

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

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CHARLES BENSON and NICOLE NAULT,

Plaintiffs-Appellants,

v

EUGENE H. BOYLE, JR., BOYLE BURDETT,  
and H. WILLIAM BURDETT, JR.,

Defendants-Appellees.

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UNPUBLISHED

February 7, 2013

No. 307543

Wayne Circuit Court

LC No. 2011-010185-NM

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

BOONSTRA, J., (*concurring*).

I concur in the result. I write separately to explain my somewhat differing rationale from that of the majority.

I agree entirely that summary disposition pursuant to MCR 2.116(C)(8) was improper. Because the trial court took into consideration record evidence upon which defendants relied in support of their motion, the motion should not have been granted under subrule (C)(8). I further agree that summary disposition pursuant to MCR 2.116(C)(10) was premature, and that plaintiffs' amended complaint should have been allowed.

I premise the latter conclusion in part on the fact that MCR 2.118(A)(1) authorizes a party to amend a pleading "once as a matter of course within 14 days after being served with a responsive pleading." Here, defendants never served a responsive "pleading." Defendants instead filed a motion for summary disposition, in lieu of filing an answer to plaintiffs' complaint. A pleading is narrowly defined to include an answer, but not a motion. MCR 2.110(A). In my view, Plaintiffs therefore had an absolute right to amend their complaint, without having to seek or obtain leave of the trial court to do so. When presented with plaintiffs' motion for leave to amend their complaint<sup>1</sup>, therefore, the trial court in my judgment was obliged to grant that motion or, at a minimum, to note plaintiffs' right to amend without leave and to

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<sup>1</sup> Plaintiffs represent that, in their response to defendants' motion for summary disposition, they specifically asked the trial court for leave to amend their complaint. Thereafter, on December 1, 2011, after the trial court held a hearing on defendants' motion but before it issued its opinion and order granting summary disposition to defendants, plaintiffs formally filed a motion to amend their complaint.

afford plaintiffs the opportunity to do so. MCR 2.118(A)(1); see also 1 Longhofer, Michigan Court Rules Practice (6<sup>th</sup> ed), § 2118.2, p 788 (“A party may therefore appropriately reply to a motion under [MCR 2.116] with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).”)

Moreover, in any event, the trial court was obliged to consider the request for leave to amend, and the proposed amended complaint, prior to or in conjunction with deciding defendants’ motion for summary disposition. MCR 2.116(I)(5) (“If the grounds asserted are based on subrule (C)(8), (9), or (10), the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified”) (emphasis added). The use of the term “shall” denotes a mandatory requirement. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Instead, the trial court failed to address in any fashion plaintiffs’ request for leave to amend, or the proposed amendment, granted summary disposition to defendants, and canceled the scheduled hearing on plaintiffs’ motion to amend. In my judgment, the amendment should have been permitted both because, as noted, plaintiffs had a right to amend without leave, and because the trial court was obliged under MCR 2.116(I)(5) to grant the opportunity to amend absent a finding that the amendment “would not be justified.” The trial court never made any such finding.<sup>2</sup>

MCR 2.108(C)(2) does not compel otherwise. The use therein of the phrase “if one is allowed” (in requiring that the trial court set a time for filing an amended pleading), does not impose a “leave” requirement where, as here, one does not otherwise exist; rather, it merely recognizes that, depending on the circumstances, an amendment may be either permitted as of right (as here) or granted by leave of the trial court. In either event, the amendment would be one that is “allowed,” in the context of MCR 2.108(C)(2).

Moreover, it is of no moment, in my view, that plaintiffs’ motion to amend was filed after the hearing on defendants’ motion for summary disposition. First, plaintiffs requested leave to amend in their response to the summary disposition motion—prior to the summary disposition hearing. Second, while the trial court gave an oral ruling from the bench at the summary disposition hearing regarding the dismissal of certain of plaintiffs’ claims, it did not issue any ruling at that time with respect to plaintiffs’ legal malpractice claim, which is the only claim that is the subject of this appeal. Third, and notwithstanding its oral ruling (on other counts), the trial court did not issue any order whatsoever relative to defendants’ motion for summary disposition until after plaintiffs had formally filed their motion to amend the complaint. A court speaks only through its written orders. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). This is not a situation, therefore, where a party requested leave to amend *after* the trial court granted summary disposition.

I also agree with the majority that the trial court’s grant of summary disposition was premature. Defendants supported their motion with documentary evidence of their choosing,

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<sup>2</sup> While defendants’ maintain that amendment would have been futile and “would not be justified,” MCR 2.116(I)(5), the trial court made no such assessment, and we should not do so in the first instance.

while otherwise failing to respond to plaintiffs' discovery requests. While plaintiffs moved to compel discovery, the trial court deferred a hearing on plaintiffs' motion to compel, and then granted summary disposition before that motion could be heard. Discovery should have been allowed to proceed; particularly given that defendants relied on certain documentary evidence in support of their motion for summary disposition, plaintiffs should have been afforded the opportunity in discovery to properly rebut the motion. While I would otherwise offer no characterizations as to the merits of plaintiffs' claims or the propriety of any particular discovery request, I agree with the majority that it was simply too early to say that plaintiffs could not support their claims, and that plaintiffs should have been afforded the opportunity in discovery to do so. The trial court's grant of summary disposition was therefore premature.

I therefore concur with the majority in reversing the trial court's grant of summary disposition to defendants, and in remanding for further proceedings.

/s/ Mark T. Boonstra