STATE OF MICHIGAN

COURT OF APPEALS

ANGELES B. GILMORE, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 287417 Wayne Circuit Court
SPECTRUM HUMAN SERVICES, INC., Defendant-Appellant.	LC No. 08-104369-ND

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's August 6, 2008, order, which denied defendant's motion for summary disposition in this negligence action. Reversed and remanded.

I. Facts and Procedural History

Defendant is a non-profit corporation that provides child welfare and mental health services, including housing to 16-19 year old youth who are making a transition from childhood to adulthood. Defendant leased a house in the city of Detroit from plaintiff beginning October 1, 2000, pursuant to a lease signed by the parties on September 15, 2000. The lease provided that the premises "shall be used only as a private residence for persons participating in [defendant's] semi-independent living program." Although the lease term was for one year, the parties extended the lease on a month-to-month basis until a fire completely destroyed the house on June 7, 2007.[1] In her complaint, plaintiff alleged that two teenage residents of the house had "engaged in a confrontation or altercation" and one retaliated by setting fire to a room in the house. The fire started at approximately 2:30 a.m. when the residents' supervisor, a member of defendant's staff, was asleep.

[1] "When a tenant under a valid lease for years holds over, the law implies a contract to renew the tenancy on the same terms for another year." *Wagner v Regency Inn Corp*, 186 Mich App 158, 168; 463 NW2d 450 (1990). In this case, the lease contained a holdover provision, which stated: "Any holding over after the term of this lease shall be construed as a month to month tenancy."

The parties' lease stated that "[i]n the event of fire or other damage to the Premises . . . the Parties mutually waive their rights of subrogation and recovery against each other, their agents, their employees or the residents of the Premises to the extent that the Parties are insured or are required to carry insurance." With respect to insurance, the lease contained the following two provisions:

> 9. Insurance: The Landlord agrees to maintain insurance against loss or damage to the building and personal property owned by the Landlord. Coverage shall be on an all risk of physical loss basis in the standard insurance form. The Tenant shall maintain insurance on personal property owned by the Tenant with coverage to be on all risk of physical loss basis in the standard insurance form.
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> Both Landlord and Tenant will maintain insurance coverage with limits equal to the full replacement cost of building and/or personal property as the case may be. The Landlord also agrees to maintain insurance on an all risk physical loss basis for loss of rents or loss of use to protect the Landlord in the event that fire or another covered peril damages the Premises and renders the Premises temporarily untenantable.
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> 14. Liability Insurance: The Tenant agrees to obtain and keep in effect during the lease term public liability and property damages insurance for the benefit of the Landlord and Tenant; however, liability coverage is only with the respect to the leasing of the Premises for resident's participation in the semi-independent living program. The Landlord agrees to procure and keep in effect during the lease term hereof liability insurance for bodily injury and property damage with respect to the operations necessary or incidental to ownership, maintenance or use of the leased Premises for such operations which are not with respect to the leasing of the Premises for activities pertaining to the resident's participation in the semi-independent living program.
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> The Tenant and Landlord agree that each Party will maintain the required liability insurance in the sum of Two Hundred Thousand Dollars ($200,000) as a combined single limit for both bodily injury and/or property damage claims resulting from any one occurrence.
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> The Tenant and Landlord shall deliver evidence insurance to each other.
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> The Tenant agrees to indemnify and hold harmless the Landlord from any liability for damages to any person or property in, on, or about the Premises with respect to the activities pertaining to the resident's participation in the semi-independent living program to the extent that the Tenant is insured for same.

After the fire, plaintiff filed suit against defendant for gross negligence and negligent hiring, seeking damages for the reasonable replacement value of her property, the loss of use of her rental property, the loss of future rental income, and the cost of demolition. With respect to count I, plaintiff alleged that defendant knew or should have known that the teenage residents of

the house had a propensity to commit criminal acts, and that it was foreseeable they could intentionally cause severe damage to plaintiff's property. According to plaintiff, defendant was liable for the intentional acts of the residents because of its failure to properly supervise and care for them, and because defendant made alterations to plaintiff's property that hindered the responding firemen from entering the house. With respect to count II, plaintiff alleged that defendant failed to hire staff with the ability to properly care for and oversee the management of the residents.

Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that the lease exclusively controlled the parameters of the rights and duties of the parties in the event of fire and that plaintiff had no right to bring a negligence action against defendant. The trial court denied defendant's motion, stating that defendant had a duty and responsibility to supervise the residents of the house, and issued an order to that effect. Defendant appealed the trial court's order and this Court granted the motion. *Gilmore v Spectrum Human Services, Inc*, unpublished order of the Court of Appeals, issued October 30, 2008 (Docket No. 287417).

II. Analysis

Defendant argues that the trial court erred in denying its motion for summary disposition. We agree. Plaintiff's negligence claim is foreclosed by the terms of the parties' lease. The lease includes a mutual allocation of risk and evidences the parties' intent to look only to insurance to recover for loss due to fire.

We review a motion 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). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id*. at 119. The motion should be granted only where the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6).

In denying defendant's motion for summary disposition, the trial court held, without making any additional findings, that this case presented a "*Williams v. Cunningham*[2] situation because [defendant] had a duty and responsibility to supervise the children." In *Williams*, *supra* at 501, our Supreme Court held that a merchant's duty of care does not include providing security to protect customers from criminal acts of third parties. The trial court did not indicate why it found *Williams* analogous to this case. Presumably, the court found that defendant owed plaintiff a duty to properly supervise the teenage residents of the house, i.e., to protect plaintiff from the residents' criminal acts, based on defendant's special relationship with the residents. Plaintiff argues that a duty to protect against the criminal acts of a third party may be imposed

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[2] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988).

based on a special relationship between the defendant and the third party, particularly the defendant's control over the third party. In so arguing, plaintiff cites *Graves v Warner Bros*, 253 Mich App 486; 656 NW2d 195 (2002), and *Williams*. While the general rule stated by plaintiff is correct, neither the trial court nor plaintiff has adequately addressed the effect of the parties' lease on defendant's duty. We must consider those cases that have addressed this issue.

West American Ins Co v Pic Way Shoes of Central Michigan, Inc, 110 Mich App 684, 685; 313 NW2d 187 (1981) involved a subrogee's right to proceed against a commercial property tenant where the lease required the landlord to carry fire insurance covering the replacement value of the building. This Court held that a tenant is relieved of liability for fire damage occasioned by its own negligence where the landlord agrees to provide fire insurance for the benefit of both parties. *Id*. at 686.

Then, in *New Hampshire Ins Group v Labombard*, 155 Mich App 369, 377; 399 NW2d 527 (1986), this Court established a broad rule: "We hold that, 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." The tenant in *Labombard* did not expressly agree to be liable for fire damage resulting from its own negligence and, unlike *West American*, the landlord in *Labombard* did not expressly agree to provide fire insurance. *Id*. at 375-376. Instead, the Court looked to other provisions of the lease, such as the tenant's duty "to allow the lessor to show the property to insurance agents," and concluded that the tenant had a reasonable expectation that rental payments would be used to cover the landlord's ordinary and necessary expenses, including fire insurance premiums. *Id*. at 376. The Court affirmed summary disposition in favor of the tenant to the extent the landlord sought recovery for damages to the premises resulting from the tenant's negligence, but remanded for a determination of the tenant's liability, if any, for rental income lost by the landlord. *Id*. at 377.

In *Stefani v Capital Tire, Inc*, 169 Mich App 32, 34; 425 NW2d 500 (1988), the landlord sought to recover the difference between its fire insurance proceeds and the value of the building that was destroyed as a result of the tenant's alleged negligence. This Court found the facts of the case distinguishable from those in *Labombard*, but followed the analytic approach in *Labombard* by looking to the express terms of the lease and the intent of the parties to determine whether the tenant owed a duty to the landlord. *Id*. at 36-37. Under the parties' lease, the tenant had agreed to pay all fire insurance premiums and, pursuant to an addendum, to keep the premises fully insured against fire damage. *Id*. at 37. The Court found that the language of the lease was clear and unambiguous as it pertained to the tenant's duty to maintain fire insurance and, therefore, that the landlord was allowed to proceed on its negligence claim. *Id*.

Reliance Ins Co v East-Lind Heat Treat, Inc, 175 Mich App 452, 453; 438 NW2d 648 (1989) involved "a landlord's claim and an insurer's subrogation claim against a tenant for fire-related damages to leased premises allegedly caused by the tenant's own negligence." The parties' lease provided that the tenant agreed to pay fire insurance premiums. *Id*. at 454. This Court found the case similar to *Stefani*, except that the tenant had made no express agreement to keep the premises fully insured against fire damage, but distinguishable from *Labombard* inasmuch as the lease was not silent on the issue of fire insurance premiums. *Id*. at 456. Turning to the express terms of the lease, the Court found that the lease unambiguously obligated the tenant to "pay a fixed monthly rental fee plus real estate taxes and 'insurance, five [sic] and

extended coverage on said premises.'" *Id*. at 457. The landlord obtained fire insurance that covered part of its loss and to the extent that there was coverage, "reasonable minds could not differ in concluding that the landlord's exclusive remedy was limited to the proceeds under the policy. Logic dictates that a tenant would not agree to pay for fire insurance premiums unless it also would obtain the benefits of the policy." *Id*. With regard to the landlord's claim for uninsured loss, the Court indicated that the central question was "whether the parties intended that the landlord or tenant bear the risk that the policy limit would be sufficient to fully cover the loss." *Id*. at 457-458. The Court held:

> In view of the absence of language assigning this risk to either party, the absence of language limiting the tenant's obligation to pay premiums to any amount and the fact that the landlord obtained the policy, we find that the clear intent of the parties was that the landlord was to bear the risk that the policy limit would be insufficient to cover total loss. The tenant's only duty under the terms of the lease was to pay fire insurance premiums. The tenant had no duty to determine whether the landlord obtained sufficient insurance to fully protect its property against fire damage. Under the lease the landlord had the right to secure adequate coverage and bill the tenant for the full amount of the premium. The failure of the landlord to do so may not be blamed on the tenant. [*Id*. at 458.]

In *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 593; 476 NW2d 479 (1991), the landlords sought uninsured losses resulting from a fire allegedly caused by the tenant's negligence. The parties' lease required the tenant to pay rent and utilities, but was silent with respect to fire insurance and how the risk of fire was to be allocated. *Id*. at 594. The landlords had secured fire insurance on the premises and were compensated for that damage. *Id*. But, the insurance did not cover damage to personal property and lost non-rental profits incurred and the landlords sought to recover those losses from the tenant. *Id*. The tenant moved for summary disposition, claiming, among other things, that it was not responsible for the landlords' uninsured losses because the lease "did not expressly and unequivocally provide that it would be liable for fire damage caused by its negligence." *Id*. The trial court agreed, holding: "'This is a situation in which the relationship of the parties is defined by contract and which this court would find that the tort remedies relative to negligence would not be available.'" *Id*. This Court reversed, stating:

> Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty of care by the other. The legal relationship underlying such a duty may arise by contract. That is, the contract creates the state of things that furnishes the occasion of the tort. However, there must be some active negligence or misfeasance that is distinct from the breach of duty owed under the contract. If a relationship exists that would give rise to a legal duty without enforcing the contractual promise itself, a tort action will lie; otherwise, it will not.
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> In the instant case, the trial court erroneously ruled that the legal duty owed by defendant to plaintiffs arose solely out of the contractual relationship. The contract, being silent regarding the issues of obtaining fire insurance and allocation of fire risk, was not all-inclusive of the parties' duties thereunder. Instead, the contractual relationship merely brought the parties together and

furnished the occasion of the tort. Defendant owed a duty to plaintiffs under common law to use due care in not causing a fire in the building. Because a duty existed under common law, the trial court erred in granting summary disposition to defendant on the ground that a tort action was unavailable to plaintiffs.

Given the nature of the trial court's ruling, it did not decide the scope of defendant's potential liability to plaintiffs. We will briefly discuss that issue to guide the court on remand.

In a tort action, the tortfeasor generally is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and are such as, according to common experience in the usual course of events, reasonably might have been anticipated. Damages for destruction of personal property and loss of profits have been recognized as being the legal and natural consequences of a party's negligence in causing a fire. A tortfeasor is excused from liability only for damages that are remote, contingent, or speculative.

The general rule of tortfeasor liability is not without its limits, however. In a lease situation, 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. This is because when the lease agreement is silent regarding the duty of obtaining fire insurance, the lessee may reasonably expect that the rental payments will be used to cover the lessor's ordinary and necessary expenses, including fire insurance premiums.

The holding in *Labombard* was limited to damage resulting to the real property that was the subject of the lease. It did not apply to injuries to other types of property, as evidenced by the fact that the matter was remanded for a determination of the defendant's liability for lost rental income suffered by the plaintiff. We decline to extend the *Labombard* holding to preclude a lessee's liability for all damages occasioned by the lessee's negligence. A lessee cannot reasonably expect that the rental payments will be used to insure against damage to items other than the leased premises. [*Id*. at 594-597 (citations and footnote omitted).]

In this case, the parties' lease allocated the risk of loss or damage between them. Each party agreed to insure, at its own expense, its own property. Specifically, the lease required plaintiff to "maintain insurance against loss or damage to the building and personal property owned by" plaintiff "on an all risk of physical loss basis." Likewise, the lease required defendant to "maintain insurance on personal property owned by" defendant "with coverage to be on all risk of physical loss basis." Both parties were required to "maintain insurance coverage with limits equal to the full replacement cost of building and/or personal property as the case may be." The general requirement that the parties maintain insurance on their own property is broad enough to include fire insurance. In addition, plaintiff specifically agreed to "maintain insurance on an all risk physical loss basis for loss of rents or loss of use to protect [herself] in the event that fire or another covered peril damages the Premises and renders the Premises temporarily untenantable." The express terms of the lease evidence intent by the parties to look

only to insurance to recover for loss due to fire, thereby relieving each from liability and allowing them to avoid subrogation exposure. Indeed, the lease further stated that "[i]n the event of fire or other damage to the Premises . . . the Parties mutually waive their rights of subrogation and recovery against each other, their agents, their employees or the residents of the Premises to the extent that the Parties are insured *or are required to carry insurance*" (emphasis added).

Plaintiff was required under the terms of the lease to maintain insurance coverage equal to the full replacement cost of her building and personal property, and unlike *Labombard* and *Antoon*, she was also required to maintain insurance for loss of rents or use to protect herself in the event that fire damaged the premises and rendered it temporarily untenantable. Plaintiff's insurance company paid her $30,000 for damages to the premises, which was the total amount of plaintiff's policy.[3] Defendant may not be held liable for plaintiff's failure to obtain insurance coverage equal to the full replacement cost of the house or insurance for the loss of rents or use, given the terms of the parties' lease. See *Reliance*, *supra* at 458.

Plaintiff claims on appeal that in interpreting the parties' lease, we should consider the parties' unique relationship and unequal bargaining positions, the commercial nature of the lease, the conditions understood by plaintiff that were not included in the lease, although she does not clearly identify those conditions, and the public policy implications of upholding the parties' lease. Specifically, plaintiff claims that the subrogation and insurance provisions in the lease were included by defendant and were intentionally misleading and/or ambiguous. She asserts that there was no "meeting of the minds" between the parties regarding the phrase "in the event of fire" and other references to fire damage. According to plaintiff, the term "fire," as it is used in the lease, must be interpreted to mean, "fire caused by negligence," because the parties could not have intended the term to encompass intentionally set fires, and even if defendant did, she did not. We disagree. "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Phillips v Homer*, 480 Mich 19, 24; 745 NW2d 754, 2008 (citations omitted). Here, there is nothing in the lease indicating that the parties intended the term "fire" to mean anything other than its plain, ordinary meaning or to create a distinction between negligently started and intentionally set fires. The terms of the lease are unambiguous and must be enforced as written.

The terms of the parties' lease expressly and unambiguously required plaintiff to maintain insurance coverage equal to the full replacement cost of her building and personal property, as well as insurance for loss of rents or loss of use to protect herself in the event of fire. The lease also evidences intent by the parties to look only to insurance to recover for loss due to fire. Accordingly, defendant may not be held liable for plaintiff's loss. Defendant is entitled to summary disposition under MCR 2.116(C)(10).

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[3] Plaintiff does not assert, nor is there any record evidence, that she obtained any other insurance policies related to the property at issue.

In light of our decision on this issue, we need not address the parties' remaining claims on appeal.

Reversed and remanded to the trial court for issuance of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering