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STATE OF MICHIGAN

COURT OF APPEALS

BILL RUSU,

Plaintiff-Appellant,

v

TRILOGY HEALTHCARE OF OAKLAND, LLC d/b/a WESTLAKE HEALTH CAMPUS,

Defendant-Appellee.

UNPUBLISHED
September 17, 2026
11:00 AM

No. 375420
Oakland Circuit Court
LC No. 2024-207056-NO

Before: BAZZI, P.J., and PATEL and ACKERMAN, JJ.

ACKERMAN, J. (*dissenting*).

I respectfully dissent. The majority concludes that the trial court erred by granting summary disposition to defendant on the issues of breach and notice based on plaintiff's assertion "that additional safety precautions could have been taken in light of the circumstances," rather than on any "evidence that the subject door was malfunctioning or failed to comply with any standards." But when the trial court granted summary disposition, the operative complaint alleged only that the door had malfunctioned. Although plaintiff had moved to amend the complaint to replace that allegation with a claim that the door closed on him without warning, the trial court never ruled on that motion. Because the trial court was required to consider whether amendment was warranted when granting summary disposition under MCR 2.116(C)(10), see MCR 2.116(I)(5), and failed to do so, I would vacate the order granting summary disposition and remand without reaching the merits.

Plaintiff's original complaint alleged that the automatic door at defendant's facility "malfunctioned and abruptly closed" on him. Following discovery, plaintiff's retained expert inspected the door and concluded that it had not malfunctioned. In January 2025, defendant moved for summary disposition under MCR 2.116(C)(10), asserting that plaintiff could not establish a defect on the premises or that defendant had actual or constructive notice of such a defect. On March 5, 2025, before the trial court ruled on that motion, plaintiff moved under MCR 2.118(A) to amend his complaint to conform to the evidence. The proposed amendment replaced the allegation that the door "malfunctioned" with an allegation that the door "closed, without warning" on plaintiff. Defendant opposed the motion as untimely and futile. The trial court did not rule on

the motion to amend. Instead, on March 25, 2025, it granted defendant's motion for summary disposition and dismissed the case.

In my view, the trial court erred by deciding the summary-disposition motion without addressing plaintiff's motion to amend. "Under MCR 2.116(I)(5), '[i]f 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.' " *Reeves v Wayne Co*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket Nos. 367444 and 367447); slip op at 3 (emphasis added). That language is mandatory, and it leaves a trial court with no discretion to bypass the question of amendment when granting summary disposition under MCR 2.116(C)(8), (9), or (10). *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003); see also *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) ("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 . . . .").

This Court has recognized that MCR 2.116(I)(5) "is not specific on the order of [the] rulings" and that trial courts may implement the rule in a variety of legitimate ways, including by entering a conditional order granting summary disposition unless an amended complaint is filed by a specified date. *Reeves*, ___ Mich App at ___; slip op at 3-4 (citation omitted). But the trial court here neither entered a conditional order nor otherwise addressed the pending motion to amend. Its opinion considered only whether a defect existed on the premises and whether defendant had notice of that defect.

A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A ruling that turns on whether a "defect" existed necessarily presupposes a pleading that alleges one because the court's task under that subrule is to measure the evidentiary record against the claim as pled. See MCR 2.116(G)(5) (requiring the trial court to consider "the pleadings" together with the evidence on a motion brought under subrule (C)(10)). Once plaintiff moved to amend the allegation on which that analysis depended, the trial court could not properly resolve the case on that basis without also determining whether the proposed amendment should be allowed. See *Weymers*, 454 Mich at 658.

Nor can the trial court's failure to address the amendment motion be deemed harmless. The allegation on which the trial court relied was the very allegation plaintiff sought to remove. The trial court granted summary disposition on the ground that plaintiff had not established "that any defect actually existed on Defendant's premises," language that tracks the original complaint's allegation that the door had malfunctioned. By the time the court entered that order, however, plaintiff had conceded that the door did not malfunction and had moved to replace that allegation with a claim that the door "closed, without warning" on him. That proposed theory did not depend on a mechanical failure. It instead concerned whether defendant's chosen precautions were adequate to protect against the asserted risk.

The majority acknowledges that plaintiff alleged in his complaint that the automatic door malfunctioned. It also recognizes that the record does not support a finding that the door malfunctioned or that its timing violated industry standards cited by defendant. Standing alone,

that should terminate plaintiff's action—he has conceded that the factual premise of his complaint is incorrect. The majority nevertheless concludes that genuine issues of material fact remain because "plaintiff maintains that additional safety precautions could have been taken in light of the circumstances." But plaintiff does not maintain that allegation *in his complaint*, which defines the theory on which he sought relief. Plaintiff tried to amend his complaint in the trial court, but the trial court granted summary disposition without addressing his motion to amend.

The majority further observes that "[o]n appeal, plaintiff does not claim that the trial court erred by failing to address his motion or grant him leave to amend." But that observation cuts the other way; if plaintiff is not making any such argument, we arguably ought to *affirm*, because he has conceded that the factual premise underlying his operative complaint is incorrect. In my view, the majority opinion implicitly grants the motion to amend the complaint in the first instance, an endeavor that should be undertaken not by a reviewing court on appeal but by the trial court on remand.

Although plaintiff does not specifically challenge the trial court's failure to address his motion to amend, it is apparent that his arguments on appeal depend on the theory set forth in his proposed amended complaint. Because plaintiff attempted to address the very defect in the complaint for which the trial court faulted him, and the trial court erred by granting summary disposition without addressing the motion to amend, I would be content to vacate the order granting summary disposition and remand for the trial court to rule on plaintiff's motion to amend in the first instance, applying the standard set forth in MCR 2.118(A)(2) and *Weymers*, 454 Mich at 658, in conjunction with its ruling on defendant's summary-disposition motion. Only after the amendment motion is resolved, and even then only if the trial court again grants summary disposition to defendant, should this Court address whether plaintiff has established a genuine issue of material fact as to breach or notice.

/s/ Matthew S. Ackerman