

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL LAMPHERE,

Plaintiff-Appellant,

v

AMANDA ABRAHAM, DEBORAH
ABRAHAM, LAURYN GEROU, MARIE
RITZENHEIN, RENEE RITZENHEIN,
MARYANNE RITZENHEIN-STEVENS,
DONALD STEVENS, and WILLIAM
RITZENHEIN,

Defendants-Appellees.

UNPUBLISHED
October 30, 2012

Nos. 306354, 306544
Kent Circuit Court
LC No. 10-000358-NI

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In Docket No. 306354, plaintiff appeals the trial court's order granting summary disposition to defendants. In Docket No. 306544, plaintiff appeals the trial court's consolidated final order which, among other things, denied plaintiff's motion for leave to file a second amended complaint. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

On October 16, 2008, plaintiff, while heavily intoxicated, fell from the rooftop deck of a house owned by defendants MaryAnne Ritzenhein-Stevens and Donald Stevens. Evidence showed that the deck was under construction at the time, the railings had been removed, and that defendants placed a bungee cord across the stairway leading to the deck as well as a sign warning people to use another route. MaryAnne's sister, defendant Marie Ritzenhein, lives in the upstairs apartment of the house with her daughter, defendant Renee Ritzenhein. On the night of the accident, Renee hosted a party which plaintiff attended with his girlfriend, defendant Amanda Abraham. Plaintiff's friends, defendant Lauryn Gerou and defendant William Ritzenhein, also attended the party. Plaintiff drank alcohol before he arrived at the party, he consumed a considerable amount of alcohol while at the party, and he also smoked marijuana. Others who attended the party testified that plaintiff was very intoxicated and one witness described plaintiff as "falling down drunk." As plaintiff left the party sometime after midnight,

he walked onto the deck and fell off. After he fell, Amanda took plaintiff to her house where she lived with her mother, defendant Deborah Abraham. Lauryn and William followed and helped take plaintiff inside. Deborah and Amanda sought medical treatment for plaintiff the next afternoon.

II. DISCUSSION

A. STANDARD OF REVIEW

Plaintiff challenges the trial court's grant of summary disposition to each defendant pursuant to MCR 2.116(C)(10). "A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, depositions, admissions, and any documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* The motion may be granted only if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

B. PREMISES LIABILITY

We need not decide whether the trial court correctly granted summary disposition to Marie, Renee, MaryAnne, and Donald on the ground that the condition of the deck was open and obvious or unreasonably dangerous, because the court correctly ruled that plaintiff's claim is barred pursuant to MCL 600.2955a(1), which provides:

It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

Plaintiff does not dispute that he is presumed to have had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance within the meaning of MCL 600.2955a. Thus, the only issue is whether, as a result of that impaired ability, he was 50 percent or more the cause of the accident that caused his injuries. Here, the evidence shows that plaintiff was familiar with the house, had accessed the third floor on numerous occasions from the exterior stairs and deck, and that he knew about the condition of the deck because he helped repair it. Plaintiff, and other people in the house, were also well aware of the condition of the deck and that it did not have a railing around it, and evidence showed that others traversed the deck numerous times without incident.

Marie, Renee, MaryAnne, and Donald presented the affidavit of an expert on alcohol and drug use and abuse who opined that plaintiff's senses were highly impaired at the time of the accident. When he fell, his blood alcohol level was more than three times the legal limit and he

admitted that he also smoked marijuana at the party. Defendants also presented testimony from numerous partygoers who recalled that plaintiff was highly intoxicated at the party, and that he fell more than once inside the house that night because of his intoxication. Plaintiff himself admitted that he was partially at fault for his injuries because of his intoxication.

Although plaintiff argues that the apportionment of fault is a factual question for the jury, MCL 600.2955a may be used as an absolute defense at the summary disposition phase of a case when there is no genuine issue of fact that the injured person's intoxicated condition was fifty percent or more the cause of the accident that resulted in the person's death or injury. Here, in light of the undisputed evidence of plaintiff's intoxicated state, the witness testimony concerning plaintiff's degree of intoxication and drunken behavior, as well as testimony that numerous other people had repeatedly navigated the deck without incident, there is no genuine issue of material fact that plaintiff was 50 percent or more the cause of the accident that resulted in his injuries as a result of his impaired ability. Stated another way, there is no genuine issue of material fact that plaintiff's intoxication was "more the cause of injuries than any other cause[.]" *Wysocki v Felt*, 248 Mich App 346, 369; 639 NW2d 572 (2001). Accordingly, the trial court did not err in granting summary disposition on plaintiff's premises liability claim against Marie, Renee, MaryAnne, and Donald.

C. CONDUCT FOLLOWING PLAINTIFF'S FALL

Plaintiff maintains that the trial court erred in granting summary disposition in favor of Amanda, Deborah, Lauryn, and William under MCL 600.2955a. He argues that the injuries he sustained as a result of their delay in seeking medical treatment are separable from the injury he sustained due to his fall.

We offer no opinion regarding whether these defendants owed or breached a duty of due care to plaintiff in their decision not to seek immediate medical assistance after plaintiff's fall. The question is whether the trial court correctly ruled that these defendants are entitled to summary disposition on the basis of the absolute defense under MCL 600.2955a.

As discussed, "[u]nder MCL 600.2955a(1), a plaintiff's impaired ability to function because of intoxicating liquor is an absolute defense if the plaintiff's impaired ability to function 'was 50% or more *the* cause of *the* accident or event that resulted in *the* death or injury.'" *Beebe v Hartman*, 290 Mich App 512, 521; 807 NW2d 333 (2010), vacated in part 489 Mich 956 (2011) (emphasis in original). "Thus, in order for the absolute defense of impairment statute to apply, the plaintiff's impairment from alcohol must have been 'the cause of the accident or event,' and the particular accident or event must have resulted in the particular injury." *Id.* at 521-522. In *Beebe*, this Court determined that "there were two distinct injuries that were the result of two separate accidents or events." *Id.* at 522. "The first accident or event was [the] plaintiff's snowmobile accident; the injuries that resulted from this accident or event were tibia and fibula fractures in [the] plaintiff's right leg." *Id.* "The second accident or event was [the] defendants' alleged medical malpractice in failing to diagnose and treat [the] plaintiff's compartment syndrome; the injuries from this accident or event included pain and the contracture of the toes of [the] plaintiff's right foot." *Id.* This Court noted that "[t]he relevant injury for purposes of [the] plaintiff's medical malpractice action was not the fractures of the bones in his right leg, but the separate and distinct injury to [the] plaintiff that resulted from [the]

defendants' alleged medical malpractice." *Id.* This Court concluded that "the injury giving rise to [the] plaintiff's complaint is based on [the] plaintiff's medical malpractice action, which was a separate and distinct injury from those suffered as a result of [the] plaintiff's intoxication." *Id.*

Here, plaintiff claims he suffered distinct and separate injuries from delayed medical treatment, while defendants contend that any alleged aggravation of injuries from a delay in care cannot be separated from the injuries he sustained in his drunken fall from the deck. We hold that, while a close question, plaintiff raised an issue of fact about whether he may have sustained a separate and distinct injury as a result of delayed medical intervention. Plaintiff presented testimony from a neurosurgeon, a neurologist, and a physical medicine and rehabilitation physician. Each doctor recognized that plaintiff's fall and head trauma primarily caused his injuries, and plaintiff's neurosurgeon testified that intoxication may have hindered his ability to breathe to properly oxygenate his brain. However, evidence also suggests that the delay in treatment contributed to plaintiff's respiratory depression and that some of his neuronal/synaptic damage could have been ameliorated by quicker medical intervention. Plaintiff's expert, who did not treat plaintiff, testified that he believes plaintiff's outcome would have been better with prompt treatment because neurons died due to a lack of oxygen over time, but no doctor could testify to what extent plaintiff's short or long-term medical problems can be attributed to the delay, rather than to plaintiff's initial head trauma. However, viewing the evidence in a light most favorable to the plaintiff, it appears medical testimony established at least a question of fact regarding whether a separate and distinct injury arose out of the delay in seeking medical treatment and, therefore, the trial court erred in granting summary disposition to Amanda, Deborah, Lauryn, and William pursuant to the absolute defense under MCL 600.2955a. Again, our holding relates only to the application of the intoxication defense, and questions of duty, breach, and causation remain before the court if the absolute defense does not apply.

D. MOTION TO FILE A SECOND AMENDED COMPLAINT

Lastly, plaintiff argues that the trial court abused its discretion in denying his motion for leave to file a second amended complaint. We review the trial court's decision for an abuse of discretion. *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party" and that "[l]eave shall be freely given when justice so requires." "The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result." *Amburgey v Sauder*, 238 Mich App 228, 246; 605 NW2d 84 (1999). "Delay, alone, does not warrant denial of a motion to amend." *Id.* at 247. "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 may be found "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 [or she] did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997).

Plaintiff moved for leave to file a second amended complaint to add a claim against Marie for negligent supervision of Renee, a minor. See *American States Ins Co v Albin*, 118 Mich App 201, 206; 324 NW2d 574 (1982). The trial court denied the motion because it was brought too late in the proceedings. The record reflects that there was a significant delay in plaintiff seeking to amend his complaint to bring the new negligent supervision claim. Plaintiff did not move for leave to file his second amended complaint until almost a year after he filed his amended complaint and three months after he deposed Marie and Renee. Further, the delay was prejudicial to Marie because discovery closed three months earlier, the time for filing dispositive motions expired two months earlier, and Marie did not have reasonable notice that plaintiff would bring the new claim. The trial court's denial of plaintiff's motion did not constitute an abuse of discretion. *Maldonado*, 476 Mich at 388; *Tierney*, 257 Mich App at 687.

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

/s/ Henry William Saad
/s/ William C. Whitbeck