

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TIMMOTHY A. LAPKA and CHERYL LAPKA,  
Plaintiffs-Appellants,

UNPUBLISHED  
October 9, 2012

v

R&R KUCH FARMS, INC., DOLORES J. KUCH  
and RONALD R. KUCH,

No. 306113  
Huron Circuit Court  
LC No. 10-004517-NO

Defendants-Appellees.

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Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff<sup>1</sup> appeals as of right the trial court's orders granting defendants' motion for summary disposition and denying plaintiff's motion for leave to file an amended complaint. We affirm.

**I. BACKGROUND**

Plaintiff worked for defendant R&R Kuch Farms, Inc., for approximately six years. During that time, plaintiff was responsible for general farm duties. On November 18, 2007, shortly after lunchtime, at about 12:30 p.m., plaintiff experienced severe heartburn, dizziness, and nausea while he was plowing a field with a tractor. Plaintiff stopped the tractor, and vomited a few times at the end of the field. Plaintiff drove the tractor across the field to the pick-up truck. At this point, defendant Ronald R. Kuch, who had been plowing at the other end of the field, drove his tractor to the pick-up truck to see if there was a problem. Plaintiff told Ronald that that he was not feeling well and needed to lie down. Ronald continued to work while plaintiff rested in the pick-up truck. After lying down, plaintiff began profusely sweating and lost consciousness for a short time.

When Ronald finished plowing, he returned to the pick-up truck. Plaintiff told Ronald that he was sick, did not feel well, and that something was wrong. At that point, Ronald asked plaintiff to drive his tractor to the farm down the road. Plaintiff complied and drove the tractor

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<sup>1</sup> "Plaintiff" refers to Timothy A. Lapka only unless otherwise noted.

while Ronald followed him in the pick-up truck. After this task was completed, plaintiff again stated he did not feel well and Ronald drove plaintiff to the home farm. At some point, plaintiff asked Ronald for Tums because of his heartburn. Once they arrived at the home farm, plaintiff got into his vehicle and drove home. During the drive home, plaintiff was sweating and unable to focus.

Once plaintiff arrived home, plaintiff's daughter called his wife, plaintiff Cheryl Lapka, to tell Cheryl that plaintiff was ill. Cheryl rushed home and observed that plaintiff was ashen, sweating, hunched over, and grasping his chest. Cheryl immediately drove plaintiff to Scheurer Hospital in Pigeon, and from there plaintiff was quickly airlifted to Covenant Hospital in Saginaw. It was determined that plaintiff suffered from a major heart attack and that his heart was damaged as a result of the heart attack.

On July 30, 2010, plaintiff filed a complaint against defendants R&R Kuch Farms, Ronald, and Dolores J. Kuch. Plaintiff alleged that he was entitled to bring a civil action in the circuit court for worker's compensation benefits pursuant to MCL 418.641 because defendants failed to carry worker's compensation insurance. Plaintiff also asserted a negligence claim, alleging that defendants failed to promptly assist and/or address plaintiff's medical emergency.

Subsequently, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (10). Regarding plaintiff's claim that the circuit court should decide his worker's compensation claim, defendants argued that summary disposition was proper pursuant to MCR 2.116(C)(4) because any claim for compensation or benefits under the Worker's Disability Compensation Act (WDCA) was not within the subject matter jurisdiction of the trial court. Regarding the negligence claim, defendants asserted that summary disposition was proper pursuant to MCR 2.116(C)(10) because they had no duty to provide medical assistance to plaintiff.

Thereafter, plaintiff filed a motion for leave to file an amended complaint pursuant to MCR 2.118(A)(2). Plaintiff alleged that defendants' failure to secure worker's compensation insurance constituted negligence. In addition, plaintiff argued that defendants had a statutory duty to provide worker's compensation insurance to plaintiff.

After the trial court heard oral argument on the motions, it granted defendants' motion for summary disposition and denied plaintiff's motion for leave to file an amended complaint. The trial court concluded that it did not have jurisdiction to award worker's compensation benefits:

But if you read that [*Smeester v Pub-n-Grub, Inc (On Remand)*, 208 Mich App 308; 527 NW2d 5 (1995)], if an employer fails to purchase worker's compensation insurance in violation of Section 611, an injured worker may bring an action against the employer for the worker's compensation benefit to which he is entitled.

An injured worker may also bring a negligence - - so in addition to what he could do anyway, an injured worker may also bring a negligence action - - a negligence action against the employer. In such an action, the negligence action, neither the three defenses listed in Section 141 nor the defense of comparable

negligence is available. Damages are not limited to those provided in the Worker's Disability Compensation Act. You can also get those additional damages - - tort damages, but if the worker is paid benefits under the Act, these will be offset against a judgment in the negligence action.

\* \* \*

But - - but I - - you know, I read this to - - to be contemplating a situation where the - - the employee has gone - - has applied for and received workman's comp benefits and then sues the employer and now there's some credit that should be given to the employer on the judgment against the employer.

But going - - then going to the Smeester - - Smeester two, here's what the court says, we hold, one, negligence - - negligence is an element of an employee's cause of action against an employer under 641(2). Which we agree with that, that's the tort claim.

Two, an employer may not assert as a defense the negligence of the employee, no comparative negligence, unless that negligence is willful. And, three, an employee's damages are not limited to the worker's compensation benefits available pursuant to the WDCA.

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But I think pretty clearly as I understand having read all of this that this contemplates an action in the Workman's Disability Compensation Act, in that administrative proceeding. So I'm going to grant the motion.

\* \* \*

Because I don't find there is evidence of negligence.

The trial court entered an order granting defendants' motion for summary disposition and an order denying plaintiff's motion for leave to file an amended complaint. From these rulings, plaintiff appeals as of right.

## II. ANALYSIS

### A. THE WORKER'S COMPENSATION CLAIM

Plaintiff argues that the trial court improperly granted defendants' motion for summary disposition because the circuit court has jurisdiction over both his worker's compensation claim and negligence claim. We disagree.

"We review a trial court's decision on a motion for summary disposition based on MCR 2.116(C)(4) de novo to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact." *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). Whether the circuit court has

jurisdiction over a case is a question of law that is reviewed de novo. *Trostel, Ltd v Dep't of Treasury*, 269 Mich App 433, 440; 713 NW2d 279 (2006).

“Typically, an employee’s exclusive remedy against an employer for work-related personal injury, or occupational disease, . . . [are] those benefits provided by the WDCA.” *Johnson v Detroit Edison Co*, 288 Mich App 688, 695-696; 795 NW2d 161 (2010). Thus, the worker’s compensation “bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment.” *Sewell v Clearing Machine Corp*, 419 Mich 56, 62; 347 NW2d 447 (1984) (footnote omitted). However, the circuit court “retain[s] the power to decide the more fundamental issue [of] whether the plaintiff is an employee (or fellow employee) of the defendant [the employer].” *Id.* Consequently, the circuit court retains the power to determine whether it has jurisdiction over the case. *Id.* at 63. Once the circuit court determines that the WDCA applies in a particular case, the determination of what benefits are available, if any, are within the exclusive jurisdiction of the worker’s compensation bureau. See MCL 418.841 (“Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker’s compensation magistrate, as applicable.”).

The parties concede that there was an employer/employee relationship on the date plaintiff suffered his heart attack. Because the determination of worker’s compensation benefits is within the exclusive jurisdiction of the worker’s compensation bureau, the worker’s compensation bureau must determine whether plaintiff is eligible to receive worker’s compensation benefits. Nevertheless, plaintiff contends that *Smeester*, 208 Mich App at 308, stands for the proposition that he may bring both a worker’s compensation claim and a negligence claim before the circuit court because defendants’ failed to carry worker’s compensation insurance as required by MCL 418.611.

It is true that when an employer fails to comply with the insurance requirement of MCL 418.611, then “it is liable in tort for injuries to its employees.” *State Farm Mut Auto Ins Co v Roe*, 226 Mich App 258, 265-266; 573 NW2d 628 (1997), citing MCL 418.641(2);<sup>2</sup> see *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 622-623; 640 NW2d 589 (2001) (an employee may pursue a negligence claim in a civil action when an employer fails to procure insurance as required by the WDCA). However, plaintiff’s reliance on *Smeester* is misplaced.

In *Smeester*, after the employee-plaintiff was injured while working for the employer-defendant, it was determined that the defendant did not carry worker’s compensation insurance. 208 Mich App at 310. Once it was determined that defendant failed to carry worker’s compensation insurance in violation of MCL 418.611, the plaintiff brought a civil action seeking tort damages pursuant to MCL 418.641. *Id.* The issue on remand was whether the plaintiff

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<sup>2</sup> MCL 418.641(2) provides that, “[t]he employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131.”

needed to prove negligence of the employer before recovering damages in a civil action. *Id.* The *Smeester* Court concluded:

The circuit court erred in determining that an action such as the present one under § 641(2) essentially is duplicative of a worker's compensation proceeding. There would be no point to pursuing such a common-law remedy, with its requirement that the plaintiff prove fault, when the same recovery could be had in a worker's compensation proceeding without the necessity or risk of adducing proof of employer negligence. This common-law action is principally one for damages not otherwise recoverable within the worker's compensation system, although, if the present plaintiff has not yet received such benefits, she may plead and prove such damages on trial of this case. Should she fail to prove negligence, however, she can revert to the administrative remedy, which is not preconditioned on proof of employer fault. [208 Mich App at 314-315.]

Accordingly, the *Smeester* Court held:

(1) negligence is an element of an employee's cause of action against an employer under § 641(2); (2) an employer may not assert as a defense the negligence of the employee, unless that negligence is willful, MCL 418.141; . . . and (3) an employee's damages are not limited to the worker's compensation benefits available pursuant to the WDCA. [208 Mich App at 315.]

Therefore, contrary to plaintiff's argument, *Smeester* does not allow the circuit court to determine both a worker's compensation claim and a negligence action pursuant to MCL 418.641. Instead, *Smeester* merely clarified that MCL 418.641 "restore[d] the common-law right of action abolished by § 131" when an employer fails to carry worker's compensation insurance. 208 Mich App at 313. Consequently, "the WDCA does not absolve an employer who is uninsured from nonetheless remaining liable under its provisions for statutory benefits. Section 641(1) delineates criminal sanctions and § 641(2) imposes common-law liability in addition to, but not as a substitute for, benefits recoverable under the WDCA." *Id.* at 312. (Emphasis added.)

Thus, when an employer fails to procure worker's compensation insurance, the penalty is that worker's compensation benefits are no longer the employee's exclusive remedy. The employee may pursue a negligence claim through a civil action in addition to the worker's compensation benefits available under the WDCA. But, this remedy does not divest jurisdiction of a worker's compensation claim from the worker's compensation bureau. *Smeester*, 208 Mich App at 315 (If a plaintiff's negligence claim fails, he "can revert to the administrative remedy, which is not preconditioned on proof of employer fault."). (Emphasis added.) The trial court properly granted summary disposition pursuant to MCR 2.116(C)(4) regarding plaintiff's worker's compensation claim.

## B. THE NEGLIGENCE CLAIM

Plaintiff asserts that the trial court erred in granting defendants' motion for summary disposition because there is a genuine issue of material fact regarding whether defendants were negligent in failing to provide medical assistance to plaintiff. We disagree.

This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider 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).<sup>3</sup> Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Whether a duty exists is a question of law that is reviewed de novo. *Hill v Sears, Roebuck & Co*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (Docket Nos. 143329, 143348 & 143633, decided August 16, 2012), slip op, p 9.

"A common-law negligence claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages." *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). "It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff." *Id.* at 21, quoting *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 99; 485 NW2d 676 (1992). "[A] legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another." *Id.* at 22. Therefore, "[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable. If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors." *Hill*, \_\_ Mich at \_\_ (slip op at 11) (quotations and citations omitted).

"[A]s a general rule, there is no duty that obligates one person to aid or protect another[.]" *Hill*, \_\_ Mich at \_\_ (slip op at 10) (quotations and citations omitted), however "[a] duty may be found if there is a special relationship between the plaintiff and the defendant[.]" *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992); see also *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 717; 462 NW2d 851 (1990) ("Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person.") (quotations

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<sup>3</sup> Plaintiff has cited to *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973), which no longer contains the proper standard to apply in deciding summary disposition motions under MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999); *McCart v J Walter Thompson USA Inc*, 437 Mich 109, 115 n 4; 469 NW2d 284 (1991). No longer are courts required to deny motions for summary disposition under MCR 2.116(C)(10) if there is any possibility that "a record might be developed that would leave open an issue on which reasonable minds could differ." Counsel is encouraged to be more careful in citing the appropriate standard in the future.

and citation omitted). “[T]he determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself.” *Dykema*, 196 Mich App at 9. The employer-employee relationship is considered a special relationship. *Id.* at 8.

Regarding foreseeability “[t]he question is whether the defendant’s action or inaction created a risk of harm to the plaintiff, and whether the resulting harm was foreseeable.” *Sherry v East Suburban Football League*, 292 Mich App 23, 29; 807 NW2d 859 (2011), citing *Schuster v Sallay*, 181 Mich App 558, 563; 450 NW2d 81 (1989).

Knowledge is fundamental to liability for negligence. *The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man.* Foreseeability of harm, in turn, unless it is to depend on supernatural revelation, must depend on knowledge. *Knowledge has been defined as the consciousness of the existence of a fact*, and fact includes not only objects apparent to the senses but the characteristics and traits of people and animals and the properties and propensities of things—the laws of nature, human and otherwise. [*Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 405; 224 NW2d 843 (1975) (quotations and citation omitted).] [Emphasis added.]

Consequently, foreseeability “depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.” *Samson*, 393 Mich at 406.

In this case, there is no genuine issue of material fact regarding whether defendants owed a duty to plaintiff.<sup>4</sup> While the parties concede that plaintiff and defendants had an employer-employee relationship, the harm suffered by plaintiff was not foreseeable to defendants. Although plaintiff points to Ronald’s request for plaintiff to drive the tractor after he told Ronald that he did not feel well as evidence establishing harm, defendants could not have foreseen that Ronald’s request created an unreasonable risk of injury. Likewise, plaintiff’s allegation that defendants should have provided medical assistance to him fails because defendants had no knowledge that plaintiff was suffering a heart attack. While plaintiff stated that he experienced severe heartburn, dizziness, nausea, profuse sweating, vomiting, and a brief loss of consciousness, he also admitted that he did not relate any of these symptoms to Ronald. Instead, plaintiff merely told Ronald that he was sick and did not feel well, he believed that something was wrong, and he needed Tums for his heartburn. Defendants could not have anticipated that plaintiff was actually suffering a heart attack, and thus, they could not have known that their inaction in not providing medical assistance to plaintiff would create an unreasonable risk of injury.

As a corollary argument, plaintiff asserts that defendants’ violation of MCL 418.611 by failing to secure the necessary worker’s compensation insurance created a rebuttable

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<sup>4</sup> For purposes of this motion, defendants accept plaintiff’s facts as true.

presumption of negligence because this statutory violation could result in criminal penalties. See MCL 418.641(1).<sup>5</sup> Consequently, plaintiff argues that there is a genuine question of fact regarding whether defendants were negligent. We disagree.

“An accurate statement of our law is that when a court adopts a penal statute as the standard of care in an action for negligence, violation of that statute establishes a prima facie case of negligence, with the determination to be made by the finder of fact whether the party accused of violating the statute has established a legally sufficient excuse.” *Zeni v Anderson*, 397 Mich 117, 143; 243 NW2d 270 (1976). This means that a “[v]iolation of a penal statute creates a prima facie case of negligence from which the jury may draw an inference of negligence, but it does not establish negligence per se.” *Gould v Atwell*, 205 Mich App 154, 158; 517 NW2d 283 (1994), citing *Zeni*, 397 Mich at 128-129 and *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 487-488; 478 NW2d 914 (1991). But, “this rule of law is applicable only if the penal statute does not provide for civil liability. Absent explicit legislative language creating civil liability for the violation of a criminal statute, a court in its discretion may either adopt the legislative standard or retain the common-law reasonable person standard of care.” *Id.* at 158-159, citing *Zeni*, 397 Mich at 137.

Here, as previously discussed, defendants did not owe a duty to plaintiff, and thus, plaintiff’s assertion that this statutory violation establishes a standard of care that defendants breached is not relevant. Even assuming that defendants owed a duty to plaintiff, plaintiff would still not be able to use MCL 418.641(1) to create an inference of negligence because MCL 418.641(2) provides for a civil remedy, and thus, § 641(1) cannot be used as a legislative standard of care. *Gould*, 205 Mich App at 158-159. The trial court properly granted defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff’s negligence claim.

### C. THE MOTION TO AMEND THE COMPLAINT

Plaintiff argues that the trial court erred in failing to grant his motion for leave to file an amended complaint pursuant to MCR 2.118(A)(2). We disagree. We review a trial court’s denial of leave to amend a pleading for an abuse of discretion. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). An abuse of discretion occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes. *Id.*

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. Leave shall be freely given when justice so requires.” Generally, “the trial court must make findings regarding whether justice is served by the amendment.” *PT Today, Inc v Comm’r of Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). “[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to

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<sup>5</sup> MCL 418.641(1) provides, in part, that “[a]n employer who fails to comply with the provisions of section 611 is guilty of a misdemeanor and may be fined not more than \$1,000.00, or imprisoned for not more than 6 months, or both.”

cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility.” *Id.* at 143. “The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile.” *Id.* “An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction.” *Id.* (citations omitted).

Although the trial court failed to state its reasons for denying plaintiff’s motion for leave to file an amended complaint, the amendment was untimely sought and would have been futile. *PT Today*, 270 Mich App at 142-143. Plaintiff’s motion to amend sought to add claims alleging that defendants’ failure to carry worker’s compensation insurance constituted negligence and that defendants had a statutory obligation to carry worker’s compensation insurance. Both of these claims are legally insufficient on their face because they merely restate plaintiff’s allegation that defendants’ failure to carry worker’s compensation insurance permitted him to bring a civil action in circuit court. Moreover, these claims seek, in part, worker’s compensation benefits which the circuit court does not have jurisdiction to award. And, the motion was filed one day prior to the close of discovery and after case evaluation. The trial court did not abuse its discretion in denying plaintiff’s motion for leave to file an amended complaint.

Affirmed.

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens