

STATE OF MICHIGAN
COURT OF APPEALS

OHIO CASUALTY INSURANCE COMPANY,
as subrogee of BELLEVILLE NIGHTS, INC., and
AKRAM G. NAMOU,

UNPUBLISHED
March 8, 2005

Plaintiff-Appellant,

v

No. 247817
Wayne Circuit Court
LC No. 02-219375-NZ

OAKLAND PLUMBING COMPANY,

Defendant-Appellee,

and

OAKLAND CONSTRUCTION COMPANY,

Defendant.

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendants¹ under MCR 2.116(C)(10). We affirm.

Plaintiff issued a property insurance policy to Belleville Nights, Inc., and Akram G. Namou (the owners), providing insurance for loss or damage to two hotels, a Best Western and a Holiday Inn, which were under construction. Defendant was retained as a subcontractor to perform plumbing installations in both hotels. On June 7, 1999, a fire destroyed the Holiday Inn and damaged the Best Western. Plaintiff alleged that the fire started because one of defendant's employees used a propane torch to solder pipe connections in the hotels in close proximity to

¹ Although plaintiff's complaint named both Oakland Plumbing Company and Oakland Construction Company as defendants, Oakland Plumbing Company acknowledged below that it was the sole plumbing subcontractor on the pertinent construction project, and defendant Oakland Construction Company is not a party to this appeal. As used in this opinion, the singular term "defendant" is used to refer to Oakland Plumbing Company.

wood beams and framing, using a process called “brazing” or “pipe sweating,” and failed to follow safety precautions, in violation of applicable fire codes and Occupational Safety and Health Administration (OSHA) regulations. Plaintiff reimbursed the owners for their losses under its insurance policy and was then subrogated to the rights of its insured parties. Plaintiff brought this action against defendant, alleging claims of negligence, “gross negligence and/or wilful and wanton misconduct,” and breach of a warranty of workmanlike performance. Among defendant’s affirmative defenses in answer to plaintiff’s complaint was that a waiver of subrogation clause in the construction contract barred plaintiff’s claims.

Plaintiff’s insurance policy contained a subrogation clause, indicating that if it paid for a loss it could require the owners to assign their right of recovery against others to plaintiff. The clause also specifically stated that the owners could, in writing, waive their right to recover from others before a loss occurred. The contract between the owners and the general contractor included a clause requiring the owners to purchase and maintain property insurance on a replacement cost basis. A second clause provided:

11.3.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractor agents and employees, each of the other, and (2) the Architects, Architect’s consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. . . .^[2]

Defendant moved for summary disposition under MCR 2.116(C)(10), relying on the waiver of subrogation clause. The trial court granted defendant’s motion, noting that the waiver provision was not limited to accidental fires but applied “whenever there is property damage caused by fire.” The court concluded, “The clause is not negated by pleading code, regulation violations, a contract breach, or gross negligence.” The court also denied plaintiff’s motion for reconsideration.

This Court reviews a motion for summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff’s claims. *Id.* at 337. In ruling on the motion, a court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

² This clause was adopted from the 1987 edition of the Standard Form of Agreement between Owner and Contractor, produced by the American Institute of Architects (AIA).

Plaintiff's argument that the trial court erred in granting summary disposition is threefold. It argues (1) that a party may not use a contract to shield itself from liability for gross negligence or wilful or wanton misconduct; (2) that a party may not use a contractual provision to shield itself from liability for violations of public safety regulations and codes; and (3) that, as a matter of public policy, the above rules prohibiting the contractual avoidance of liability for a party's own gross negligence should apply irrespective of the nature of the damages.

This Court previously considered a substantially similar waiver of subrogation clause in *Zurich Ins Co v Midwest Management, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 1996 (Docket Nos. 185055, 185056), a case cited by plaintiff. In *Zurich*, this Court stated that the waiver clause "preclude[d] the owner from suing the contractor or its subcontractors if insurance covers the loss" and further provided that the owner was responsible for obtaining insurance to cover the work. *Id.*, slip op at 3. Citing *Tokio Marine & Fire Ins Co v Employers Ins of Wausau*, 786 F2d 101, 104-105 (CA 2, 1986), the *Zurich* Court stated, "The purpose of the waiver clause was to insure that insurance covered losses to the work so that the construction project could continue unimpeded, without the parties to the contract being involved in litigation." *Zurich, supra*, slip op at 3. The Court stated that the clause was "not a straight exculpatory clause. . . . Instead, the clause mutually absolves both parties from liability where insurance covers the loss. The clause here was not formulated to protect one party from its own negligence. . . . Rather, it was designed for the benefit of both parties." *Id.*, slip op at 4.

It is clear that the clause in the instant case would prohibit plaintiff's claim for ordinary negligence, in accordance with *Zurich*, because published Michigan case law establishes that a party may contract against liability for harm caused by ordinary negligence. See, e.g., *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002); *Universal Gym Equipment Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 367; 526 NW2d 5 (1994), vacated in part on other grounds on rehearing, 209 Mich App 511; 531 NW2d 719 (1995); and *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994), modified on other grounds in *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). However, a party may not by contract protect itself from liability for gross negligence or wilful and wanton misconduct. *Universal Gym, supra* at 367; *Lamp, supra* at 594.

Defendants argued below that the rule against contracting away liability for one's own gross negligence applied only to personal injury cases. We need not decide this issue in this case, however, because we conclude that plaintiff's allegations about defendant's conduct fail to rise to the level of gross negligence or wilful and wanton misconduct. Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994), quoting MCL 691.1407; see also *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). To establish a claim of wilful and wanton misconduct, a plaintiff must prove that the defendant

(1) knew of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) had the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) failed to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Lamp, supra* at 595.]

Plaintiff's complaint contains the following factual allegations regarding defendant's alleged conduct:

7. Authorized employees of the defendants utilized propane torches to solder pipe connections, in a process known as brazing, or "pipe sweating" during the course of the construction of the two hotels.

8. In the course of its work, employees of the defendants used torches in close proximity to wood beams and framing in the building.

9. The use of such a torch created significant heat, sparks and embers which required simple safety precautions to be followed, including certain precautions required by OSHA regulations and applicable fire codes.

10. In violation of applicable fire codes and OSHA regulations, employees of the defendants failed to follow any safety precautions when using the torch on June 7, 1999, such conduct resulted in the ignition of combustible materials within the building causing a fire that completely destroyed the building. . . .

In the count labeled "gross negligence/willful and wanton misconduct," plaintiff's complaint alleges:

18. The defendants had a duty to exercise reasonable and ordinary care in the performance of the construction activities at the property of Belleville Nights, Inc. so as to prevent harm to persons and property at that location.

19. The defendants had a duty to perform the construction activities at the property of Belleville Nights, Inc. in accordance with all applicable statutes, regulations and codes so as to prevent harm to persons and property at that location.

20. The defendants had knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to persons and property and had the ability to avoid harm by ordinary care and diligence in the use of the means at hand.

21. In violation of applicable fire codes and other OSHA regulations, the defendants failed to take necessary precautions and utilize ordinary care, when, to the ordinary mind it must have been apparent that the result was likely to be a disastrous fire as actually occurred.

22. The fire which occurred on June 7, 1999 and the resulting destruction of the building owned by Belleville Nights, Inc. was a direct and proximate result of the gross negligence and willful and wanton misconduct of the defendants acting through their authorized agents, servants and employees, acting with the scope of their agency and employment.

23. As the direct and proximate result of the gross negligence and willful and wanton misconduct of the defendants, the plaintiff and plaintiff's insureds have been caused to suffer losses and damages as alleged in the preceding paragraphs.

In response to defendant's motion for summary disposition, plaintiff submitted investigative reports from the Michigan State Police and the Van Buren Department of Public Safety, as well as reports from Harris Investigations and Sadler & Associates. The reports single out one of defendant's plumbers, Edward Stanley, who was using a propane torch on the day the fire occurred. Although Stanley acknowledged using a torch that day, he stated that he was not in any tight situations requiring him to be close to wood. Both the report by the Michigan State Police and the Van Buren Department of Public Safety indicate that the exact cause of the fire was "undetermined." The Harris Investigations report mentions that the investigator interviewed Stanley, who indicated that it was common in the plumbing industry for adjacent wood to become charred during the use of a propane torch, that he would usually rub resin in the charred area, and that, on the day of the fire, it was not even necessary to rub resin because there was no noticeably charred surface. The Harris Investigations report writer stated that the "most probable cause" of the fire was an "inadvertent human act involving the admitted usage of [a] handheld propane torch."

Plaintiff argued below that Stanley's methods violated OSHA regulations, the Belleville City Fire Prevention Code, and industry standards. Other alleged regulations and code violations included the lack of fire extinguishers on the construction premises and the alleged fact that no fire watch was maintained for one-half hour after Stanley's work was completed.

Accepting all plaintiff's allegations and documentary evidence as true, plaintiff has established at best a rebuttable presumption of negligence on the part of defendant and its employee, Edward Stanley. Stanley's conduct cannot be characterized as rising to a level "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings, supra* at 136, quoting MCL 691.1407. Although plaintiff alleges that Stanley's conduct violated government regulations, safety codes, and industry standards, the presumption that arises from violation of a statute is ordinary negligence, not gross negligence. *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 592; 581 NW2d 272 (1998). It follows that violations of OSHA regulations, local safety codes, and industry standards would also raise, at most, a presumption of ordinary negligence. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden, supra* at 122-123. We find that plaintiff has failed to create a jury question with regard to the issue of gross negligence or wilful and wanton misconduct. The waiver of subrogation clause bars plaintiff's claim for ordinary negligence.

Plaintiff also raises a public policy argument, contending that in Michigan a party may not benefit from the enforcement of a contractual provision if the party's conduct violates statutes and regulations designed to protect human life and public safety. Plaintiff maintains that defendant violated numerous safety regulations, causing "a catastrophic fire" and "endangering the lives of many" yet seeks "to avoid liability by tendering a contractual provision as a defense." The primary case cited by plaintiff in support of this argument is *Calef v West*, 252 Mich App 443, 452; 652 NW2d 496 (2002), which involved the interpretation of an exculpatory clause in a residential lease agreement in the context of a personal injury lawsuit brought by a

tenant. This Court found that the clause violated the Truth in Renting Act, MCL 554.631 *et seq.*, particularly MCL 554.633, which prohibits any provision in a rental agreement that “[e]xculpates the lessor from liability for the lessor’s failure to perform, or negligent performance of, a duty imposed by law.” *Id.* at 452. Plainly, the *Calef* decision, invalidating a one-sided lease provision that is specifically prohibited by statute, does not serve as precedent for invalidating the mutual waiver of liability provision brought in a contract between two commercial entities that is at issue in the present case. Public policy developed in the interest of public safety, particularly policy aimed to protect consumers from one-sided exculpatory contract clauses, does not prohibit the mutual waiver of liability provision at issue, which waives liability only for property damage “caused by fire or other perils” and only “to the extent covered by property insurance” obtained for purposes of the construction project.

Next, plaintiff argues that summary disposition was premature because discovery was not complete. Plaintiff argues that the trial court’s scheduling order set January 16, 2003, as the date for completion of discovery, but defendant moved for summary disposition on December 12, 2002, without completing plaintiff’s interrogatories or participating in depositions.³ Plaintiff mentions that defendant further declined to enter into a stipulation of facts that plaintiff proposed, and plaintiff argues that defendant’s motion was premature because plaintiff was required to submit evidentiary support in opposition to the motion under MCR 2.116 and could not adequately support its response without discovery.⁴

“Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). However, summary disposition is not premature “if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party’s position.” *Id.* A party opposing summary disposition must produce evidence showing a material issue of fact left for trial. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). This Court reviews a trial court’s decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

Plaintiff did not indicate to the trial court and does not indicate on appeal what evidence further discovery would have a reasonable chance of uncovering, stating only that it was required to provide proof of gross negligence, wilful and wanton misconduct, and violations of life safety codes. The allegations in plaintiff’s complaint, together with the information presented in the police, public safety, and insurance investigation reports, do not allege or support the possible existence of conduct that rises to a level of gross negligence or wilful and wanton misconduct. At most, plaintiff’s allegations amount to allegations of ordinary negligence on the part of defendant’s employee. Therefore, the trial court did not abuse its discretion in granting summary disposition before the scheduled date for the end of discovery.

³ We note that oral argument on defendant’s motion was conducted in February 2003 and plaintiff filed its response to the motion on January 31, 2003; both activities were subsequent to the discovery cutoff date.

⁴ Plaintiff does not allege that it sought to compel the discovery it claimed was necessary.

Plaintiff also contends that summary disposition should have been brought under MCR 2.116(C)(7). Summary disposition is proper under MCR 2.116(C)(7) if there is a valid release of liability between the parties. MCR 2.116(C)(7); *Xu, supra* at 266. A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Xu, supra* at 266-267. If “a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled.” *Blair v Checker Cab Co*, 219 Mich App 667, 671; 558 NW2d 439 (1996). Further, if the trial court grants summary disposition under one subrule when it was actually appropriate under another, “the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct [subrule].” *Detroit News, Inc v Policemen & Firemen Retirement System of the City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002) (internal citation and quotation omitted).

It appears that the trial court’s ruling that the waiver of liability clause was “not negated by pleading code, regulation violations, a contract breach, or gross negligence” was based on MCR 2.116(C)(7). However, plaintiff does not argue that it was misled or prejudiced by the trial court’s apparent reliance on this subrule. Moreover, the confusion over the correct subrule is not a fatal defect even though this Court reviews the grant of summary disposition under MCR 2.116(C)(10), considering the pleadings and documentary evidence and finding no genuine issue of fact regarding gross negligence or wilful and wanton misconduct. *Detroit News, Inc, supra* at 66.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello