# STATE OF MICHIGAN

# COURT OF APPEALS

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JOSHUA M. KINNIEBREW, Personal Representative of the Estate of DARIUS ANTHONY KINNIEBREW, Deceased,

Plaintiff-Appellant,

v

RON STEWART, JAMIE COOLEY and RON SHIVER, each Individually and as Successor Trustees and constituting the local Board of Trustees for the West Wayne Church of God and MICHIGAN CHURCH OF GOD,

Defendants-Appellees,

and

FELLOWSHIP MISSIONARY BAPTIST CHURCH OF ROMULUS, a Michigan Non-Profit Corporation, KEEP IT IN THE 70'S, INC., a Michigan Corporation, DAVID BROWN, RON AMMAN, KEN BAKER, JOHN MARKS and SCOTT BECKINGTON

Defendants.

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UNPUBLISHED
October 21, 2008

No. 279826
Wayne Circuit Court
LC No. 06-617598-NO

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's July 27, 2007, order dismissing its complaint. On appeal, plaintiff argues that the trial court erred when it granted summary disposition in favor of Ron Stewart, Jamie Cooley, Ron Shiver and the Michigan Church of God

(MCG).[1] Plaintiff further argues that the trial court erred when it denied his second motion to amend his complaint. We affirm.

This case stems from a June 27, 2001, accident where Darius Anthony Kinniebrew (the deceased) was electrocuted in the attic of a church while installing a new air conditioning system. On April 4, 2001, almost three months prior to the accident, the West Wayne Church of God (WWCG), which is associated with the MCG, sold the church in question, appointing Stewart, Shiver and Cooley as trustees to help consummate the sale, to the Fellowship Missionary Baptist Church of Romulus (FMBCR).

Approximately one day after the tragic accident, Richard Olson, an electrician, was brought in to determine what went wrong. After several hours of inspection, which included numerous trips to and from the attic to conduct voltage readings in different scenarios, Olson determined that "[t]he hot 120 volt line to the light fixture was pinched between the fixture mounting stem and the hickey (fixture stem) mounted inside the box," opining that it was pinched "at some point in time [when] somebody tightened something too hard." Olson concluded that as a result of the pinched-wire, the electrical box became electrified every time the sanctuary lights were turned on, which in turn electrified the aluminum foil backed ceiling and the recently attached sheet metal ducts. Olson opined that the deceased, who was probably soaking wet with sweat while working in the attic, was likely electrocuted when his back came in contact with a steel beam, causing him to become a conduit between the beam and the electrified duct work.

Plaintiff first argues on appeal that the trial court erred when it granted summary disposition in favor of the MCG, Stewart, Cooley and Shiver. We disagree. We review de novo a trial court's decision to grant or deny a motion for summary disposition, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002).

"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Premises liability requires "both possession and control over the land" because the one with possession and control is usually in the best position to prevent harm to others, *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 661-662; 575 NW2d 745 (1998), and thus where a defendant does not have possession and control over the premises, it does not owe an invitee a duty, *Orel v Uni-Rak Sales Co*, 454 Mich 564, 565; 563 NW2d 241 (1997). Generally when a land vendor "surrenders title,

[1] These parties will be collectively referred to as defendants.

possession, and control" of property through a sale, the vendor surrenders "all responsibility for the land's condition to the purchaser." *Christy v Glass*, 415 Mich 684, 694; 329 NW2d 748 (1982). However, if a vendor fails to disclose "to the purchaser any concealed condition known to him which involves an unreasonable danger," a vendor is still liable for any harm caused by such condition until the purchaser discovers or should have discovered the condition. *Id*. at 694-695.

For at least three reasons the trial court correctly held that defendants were not liable for this injury. First, as previously discussed, the WWCG sold the property in question to the FMBCR on April 4, 2001, almost three months prior to the June 27, 2001, accident where the deceased was electrocuted. Thus, there was no genuine issue of material fact that defendants did not own the property at the time of the injury. Second, there is no evidence showing that defendants had possession or control of the property. Third, even if defendants were considered to have "possession and control" of the property at the time that the WWCG owned the church, defendants still would not have owed plaintiff a duty unless there was evidence that the parties knew of the dangerous condition and subsequently failed to disclose the condition to the FMBCR at the time of sale. *Orel, supra* at 565; *Christy, supra* at 694-695.

No evidence has been presented to suggest that any of the defendants knew of the pinched wire and/or corresponding electrified attic. In fact, Olson stated that (1) the pinched wire was not visible, (2) a lay person "would have no reason . . . to detect" that the attic was electrified when the sanctuary lights were on because the only way to find out was to go into the attic with a voltmeter, and (3) it would have even been unlikely that an electrician would have discovered the dangerous condition because it was likely something that an electrician would not have looked for. Moreover, Ron Amann and Ken Baker's pre-sale inspection of the property at the request of the FMBCR did not reveal the dangerous condition. The evidence that was presented therefore showed that not only did defendants not know of the condition, but also it is unlikely that they could have even discovered the condition. Hence, plaintiff failed to establish a genuine issue of material fact that defendants owed plaintiff a duty, *Orel, supra* at 565; *Christy, supra* at 694-695, and the trial court did not err when it granted summary disposition in favor of defendants.[2] *Rose, supra* at 461; *Kennedy, supra* at 712.

Plaintiff's final argument is that the trial court erred when it denied plaintiff's motion for leave to file a second amended complaint. Once again, we disagree. We review a trial court's denial of a motion to amend a complaint for an abuse of discretion, *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003), reversing the trial court only if its decision resulted in an outcome falling outside the range of principled outcomes, *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

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[2] Plaintiff's brief mention of MCL 338.887(3)(a) is to no avail. For one, plaintiff does not explain how a potential violation of this statute, with criminal penalties, helps his tort claim. *Ambs v Kalamazoo Co Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). In addition, that statutory provision only places restrictions on the person performing the electrical work, not the consumer. MCL 338.887(2); *Silver v AOC Corp*, 31 Mich App 147, 150; 187 NW2d 532 (1971).

Leave to amend a complaint should be freely granted when justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only 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, or where amendment would be futile. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

Here, plaintiff moved to amend his complaint so that he could add a claim under the "inherently dangerous activity" doctrine, citing *DeShambo v Nielsen*, 471 Mich 27; 684 NW2d 332 (2004), in which our Supreme Court stated "[w]hen a landowner hires an independent contractor to perform work that poses a peculiar danger or risk of harm, it is reasonable to hold the landowner liable for harm *to third parties* that results from the activity," *Id*. at 38 (emphasis in original). The trial court denied plaintiff's motion on the basis that it was "futile and untimely."

Here, the WWCG sold the property to the FMBCR almost three months prior to the June 27, 2001, accident, and thus, defendants did not own the property at the time of the accident. Rather, the FMBCR, who owned the property at the time of the accident, hired the independent contractor who in turn brought in the third party that was injured. Under these undisputed facts, defendants could not have been liable under the "inherently dangerous activity" doctrine, and thus plaintiff's proposed amendment would have been futile. *DeShambo, supra* at 38. We therefore hold that the trial court did not abuse its discretion when it denied the motion. *Phinney, supra* at 523.

Affirmed.

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