STATE OF MICHIGAN

COURT OF APPEALS

MARGARET HANCOCK,

Plaintiff-Appellant,

v

DETROIT HEALTH CORPORATION,
d/b/a FITNESS USA HEALTH SPA,

Defendant-Appellee.

UNPUBLISHED
December 30, 1996

No. 186798
Wayne County
LC No. 94-426177-NI

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

In 1986, plaintiff signed a contract for a lifetime membership to defendant's fitness center. Among the terms of the contract were the following:

> Member agrees that all use of the facilities shall be undertaken by Member at Member's risk… The Spa shall not be liable for any claims, demands, injuries, damages or causes of action whatsoever to a Member or property arising out of, or in connection with, the use of the Spa or premises, and Member does release and discharge the Spa from all such claims, demands, injuries, damages or causes of action.

On June 15, 1993, plaintiff's foot slipped off the pedal of a leg press machine she was using at defendant's exercise facility and the equipment fell directly on plaintiff's leg causing her to suffer a mild contusion to the fibula. Plaintiff filed a premises liability suit and summary disposition was granted in favor of defendant pursuant to MCR 2.116(C)(10). Plaintiff now appeals as of right. We affirm.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Lytle v Malady*, 209 Mich App 179, 183; 530 NW2d 135 (1995), leave granted 451

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Mich 920 (1996). We review such a motion de novo, giving the benefit of doubt to the nonmovant in order to determine whether the movant would be entitled to judgment, as a matter of law. *Id.*

Plaintiff first contends that summary disposition was improper because the release provision contained in the application for membership to defendant's health club was ambiguous, plaintiff never read the provision before signing the application and none of defendant's employees informed her of the substance of that release. Furthermore, plaintiff argues that because the release was written in small print on the back of the application form and created a high risk of confusing plaintiff, the binding effect of the release is prohibited by Michigan's Uniform Commercial Code, MCL 440.1101 *et seq.*; MSA 19.1101 *et. seq.*, and the Michigan Consumer Protection Act, MCL 445.901 *et. seq.*; MSA 19.418(1) *et seq.*

Reviewing the record carefully, we conclude that no genuine issue of material fact existed with regard to whether plaintiff's claim for ordinary negligence was effectively barred by the challenged release provision. The record establishes that, even if plaintiff did not read the release provision, she was fully capable of understanding the provision had she taken the time to read it and was not coerced in any way into signing the contract. *Skotak v Vic Tanny International, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994); *Dombroski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993); *DeValerio v Vic Tanny International*, 140 Mich App 176, 179-180; 363 NW2d 447 (1984). The contract was clear and unambiguous. *Osman v Summer Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995); *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Therefore, any claim arising out of defendant's alleged ordinary negligence was barred by the release provision contained within the membership contract signed by plaintiff. Because plaintiff failed to raise the arguments that the release provision violated Michigan's Uniform Commercial Code or the Michigan Consumer Protection Act below, such arguments are not properly preserved and we need not address them. *Adam v Sylvan Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Accordingly, the motion for summary disposition was properly granted.

Plaintiff also argues that the trial court erred when it denied her motion for leave to amend her complaint to add a count of gross negligence. We review a trial court's decision regarding leave to amend for an abuse of discretion. *Milnikel v Mercy-Memorial Medical Center, Inc*, 183 Mich App 221, 222; 454 NW2d 132 (1989). MCR 2.118(A) provides in relevant part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Reasons which justify the denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

defendant, or mere futility. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973); *Weymers v Khera*, 210 Mich App 231, 240; 533 NW2d 334 (1995). An amendment would be futile if, ignoring the substantive merits of the claim, it would leave the claim legally insufficient on its face or if the addition of the new allegations would merely restate those already made. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990); *Dukeshere Farms, Inc v Director of Department of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988).

Conduct by a defendant is grossly negligent where a defendant "who knows, or ought, by the exercise of ordinary care, to know, of the precedent negligence of the plaintiff, by his subsequent negligence does plaintiff an injury." *Gibbard v Cursan*, 225 Mich 311, 319; 196 NW 398 (1923); cf. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).[1] Our review of the record does not support a finding that defendant's alleged conduct in allowing its leg press machine to be used by the members of defendant's fitness center without a protective rubber piece amounted to conduct that was grossly negligent. Accordingly, the trial court did not abuse its discretion when it denied plaintiff's motion for leave to amend her complaint because plaintiff's gross negligence claim would have been futile. *McNees, supra at* 103; *Dukeshere Farms, Inc, supra at* 530.

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] In *Jennings*, the Supreme Court rejected the *Gibbard* common law definition of gross negligence in a case involving the Emergency Medical Services Act, MCL 333.20901; MSA 14.15(20901), where the Legislature had not defined that term. Instead, after making a determination that the EMSA and the Government Tort Liability Act had the same legislative purpose, the Court adopted the definition of the Legislature in the GTLA that gross negligence was "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); MSA 3.996 (107)(2)(c). However, the *Jennings* definition of gross negligence has not been applied to a non-EMSA or non-GTLA case. Were we to adopt the *Jennings* definition of gross negligence, our conclusions would be the same in the instant matter.