury and wrongful death actions involving the fault of more than one person, the trial court must instruct the jury to answer special interrogatories regarding the percentage of total fault of all persons that contributed to the death or injury "regardless of whether the person was or could have been named as a party to the action." Under MCL 600.6304(8), "'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." *Jones v Enertel, Inc*, 254 Mich App 432, 436; 656 NW2d 870 (2002). In accordance with *Jones*, "a duty must first be proved before the issue of fault or proximate cause can be considered." *Id.* at 437.[5]

In granting Steel Master's motion for summary disposition, the trial court did not make a determination on the issue of Steel Master's fault. Rather, the court only found that there was no genuine issue of material fact regarding Steel Master's liability based on plaintiff's asserted theories of recovery. Specifically, the court determined that: Steel Master was not liable for negligent transportation and delivery because Rozafa was the carrier responsible for transporting and delivering the conveyor parts to Visteon; Steel Master was not liable for Rrogomi's actions because Steel Master was not Rrogomi's employer; plaintiff failed to establish an issue of fact regarding whether Steel Master negligently packaged and loaded the trailer; and Steel Master did not breach a duty to warn given James Borelli's testimony that both he and Neill assessed the conveyor parts' stability before unloading the trailer.

Because "a duty must first be proved before the issue of fault or proximate cause can be considered . . . . [A] party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability." *Jones, supra* at 437-438. Notably absent

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[5] We note that our Supreme Court has recently vacated its opinion in *Romain v Frankenmuth Ins Co*, ___ Mich ___; 754 NW2d 257 (2008), which affirmed that *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002), served as the controlling precedent by requiring proof of a duty before the allocation and apportionment of liability under MCL 600.6304. *Romain v Frankenmuth Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 135546, issued September 24, 2008). In vacating their earlier opinion, the Supreme Court is reconsidering, in addition to other issues, "whether the Legislature intended to impose a legal duty requirement as a precondition for allocating fault under . . . MCL 600.6304." *Id.*

from the trial court's opinion and order was any finding that Steel Master owed plaintiff a duty regarding packaging and loading of the trailer/shipment. Rather, the trial court determined that there existed no issue of fact that Steel Master did not *breach* a duty under plaintiff's asserted theories of recovery. Therefore, given that the trial court's ruling was not based on the absence of a duty, a determination was not made regarding Steel Master's fault. Because that issue was not resolved, the trial court erred in dismissing Rozafa's and Rrogomi's notice of nonparty at fault.

Plaintiff contends that this Court's analysis in *Jones* precludes Rozafa and Rrogomi from naming Steel Master a nonparty at fault. However, unlike *Jones,* in which this Court found that application of the open and obvious doctrine precluded any duty owed by the defendant, the trial court in the instant case did not find the absence of a duty owed by Steel Master. Thus, application of this Court's reasoning in *Jones,* supports the conclusion that it was permissible to name Steel Master as a nonparty at fault.

We note that Rozafa and Rrogomi assert that although their position prevails under *Jones*, that case was wrongly decided because it "equated 'fault' with 'negligence'" and failed to apprehend that "duty focuses on the relationship between the parties [whereas] proximate cause focuses on the relationship between the conduct and the injury." Although MCL 600.6304(8) defines fault in terms of proximate cause, Rozafa's and Rrogomi's attempt to isolate duty from proximate cause is misplaced. As our Supreme Court explained in *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977):

> The questions of duty and proximate cause are inter-related because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend on foreseeability - whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.

Consequently, *Jones*'s reliance on the determination of fault based on the existence of a duty is correct and Rozafa's and Rrogomi's argument on this point fails.

We affirm the trial court's order granting Steel Master's motion for summary disposition and denying plaintiff's motion to file a second amended complaint, but reverse the trial court's order granting plaintiff's motion to dismiss Rozafa's and Rrogomi's notice of nonparty at fault.

/s/ Patrick M. Meter
/s/ Michael J. Talbot