STATE OF MICHIGAN

COURT OF APPEALS

BEVELYN FISHER, Personal Representative of the Estate of TIARA FISHER, deceased, Plaintiff-Appellant, v SOUTHFIELD PUBLIC SCHOOLS, SOUTHFIELD BOARD OF EDUCATION, and YOLETTA PATRICE HALL, Defendants-Appellees, and RICHARD JAMES FARRELL, Defendant.	UNPUBLISHED January 12, 2010 No. 288106 Oakland Circuit Court LC No. 07-087761-NI

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants in this wrongful death and negligence action, which arises from the death of 15-year old Tiara Fisher (hereinafter "the decedent"). We affirm.

I. Factual and Procedural History

The basic facts pertaining to this accident are not in dispute. On December 7, 2005, at approximately 6:42 a.m., defendant Yoletta Patrice Hall (Hall) was driving a Southfield Public Schools bus. She was proceeding to her second stop of the morning at 21851 Evergreen Road near Mada Avenue. She observed the decedent in the process of crossing the street en route to the bus stop. Approaching the stop, Hall activated the flashing/alternating yellow lights on the bus and pulled over to the right in preparation to pick up students. A Lexus, driven by Carolyn Cleveland, was directly behind the bus and began to slow down. However, the second vehicle behind the bus, a pick up truck driven by Richard James Farrell, pulled around the Lexus and entered the left turn lane to pass Cleveland and the bus. Farrell struck the decedent, who suffered multiple fatal injuries. Eyewitness accounts suggest Farrell accelerated as he attempted to pass the Lexus and school bus.

Plaintiff initiated this action in the Oakland Circuit Court, raising three counts against defendants, City of Southfield Public Schools, Board of the Southfield School District and Hall (hereinafter referred to jointly as "defendants"). Defendants filed an answer generally denying liability and also raised several affirmative defenses, including governmental immunity. In accordance with the trial court's scheduling order, discovery was initially set to close on June 20, 2008, but was extended to August 15, 2008.

Asserting governmental immunity, defendants sought summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) of plaintiff's wrongful death and negligence/gross negligence claims. The hearing was originally scheduled to occur on July 2, 2008, but was adjourned. Defendants filed another summary disposition motion on August 20, 2008, seeking dismissal of all claims. Although the hearing was scheduled to occur on September 17, 2008, on September 12, 2008, Judge Andrews issued a written opinion and order granting defendants' request for summary disposition. In summary, the trial court determined that defendants were governmentally immune pursuant to MCL 691.1405, because decedent's injuries were not the result of the negligent operation of the school bus. Similarly, the trial court ruled that plaintiff had not established Hall's gross negligence, pursuant to MCL 691.1407. Finally, the trial court determined that plaintiff's due process claims should be dismissed based on a failure to identify a policy or custom, which served as the moving force behind defendants' alleged constitutional violations and the failure to establish that defendants acted with "deliberate indifference" to the decedent's rights. Concurrently, plaintiff filed a motion seeking the adjournment of the summary disposition hearing. Plaintiff's motion implied that discovery was continuing and that the grant of summary disposition would be premature. A review of the lower court record reveals the trial court did not address this motion. However, on September 29, 2008, the trial court issued an order indicating dismissal of the action based on the parties' failure to appear for trial.

II. Standard of Review

A circuit court's decision on a motion for summary disposition is reviewed by this Court de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A summary disposition motion brought pursuant to MCR 2.116(C)(7) does not test the merits of a claim, but rather certain defenses that may preclude the necessity of trial. *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). Although neither party is required to submit supporting documentation, this Court will consider any admissible evidence supporting or opposing a plaintiff's claims. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006). If there are no material facts remaining in dispute, this Court's analysis in accordance with subrule (C)(7) parallels that used in conjunction with MCR 2.116(C)(10). *Id.* at 111-112. When reviewing a motion under subrule (C)(10), "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh, supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In addition, this Court reviews a trial court's decision pertaining to a discovery matter for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132

(2004). Similarly, "[t]his Court reviews a grant or denial of a motion for leave to amend pleadings for abuse of discretion." *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Safian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

III. Analysis

A. Governmental Immunity

Plaintiff contends the trial court erred in granting summary disposition in favor of defendants on the basis of governmental immunity. Specifically, plaintiff argues that defendants City of Southfield Public Schools and the Southfield Board of Education were negligent in failing to comply with MCL 257.1855(4)(c) in assigning the decedent a bus stop that required her to traverse more than three lanes of traffic. In addition, plaintiff claims that defendant Hall was grossly negligent in operating the school bus by failing to stop and activate her red flashing signals immediately upon observing the decedent in the process of crossing the street. Purportedly, Hall is liable because Farrell's attempt to avoid stopping was foreseeable following the activation of her yellow flashing signals on the bus.

Generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The operation of a school bus system by a public school district is typically recognized to constitute an immune governmental function. *Cobb v Fox*, 113 Mich App 249, 257; 317 NW2d 583 (1982). Any recognized exceptions, such as the motor vehicle exception, to this broad grant of immunity are to be construed narrowly. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

The motor vehicle exception to governmental immunity specifically excepts injuries "resulting from the negligent operation . . . of a motor vehicle." MCL 691.1405. In accordance with rulings by our Supreme Court, the term "operation" is limited to "the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle." *Chandler v Muskegon Co*, 467 Mich 315, 321-322; 652 NW2d 224 (2002) (emphasis in original). Because of the narrow construction of this exception as discussed in *Robinson*, it is required that a decedent's injuries "resulted from" the government-owned vehicle, i.e., that the school bus was physically involved in causing the decedent's injuries while being operated as a motor vehicle. In this instance, it is undisputed that the school bus made no physical contact with the decedent or the vehicle driven by Farrell. Hence, as determined by the trial court, because the school bus was not physically involved in the collision that caused the decedent's injuries, the motor vehicle exception to governmental immunity is inapplicable.[1]

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[1] Plaintiff relies, in part, on an unpublished case from this Court in support of her theory of liability. *Helfner v Center Line Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2006 (Docket No. 265757). However, plaintiff fails to recognize that
(continued…)

Contrary to plaintiff's assertions, Hall did not place in motion the object that caused the decedent's injuries. Hall conformed to the requirements of MCL 257.1855, which provides, in relevant part:

> (1) A school bus driver shall actuate alternately flashing lights only when the school bus is stopped or stopping on a highway or private road for the purpose of receiving or discharging pupils . . . .
>
> (2) The driver of a school bus while operating upon the public highways or private roadways open to the public shall receive or discharge pupils from the bus in the following manner:
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> * * *
>
> (b) If the pupils are required to cross the roadway, the driver of a school bus equipped with red and amber alternately flashing overhead lights . . . *shall* activate the alternately flashing overhead amber lights not less than 200 feet before the stop, stop the bus on the roadway or private road to provide for the safety of the pupils being boarded or discharged, deactivate the alternately flashing overhead amber lights, and activate the alternately flashing overhead red lights while receiving or discharging pupils. The bus *shall* stop in the extreme right-hand lane for the purpose of boarding or discharging pupils. [Emphasis added.]

Hall's activation of the amber warning lights on the school bus were a signal to drivers in the immediate vicinity to slow down and prepare to stop. While we recognize that it is foreseeable that a driver will ignore the flashing light indicators on a bus to avoid stopping or delay, Farrell's decision to disregard the alternating amber lights is not attributable to any negligence on the part of the bus driver, particularly given her conformance with the requirements provided in MCL 257.1855(2)(b). While this incident was tragic and resulted in the loss of the life of a young girl, the collision of a private motorist's vehicle with the decedent was not the result of or caused by the negligent operation of the school bus. Hence, summary disposition based on governmental immunity was proper.

Plaintiff further contends that defendants were grossly negligent for their violation of MCL 257.1855(4)(c), regarding the selection and assignment of the decedent's school bus stop because it required her to cross more than three lanes of traffic. The cited statutory provision, provides in relevant part:

> (4) The driver of a school bus shall not stop the bus for the purpose of receiving or discharging pupils in the following instances:
>
> * * *

(…continued)

this decision was reversed by our Supreme Court for the reasons contained in Judge Whitbeck's dissenting opinion. *Helfer v Center Line Public Schools,* 477 Mich 931; 723 NW2d 459 (2006).

> (c) Upon a roadway constructed or marked to permit 3 or more separate lanes of vehicular traffic in either direction if the pupils are required to cross the roadway.[2]

Contrary to plaintiff's assertions, even if this Court were to presume that a violation of the cited statute would constitute negligence per se in these circumstances, the violation of a statutorily imposed duty comprises or constitutes only ordinary negligence and not gross negligence. *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003). Evidence of ordinary negligence does not serve to create a material question of fact concerning the gross negligence necessary to overcome a defense of governmental immunity. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

Further, plaintiff elects to completely ignore the fact that defendants provided the affidavit of Denise S. Davis, a dispatcher with the Southfield Public Schools. Davis averred that the computer records pertaining to assignment of the decedent's bus stop indicated that "Tiara Fisher was to be on Bus route #14 which would have made her stop the intersection of Stahelin and Midway," precluding the necessity of her crossing of Evergreen Road. Plaintiff has not come forward with any evidence to contradict or dispute this affidavit. The purpose in emphasizing this fact is not to attribute or shift blame to the decedent for use of the wrong bus stop, but merely to demonstrate that defendants' assignment of a bus stop was not in violation of the relevant statutory provision. Based on the fact that the decedent's designated bus stop did not violate MCL 257.1855(4)(c), plaintiff's contention of negligence in the violation of this statutory provision is both insufficient to impose liability and without merit.

Plaintiff's additional assertion regarding the gross negligence of Hall for failing to stop the bus in the roadway and immediately activate the flashing red lights is similarly specious. MCL 691.1407 provides, in relevant part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

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[2] MCL 257.1855(7) defines "required to cross the roadway" as "not include[ing] crossing the roadway with the assistance of a traffic control signal, or with the assistance of a school crossing guard . . . and applies only to the roadway on which the stop is being made."

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
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> * * *
>
> (7) As used in this section:
>
> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

There is no evidence to support plaintiff's contention that Hall was negligent or grossly negligent given her adherence to the dictates of MCL 257.1855(2)(b). To suggest that Hall should have made an unanticipated and sudden stop in the roadway and immediately activated the red flashing bus lights fails to comprehend the increased potential for creating an accident and injuries through such unexpected behavior. Given that Hall complied with MCL 257.1855(2)(b) in the manner of stopping the bus there can be no assertion of ordinary negligence. Having failed to establish even a claim of ordinary negligence, plaintiff's assertion of gross negligence cannot be substantiated.

B. 42 USC 1983 Claims

In sum, we understand plaintiff's 42 USC 1983 claims to assert constitutional violations premised on defendants' improper or lack of training of Hall and failure to comply with MCL 257.1855, which purportedly translates into a deliberate indifference for the decedent's safety and rights, the existence of a state-created danger and special relationship.

Initially we note that, as a matter of law, 42 USC 1983 does not comprise "an independent source of substantive rights." "[R]ather it merely provides a remedy for the violation of rights guaranteed by the federal constitution or statutes." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). In accordance with 42 USC 1983, a person may file an action seeking redress when they experience the deprivation of their federal constitutional rights because of the actions of another person acting under color of state law. *Walsh, supra* at 635. However, in accordance with *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978):

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Hence, the doctrine of respondeat superior does not attach to actions filed pursuant to 42 USC 1983 against municipalities. *Collins v City of Harker Heights, Texas,* 503 US 115, 123; 112 S Ct 1061; 117 L Ed 2d 261 (1992). A direct causal link must exist between a municipal policy or custom and the alleged constitutional deprivation, and the policy or custom must demonstrate a deliberate indifference to an individual's rights. *Id.* at 123-124; see also *Morden v Grand Traverse Co,* 275 Mich App 325, 333; 738 NW2d 278 (2007).

Plaintiff contends she maintained a viable 42 USC 1983 claim against defendants premised on their failure to adequately or properly train Hall. In accordance with *City of Canton, Ohio v Harris,* 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the failure to properly train employees may be considered a "policy" for purposes of an sustaining a § 1983 action where the failure to train amounts to deliberate indifference. However, "a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'" *Id.* at 389 (citations omitted). In addition, for liability to attach, the training program is required to be closely related to the ultimate injury. *Id.* at 391. The relevant question then becomes whether the injury would have been avoided if the employee had received the identified training.

Contrary to plaintiff's contention, there was evidence that bus drivers, such as Hall, received training. Plaintiff fails to delineate any manner in which defendants' asserted training was deficient. As such, plaintiff has failed to demonstrate or establish that the training program was either closely related to the ultimate injury or that the injury could have been avoided had Hall been trained differently. As such, summary disposition was properly granted to defendants.

Plaintiff contends that defendants' violation of MCL 257.1855(4)(c) in establishing the decedent's school bus stop at a location requiring her to cross multiple lanes of traffic deprived her of her constitutional right to life and showed a deliberate indifference to her safety. "In order to sustain a cause of action under § 1983, the plaintiff must establish that: (1) the defendant acted under color of state law; (2) the conduct deprived the plaintiff of constitutional rights; and (3) the deprivation of rights occurred without due process of law." *Makis v City of Grosse Point Park,* 180 Mich App 545, 553; 448 NW2d 352 (1989), citing *Jones v Sherrill,* 827 F2d 1102, 1104 (CA 6, 1987). Plaintiff cannot demonstrate either a violation of the decedent's constitutional rights under color of state law, the existence of a state-created danger or policy or procedure, which rises to the level of deliberate indifference, given the undisputed affidavit of Davis showing the decedent's assignment to a school bus stop that did not require her crossing of multiple lanes of traffic. Because defendants were not shown to be in violation of MCL 257.1855, there could be no finding of deliberate indifference to the decedent's safety. Further, even if defendants had violated MCL 257.1855 in assigning the decedent a school bus stop, "[m]ere negligence [in the application of the policy] is insufficient under § 1983; the applicable standard is [whether the policy evidences or authorizes] deliberate indifference, gross negligence, or recklessness." *Alexander v Riccinto,* 192 Mich App 65, 73; 481 NW2d 6 (1991), citing *Hill v Saginaw,* 155 Mich App 161, 171; 399 NW2d 398 (1986). As such, the trial court's grant of summary disposition was proper.

Further, plaintiff's contention that defendants failed to deny culpability in their answer to the complaint is specious. Although defendants admitted to their legal duties and obligations, they clearly and specifically denied any wrongdoing or breach of said duties and raised relevant affirmative defenses. As such, plaintiff's assertion is without basis or merit.

C. Procedural Claims

Plaintiff's presentation of claims pertaining to procedural errors by the trial court is misleading in several respects. First, although plaintiff's June 4, 2008, motion seeking to extend discovery and postpone a hearing on defendant's summary disposition motion also includes, in its caption, a request to "amend its complaint," a review of the content of the motion indicates that any request to amend is conspicuous by its complete absence. Second, plaintiff indicates she provided an affidavit by her counsel in conjunction with her emergency motion to adjourn the hearing on summary disposition, filed September 15, 2008, which "contend[ed] that Fisher had a fair chance of supporting her opposition . . . and in gathering sufficient facts." Importantly, this was filed subsequent to the trial court's ruling in this matter. In addition, at the time this statement was made it did not seek an extension of discovery, which had lapsed for the second time, having already been extended once by the trial court. The motion merely implied that plaintiff was continuing to conduct discovery without any reference to the fact that the amended date for the conclusion of discovery had passed.

We find that plaintiff has no basis to assert error by the trial court in failing to permit amendment of her complaint, when an actual request to amend was never filed or sought. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007), citing *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). The mere inclusion of the words "to amend its complaint" in the title of a motion, without any reference or development within the body of the motion itself and without a specific request for such relief, is insufficient for either the trial court to act or to subsequently assert error. Further, in purportedly seeking to amend the complaint, plaintiff failed to comply with MCR 2.118(A)(4), which mandates that, "Amendments must be filed in writing, dated and numbered consecutively, and must comply with MCR 2.113."

Plaintiff implies that the trial court was required to allow amendment of her complaint in order to avoid summary disposition. However, at least in part, because summary disposition was granted in accordance with MCR 2.116(C)(7), the trial court was under no obligation to provide plaintiff with an opportunity to amend her complaint in accordance with MCR 2.116(I)(5). Further, a plaintiff is not entitled to amend their complaint if such an amendment would be futile. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000) (citation omitted). In arguing the propriety of permitting her to amend the complaint, plaintiff suggests that the recently completely deposition of the Transportation Manager for Southfield Public Schools supports the postponement of summary disposition and, impliedly, the amendment of her pleadings because:

> [T]he Transportation Manager made it clear that due to the hazardous exposure to students by requiring them to cross more than three lanes of traffic in violation of state statute that he has directed that this requirement be terminated because of such hazardous exposure.

The cited statement is insufficient to support amendment and would be precluded by MRE 407, which provides in relevant part:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

In addition, plaintiff contended in the motion that two yet to be completed depositions "would proffer testimony . . . ." However, the gist or content of that testimony is unspecified or fails to indicate how it is substantively different from evidence already available. "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). In sum, because plaintiff has failed to comply with the relevant court rules and has not articulated a non-futile basis for the amendment of her complaint, she would not be entitled to the opportunity even if she had actually made such a request.

Plaintiff also contends that the grant of summary disposition was premature because of continuing discovery. Specifically, plaintiff indicated she had scheduled but not completed the depositions of Carolyn Crawford[3], identified as an eyewitness to the accident, the estate's personal representative (plaintiff) and an expert, Jonathan Crane.[4] However, it is difficult to ascertain how the grant of summary disposition can be deemed premature when discovery has closed. In addition, none of the individuals identified were unknown or newly discovered by plaintiff necessitating the scheduling of their depositions to occur after the close of discovery. Certainly, with regard to the estate's personal representative, the eyewitness, and her own expert, plaintiff should have been able to obtain information without waiting to conduct a deposition. It is unclear to this Court how further discovery would stand a reasonable chance of uncovering factual support for plaintiff's claims based on testimony from these three individuals given the lack of any factual dispute regarding how the accident occurred. It is understood that Michigan's discovery rules are to be broadly construed. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). However, the rules of discovery are not interpreted to permit "fishing expeditions." *VanVorous, supra* at 477 (citation omitted). Further, the mere promise or assertion that additional facts could be established is insufficient to preclude summary disposition. *Maiden, supra* at 121. Given the conclusion of discovery, there is no basis for plaintiff to suggest that summary disposition was premature, particularly with regard to the issues being considered in accordance with MCR 2.116(C)(7). *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003); *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

In addition, when opposing summary disposition on the premise of incomplete discovery, a litigant is required to comply with MCR 2.116(H)(1), which mandates the presentation of affidavits in support of their position. *Coblentz v Novi*, 475 Mich 558, 570-571; 719 NW2d 73

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[3] Although in her motion, plaintiff identifies this witness as Carolyn Crawford, based on the list of eyewitnesses provided in the police report, this individual is assumed to be Carolyn Cleveland, the driver of the Lexus that was situated directly behind the school bus at the time of the accident.

[4] Crane is identified on plaintiff's witness list as an accident reconstructionist.

(2006). Although plaintiff submitted the affidavit of counsel in support of the motion it does not technically comply with the requirements of MCR 2.116(H)(1). Consequently, plaintiff has failed to demonstrate that the grant of summary disposition was premature. *Coblentz, supra* at 571.

IV. Conclusion

We affirm the trial court's grant of summary disposition in favor of defendants on all claims.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot