STATE OF MICHIGAN

COURT OF APPEALS

JUDITH BISS, Individually and as Personal Representative of the Estate of DENNIS A. RUMPTZ, deceased,

Plaintiff-Appellant,

v

CAVALIER PROPERTIES, INC., d/b/a SECURED SELF STORAGE,

Defendant-Appellee.

UNPUBLISHED
June 14, 1996

No. 176997
LC No. 93-325668-NZ

Before: Jansen, P.J., and McDonald and D.C. Kolenda,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a June 16, 1994, order of the Wayne Circuit Court granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff Judith Biss and her deceased husband, Dennis Rumptz, collected, traded, and sold sports cards and sports memorabilia. Plaintiffs kept their collection with defendant's Secured Self Storage facility, located in Dearborn Heights. On September 9, 1990, plaintiffs contracted with defendant for a secured storage unit by signing a lease. The lease included a limit on liability by including the following:

> Lessor shall not be liable for loss or damage to the contents of renter's unit, caused by any of the following whether or not the loss or damage is due to dishonest acts or negligence of lessor's employees or customers . . .

On October 5, 1992, plaintiff went to defendant's office to pay the monthly rent. She was informed by defendant's resident manager that he believed that the unit had been vacant since mid-August of 1992 because there was no lock on the storage unit. Plaintiff then inspected her storage unit

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* Circuit judge, sitting on the Court of Appeals by assignment.

and discovered that the sports collection was missing. The sports collection had a value in excess of $50,000. Although plaintiff had paid rent for August and September of 1992, she had never been informed by defendant that there was no lock on the storage unit since August.

On September 10, 1993, plaintiff filed her complaint in the Wayne Circuit Court alleging that defendant's gross negligence and its breach of the bailment agreement caused plaintiff to lose her property. After discovery was complete, defendant filed a motion for summary disposition, asserting that plaintiff had failed to offer any proof to support her claim that the property was lost as a result of defendant's gross negligence or criminal activity. The trial court agreed with defendant's argument, finding that a jury could not conclude that defendant's conduct amounted to gross negligence even in accepting the facts as stated by plaintiff. The trial court, therefore, granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

We review the trial court's decision on a motion for summary disposition de novo. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A motion under MCR 2.116(C)(10) tests the factual basis of the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Radtke, supra*, p 374. The court must consider pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to it, and all reasonable inferences drawn therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

We first address plaintiff's claim that public policy prohibits the contractual release of defendant's liability for plaintiff's damages. It is well-settled that it is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence. *Skotak v Vic Tanny, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994); *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993); *Paterek v 6600 Ltd*, 186 Mich App 445, 448; 465 NW2d 342 (1990). The validity of a contract of release turns on the intent of the parties. To be valid, a release must be fairly and knowingly made. *Skotak, supra*, p 618. A release is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Id.*

In this case, plaintiff has not alleged or shown that the release was invalid. There is no allegation that plaintiffs, when they contracted with defendant, were dazed, in shock, or under the influence of drugs. Further, there is no allegation that the nature of the lease was misrepresented, nor is there any allegation of fraudulent or other overreaching conduct. Finally, although plaintiff claims that the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.*, abrogates the release in the case, plaintiff did not bring a claim under the MCPA. Accordingly, we conclude that public policy does not invalidate the release contained in the lease in this case.

Although a release provision may absolve a party from liability for ordinary negligence, a release cannot absolve a party for grossly negligent conduct because it violates the public policy of this state. *Universal Gym Equipment, Inc v Vic Tanny Intern'l, Inc,* 207 Mich App 364, 367; 526 NW2d 511 (1994), vacated in part on other grounds on rehearing 209 Mich App 511 (1995). Plaintiff, therefore, brought a claim alleging gross negligence. She claims that the trial court erred in failing to apply the correct definition of gross negligence to the facts of this case.

After the trial court's ruling, the Supreme Court's decision in *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994) was released. In *Jennings*, the Supreme Court changed the common-law definition of gross negligence. Gross negligence is now defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.,* p 136. This Court has recently retroactively applied *Jennings* where it was decided after a trial court's ruling. *Home Ins Co v Detroit Fire Extinguisher Co, Inc,* 212 Mich App 522, 529; 538 NW2d 424 (1995). Therefore, we will simply apply to definition of gross negligence as set forth in *Jennings* to the facts of this case.

Taken in a light most favorable to plaintiff, the evidence shows that defendant advertised that it had computerized control systems and a security gate and fence. Plaintiff has presented evidence, by an affidavit of Tony Bush, that he personally observed the security gates to be open before October 5, 1992, yet there were no security guards or customers in the area. Plaintiff has also produced the deposition testimony of one of defendant's employees, who stated that the gate had been left open for as long as one month, although this was on an unspecified occasion. Plaintiff has also offered evidence (defendant's business records) that the security gate had been repaired several times before plaintiff's loss, including as recently as four months before plaintiff realized that her property was missing. There is also evidence that plaintiff was issued a lock for the door and two keys for the lock. Apparently, these were the only keys to the lock. Also, although it is clear that defendant knew that the lock was missing as early as mid-August of 1992, plaintiff was never informed of this fact.

We must conclude, albeit reluctantly, that this evidence simply does not rise to a level of gross negligence. Although there is evidence that the security gates had been left open on past occasions, there is no evidence that they actually were open at the time that plaintiff's property was taken. While defendant's conduct may well be negligent, we cannot conclude that it rises to a level of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. In fact, the repairs done to the gates suggest that defendant attempted to correct its problem with the security gates. Accordingly, the trial court did not err in concluding that a jury could not find that defendant's conduct constituted gross negligence even in accepting the facts as alleged by plaintiff.

The trial court did not err in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Kathleen Jansen
/s/ Gary R. McDonald
/s/ Dennis C. Kolenda