STATE OF MICHIGAN

COURT OF APPEALS

DANIEL GAITHER and TRACY GAITHER,

Plaintiffs–Appellants,

v

FORD EMPLOYEE FITNESS CENTER and ABC CORPORATION,

Defendants–Appellees.

UNPUBLISHED
October 18, 1996

No. 188120
LC No. 94-420712-NH

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (C)(10) in this premises liability action. We affirm.

Plaintiffs alleged that plaintiff, Daniel Gaither, a member of defendant, Ford Employee Fitness Center's health club, fell to the ground, hit his head and suffered permanent injuries while using defendant's facility. Plaintiffs sued defendant for its alleged ordinary and gross negligence in failing to maintain its facility in a reasonably safe condition. Plaintiffs further alleged that defendant's conduct amounted to wanton and wilful misconduct in that defendant failed to remove a four inch ledge or have an anti-slip device in the shower area where plaintiff, Daniel Gaither, fell.

The trial court granted defendant's motion for summary disposition, finding that the ordinary negligence claim was barred by a valid waiver of liability clause contained in the membership contract entered into by plaintiff, Daniel Gaither, and defendant. The court further found that plaintiffs had failed to establish a genuine issue of material fact with regard to their allegations of gross negligence and wilful and wanton misconduct.

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

On appeal, plaintiffs argue that although the waiver of liability clause contained in the original membership application applied to the first year of membership at defendant's facility, it did not apply to the second year during which plaintiff, Daniel Gaither, was injured. That is so, plaintiffs argue, because plaintiff, Daniel Gaither, never signed a new waiver nor was there sufficient consideration given to make the original waiver binding on him. Plaintiffs further contend that even if the waiver clause applies to the period during which plaintiff, Daniel Gaither, fell, the waiver does not shield defendant from its own acts of ordinary negligence.

Reviewing the trial court's grant of summary disposition de novo, *Stehlik v Johnson*, 206 Mich App 83, 85; 520 NW2d 633 (1994), we conclude that plaintiffs' claim for ordinary negligence was effectively barred by the challenged release clause. The record established that it was defendant's policy to require former members to review their original application forms, make appropriate changes to the forms and pay the applicable annual dues to renew their memberships. The record also revealed that when plaintiff, Daniel Gaither, applied for his second one year membership at defendant's facility, he paid the $130 membership fee after having reviewed and made changes to his original application form. Therefore, while plaintiff, Daniel Gaither, incurred legal detriment when he paid the $130 and gave up the right to sue defendant for its ordinary negligence, defendant also incurred bargained for legal detriment -- allowing plaintiff, Daniel Gaither, to use its facilities. *Skotak v Vic Tanny, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994); *Pateraek v 6600 Limited*, 186 Mich App 445, 451; 465 NW2d 342 (1990). Accordingly, summary disposition pursuant to MCR 2.116(C)(7) was appropriate.

Plaintiffs next contend that the trial court erred when it dismissed their claim for gross negligence and wilful and wanton misconduct because the proofs presented by the parties clearly supported their claim under both theories.

"A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the legal sufficiency of a claim to determine whether the opposing party's pleadings allege a prima facie case." *Wortelboer v Benzie County*, 212 Mich App 208, 217; 537 NW2d 603 (1995). When reviewing such a motion, this Court must examine the record, give the benefit of all reasonable doubts and inferences to the nonmovant and determine whether a record could be developed on which reasonable minds could differ. *Nelson v American Sterilizer Co*, 212 Mich App 589, 594; 538 NW2d 80 (1995).

In *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), our Supreme Court rejected the common law definition of gross negligence in a case involving the Emergency Medical Services Act (EMSA), MCL 333.20901 *et seq*.; MSA 14.15(20901) *et seq*., where the Legislature had not defined that term. In order to arrive at a definition of gross negligence to apply to the EMSA, the Court looked to the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*., where the Legislature defined the term as:

> [C]onduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).]

Because the Court found that the GTLA and EMSA had the same legislative purpose -- the former to shield "government agents from liability for ordinary negligence" and the latter "to immunize EMS personnel" from the same -- and both acts permitted liability for gross negligence, the Court concluded that the same gross negligence standard should be used for the EMSA. *Jennings, supra*, 446 Mich 136-137.

Although the *Jennings* definition of gross negligence has not been applied in a non-GTLA or non-EMSA case, the Court did not appear to reject the concept of common law gross negligence. Therefore, the *Jennings* definition should now be used by the courts to define common law gross negligence. Accordingly, because our review of the record does not support a finding that defendant's conduct amounted to gross negligence, summary disposition in favor of defendant as to the gross negligence claim was proper.

In addition, because we find that plaintiff's claim made out at best a claim of ordinary negligence, summary disposition in favor of defendant with regard to the wanton and wilful misconduct claim was also proper. *Bouhelheim v Bic Corp*, 211 Mich App 175, 185; 535 NW2d 574 (1995); *Ellsworth v Highland Lakes Development Assoc*, 198 Mich App 55, 61-63; 438 NW2d 5 (1993).

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski