STATE OF MICHIGAN

COURT OF APPEALS

MANDY JENSEN and BRADLEY JENSEN,

Plaintiffs-Appellants,

v

GARY HADDEN,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 351591
Allegan Circuit Court
LC No. 18-060106-CZ

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Mandy and Bradley Jensen claim to have suffered great financial loss due to a bedbug infestation in their rental home and bedbugs that followed them to their new home. Unable to afford counsel, the Jensens filed an in pro per complaint against their landlord, Gary Hadden. The complaint raised claims of intentional and negligent emotional distress that the Jensens could not support. The circuit court properly granted summary disposition in Hadden's favor under MCR 2.116(C)(10). However, the circuit court thereafter improperly denied the Jensens an opportunity to file an amended complaint.

We affirm the summary dismissal of the intentional and negligent infliction of emotional distress counts, but reverse that portion of the order making the dismissal with prejudice. We remand to allow the Jensens an opportunity to file an amended complaint raising potentially viable claims.

I. BACKGROUND

Mandy and Bradley Jensen rented a home from Gary Hadden in December 2013. Shortly after moving into the home with their children, the Jensens noticed bug bites on their bodies. The Jensens assumed the prior tenant's pets brought fleas into the home and they attempted to remedy the issue themselves. Although the Jensens continued to experience bites, they did not ask Hadden for assistance. In the spring of 2015, the Jensens observed a "white bug" on the wall of their sons' bedroom. The Jensens notified Hadden who wasted no time in responding. An inspector hired by Hadden identified the invader as a bedbug. Hadden then hired Rose Pest Control who used a combination of heat and chemical treatments to kill the bugs on June 22, July 2, July 27, and

September 11, 2015. Before the final treatment, the Jensens removed wall paneling from several areas in the home. Mandy avowed during her deposition that one of the technicians told her that the bedbugs were in the home long before the Jensens moved in "due to how imbedded they were in the walls."

The Jensens filed suit in pro per against Hadden on August 23, 2018. The single-page complaint alleged that Hadden failed to inform them of the bedbug infestation before they moved into the residence. As a result of the infestation, the Jensens asserted that they were forced to live in a pop-up camper and a shed during their lease term. Despite using the utmost care when they moved out, the bedbugs took up residence in their belongings and followed the family to their new home. The Jensens alleged they had no option but to once again change residences and abandon all their belongings. Raising claims of intentional and negligent infliction of emotional distress, the Jensens requested $283,750 in damages. The damages included the cost of their current residence, to dispose of and replace personal property, to dispose of their vehicles, and "for the loss of" Mandy's "career as an Independent Tupperware Consultant."

Discovery was complicated by the Jensens' lack of understanding of the court rules and procedures. The court showed great patience in explaining their duties to them. On November 16, 2018, Hadden first questioned the adequacy of the Jensens' complaint. Hadden noted that the action was coded as a general civil action, rather than an action for personal injury. At a pretrial conference, the court acknowledged the nature of the Jensens' claims and extended discovery to permit Hadden to secure additional information regarding their injuries.

On December 18, 2018, the court granted Hadden's motion to compel the Jensens' response to interrogatories and production of records. The court later denied Hadden's motion to dismiss the complaint as a sanction for failure to timely comply, giving the Jensens an additional opportunity to answer. At the hearing on Hadden's motion to dismiss, the court instructed the Jensens that as their complaint sought damages for "emotional distress," they were required to prove their injuries through medical records. Hadden would bear the cost of collecting those records and the Jensens need only sign authorizations. The Jensens filed a motion for a protective order, contending that their medical records contained information about extremely personal family issues not related to their injuries stemming from the bedbug infestation. At the hearing, the court advised the Jensens that as they had claimed emotional injury connected to the bedbug infestation, Hadden was entitled to discover information related to other sources of that emotional injury. Although the court denied the Jensens' motion for a protective order, it declined Hadden's request to take the Jensens to task.

The parties engaged in mediation, and the mediator filed a report indicating that a conditional agreement had been reached. At a later hearing, however, the mediator advised the court that mediation ultimately failed because he required the Jensens to allow Hadden to try to ameliorate the bedbug infestation in their new home, but the Jensens refused to allow Hadden's agents to fumigate. The mediator appeared because the Jensens had complained of his conduct during the mediation process, accusing him of bias toward Hadden. The court struck the Jensens' complaint against the mediator as improperly filed.

A week after mediation concluded, Hadden sought summary disposition of the Jensens' intentional and negligent infliction of emotional distress claims under MCR 2.116(C)(7) and

(C)(10). Hadden asserted that the action was filed beyond the applicable three-year statute of limitations and that the Jensens failed to establish the necessary elements of either claim.

At the onset of the summary disposition hearing, the court indicated its intent to deny the motion under (C)(7) because it was "too difficult to determine exactly when the action arose." The court preliminarily noted the Jensens had not established the necessary emotional distress to support their claims.

During argument, Ms. Jensen implied that she and her husband had not intended to limit their claims to intentional and negligent infliction of emotional distress. "I don't know if I worded it wrong or if I numbered it wrong but the - - the amount listed was for our home, our property, etcetera, which was listed below that. I don't know if I worded it wrong, listed it wrong." Ms. Jensen "ask[ed] for the ability to rewrite that" or "redo" it as permitted in the court rules. Hadden's counsel objected to any potential motion to amend the complaint because the Jensens had not identified the "viable or sustainable" alternate claim they would raise.

The court ultimately denied the motion to dismiss based on the statute of limitations but summarily dismissed the negligent and intentional infliction of emotional distress claims under MCR 2.116(C)(10). In doing so, the court expressed its sympathy for the in pro per plaintiffs. The court determined that the complaint gave Hadden notice of only two claims: negligent and intentional infliction of emotional distress. Paragraph 7 of the complaint, the court continued, made it "pretty clear" that the Jensens were "suing for severe emotional distress and intentional [and] negligent infliction of emotional distress and exemplary damages for each of [the] household members." "[U]nfortunately exemplary damages only apply if there's a different legal claim that supports the award of damages." The court continued:

> The Plaintiffs do ask for a certain amount of money but they don't indicate anything other than the emotional distress that they've undergone as a legal claim of why they're entitled to - - to all this money.
>
> And unfortunately the Court can't guess on what legal claims they have and Defendant's [sic] should not be made to guess on what legal claims a Plaintiff has. And that's unfortunately it seems what Mr. and Mrs. Jensen are asking the Court to do is to - - is to guess about what their other claims might be.
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> But the Court can't guess on that and their complaint is not clear on that so the Court is going to grant summary disposition and dismiss - - and dismissal of the lawsuit.
>
> MCR 2.116(I)(5) does state that if the Court grants summary disposition under rule (C)(10) the Court shall give the parties an opportunity to amend their pleadings pursuant to MCR 2.118. So I'll leave that to the - - to the Plaintiffs to see if they can come up with a claim.
>
> At this point the Court's not aware of a claim that would - - that would apply. But the Court also can't give legal advice to the Plaintiffs about what legal claims they might have in this case.

> So the Court does feel it's appropriate to give them an opportunity to see if they want to file a motion under 2.118 and 2.116(I)(5) with regards to an amendment of their pleadings.

The court inquired of defense counsel about the time limit for the Jensens to file a motion to file an amended complaint. Defense counsel went to great lengths to explain why it would be inappropriate to file a motion to amend in this case. Specifically, as the Jensens had not cited any alternative viable cause of action, there was no ground to dismiss without prejudice and allow an amendment. Counsel argued:

> My fear, your Honor, is that we enter into the exact situation we did in August of 2018 where we get another pro per complaint filed and it's for lack of a better term, it's a mess. And my client has gone through this for the past, you know, nearly a year at this point and unless we can identify something that . . . a cause of action that they think and the Court believes could potentially turn into a viable cause of action we're exactly where we were when the complaint was filed.
>
> And I think that would be prejudicial to - - they're essentially getting a completely second bite of the apple.
>
> * * *
>
> It's almost a de novo type of situation that we're in. . . .

Ms. Jensen expressed that she did not "know at this point" what claim to allege. The court then agreed with the defense "that there hasn't been a statement by the Plaintiffs with regards to any other potential legal claim that might be viable at this point" and dismissed the action.

Hadden presented a proposed order to the court on October 7, 2019, providing for dismissal with prejudice. The Jensens objected because the court had not indicated on the record that dismissal was with prejudice and the order violated their right to amend the complaint. The Jensens further complained that the court had initially indicated its intent to permit amendment but then improperly asked the defense his opinion on that issue and accepted his argument. In challenging the merits of dismissal under MCR 2.116(C)(10), the Jensens cited an example of a claim that could have been raised in their complaint—Hadden's violation of the "Michigan Implied Warranty of Habitability."

The court issued its written order on October 17, 2019. The order indicated that the matter was dismissed with prejudice, clarifying that the Jensens were not permitted to file an amended complaint. And the court contemporaneously issued an order rejecting the Jensens' objections to the proposed order presented by Hadden.

II. SUMMARY DISPOSITION

The Jensens first challenge the circuit court's dismissal of their negligent and intentional infliction of emotional distress claims under MCR 2.116(C)(10). We review de novo a trial court's ruling on a summary disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. 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. [*Id*. at 139-140 (quotation marks and citations omitted).]

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Lucas v Awaad*, 299 Mich App 345, 359; 830 NW2d 141 (2013) (quotation marks and citation omitted). "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*. (quotation marks and citation omitted). "Accordingly, liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id*. (quotation marks, citation, and alteration omitted).

Taken in the light most favorable to the Jensens as the nonmoving parties, the record establishes that they waited two years to ask their landlord for assistance with a bug infestation. As soon as the landlord learned that his tenants found a "white bug" in the home, he secured the services of exterminators to identify and kill the bugs. The landlord spent several thousand dollars for the exterminators to undertake four treatments of the home. This responsive action cannot be characterized as extreme, outrageous, or outside the bounds of decency. Moreover, intentional infliction of emotional distress, as stated in its name, is an intentional tort. It requires proof that the defendant possessed "a specific intent . . . to inflict the alleged injury of emotional distress on plaintiffs." *Graham v Ford*, 237 Mich App 670, 673-674; 604 NW2d 713 (1999). The Jensens cannot establish that Hadden specifically intended to cause them emotional distress where Hadden so quickly responded to their concerns. And although Ms. Jensen testified that an agent of Rose Pest Control informed her that the bedbugs were in the home before the Jensens moved in, there is no record evidence that Hadden had any notice of their presence. Accordingly, the circuit court properly dismissed the Jensens' intentional tort claim.

The court also properly dismissed the Jensens' count of negligent infliction of emotional distress. Michigan recognizes a cause of action for negligent infliction of emotional distress "only when a plaintiff witnesses *negligent injury to a third party* and suffers mental disturbance as a result." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581 n 6; 603 NW2d 816 (1999) (emphasis added). Specifically, in order to recover for such a claim, a plaintiff must establish that

> (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person's immediate family,

> and (4) the plaintiff is present at the time of the accident or suffers shock "fairly contemporaneous" with the accident. [*Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).]

We have repeatedly rejected any invitation to extend the tort to cover other factual patterns. See *Teadt*, 237 Mich App at 581 n 6; see also *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993) ("[W]e decline to apply the tort of negligent infliction of emotional distress beyond the situation where a plaintiff witnesses negligent injury to a third person and suffers mental disturbance as a result.").

The only third-parties possibly injured in this case are the Jensens' children. Bug bites, although uncomfortable, are not a serious injury. Indeed, the Jensens presented no medical records to establish that the bug bites suffered by their children caused any health consequences. Further, the record does not support negligence on Hadden's part. Again, Hadden immediately responded when the Jensens advised him that they found a white bug in their home. Hadden paid for four exterminator treatments in an attempt to ameliorate the bedbug problem. Absent a serious injury inflicted upon a third party and negligent conduct by the defendant, the circuit court properly dismissed this count as well.

III. AMENDMENT

The circuit court granted summary disposition under MCR 2.116(C)(10). MCR 2.116(I)(5) provides that when a court grants summary disposition pursuant to subsection (C)(10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence before the court shows that the amendment would not be justified." This language is mandatory. *Ellison v Dep't of State*, 320 Mich App 169, 180; 906 NW2d 221 (2017). "[T]he court *must* give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Weymers v Khera*, 454 Mich 639, 657; 563 NW2d 647 (1997) (emphasis added). The right to amend the complaint "should be freely granted, unless the amendment would not be justified." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Amendment may also be denied if the defendant would suffer undue prejudice as a result. *PT Today, Inc v Comm'r of Office of Fin and Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Prejudice exists only "if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id.*

The Jensens claimed the circuit court treated them unfairly, such as by modifying the scheduling order at the defense's request, permitting the defense to use a records service to secure the Jensens' medical records, and dismissing the Jensens' circuit court "complaint" against the mediator. These various challenges stem from the Jensens' lack of familiarity with applicable court rules and practice. Although the court informed the Jensens that it could not advise them on their cause of action, the circuit court took time to explain its actions and rulings throughout the proceedings. There simply is no evidence that the court treated the Jensens unfairly.

However, the court did err in denying the plaintiffs an opportunity to amend their complaint. On appeal, Hadden contends that the circuit court properly denied the Jensens' "oral

request to file an amended complaint, because [the Jensens] failed to present a proposed written amendment to the court and [the Jensens] failed to proffer any evidence to the court suggesting that an amendment would be justified." The court rules specifically provide, however, that a motion need not be in writing if it is made during a hearing or trial. MCR 2.119(A)(1).

This Court has held that "[w]hen a party makes an oral request to amend the complaint under MCR 2.116(I)(5), that party must also offer a proposed amendment in writing." *Grayling Twp v Berry*, 329 Mich App 133, 151-152; 942 NW2d 63 (2019). Because the court rules allow for an oral motion to amend during a hearing or trial, if the motion prevails a party must be permitted a reasonable time to file a written amendment. In this case, even though the Jensens made an oral request, the circuit court initially indicated that it was inclined to allow the Jensens to file an amended complaint. The court then allowed the defense to make a statement, and expressed its agreement with that statement, thereby denying the Jensens an opportunity to amend. There was no reason for the in pro per plaintiffs to doubt the circuit court's ruling. The court told the in pro per plaintiffs that they could not file an amended complaint and unsurprisingly, the in pro per plaintiffs believed it. We discern no ground to fault the Jensens for failing to follow through with a written motion and written amended complaint under these circumstances.

Moreover, the circuit court never determined that an amendment would be futile. It is not disputed that the Jensens have experienced a bedbug infestation at their new home caused by the infestation at the home rented from Hadden. The Jensens outlined their financial damages as a result. The court seemingly recognized that some cause of action may arise from those facts; the court just could not lead the in pro per plaintiffs to that cause of action. The defense's argument raised the specter of prejudice, but did not cite any prejudice beyond what any defendant would experience. Accordingly, there appears no valid ground to deny a motion to amend in this case.

We affirm the summary dismissal of the intentional and negligent infliction of emotional distress counts, but reverse that portion of the order making the dismissal with prejudice. We remand to allow the Jensens an opportunity to file an amended complaint. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher