

STATE OF MICHIGAN  
COURT OF APPEALS

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LAUREL WOODS APARTMENTS,

Plaintiff-Appellant,

v

NAJAH ROUMAYAH and REBECCA  
ROUMAYAH,

Defendants-Appellees.

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FOR PUBLICATION

March 8, 2007

9:10 a.m.

No. 269506

Oakland Circuit Court

LC No. 05-069007-CZ

Official Reported Version

Before: Wilder, P.J., and Kelly and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent from the majority's conclusions that defendants were contractually bound to plaintiff in such a manner as to nullify this Court's holding in *New Hampshire Ins Group v Labombard*, 155 Mich App 369; 399 NW2d 527 (1986). Additionally, I dissent because I disagree with the majority's failure to apply the provisions of MCL 600.2956 to this case.

The trial court reached the right conclusion concerning defendants' contractual liability by its reliance on this Court's decision in *Labombard*. In *Labombard*, the plaintiff insurance company, as subrogee of the landlord, brought suit against the defendant tenant for the damages incurred after the tenant's three-year-old daughter set fire to the building while playing with matches. *Id.* at 370. The rental agreement contained the following provision, in which the defendant tenant agreed:

"[4.] To keep the premises, including the equipment appliances, and fixtures of every kind and nature during the term of this rental agreement in as good repair and at the expiration thereof, yield up same in like condition as when taken, reasonable wear and damage by the elements excepted." [*Id.* at 371 n 1, quoting the rental agreement.]

The rental agreement also contained the following provision:

"[9.] If the premises become wholly untenable through damage or destruction by fire not occasioned by negligence of the Tenant, this rental agreement shall be void; if partially untenable, the Landlord shall repair the same with all convenient speed, and the obligation of the Tenant to pay the

monthly rental fee shall continue in full force provided such repairs shall be completed within forty days." [*Id.*]

This Court affirmed the trial court's order granting summary disposition in favor of the tenant, noting that "[t]he rental agreement did not address the issue of [the tenant's] liability for fire damage to the premises resulting from her negligence." *Id.* at 374, citing *Nationwide Mut Fire Ins Co v Detroit Edison Co*, 95 Mich App 62; 289 NW2d 879 (1980). After discussing similar cases from other jurisdictions, this Court examined the rental agreement at issue and noted that it did not contemplate the tenant's liability for fire damage—including paragraph 9, which obligated the tenant to pay rent—notwithstanding total destruction of the residence by fire, regardless of the tenant's fault. *Labombard, supra* at 375-376. Further, a tenant may "reasonably expect" that rental payments will be used to cover fire insurance premiums. *Id.* at 376. Accordingly, "absent an express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer in tort for negligently caused fire damage to the premises, the tenant has no duty to the lessor or insurer which would support a negligence claim for such damages." *Id.* at 377.

In *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592; 476 NW2d 479 (1991), the landlord plaintiffs leased a building to the defendant. Subsequently, the premises were damaged by fire, which the landlord alleged was caused by the tenant's negligence. *Id.* at 593. The lease agreement was "silent with respect to who was to obtain fire insurance and how risk of fire [damage] was to be allocated." *Id.* at 594. The *Antoon* Court, citing *Labombard*, held that "a lessee is not liable for fire damage to the premises resulting from the lessee's negligence absent an express provision in the lease agreement providing for such liability." *Id.* at 596.

In *Stefani v Capital Tire, Inc*, 169 Mich App 32; 425 NW2d 500 (1988), this Court addressed the effect of an explicit clause requiring a tenant to insure the leased premises against fire loss on the tenant's responsibility for negligently caused fire damage. There, the lease contained the following provision:

"In addition to the rentals hereinbefore specified, the Tenant agrees to pay as additional rental all premiums for insurance against loss by fire on the premises and on the improvements situated on said premises.

\* \* \*

In addition, Tenant shall keep the premises fully insured against fire and casualty and plate glass damage." [*Id.* at 33-34, quoting the lease agreement.]

The *Stefani* Court noted that "[t]he *Labombard* Court seemed especially concerned about two interrelated factors: the provisions in the lease agreement about fire insurance and the expectations of the parties." *Id.* at 36. Further, this Court stated that regardless of an express assumption of liability for fire damage caused by the tenant's own negligence, the tenant could not reasonably believe that a portion of its rent was going to pay rental insurance proceeds because the lease was not silent regarding the tenant's responsibility to maintain fire insurance on the leased premises. *Id.* at 37. The Court then affirmed the jury verdict awarding damages to the landlord. *Id.* at 38.

Contrary to this line of cases, the majority contends that the trial court erred in relying on *Labombard, supra*, and states that the instant matter is a breach of contract action rather than an action based on negligence. According to the majority, because *Labombard* only applies to negligence cases or cases that sound in tort rather than in contract, it is inapplicable. Because the mere announcement of a legal conclusion does not make it so, I respectfully dissent.

A review of the lower court record does not support the majority's contention. Furthermore, though dismissed by the majority as inapplicable to the facts set forth in this case, *Labombard* addressed a lease agreement and the allegedly negligent actions of the tenant. As we noted in *Antoon, supra* at 595, citing *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), "the contract create[d] the state of things that furnishe[d] the occasion of the tort." Specifically, a lease agreement merely brings together the tenant and the landlord and may set forth the limits on the tortfeasor's liability. Thus, pursuant to our jurisprudence, we must look to the lease agreement to determine whether defendants expressly and unequivocally agreed to be liable in tort for negligently caused fire damages. Further, we must determine whether the lease agreement indicates that both parties expected that fire insurance would not be obtained on the premises and whether the parties allocated the risk of fire loss.

The majority concedes that the only relevant paragraph of the lease agreement concerning this issue is paragraph 9. Contrary to the great significance the majority assigns to it, I conclude that paragraph 9 of the lease agreement is nothing more than a general "yield up" provision that envisions defendants' liability for normal wear and tear to the apartment—almost an identical provision to the one in *Labombard*. It states that defendants will be "liable for any damage to the Premises . . . that is caused by the acts or omissions of" defendants and that plaintiff is responsible for all repairs to the apartment unless such damage is caused by defendants' "acts or neglect, in which case such cost and expense incurred by" plaintiff shall be paid by defendants. This is not the "express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer in tort for negligently caused fire damage to the premises waiver" envisioned by *Labombard* and *Antoon*. Both *Labombard* and *Antoon* require an express and unequivocal agreement by defendants to be liable in tort for negligently caused fire damage. Paragraph 9 is not an agreement by defendants to be liable in tort for fire damage to the apartment. Moreover, paragraph 9 of the lease agreement is similar to the "yield up" provision in *Labombard, supra* at 371 n 1, which this Court found did not address the tenant's liability for fire damage to the premises resulting from negligent acts. Thus, I would conclude that the lease agreement does not contain an express and unequivocal agreement by defendants to be liable in tort for negligently caused fire damages to the premises, and, furthermore, there is nothing in the lease agreement that removes this case from the precedent this Court set forth in *Labombard*. Contrary to the conclusions of the majority, I contend that the facts of *Labombard* are so similar to those in this matter as to make its applicability a foregone conclusion.

Furthermore, a reading of the remainder of the provisions at issue supports my interpretation of the "contract." First, paragraph 13 requires defendants to allow "insurance carriers" and "fire department inspectors" access to the apartment to inspect the premises and allows plaintiff access to the apartment to make any repairs given prior notice. See *Labombard, supra* at 373-374. Second, under paragraph 16, plaintiff recommends that defendants only obtain renter's insurance for loss or damage to their personal property that is caused by fire. Plaintiff specifically excludes its liability for any damage caused by fire to defendants' personal property.

Third, under the "Rules and Regulations" section, which is appended to the lease agreement, defendants agree not to "allow any activity on or around the Premises that would result in an increase in fire insurance premiums for the Premises." Finally, and most importantly, the lease agreement specifically excludes defendants' responsibility for "any portion of fire or extended coverage insurance" that plaintiff "may elect to maintain on the Premises." Moreover, defendants' responsibility for rent payments continues regardless of whether the destruction is caused by defendants' negligence.

"The language of a contract should be given its ordinary and plain meaning." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). The lease agreement unambiguously excludes defendants' responsibility for fire insurance on the apartment. Further, the contract does not allocate any of the risk of loss to defendants for fire damage to the property. *Antoon, supra* at 594. Thus, defendants could reasonably expect that a portion of the rental payments were used to cover fire insurance premiums and could reasonably conclude that they were not liable for fire damage to the property. *Labombard, supra* at 376-377. Regardless of defendants' insurance coverage or plaintiff's decision to self-insure the apartment, defendants were not obligated under the lease agreement for any negligently caused fire damage to the apartment. Accordingly, I would hold that the trial court did not err in concluding that defendants were not responsible for fire damage to the apartment.

I cannot join with the majority because I am not persuaded that merely by labeling defendants' action a "contract claim" this Court can circumvent 20 years of precedent when considering almost identical facts. In my view, the majority's holding creates a distinction where none exists regarding the essence of the claim in this case and conclusively, and without analysis, accepts defendants' characterization of its action against plaintiff as a "contract claim." This Court is not bound by a party's choice of labels for its cause of action because this would effectively exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). If the facts presented in this case amount to a "contract" claim rather than a "tort" claim, then the same can be said of *Labombard, Antoon*, and most, if not all of their progeny. In sum, the majority has merely announced this case a "contract" claim and by so holding has obviated 20 years of jurisprudence in this state.

I also disagree with the majority's contention that defendants are jointly and severally liable, despite MCL 600.2596, for any recoverable damages to plaintiff's personality and lost rental income.

"As part of its tort reform legislation, the Michigan Legislature abolished joint and several liability and replaced [it] with 'fair share liability.' The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault." *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). MCL 600.2956 provides as follows:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.2957(1) further provides, "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault." Thus, as our Supreme Court noted in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 51; 693 NW2d 149 (2005), the tort reform legislation

eliminated joint and several liability in certain tort actions, requir[ing] that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provid[ing] that each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault. As such, in an action in which an injured party has sued only one of multiple tortfeasors and in which [MCL 600.2956, 600.2957, and 600.6304] apply, the tortfeasor would have no need to seek contribution from other tortfeasors, either in that same action (by bringing in third-party defendants) or in a separate action, because no "person shall . . . be required to pay damages in an amount greater than his or her percentage of [allocated] fault . . . ." [Citation omitted.]

I disagree with the analysis offered by the majority regarding the applicability of joint and several liability to the facts presented in this case. It is abundantly clear that plaintiff is seeking "damages . . . for . . . property damage" in an action based on "tort or another legal theory." MCL 600.2956. "If the language [of a statute] is clear and unambiguous, judicial construction is neither required nor permitted, and the statute must be enforced as written." *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 466; 713 NW2d 285 (2006). Clearly, plaintiff seeks to recover for property damage to the apartment allegedly caused by Rebecca Roumayah's negligence. Thus, there is no way to apply MCL 600.2956 to the facts of this case without concluding that defendants are severally liable for any damages that plaintiff may recover.

Furthermore, a review of the record shows that plaintiff has failed to set forth affirmative evidence demonstrating that Najah Roumayah caused or contributed to the fire in the apartment. A review of Najah Roumayah's affidavit indicates that he was not present at the apartment when the fire occurred. Because there is no question of fact regarding whether Najah Roumayah caused the fire, I would direct the trial court on remand to enter an order granting summary disposition in his favor.

An issue not raised in the majority opinion is whether plaintiff may recover damages for uninsured losses to real and personal property. Because I would hold that plaintiff is entitled to such recovery, I would affirm the trial court's grant of summary disposition to defendant Najah Roumayah with respect to any theory of liability, and also affirm the trial court's conclusions that this Court's decision in *Labombard* is applicable to the facts of this case. I would remand the matter to the trial court for trial on the issues whether Rebecca Roumayah caused the damage to plaintiff's personality and whether this damage caused plaintiff to lose rental income or other uninsured losses.

/s/ Stephen L. Borrello