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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

RYAN E. BUCHANAN ET AL.,

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF
PARKS AND RECREATION,

Defendant and Respondent.

H040383

(Santa Cruz County

Super. Ct. No. CV176283)

I. INTRODUCTION

Appellant Ryan E. Buchanan was seriously injured at Sunset State Beach when he was buried in a sand collapse that occurred while he was attempting to connect two large holes he had dug with a tunnel that was six to seven feet below the surface. His brother, appellant Jacob R. Buchanan, witnessed the tragic accident. Through their guardian ad litem, Bret Buchanan, Ryan and Jacob¹ brought the instant action against respondent California Department of Parks and Recreation (DPR). In their amended complaint, Ryan asserts a cause of action for negligence and Jacob asserts a cause of action for negligent infliction of emotional distress as a bystander.

¹ Since appellants have the same surname, we will refer to them by their first names for purposes of clarity and consistency with the record below, and meaning no disrespect.

The trial court sustained DPR's demurrer to the amended complaint without leave to amend on the ground that the action was barred under Government Code section 831.7,² which generally immunizes public entities from liability for personal injury claims arising from participation in hazardous recreational activities on public property. (See *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 963-964 (*Wood*).) For reasons that we will explain, we determine that the action is barred under the immunity provided by section 831.7 and therefore we will affirm the judgment of dismissal.

II. FACTUAL BACKGROUND

Our summary of the facts is drawn from the allegations of the amended complaint, since in reviewing a ruling sustaining a demurrer without leave to amend we assume the truth of the properly pleaded factual allegations and the matters properly subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.)

On June 25, 2011, 17-year-old Ryan and his brother Jacob³ participated in a church youth group outing to Sunset State Beach, where their church had reserved a campground site and picnic area. Sunset State Beach was patrolled by park rangers, lifeguards, and other "state agents."

The members of the church group included approximately 50 teenagers and eight adults. During the outing to Sunset State Beach, Ryan and another boy "created an unnatural condition that was not common to nature and would not naturally occur in that location, in that they were engaged in digging large holes in the sand in a picnic area being used by the church group, which was located within the park boundaries, separated from the beach by sand dunes, but within sight of a nearby elevated life guard station."

² All further statutory references are to the Government Code unless otherwise indicated.

³ The opening brief states that Jacob is the younger brother of Ryan.

Park rangers observed the boys' digging activity and interacted with the church group's adult chaperones.

Although "State Park Beach personnel" were aware that in 2008 an 11-year-old boy had died in a sand dune collapse about 20 miles away from Sunset State Beach, and had received education and training "for incidents like that," they failed to warn Ryan or the adult chaperones of the "dangers of collapsing sand." The adult chaperones relied on "State Beach personnel's silence in view of the activity" in permitting Ryan's hole digging to "progress."

After Ryan and the other boy had dug "two large holes in the sand," they "formed a plan to connect the two holes by a tunnel under the sand, some six to seven feet below the surface." Ryan "was in the depths of the unnatural construct when the sand collapsed." Ryan remained buried for many minutes without oxygen while children, adults, and "Park personnel" tried to "exhume him." Ryan's brother Jacob observed "the terrible import of what was taking place, unable to move or help." The other boy was quickly freed and was not physically injured, but Ryan's "injuries have left him in a permanent vegetative state."

III. PROCEDURAL BACKGROUND

A. The Amended Complaint

According to defendant DPR, plaintiffs served their original complaint in April 2013 and DPR responded by filing a demurrer to the complaint.⁴ After the parties met and conferred, plaintiffs filed an amended complaint. DPR is the only defendant named in the amended complaint.

The amended complaint included two causes of action. In the first cause of action for negligence, plaintiff Ryan alleged that the employees of DPR observed or should have

⁴ The original complaint and DPR's demurrer were not included in the record on appeal.

observed the digging activities of Ryan and another boy, and their breach of their duty to warn the church group's adult chaperones of the known risk of the boys' digging activities showed a lack of any care and was the proximate cause of Ryan's injuries.

In the second cause of action for negligent infliction of emotional distress, plaintiff Jacob alleged that he was present at the scene of his brother Ryan's injury, and he suffered serious emotional distress due to his contemporaneous awareness that Ryan was buried in the sand and injured. Jacob further alleged that DPR's conduct was a substantial factor in causing him to suffer serious emotional distress.

B. Demurrer to the Amended Complaint

DPR demurred to the amended complaint (hereafter, the complaint) on the grounds that the allegations in the complaint (1) failed to show that DPR owed a duty to plaintiffs; (2) DPR was immune from liability under section 831.7; and (3) DPR was immune from liability under section 831.2.

As to duty, DPR argued that as a public entity it owed no duty to the public absent a special relationship, and the complaint lacked any allegations sufficient to show the elements of a special relationship. DPR noted that plaintiffs did not allege that a DPR employee had directed any specific conduct towards the plaintiffs with respect to digging in the sand or making sand tunnels, and also did not allege that plaintiffs had relied on such conduct to their detriment. Additionally, DPR noted that there were no allegations that DPR had created or increased the risk of harm to plaintiffs by involvement in the digging or collapse of the sand tunnel.

Alternatively, DPR argued that it was immune from liability pursuant to section 831.7, which shields public entities from claims arising from hazardous recreational activities. DPR asserted that Ryan's activity of digging deep holes in the beach sand and connecting the holes with a tunnel that was six to seven feet below the surface constituted a hazardous recreational activity with a substantial risk of injury due to sand collapse. Since the risk of injury from sand collapse is an inherent risk of digging

and tunneling deep in sand, DPR argued that its alleged failure to warn of that inherent risk did not preclude the application of immunity under section 831.7.

DPR also argued that it was immune from liability pursuant to section 831.2, which shields public entities from liability for claims arising from natural conditions of unimproved public property. According to DPR, since a public beach is deemed a natural condition of unimproved public property pursuant to section 831.21, even where human activity is combined with the property's natural condition, it was immune from plaintiffs' claims of injury resulting from the collapse of beach sand.

Plaintiffs opposed the demurrer for several reasons. First, plaintiffs argued that they had pleaded facts sufficient to show that DPR owed them a duty of care, based on their allegations of a special relationship arising from the payment of a fee for their campsite reservation and also based on the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 for determining the existence of a duty of care.

Second, plaintiffs rejected DPR's government immunity defenses. Plaintiffs argued that the immunity provided by section 831.7 for claims arising from hazardous recreational activities did not bar their tort claims because digging in the sand was not one of the hazardous recreational activities enumerated in the statute; the evidence would show that the risks of digging in the sand were not known by the general public; and DPR's conduct was grossly negligent. Regarding section 831.2, plaintiffs argued that the immunity provided by that section for injuries resulting from a natural condition of the beach did not apply because their injuries were the result of holes that were not natural conditions. Plaintiffs sought leave to amend their complaint if the trial court determined that their allegations were insufficient to overcome DPR's demurrers.

C. Trial Court Order

The trial court's September 23, 2013 order sustained DPR's demurrer to the amended complaint without leave to amend and entered a judgment of dismissal in favor of DPR. The order states that the demurrer is sustained "on the grounds that Plaintiffs'

claims are barred by the Hazardous Recreational Activity immunity found in Government Code section 831.7.”

IV. DISCUSSION

Plaintiffs contend on appeal that the trial court erred in sustaining DPR’s demurrer because the immunity provided by section 831.7 for claims against a public entity arising from hazardous recreational activity does not apply in this case, since DPR breached its duty to protect Ryan from the dangers of collapsing sand. Before evaluating plaintiffs’ contentions, we will outline the applicable standard of review.

A. Standard of Review

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, our review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

In performing our independent review of the complaint, we assume the truth of all facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We do not assume the truth of “ ‘ ‘contentions, deductions or conclusions of fact or law.’ ’ ” (*Ibid.*) We also consider matters that may be judicially noticed and facts appearing in any exhibits attached to the complaint. (Code Civ. Proc., § 430.30, subd. (a); *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) Further, “we give the complaint a reasonable interpretation, and read it in context.” (*Ibid.*)

After reviewing the allegations of the complaint, the complaint’s exhibits, and the matters properly subject to judicial notice, we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Where, as here, a demurrer is based upon an affirmative defense, such as government immunity, the demurrer “will be sustained only where the face of the complaint discloses that the action is necessarily

barred by the defense. [Citation.]” (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183 (*Casterson*).

We will begin our evaluation with plaintiffs’ contention that the trial court erred in ruling their claims against DPR are barred by the government immunity provided by section 831.7 because, for reasons that we will explain, we find that issue to be dispositive. Accordingly, we need not address the issues raised on appeal regarding whether DPR breached a duty of care or was liable for a dangerous condition of public property.

B. Section 831.7

“Under the Government Claims Act (Gov. Code, § 810 et seq.), a public entity is *not* liable ‘[e]xcept as otherwise provided by statute.’ (Gov. Code, § 815; [citation].) If the Legislature has not created a statutory basis for it, there is no government tort liability. [Citation.]” (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009.)

In the present case, plaintiffs allege in their complaint that DPR is liable under section 815.2, subdivision (a) for the negligence of DPR employees in failing to warn Ryan of the dangers of digging in the sand. Section 815.2, subdivision (a) states: “A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.”

However, “[i]f a public employee of a public entity is immune from liability, so too is the public entity unless otherwise provided by statute. (§ 815.2, subd. (b); [citation].)” (*Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1449, fn. omitted.) Section 815.2, subdivision (b) provides: “Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.” Here, the

trial court determined that plaintiffs' claims against DPR were barred by the statutory immunity provided by section 831.7.

Section 831.7, subdivision (a) states: "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity." The Legislature's intent in enacting section 831.7 was " 'to prevent the hang glider or rock climber from suing a public entity when that person injured himself [or herself] in the course of that activity.' [Citation.]" (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 157 (*Avila*).

"Hazardous recreational activity" is defined in the statute as "a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator." (§ 831.7, subd. (b).) " 'Hazardous recreational activity' is further defined by a *nonexclusive* list of activities that qualify, including such activities as diving, skiing, hang gliding, rock climbing, and body contact sports. [Citation.]" (*Avila, supra*, 38 Cal.4th at p. 154, italics added; § 831.7, subd. (b)(1)-(3).)

Section 831.7 includes several exceptions to hazardous recreational activity immunity. An exception for failure to warn is stated in section 831.7, subdivision (c)(1)(A), which provides: "Notwithstanding subdivision (a), this section does not limit liability that would otherwise exist for any of the following: [¶] (A) Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose."

The language of section 831.7, subdivision (c)(1)(A) therefore “establishes that the Legislature’s aim was to withhold immunity if the public entity failed to warn or guard against a dangerous condition or hazardous activity that was not an inherent part of the activity specified in the statute. Thus, in determining whether a public entity is entitled to statutory immunity, a plaintiff’s knowledge of any particular risks is irrelevant.” (*Perez v. City of Los Angeles* (1994) 27 Cal.App.4th 1380, 1387 (*Perez*.)

Section 831.7 also includes an exception for gross negligence: “Notwithstanding subdivision (a), this section does not limit liability that would otherwise exist for any of the following: [¶] . . . [¶] (E) An act of gross negligence by a public entity or a public employee that is the proximate cause of the injury.” (*Id.*, subd. (c)(1)(E).) “Gross negligence is defined as ‘the want of even scant care or an extreme departure from the ordinary standard of conduct.’” [Citations.]” (*Wood, supra*, 111 Cal.App.4th at p. 971.)

C. Analysis

1. Hazardous Recreational Activity

Plaintiffs argue that the government immunity provided by section 831.7 does not bar their claims against DPR because digging in the sand is not a hazardous recreational activity within the meaning of the statute and, in any event, Ryan could not reasonably assume the risk of sand collapse as an inherent part of his digging activities.

DPR responds that plaintiffs cannot avoid the immunity provided by section 831.7 because they allege in their complaint that the risk of sand collapse was a known risk of the hazardous recreational activity of digging holes in the sand. Relying on the decision in *Knight v. Kaiser Co.* (1957) 48 Cal.2d 778 (*Knight*), disapproved on another ground in *King v. Lennen* (1959) 53 Cal.2d 340, 344, DPR also asserts that the risk of sand collapse has been long recognized in the case law as an inherent and obvious risk of digging in the sand. Additionally, since the list of hazardous recreation activities set forth in section 831.7, subdivision (b)(1)-(3) is nonexclusive, DPR maintains that the omission of digging

in the sand from the list does not mean that digging in the sand is not a hazardous recreational activity.

We are not convinced by plaintiffs' argument that Ryan's activity, as alleged in the complaint, of digging large holes in the sand and connecting the holes by a tunnel "some six to seven feet below the surface" was not a hazardous recreational activity within the meaning of section 831.7. The omission of the activity of digging large holes and deep tunnels in the sand from the list of specific hazardous recreational activities set forth in section 831.7, subdivision (b)(1)-(3) is immaterial, since the California Supreme Court has stated that the list is nonexclusive. (*Avila, supra*, 38 Cal.4th at p. 154.)

Moreover, as we have noted, "[h]azardous recreational activity" is generally defined in the statute as "a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator." (§ 831.7, subd. (b).) The recreational activity of digging large holes in the sand and connecting them with a six-to-seven foot deep tunnel cannot be deemed an activity that creates a minor, trivial, or insignificant risk of injury to the participant; therefore, the activity constituted a hazardous recreational activity within the meaning of section 831.7. Our Supreme Court ruled in *Knight* that the danger of asphyxiation from sand collapse while digging holes in the sand is an inherent risk that is "obvious to everyone." (*Knight, supra*, 48 Cal.2d at p. 782.)

Therefore, absent an applicable statutory exception, under section 831.7 DPR is immune from liability for Ryan's claim of personal injury resulting from the inherent risk of sand collapse while participating in the hazardous recreational activity of digging large holes in the sand and connecting them with a deep tunnel. (§ 831.7, subd. (a).)

2. Failure to Warn Exception

Plaintiffs argue that they have sufficiently alleged exceptions to immunity under section 831.7, since they allege that DPR's park rangers were grossly negligent in failing to stop Ryan's sand digging activities or to warn him in light of their knowledge and

training regarding the danger of sand collapse. DPR disagrees, arguing that the failure to warn exception to section 831.7 immunity does not apply in this case.

Under section 831.7, subdivision (c)(1)(A), the failure to warn exception applies only where the public entity failed to warn or guard against a dangerous condition or hazardous activity that was not an inherent part of the hazardous recreational activity. (*Perez, supra*, 27 Cal.App.4th at p. 1387.) Thus, in *Perez*, the City of Los Angeles's demurrer under section 831.7 was properly sustained without leave to amend where the plaintiff alleged that he fell and was injured while swinging from a rope hung in a tree on public property. (*Id.* at pp. 1382-1383.) The appellate court determined that the City of Los Angeles had no duty to guard or warn against the tree rope swinging, since plaintiff's injury had resulted from the risk of falling that was inherent in the hazardous recreational activity of tree rope swinging. (*Id.* at pp. 1383-1384.)

Similarly, in *DeVito v. State of California* (1988) 202 Cal.App.3d 264 (*DeVito*) the appellate court ruled that the State of California's demurrer was properly sustained without leave to amend because the State was immune from liability under section 831.7 for personal injuries that resulted when the plaintiff fell while swinging from a fire hose hung from a tree. (*DeVito, supra*, 202 Cal.App.3d at pp. 266-267.) The court stated that "the complaint alleged the public entity knew of the dangerous condition of the fire hose hanging from the tree next to the slope. But the danger that a person who swings on the hose might fall down the slope is assumed by the participant as an inherent part of the activity of 'tree rope swinging.' [Citation.]" (*Id.* at p. 272, fn. omitted.) Therefore, the State had no duty to guard or warn against the known dangerous condition of the fire hose swing. (*Ibid.*)

The present case is analogous to the tree rope cases. Plaintiffs allege that DPR personnel knew that digging holes in the sand was dangerous due to the risk of sand collapse, yet they failed to warn Ryan or stop him from digging. Since, as we have previously determined, the risk of sand collapse was inherent in the hazardous

recreational activity of digging large holes and deep tunnels in the sand, Ryan assumed the risk of sand collapse when he engaged in that activity. DPR therefore had no duty to guard against the known dangerous condition or hazardous activity of digging holes and tunnels in the sand or to warn Ryan and the section § 831.7, subdivision (c)(1)(A) exception for failure to warn does not apply in this case.

3. Gross Negligence Exception

Plaintiffs contend that statutory immunity under section 831.7 does not apply because DPR's park rangers were grossly negligent, since they "exhibited an extreme departure from the ordinary standard of care" when they observed Ryan's sand-digging activity and failed to stop the activity despite their knowledge and training regarding the danger of sand collapse. DPR responds that the allegations of DPR's failure to warn are insufficient for the gross negligence exception provided by section 831.7, subdivision (c)(1)(E), since DPR cannot be held liable for failure to warn of a known danger that is inherent in the hazardous recreational activity of digging in the sand.

The gross negligence exception is stated in section 831.7, subdivision (c)(1)(E), which provides: "Notwithstanding subdivision (a), this section does not limit liability that would otherwise exist for any of the following: [¶] . . . [¶] (E) An act of gross negligence by a public entity or a public employee that is the proximate cause of the injury." "Gross negligence is defined as 'the want of even scant care or an extreme departure from the ordinary standard of conduct.'" [Citations.] (*Wood, supra*, 111 Cal.App.4th at p. 971.)

Thus, for the gross negligence exception to the hazardous recreational activity immunity provided by section 831.7 to apply, the complaint must allege "facts showing 'an extreme departure from the ordinary standard of care.' [Citation.]" (*DeVito, supra*, 202 Cal.App.3d at p. 272.) In *DeVito*, the appellate court determined that the complaint failed to invoke the section 831.7, subdivision (c)(1)(E) gross negligence exception where it was alleged that the State had negligently failed to guard or warn against the

known dangerous condition of the fire hose hung from a tree over a steep slope that had caused frequent serious injuries. (*DeVito, supra*, 202 Cal.App.3d at pp. 267, 272.)

We reach a similar result in the present case, since the complaint fails to state facts sufficient to show that DPR demonstrated either the want of scant care or an extreme departure from the ordinary standard of conduct. As we have discussed, DPR had no duty to guard against the known dangerous condition or hazardous activity of digging holes and tunnels in the sand or to warn Ryan, since the risk of sand collapse was an inherent risk of that activity. (See *Perez, supra*, 27 Cal.App.4th at p. 1387.) Consequently, the allegations in the complaint are insufficient to show that DPR was grossly negligent, and the gross negligence exception (§ 831.7, subd. (c)(1)(E)) to the hazardous recreational activity immunity provided by section 831.7, subdivision (a) does not apply.

4. Negligent Infliction of Emotional Distress

Plaintiffs contend that section 831.7 does not bar Jacob's bystander claim for negligent infliction of emotional distress because DPR is only immunized if Jacob knew or should have known that Ryan's activity of digging in the sand created a substantial risk that Jacob would suffer emotional injury. DPR responds that Jacob's claim for negligent infliction of emotional distress is barred by section 831.7 because Jacob's claim flows from witnessing Ryan's hazardous recreational activity.

The California Supreme Court has instructed as follows regarding a bystander's claim for negligent infliction of emotional distress: "[A] plaintiff may recover damages for emotional distress caused by observing *the negligently inflicted injury* of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is

not an abnormal response to the circumstances.” (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668, fns. omitted, italics added (*Thing*).

Thus, a bystander’s claim for negligent infliction of emotional distress is dependent upon observing injury to a close relative that was negligently inflicted by the defendant. (See *Thing, supra*, 48 Cal.3d at pp. 667-668.) Since DPR is immunized under section 831.7 from liability for Ryan’s negligence claim, as a matter of law DPR also has no liability for Jacob’s derivative claim of negligent infliction of emotional distress based on witnessing injuries to Ryan that were allegedly caused by DPR’s negligence.

D. Request for Leave to Amend

For the above reasons, we have determined that DPR’s demurrer to the amended complaint was properly sustained because the face of the complaint disclosed that the action is necessarily barred by the affirmative defense of government immunity under section 831.7. (See *Casterson, supra*, 101 Cal.App.4th at p. 183.) We next consider whether the trial court properly denied leave to further amend the complaint.

The rules governing leave to amend the complaint are well established. “If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando, supra*, 31 Cal.4th at p. 1081.)

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he [or she] can amend his [or her] complaint and how that amendment will change the legal effect of his [or her] pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set

forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation].” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44.)

In the present case, plaintiffs state in their brief that “if this Court finds that Plaintiffs’ once-amended Complaint contains a curable defect, the judgment should likewise be reversed with directions to allow plaintiffs to cure the defect by amendment.” Plaintiffs have not offered either a proposed second amended complaint or specific factual allegations showing how the complaint may be further amended to state a cause of action against DPR that is not barred by the statutory immunity provided by section 831.7, subdivision (a). Accordingly, plaintiffs have not met their burden on appeal to show that their complaint may be further amended to cure this defect. (See *Schifando, supra*, 31 Cal.4th at p. 1081.) We therefore determine that the trial court did not abuse its discretion in denying leave to amend.

V. DISPOSITION

The judgment of dismissal is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MÁRQUEZ, J.