STATE OF MICHIGAN

COURT OF APPEALS

KRISTIE REH,

Plaintiff-Appellant,

v

ROSE LASKOWSKI, MADHUMALTI D. BHAVSAR, and DONALD PROUX,

Defendants-Appellees.

UNPUBLISHED
February 24, 2009

No. 279102
Tuscola Circuit Court
LC No. 05-023361-NO

KRISTIE REH,

Plaintiff-Appellant,

v

CARO REGIONAL CENTER,

Defendant-Appellee.

No. 279103
Court of Claims
LC No. 06-000129-MZ

PATRICIA COLBURN SPENCER,

Plaintiff-Appellant,

v

ROSE LASKOWSKI, MADHUMALTI D. BHAVSAR, and DONALD PROUX,

Defendants-Appellees.

No. 279104
Tuscola Circuit Court
LC No. 05-023312-NO

PATRICIA COLBURN SPENCER,

Plaintiff-Appellant,

v

No. 279105

CARO REGIONAL CENTER,

Defendant-Appellee.

Court of Claims
LC No. 06-000131-MZ

LARRY GETTEL,

Plaintiff-Appellant,

v

ROSE LASKOWSKI, MADHUMALTI D. BHAVSAR, and DONALD PROUX,

Defendants-Appellees.

No. 279106
05-023313-NO
LC No. 05-023313-NO

LARRY GETTEL,

Plaintiff-Appellant,

v

CARO REGIONAL CENTER,

Defendant-Appellee.

No. 279107
Court of Claims
LC No. 06-000132-MZ

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs also appeal the trial court's order denying their motion to amend the complaint. Because we conclude that the trial court did not err in holding that defendants Caro Regional Center (Caro Center), Rose Laskowski, and Madhumalti Bhavsar were entitled to governmental immunity, we affirm the trial court's order granting summary disposition to the Caro Center, Laskowski, and Bhavsar. However, we conclude that the trial court erred in holding that defendant Donald Proux was entitled to governmental immunity. We reverse the trial court's order granting summary disposition to Proux on all plaintiffs' claims except the claims for mental health professional liability and inherently dangerous activity, because we conclude that Proux is entitled to summary disposition under MCR 2.116(C)(8) on those two claims. Finally, because plaintiffs have not established that an amendment of the complaint would not be futile, we affirm the trial court's order denying plaintiffs' motion to amend.

I. Basic Facts and Procedural History

Corbin Thomas, after he was found not guilty by reason of insanity at a criminal trial, was admitted to the Caro Center. At the Caro Center, Thomas threatened that he "wanted to kill white people."

On June 22, 2004, Thomas received permission to roam the grounds of the Caro Center unsupervised for 15 minutes. While roaming the grounds of the Caro Center unsupervised, Thomas eloped. Sometime before he eloped, Thomas had obtained a set of master keys to the Caro Center, which granted him access to the entire Caro Center, including the Caro Learning Center. The Caro Learning Center, an alternative high school, leased space at the Caro Center. On June 25, 2004, Thomas, using the set of master keys, entered the Caro Learning Center and attempted to kill plaintiffs, employees of the Caro Learning Center.

Plaintiffs sued defendants, asserting seven claims against them: (1) landlord liability, (2) gross negligence, (3) maintaining a defective building, (4) nuisance, (5) negligent entrustment, (6) mental health professional liability, and (7) inherently dangerous activity. In lieu of filing an answer, the Caro Center, Laskowski, and Bhavsar moved for summary disposition under MCR 2.116(C)(7) and (8), and Proux, in a separate motion, moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Affidavits attached to the motions established that the Caro Center was a state owned hospital operated under the direction of the Department of Community Health and that, in June 2004, Laskowski was the director of the Caro Center, Bhavsar was a staff psychiatrist, and Proux was a locum tenens psychiatrist. The trial court granted summary disposition to defendants under MCR 2.116(C)(7) on the basis of governmental immunity.

II. Governmental Immunity

On appeal, plaintiffs claim that the trial court erred in granting summary disposition to the four defendants on the basis of governmental immunity.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Marchyok v Ann Arbor*, 260 Mich App 684, 686; 679 NW2d 703 (2004). Summary disposition is properly granted under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . immunity granted by law." A motion made under MCR 2.116(C)(7) need not be supported by documentary evidence. MCR 2.116(G)(2), (3); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, if documentary evidence is submitted, it must be considered by the court, but only to the extent that it would be admissible as evidence. MCR 2.116(G)(5), (6); *Maiden, supra* at 119. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden, supra* at 119. "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

We consider seriatim whether the Caro Center, Laskowski and Bhavsar, and Proux were entitled to summary disposition on the basis of governmental immunity.

B. Caro Center

On appeal, plaintiffs claim that the trial court erred in granting summary disposition to the Caro Center on the basis of governmental immunity because, by alleging that the Caro Center was engaged in a propriety function when it leased a portion of the Caro Center to the Caro Learning Center, they alleged that the rental fee charged by the lease was excessive and not authorized by law. Plaintiffs' argument rests on two premises: (1) if the rental fee charged by the lease was unauthorized, then the lease itself was unauthorized, and (2) if the lease was unauthorized, then the Caro Center was engaged in a proprietary function.

"[A] governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). This definition is to be broadly construed; "[i]t only requires that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged." *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004) (internal quotations and citation omitted).

Plaintiffs do not contest that the leasing of state owned property is a governmental function. Rather, plaintiffs assert that the leasing of state owned property becomes an unauthorized act when the rental fee exceeds prevailing market rates or actual costs as determined by the Department of Management and Budget. Plaintiffs' assertion is based on MCL 18.1221(6), which provides that the "renting, leasing, or licensing of state owned land and facilities to private and public entities shall be at prevailing market rental values or at actual costs as determined by the director."

Tort liability may be imposed on a governmental agency if the agency was involved in an ultra vires activity. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986); *Herman, supra* at 144. An ultra vires activity is "an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law." *Hyde*, *supra* at 253. To determine whether a governmental agency is engaged in an ultra vires act the focus must be on the general activity, not the specific activity involved. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). Moreover, "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989).

Plaintiffs do not contest that the lease of a portion of the Caro Center to the Caro Learning Center was authorized by law. Because there was legal authority for the lease, an unauthorized performance of the lease, i.e., charging a fee that exceeded the prevailing market rental values or actual costs, would not transform the lease into an unauthorized, or ultra vires, activity. *Id.* Accordingly, the first premise of plaintiffs' argument—that, if the rental fee charged by the lease was unauthorized, the lease itself was unauthorized—is incorrect.

In addition, even if discovery was conducted and it was established that the rental fee charged by the lease exceeded the prevailing market rates or actual costs, this fact alone would not establish that the lease was a proprietary function. A proprietary function is not the equivalent of an unauthorized activity. A proprietary function is "any activity which is

conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413. This definition is "clear and unambiguous. Two tests must be satisfied: The activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998) (internal citation omitted); see also *Herman, supra* at 145-146. Plaintiffs' argument as to why the lease of a portion of the Caro Center to the Caro Learning Center is a proprietary function is devoid of any reference to or consideration of these two tests. Accordingly, the second premise of plaintiffs' argument—that, if the lease was unauthorized, the Caro Center was engaged in a proprietary function—is also incorrect.

Because the two premises of plaintiffs' argument are legally incorrect, we reject plaintiffs' argument that the trial court erred in concluding that the Caro Center was entitled to governmental immunity. We affirm the trial court's grant of summary disposition to the Caro Center.

C. Laskowski and Bhavsar

Plaintiffs argue that the trial court erred in granting summary disposition based on governmental immunity to Laskowski and Bhavsar because they pleaded a cause of action for gross negligence.

An employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury. MCL 691.1407(2); *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Here, the "one most immediate, efficient, and direct cause" of plaintiffs' injuries was Thomas's physical attack of them. Because reasonable jurors could not find that any conduct by Laskowski and Bhavsar was "the proximate cause" of plaintiffs' injuries, the trial court properly granted summary disposition to Laskowski and Bhavsar. We affirm the trial court's grant of summary disposition to Laskowski and Bhavsar.[1]

D. Proux

Plaintiffs claim that, because Proux admitted that he was an independent contractor and because an independent contractor who works for a governmental agency is not entitled to governmental immunity, the trial court erred in granting summary disposition to Proux under MCR 2.116(C)(7).

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[1] Because any conduct by Laskowski and Bhavsar was not "the proximate cause" of plaintiffs' injuries, we reject plaintiffs' argument that Laskowski and Bhavsar could be held liable on a nuisance theory. Nothing in the plain language of MCL 691.1407(2) suggests that a governmental employee can be held liable for the creation of a nuisance where the employee's action did not constitute "gross negligence that is the proximate cause of the injury."

Whether an independent contractor working on behalf of a governmental agency is entitled to governmental immunity requires construction of MCL 691.1407(2). Pursuant to MCL 691.1407(2), governmental immunity is afforded to "each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force." The goal of statutory interpretation is to give effect to the intent of the Legislature. *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and the Court must apply the statute as written. *Id.* "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

An employee is distinct from an independent contractor. An employee is "[a] person who works in the service of another person (the employer) . . . the employer has the right to control the details of work performance." Black's Law Dictionary (7th ed). An independent contractor is "[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." *Id.* Whether one is an employee or an independent contractor has legal significance. For example, an employer is generally not liable for the negligence of an independent contractor, *Reeves v Kmart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998), while an employer is generally liable for an employee's negligent acts committed within the scope of employment, see *Rogers v J B Hunt Transport, Inc*, 244 Mich App 600, 605; 624 NW2d 532 (2001), rev'd on other grounds 466 Mich 645 (2002). Because the Legislature has not included independent contractors within the list of persons afforded governmental immunity, MCL 691.1407(2), and because we may not read anything into an unambiguous statute that is not within the plain language of the statute, *Roberts*, *supra*, we conclude that independent contractors working for a governmental agency are not entitled to governmental immunity.[2]

Plaintiffs argue that, because Proux averred in his affidavit that he was an independent contractor, there can be no question of fact that Proux was an independent contractor. In his affidavit, Proux averred that he "was not a direct employee of the State of Michigan. Instead, the state contracted with a third party who placed [him] and paid [him] to work at Caro as an independent contractor." Generally, whether one is an employee or an independent contractor is determined by applying the economic-reality test. See *Rakowski v Sarb*, 269 Mich App 619, 625; 713 NW2d 787 (2006). This test considers four basic factors: "(1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal." *Id.* No single factor is controlling, and other factors may be considered. *Id.* The economic-reality test considers the totality of the circumstances surrounding the work performed.

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[2] Our conclusion is consistent with *Rakowski v Sarb*, 269 Mich App 619, 624-627; 713 NW2d 787 (2006), where the Court, without analyzing the language of MCL 691.1407(2), worked under the assumption that independent contractors working for a governmental agency are not entitled to governmental immunity.

Id. Considering Proux's averment in context, Proux believed that he was an independent contractor because of the way he was hired and paid. Because the determination whether one is an independent contractor requires consideration of more factors than the methods by which one is hired and paid, *id.*, Proux's qualified averment is not dispositive as to his status as an employee or independent contractor. See *id.* at 627 n 2.

We also reject Proux's argument that, based on the undisputed facts of his affidavit, he was an employee of the Caro Center. Proux averred that his duties, as a locum tenens psychiatrist, were the same as the duties of staff psychiatrists hired directly by the State and that his "immediate boss" and "overall boss" were the Caro Center's Director of Psychiatry and Psychiatrist of Clinical Affairs, respectively. However, a motion for summary disposition under MCR 2.116(C)(7) should not be granted unless no factual development could provide a basis for recovery. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1997). Here, the parties have not engaged in discovery and, despite Proux's averments about his duties and supervisors, factual development could establish that Proux was an independent contractor of the Caro Center. See *Rakowski, supra* at 625. Because factual development could establish that Proux was an independent contractor of the Caro Center, rather than an employee, the trial court erred in granting summary disposition to Proux under MCR 2.116(C)(7).

III. Alternative Grounds for Affirmance

Proux claims that, even if the trial court erred in granting summary disposition to him under MCR 2.116(C)(7), he is entitled to summary disposition under MCR 2.116(C)(8) or (10). We first address whether Proux is entitled to summary disposition on any of plaintiffs' claims under MCR 2.116(C)(8) and then address whether summary disposition on any remaining claims is proper under MCR 2.116(C)(10).

A. MCR 2.116(C)(8)

Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chemical Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the allegations of the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). All factual allegations supporting the claim, as well as any reasonable inferences or conclusions that can be drawn from the facts are accepted as true. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; __ NW2d __ (2008). A motion under MCR 2.116(C)(8) may only be granted were the claims alleged are so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

1. Medical Malpractice

Regarding all of plaintiffs' claims, with the exception of the claim for maintaining a defective building, Proux argues that summary disposition is proper under MCR 2.116(C)(8) because the claims pleaded allegations of medical malpractice, for which plaintiffs have no standing to sue. Proux contends that the basis of plaintiffs' claims is that Thomas never should have been granted a pass to roam the grounds of the Caro Center unsupervised. And, according to Proux, whether a mentally ill individual should be allowed to spend 15 minutes roaming the

grounds unsupervised raises questions of medical judgment beyond the realm of common knowledge.

Two fundamental questions are relevant to determining whether a claim sounds in ordinary negligence or medical malpractice: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). If both questions are answered in the affirmative, then the action is subject to the procedural and substantive requirements governing medical malpractice actions. *Id.* Regarding the first question, "[a] professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to the plaintiff." *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008).

In this case, no professional relationship existed between Proux and plaintiffs. Proux was not subject to a contractual duty to render professional health care services to the plaintiffs. Rather, plaintiffs generally alleged that any duty owed to them by Proux resulted from the landlord-tenant relationship between the Caro Center and the Caro Learning Center. Accordingly, plaintiffs' claims do not sound in medical malpractice. Proux's argument that, because plaintiffs' complaint pleaded allegations of medical malpractice, he is entitled to summary disposition under MCR 2.116(C)(8) is without merit.

2. Mental Health Professional Liability

Proux argues that he is entitled to summary disposition under MCR 2.116(C)(8) on plaintiffs' mental health professional liability claim because Thomas's threat to kill "white people" was not a threat against a reasonably identifiable third person.

MCL 330.1946 provides in pertinent part:

> (1) If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.
>
> (2) A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:
>
> (a) Hospitalizes the patient or initiates proceedings to hospitalize the patient under [MCL 330.1400 *et seq.*] or [MCL 330.1498a *et seq.*].
>
> (b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county

> sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.

A mental health professional only has a duty to take the actions described in MCL 330.1946(2) if four criteria are met:

> (1) a mental-health professional is presently treating a patient, (2) that patient communicates a threat of physical violence to the mental-health professional, (3) that threat of physical violence is directed against a readily identifiable third person, and (4) the patient has the apparent intent and ability to carry out the threat in the foreseeable future. *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 558-559; __ NW2d __ (2008).

In their complaint, plaintiffs alleged that they were "reasonably identifiable third persons" of defendant's threat to kill "white people" because they were Caucasian and worked at the Caro Learning Center. MCL 330.1946 does not define the phrase "a reasonably identifiable third person." Undefined statutory terms should be given their plain and ordinary meaning, and a dictionary may be consulted. *Ernsting v Ave Maria College*, 274 Mich App 506, 512; 736 NW2d 574 (2007). Resort to a dictionary to define the phrase "reasonably identifiable" is not necessary to conclude that a threat against "white people" is not a threat directed against a reasonably identifiable third person. The phrase "white people" does not refer to one person, or even to a small, distinct group of persons. Rather, the phrase refers to every person having "white" skin.[3] As such, defendant's threat was not a threat against a "reasonably identifiable third person."

Because plaintiffs failed to allege a threat by Thomas against a "reasonably identifiable third person," plaintiffs failed to state a claim under MCL 330.1946. Accordingly, Proux is entitled to summary disposition under MCR 2.116(C)(8) on the mental health professional liability claim. We affirm the trial court's grant of summary disposition to Proux on this claim. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

3. Inherently Dangerous Activity

Proux argues that he is entitled to summary disposition under MCR 2.116(C)(8) on the inherently dangerous activity claim because there was no allegation in the complaint that he hired an independent contractor.

The inherently dangerous activity doctrine is an exception to the general rule that a person who employs an independent contractor is not liable for the injuries that the contractor negligently causes. *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004). There are

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[3] Defendant's threat was not even limited to "white people" working at the Caro Learning Center, the Caro Center, or even to "white people" living in Caro, Michigan.

no allegations in the complaint that Proux, or any of defendants, hired an independent contractor and that, while engaged in an inherently dangerous activity, the independent contractor injured plaintiffs.[4] Accordingly, plaintiffs have failed to state a claim for an inherently dangerous activity. Proux is entitled to summary disposition under MCR 2.116(C)(8) on the inherently dangerous activity claim. We affirm the trial court's grant of summary disposition to Proux on this claim. See *Gleason, supra*.

4. Negligent Entrustment

Proux argues that he is entitled to summary disposition under MCR 2.116(C)(8) on the negligent entrustment claim because plaintiffs failed to plead facts establishing that Proux supplied the set of master keys to Thomas.

There are two elements to the tort of negligent entrustment: (1) the entrustor negligently entrusted the instrumentality to the entrustee; and (2) the entrustee negligently or recklessly misused the instrumentality. *Allstate Ins Co v Freeman*, 160 Mich App 349, 357; 408 NW2d 153 (1987), aff'd 432 Mich 656 (1989), mod 433 Mich 1202 (1989). In the claim for negligent entrustment, plaintiffs alleged "[t]hat Defendants supplied Thomas with a chattel, the master keys, which Defendants knew he would use in a manner involving an unreasonable risk of physical harm to others." This allegation must be accepted as true. *Detroit Int'l Bridge Co, supra*. Accordingly, Proux's argument that plaintiffs failed to plead that Proux supplied Thomas with the set of master keys is without merit.[5] Accordingly, Proux is not entitled to summary disposition under MCR 2.116(C)(8) on plaintiffs' claim for negligent entrustment.

5. Landlord Liability. Maintaining a Defective Building, and Nuisance

Proux argues that he is entitled to summary disposition under MCR 2.116(C)(8) on the claims for landlord liability, maintaining a defective building, and nuisance because the claims are based on a landlord-tenant relationship and plaintiffs failed to allege in the complaint that Proux was a landlord, owner, or administrator of the Caro Center. However, in the complaint, plaintiffs alleged that "[d]efendants," which includes Proux, "operate[d]" the Caro Center and "leased the building utilized by the Caro Learning Center." Accordingly, Proux's argument is without merit. Proux is not entitled to summary disposition under MCR 2.116(C)(8) on the claims for landlord liability, maintaining a defective building, and nuisance.

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[4] It appears that plaintiffs alleged that defendants engaged in an inherently dangerous activity in order to hold defendants strictly liable for their damages. However, a person who employs an independent contractor is not strictly liable for an injury caused while the contractor was engaged in an inherently dangerous activity. It must be shown that the contractor failed to take reasonable precautions against the danger involved in the activity. See *Bosak v Hutchinson*, 422 Mich 712, 726; 375 NW2d 333 (1985), quoting 2 Restatement Torts, 2d, § 427, p 415.

[5] To the extent that Proux is arguing that plaintiffs were required to specifically plead how Proux supplied the set of master keys to Thomas, the argument is also meritless. The facts did not need to be pleaded with particularity. See *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006).

B. MCR 2.116(C)(10)

Proux claims that he entitled to summary disposition under MCR 2.116(C)(10) on the claims for landlord liability, maintaining a defective building, nuisance, and negligent entrustment because plaintiffs have not come forward with any evidence to contradict his averments that he played no role in the administration of the Caro Center, that he had no control over the security measures or the maintenance of the Caro Center, and that he did not participate in the decision to grant Thomas the 15-minute grounds pass. We disagree. The motions for summary disposition were filed in lieu of answers and the parties have not engaged in any discovery. Because there has been no discovery, it would be inappropriate to grant summary disposition to Proux under MCR 2.116(C)(10). See *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002) (stating that a motion for summary disposition under MCR 2.116(C)(10) is generally premature if discovery has not yet closed).

IV. Motion to Amend

Finally, plaintiffs argue that the trial court erred in denying their motion to amend the complaint. We disagree. A trial court's decision to grant or deny leave to amend a pleading is reviewed for an abuse of discretion. *Jackson v Detroit Medical Ctr*, 278 Mich App 532, 539; 753 NW2d 635 (2008). An amendment is not justified if it would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

Any amendment of the complaint, with regards to the Caro Center, Laskowski, and Bhavsar, would be futile. The Caro Center is entitled to summary disposition because plaintiffs' argument as to why the Caro Center was engaged in a proprietary function is based on an incorrect legal analysis. Laskowski and Bhavsar are entitled to summary disposition because the most direct cause of plaintiffs' injuries was Thomas's physical attack of plaintiffs. Any conduct attributable to any employee of the Caro Center cannot be "the proximate cause" of plaintiffs' injuries. Any amendment of the complaint would not alter the reasoning for why the Caro Center, Laskowski, and Bhavsar are entitled to summary disposition on the basis of governmental immunity.

With regard to Proux and the two claims to which he is entitled to summary disposition, plaintiffs have made no specific argument that an amendment would not be futile. First, plaintiffs have never suggested that Thomas made any threats other than those he made against "white people." Thus, in an amended complaint, plaintiffs still would not be able to allege that Thomas made a threat against "a reasonably identifiable third person." Second, plaintiffs have never responded to Proux's argument that he is entitled to summary disposition on the inherently dangerous activity claim. By not responding to Proux's argument, plaintiffs have provided no reason to conclude that an amendment would not be futile.

Because any amendment of the complaint would be futile, we affirm the trial court's order denying plaintiffs' motion to amend the complaint.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra