

STATE OF MICHIGAN
COURT OF APPEALS

DAVID WILCOX, ELAINE WILCOX, STEVEN
WRUBEL, and ALL OTHERS SIMILARLY
SITUATED, a certified class,

Plaintiffs,

v

DORE & ASSOCIATES CONTRACTING, INC.,

Defendant/Cross-Plaintiff-Appellant,

and

DORE'S PINCONNING CHEESE, INC., a/k/a
PAUL'S PINCONNING CHEESE, INC.,
ARTHUR DORE, PINCONNING CHEESE, INC.,
REAL PINCONNING CHEESE, LC,
EARTHESAFE ENTERPRISES, INC., ALAN
MIKELL, REAL PINCONNING CHEESE, INC.,
a/k/a/ ONE HUNDRED TWENTY TWO WATER
STREET, INC., INNOQUEST, INC., I Q
MARKETING & MANAGEMENT LLC,
CHRISTOPHER GRISEL, PAUL WADZINSKI,
and GLOBAL UNION CASUALTY, INC.,

Defendants,

and

WILLIAM E. MCCARTHY,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED

June 5, 2003

No. 230313

Bay Circuit Court

LC No. 96-003507-CZ

DAVID WILCOX, ELAINE WILCOX, STEVEN
WRUBEL, and ALL OTHERS SIMILARLY
SITUATED, a certified class,

Plaintiffs-Appellants,

v

No. 230403
Bay Circuit Court
LC No. 96-003507-CZ

DORE'S PINCONNING CHEESE, INC., a/k/a
PAUL'S PINCONNING CHEESE, INC., DORE
& ASSOCIATES CONTRACTING, INC.,
ARTHUR DORE, PINCONNING CHEESE, INC.,
REAL PINCONNING CHEESE, LC,
EARTHESAFE ENTERPRISES, INC., ALAN
MIKELL, REAL PINCONNING CHEESE, INC.,
a/k/a/ ONE HUNDRED TWENTY TWO WATER
STREET, INC., INNOQUEST, INC., I Q
MARKETING & MANAGEMENT LLC,
CHRISTOPHER GRISEL, PAUL WADZINSKI,
and GLOBAL UNION CASUALTY, INC.,

Defendants,

and

WILLIAM E. MCCARTHY,

Defendant-Appellee.

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Dore & Associates Contracting, Inc. (Dore) appeals the trial court's April 13, 2000 orders that granted summary disposition to defendant William McCarthy. We affirm.

This complicated factual and procedural case arises out of Dore's promise, as surety, to pay milk farmers for the milk delivered to Pinconning Cheese Inc.'s cheese plant. The milk farmers filed a class action suit against Dore as surety and against McCarthy for alleged gross negligence in his licensing and oversight of the cheese plant as Director of the Dairy Products Division, the Michigan Department of Agriculture (MDA). In October 1996, the Attorney General filed a claim against Dore on behalf of the milk farmers under a provision of the MMA and the cases were consolidated. Thereafter, Dore filed a cross-claim of gross negligence against McCarthy.

The trial court ultimately granted summary disposition to the milk farmers on their claims against Dore, but granted summary disposition to McCarthy on the milk farmers' gross negligence claim. The trial court also granted summary disposition to McCarthy on Dore's gross negligence claim. Dore and the milk farmers appealed the orders and the appeals were consolidated by this Court. While the appeal was pending, the milk farmers settled with Dore and assigned to Dore any claims they had against McCarthy.

On appeal, Dore asserts two essential claims: The first claim we address is the milk farmers' claim against McCarthy for gross negligence and the second claim is Dore's cross-claim against McCarthy for gross negligence. In its assigned claim, Dore contends that the trial court erred by ruling that the existence of a surety precludes a finding of gross negligence by McCarthy towards the milk farmers. We reject this argument because, before the settlement between the milk farmers and Dore and before the milk farmers assigned their claims against McCarthy to Dore, the milk farmers explicitly waived this claim. Indeed, the milk farmers agreed that, as long as a surety was in place, McCarthy should not be found grossly negligent. Clearly, a party is not entitled to relief based on an issue that the party expressly waived. *Smith v Calvary Christian Church*, 462 Mich 679, 685; 614 NW2d 590 (2000). Further, an assignee has no greater rights than the assignor possessed. *Professional Rehabilitation Associates v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Dore, as the assignee of the milk farmers' claims, cannot raise an issue that the milk farmers clearly waived before the assignment. We, therefore, decline to further address this issue.¹

Regarding Dore's cross-claim against McCarthy, the trial court was also correct in ruling that McCarthy was not grossly negligent towards Dore. In connection with Dore's allegations directly related to its status as surety, the trial court correctly held that Dore is statutorily liable as surety under the Milk Manufacturing Act (MMA), MCL 288.101 *et seq.*² However, the trial

¹ To the extent Dore argues that the trial court not have *sua sponte* decided the milk farmers' claim against McCarthy, we find that the trial court's review and disposition was correct under MCR 2.116(I)(2).

² Throughout the relevant history of this cheese plant, Dore, acting through its in-house counsel, assured McCarthy and the MDA that Dore was willing and had the financial ability to pay the milk farmers for all milk delivered to the cheese plant. Indeed, Dore submitted an audited financial statement for the fiscal year 1992, along with a Declaration of Liability which stated that "Dore agrees to and freely assumes any and all financial obligations incurred by its subsidiary, whether real or implied . . ." We agree with the trial court that the record clearly shows that Dore repeatedly and expressly assumed responsibility as surety and was liable as surety under the MMA. We also agree with the following observation by the trial court regarding Dore's liability as surety:

The consequences to plaintiffs of Dore's position are so outrageous that equitable estoppel would intervene to compel liability where it might not otherwise apply even if Dore were right in its argument involving the Declaration of Liability. Here is a company that put up security so that the Cheese Plant could operate so that it could collect on the non-recourse note it had taken to cover payment of it on the sale of the Cheese Plant. All through the period Dore now claims it is not

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court also ruled that there is no genuine issue of material fact that McCarthy was not grossly negligent in performing his duties.³ We agree.

Governmental employees are immune from tort liability for injuries they cause during the course of their employment if their “conduct does not amount to gross negligence, that is the proximate cause of the injury or damage.” MCL 691.1407(2)(c). Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” *Id.* Furthermore, evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Our Supreme Court noted the following description of reckless and wanton conduct in *Dedes v Asch*, 446 Mich 99, 110-111; 521 NW2d 488 (1994), overruled on other grounds *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000):

“One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong.” [Quoting *Gibbard v Curson*, 225 Mich 311, 321; 196 NW 398 (1923), quoting *Atchison, T & SFR Co v Baker*, 79 Kan 183, 189-190; 98 P 804 (1908).]

Our review of the record, including the trial court’s substantial and well-supported findings, leads us to conclude that McCarthy was not grossly negligent under MCL 691.1407(2)(c). Dore’s allegations and the record evidence regarding McCarthy’s conduct simply do not rise to the level of “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c). Accordingly, we affirm the trial court’s order of dismissal in favor of McCarthy.

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liable as a surety, it was collecting note payments from the Cheese Plant which was in full operation.

³ The trial court stated that it granted defendant’s motion for summary disposition under MCR 2.116(C)(7) and (C)(10). “This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). “MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity.” *Id.* In considering a motion under MCR 2.116(C)(7), the court considers affidavits, depositions or other documentary evidence submitted by the party. *Id.* at 119. “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Id.* As the *Maiden* Court further explained:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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. [*Id.* at 120.]

Alternatively, we also affirm the trial court's dismissal of Dore's claim under *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). Under *Robinson* and the plain language of MCL 691.1407(2)(c), the gross negligence must be *the* proximate cause of the injury. *Robinson, supra* at 462. In other words, to be the proximate cause of an injury, the gross negligence must be "the one most immediate, efficient, and direct cause preceding an injury . . ." *Id.* at 446. Were we to conclude that McCarthy's conduct was grossly negligent (and we do not), Dore's claim must fail because McCarthy's alleged conduct was not and could not have been the most immediate, efficient, and direct cause of the injury or damage to Dore.⁴ Dore's continuing conduct after the sale and the successor corporation's failure to pay the milk farmers clearly mandate the conclusion, under *Robinson*, that McCarthy was not "the" proximate cause of the milk farmers' or Dore's injuries.

For all the foregoing reasons, we hold that the trial court correctly granted summary disposition to McCarthy.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens

⁴ We also reject Dore's argument that the trial court erred in finding that it was a surety for the cheese plant. While Dore argues that the Declaration of Liability submitted to the MDA stated that it applied only to the 1992/1993 fiscal year, as the trial court stated in reference to the letter from Dore's attorney, Dore explicitly agreed to remain surety "as long as necessary to provide security to the Cheese Plant." Moreover, in *Blekkenk v Allstate Ins Co*, 152 Mich App 65, 78; 393 NW2d 883 (1986) this Court stated:

It is the established law in this State that surety contracts, entered into in an attempt to comply with statutory requirements, are read in the light of such statutory requirements and the terms of such contracts are construed to comply with the statutory requirements. The statute is read into the contract.

Thus, Dore's Declaration of Liability held Dore to the obligations under the terms of the MMA. Under MCL 288.103j(10) of the MMA, "A licensee may request a change in its security arrangement at any time if all requirements for the new security arrangement have been met and all producers doing business with the licensee have been duly notified." MCL 288.103j (1993). It is undisputed that Dore did not notify the producers doing business with Pinconning Cheese, Inc. that Dore's security to the plant had been withdrawn. Therefore, the trial court correctly ruled that Dore had not withdrawn from its security agreement for Pinconning Cheese, Inc.