STATE OF MICHIGAN

COURT OF APPEALS

ELISEO BANDA-TAVARES aka ELISEO BANDA-TAVAREZ, and CARLA BANDA-TAVARES aka KARLA BANDA-TAVAREZ,

Plaintiffs-Appellants,

v

ELWOOD STAFFING SERVICES, INC.,

Defendant-Appellee,

and

PATRICIA LYNN MURPHY, DARREN DEWAYNE FOWLER, and SHAWNEE SPECIALTIES, INC.,

Defendants.

UNPUBLISHED
August 20, 2020

No. 350022
Berrien Circuit Court
LC No. 16-000282-NO

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying their motion for leave to file a third amended complaint. We affirm.

On June 3, 2016, Eliseo Banda-Tavares ("plaintiff")[1], was involved in a car accident wherein defendant, Patricia Murphy ("Murphy"), crossed the center line of the road and crashed head-on into his vehicle in the opposite lane. Plaintiff suffered a severe spinal cord injury as a result of the accident. Plaintiff initially brought an action for negligence against Murphy, as well as a claim for loss of consortium. Plaintiff thereafter amended his complaint to add both Shawnee

[1] "Plaintiff" shall refer to Eliseo Banda-Tavares only, as the claim of plaintiff Carla Banda-Tavares is derivative in nature.

Specialties, Inc. (averred to be Murphy's employer), and the owner of the vehicle Murphy was driving as two additional defendants. Plaintiff later filed a second amended complaint adding defendant Elwood Staffing Services, Inc. ("Elwood"), as a defendant. Elwood is a temporary staffing agency which, according to plaintiff, employed Murphy at the time of the accident and, in fact, placed Murphy in a temporary position at Shawnee Specialties, Inc. ("Shawnee"), on the date of the accident. As a result, plaintiff alleged that Elwood was responsible for Murphy's negligence based upon vicarious liability and/or respondeat superior. Elwood moved for summary disposition pursuant to MCR 2.116(C)(10) and the trial court granted the motion, but allowed plaintiff to file a motion for leave to file an amended complaint against Elwood "to plead a cause of action for alleged negligent hiring asserted in Plaintiffs' motion papers and argued orally at the hearing, but which cause of action was not ruled [upon] by the Court at that hearing."

Plaintiff did, in fact, file a motion for leave to file a third amended complaint. The trial court, however, ruled that because the proposed third amended complaint was insufficient on its face, it would be futile to allow the amended complaint and thus denied the motion. This appeal followed.

We review decisions granting or denying motions to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs if the trial court's decision results in an outcome outside the range of principled outcomes, or when it makes an error of law. *Kostadinovski v Harrington*, 321 Mich App 736, 743; 909 NW2d 907 (2017). Whether a defendant owes a duty to a plaintiff to avoid negligent conduct is a question of law that is reviewed de novo. *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

As previously indicated, the trial court granted summary disposition in Elwood's favor under MCR 2.116(C)(10). "If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5)." *Weymers*, 454 Mich at 658. "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." *PT Today, Inc v Commr of Office of Fin & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

In his proposed third amended complaint, plaintiff asserted that Elwood was a privately-owned corporation that provides temporary employment opportunities at a number of workplaces and that Elwood placed Murphy in a temporary position at one of those workplaces, specifically Shawnee, where Murphy worked at the time of this crash. Plaintiff additionally alleged:

> 22. Elwood is responsible for the crash because it hired, allowed, and put an unlicensed, uninsured driver, of whose driver's license history it had good reason to be skeptical, on the road, in violation of its own rules and procedures.
>
> 23. Ms. Murphy's records from her employer, [Elwood], show that, on March 19, 2013, Elwood asked her for her driver's license number and got it, along with Ms. Murphy's written permission to do a background check, including also criminal, drug and credit checks whenever Elwood wanted to do so.

24. On the date she was first hired by Elwood, Ms. Murphy's driver's license was suspended; in fact, as of her first hire date, Ms. Murphy's driver's license had been suspended on five previous occasions, and disclosed that she had twice driven while her license was suspended.

25. Thereafter, on June 1, 2015, Ms. Murphy was terminated by Elwood because she was moving out of state to take a job.

26. She did not stay away long, because Elwood records disclose that, on December 4, 2015, Ms. Murphy contacted Elwood again looking for employment.

27. According to Elwood records, she told Elwood she was "willing to drive 20 miles."

28. In that context of knowing she would be driving as part of her new placement, and without checking at that time of rehire on [the] status of Ms. Murphy's driver's license – despite her propensity about which Elwood knew or should have known to get it suspended and to keep driving while her license was suspended – Elwood made no check whatever on the status of her driver's license.

* * *

30. This failure to check on her driver's license record when it knew she would need to drive in its intended placement of her constituted negligent hiring by Elwood at the time of re-hiring Ms. Murphy.

* * *

34. Elwood did not ask her if she had a legal way to drive the miles which her job placement would require.

35. Elwood's failure to ask whether she had a lawful way to drive as required by her placement constituted negligent hiring.

36. If not for Elwood's negligent hiring of Ms. Murphy, she would not have been on the road to run into [plaintiff], severely injuring him.

"The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The duty element concerns whether an actor has a legal obligation to govern his actions so as not to unreasonably endanger the person or property of others. *Id*., (citation and quotation marks omitted). "In other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." *Id*. at 449-450, quoting Prosser & Keeton, Torts (5th ed), § 53, p. 356. "The ultimate inquiry in determining whether a legal duty should be

imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. The inquiry involves considering, among any other relevant considerations, the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich at 505, quotation marks and citation omitted.

A claim that an employer was negligent in the hiring or retention of an employee generally constitutes an allegation that the employer itself committed a direct tort rather than an allegation that the employer is vicariously liable for a tortious act of the employee. *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 571-572; 918 NW2d 545 (2018). "[T]he gravamen of negligent hiring or retention is that the employer bears some responsibility for bringing an employee into contact with a member of the public despite knowledge that doing so was likely to end poorly." *Id*. at 574. A claim of negligent hiring "requires actual or constructive knowledge by the employer that would make the *specific* wrongful conduct perpetrated by an employee predictable." *Id*. at 575 (emphasis in original).

> [A] duty imposed upon an employer who invites the general public to his premises, and whose employees are brought into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees. It has been held that in fulfilling such duty, an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result. [*Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412–13; 189 NW2d 286 (1971), quoting 34 ALR2d 390]

In order for plaintiff to have avoided denial of his motion to amend his complaint due to futility, plaintiff must have articulated a legally cognizable duty and a breach of that duty by Elwood. "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Plaintiff's complaint is legally insufficient on its face with respect to a duty owed by Elwood. *PT Today, Inc*, 270 Mich App at 143.

There has been no claim and no indication that Murphy was a person "unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." *Hersh*, 385 Mich at 412-413. More importantly, the only duty plaintiff has claimed on the part of Elwood was to check the driving record and driver's license status of Murphy. Plaintiff has not, however, provided any Michigan law suggesting that an employer is required to check the driver's license or driving record of an employee. Plaintiff relies on a single Colorado case and basic federal law recognizing merely the existence of a negligent hiring cause of action in Michigan. Because plaintiff provides no support for his argument concerning negligent hiring, we may reject his claim

as abandoned on appeal. *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 220; 761 NW2d 293 (2008).

Briefly considering plaintiff's argument in any event, relevant authority suggests there is no duty on the part of an employer to verify the driver's license status of an employee. In *Tortora v Gen Motors Corp*, 373 Mich 563; 130 NW2d 21 (1964), our Supreme Court specifically held that an employer had no duty to check the driving record of an employee, even though he had been driving the employer's vehicle when involved in an accident. In that case, the employee was entrusted with his employer's cars and drove company cars from car dealership to car dealership in the course of his assigned work, and also drove company cars for personal off-duty purposes. *Id*. at 566-567. On an occasion when he was driving a company car, the employee got into a car accident. *Id*. at 564-565. The injured party sued the employer. Through discovery, it was revealed that the employee had 12 moving violations in the 5 years prior to the accident at issue. *Id*. at 566. Our Supreme Court noted that the plaintiff bore the burden of establishing that the employer knew or should have known that the employee was an unfit driver and had not done so. *Id*. at 567. While the plaintiff argued that "the defendant employer was under legal duty to keep abreast of such records and to act preventively upon finding what it would have found respecting the transgressions of employee [] in the use of its cars," our Supreme Court found that there was no authority for such contention. *Id*. at 567. It thus found that it was reversible error for the trial court to instruct the jury that the employer could have determined the driving record of its employee, had it so chosen.

Here, there is even less of a reason to hold Elwood responsible for ensuring the status of Murphy's driver's license. The *Tortora* employee drove company cars as part of his employment and the employer was still not charged with verifying the employee's driving status. While it is questionable whether the same result would be reached in a similar case today, in the present case, Murphy was neither entrusted with driving her employer's cars, nor was driving a part of her job responsibilities.

It is undisputed that Murphy was placed with Shawnee solely as a machine operator. There is no evidence or indication that having a valid driver's license or driving was a requirement of her employment with Elwood or her placement as a temporary worker at Shawnee. In fact, Lorrie Kish, the human resources manager for Elwood, testified at deposition that it is "against Elwood's workers' compensation coverage for it to have employees driving vehicles for client companies. We are not able to do business and allow our employees to do that."

Additionally, it would be against public policy to impose a duty upon employers to only employ (in positions that do not directly require driving) those who had valid driver's licenses and/or unblemished driving records. There are a multitude of people who do not have a driver's license who are gainfully employed and utilize means other than personal driving to get to and from their employment. Bicycles, buses, and rides from friends or paid services are common methods used to get to required destinations by both licensed and unlicensed people. Neither the Legislature nor the Secretary of State has seen fit to impose a preclusion on employment as an additional consequence of licensing sanctions, and we will not do so here. Any social benefit of imposing a duty upon employers to only hire individuals with valid driver's licenses is significantly outweighed by the social costs of imposing the duty. *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich at 505. In sum, because plaintiff failed to

allege an appropriate and recognized standard of care that Elwood breached, amendment of plaintiff's complaint to allege negligent hiring would be futile. The trial court thus did not abuse its discretion in denying plaintiff's motion to file a third amended complaint.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Anica Letica