STATE OF MICHIGAN

COURT OF APPEALS

GOODYEAR TIRE & RUBBER COMPANY,

Plaintiff-Appellee,

v

CO-JO, INC., SO-BO, INC., and CC & COMPANY, INC. d/b/a PONDEROSA OF GREATER FLINT,

Defendants/Cross-Plaintiffs/Cross-Defendants-Appellees,

and

PETE'S PLUMBING & HEATING and DALE STRAND,

Defendants/Cross-Defendants/Cross-Plaintiffs-Appellants.

UNPUBLISHED
September 23, 1997

No. 192876
Genesee Circuit Court
LC No. 93-022267-NZ

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendants Dale Strand and Pete's Plumbing & Heating appeal as of right from the judgment entered against Strand and in favor of plaintiff on the basis of the parties' settlement agreement. We affirm.

Defendants Co-Jo, Inc., So-Bo, Inc., and CC & Company, Inc. operated a Ponderosa restaurant in the town of Burton. On December 26, 1990, an employee of the restaurant observed water leaking from a pipe located above the ceiling tiles in the kitchen. The restaurant manager called Pete's and Pete's dispatched employee Dale Strand to make the necessary repairs. While Strand was working on the pipe with a propane torch, the restaurant caught fire. The fire spread from the restaurant to plaintiff 's adjacent store, causing property damage.

In 1992, Co-Jo initiated an action against Strand and Pete's to recover for the fire damage to the restaurant under a negligence theory (hereafter referred to as the "parallel action"), and a year later, plaintiff commenced the instant action against Strand, Pete's and Co-Jo to recover for the fire damage to its store. The parties subsequently entered into a settlement agreement in the instant case whereby plaintiff would be entitled to a judgment against the party or parties found to be negligent by the trier of fact in the parallel action. In October of 1995, the jury returned verdicts of no cause of action in the parallel action. However, in response to special questions submitted to the jury, the jury found that Strand was negligent but that his negligence was not the proximate cause of Co-Jo's loss. Plaintiff thereafter moved for entry of judgment in the instant case on the basis of the jury's finding of negligence.

Defendants contend that the trial court erred in entering a judgment against defendant Strand based on the parties' settlement agreement when the jury in the parallel action found that Strand's negligence was not the proximate cause of the fire. We disagree. An agreement to settle a pending lawsuit is a contract, and is therefore governed by the legal principles generally applicable to the construction of contracts. *Walbridge Aldinger Co v Walcon Corp,* 207 Mich App 566, 571; 525 NW2d 489 (1994). Absent mutual mistake, fraud or other grounds to avoid a contract, the court acts properly in enforcing a settlement agreement. *Streeter v Michigan Consolidated Gas Co,* 340 Mich 510, 517-518; 65 NW2d 760 (1954); *Gramer v Gramer,* 207 Mich App 123, 125; 523 NW2d 861 (1994). The court will not upset a settlement based on the subjective reservation or misunderstanding of a party. *Streeter, supra* at 518; *Bd of Eaton Co Rd Comm'rs v Schultz,* 205 Mich App 371, 379; 521 NW2d 847 (1994).

Defendants argue that the trial court erroneously construed the settlement agreement as providing that plaintiff would recover if the jury in the parallel action found that Strand or Pete's was negligent, even if their negligence was not the proximate cause of the fire. The construction of an unambiguous and unequivocal settlement agreement is a question of law that this Court reviews de novo. *Gramer, supra* at 125. The primary object in construing a settlement agreement is to effectuate the parties' intent. *Smith, Hinchman & Grylls Associates, Inc v Wayne Co Bd of Road Comm'rs,* 59 Mich App 117, 123; 229 NW2d 338 (1975). The language of a contract is interpreted according to its plain meaning rather than given a technical construction. *Schroeder v Terra Energy, Ltd,* 233 Mich App 176; ___ NW2d ___ (1997).

The settlement agreement provides in its relevant part:

> 2. In the event a jury (or other finders of fact) ("fact finder") in the principal case of ST. PAUL FIRE & MARINE, et al. vs. PETE'S and STRAND, Genesee Circuit Court case no. 92-14835-CK ("principal case"), finds that neither PETE'S, STRAND nor PONDEROSA was negligent or otherwise culpable ("negligent") GOODYEAR'S recovery shall be zero dollars.
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> 3. In the event a fact finder in the principal case finds that either or both PETE'S and/or STRAND were negligent and PONDEROSA was not negligent, GOODYEAR shall be entitled to:

a. Entry of an appropriate judgment of $18,000 inclusive of interest, costs and attorney fees in case no. 93-22267-NZ;

b. Payment of $18,000 within sixty (60) days of the date of a final dispositive judgment or order in the principal case from PETE'S and/or STRAND, jointly and severally, or their insurance carrier if either or both were found negligent.

By clear and unambiguous language, the parties agreed that defendant Strand would pay plaintiff $18,000 if the jury in the parallel action found him, but not Pete's or Co-Jo, negligent. The word "negligent" or "negligence" generally means lacking in due care or concern. *The American Heritage Dictionary of the English Language* (1976), p 879. Our Supreme Court has similarly defined negligence as "conduct involving an unreasonable risk of harm." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Defendants improperly seek to equate the term "negligence" with the cause of action for negligence.

> The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. [*Id.* at 449.]

Negligence alone does not establish liability. *Martiniano v Booth*, 359 Mich 680, 693; 103 NW2d 502 (1960); *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). The parties[1] use of the phrase "negligent or otherwise culpable" in paragraph two merely reinforces the determination that the contractual language refers to defendants' conduct, not causation, since both terms relate to the blameworthiness of a person's actions. Therefore, the trial court properly entered judgment against defendant Strand pursuant to paragraph three of the settlement agreement.

Next, defendants contend that the trial court erred in entering a judgment before this Court decided Co-Jo's appeal in the parallel action. Again, we disagree. Paragraph three of the settlement agreement clearly and unambiguously provides that plaintiff was entitled to entry of a judgment in the event the jury found that defendant Strand was negligent and that he must satisfy the judgment "within sixty (60) days of the date of a final dispositive judgment or order in the principal case." Paragraph three of the settlement agreement does not condition entry and satisfaction of the judgment on disposition of an appeal in the parallel action. Nor does paragraph nine of the agreement modify paragraph three. Paragraph nine merely provides defendant with a basis for moving to set aside the judgment in the event the result of the parallel action is altered on appeal. MCR 2.612(C)(1)(e). Thus, the court properly directed that payment on the judgment is not contingent on an appeal in the parallel action.

The court entered judgments of no cause of action in the parallel action on January 8, 1996, and entered judgment in this case three weeks later. Therefore, per the terms of the agreement, plaintiff was entitled to payment by March 8, 1996. The court nevertheless ordered that defendant Strand need not satisfy the judgment until sixty days after this Court's decision. Because defendant Strand received a

more favorable result than he was entitled, he cannot now complain that the court erred by failing to abide by the terms of the settlement agreement.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] We are appreciative of appellant's argument that the "or otherwise culpable" language in § 2 of the settlement agreement implies that the term "negligent" was designed to describe negligence of a culpable character. However, we do not believe that such an inference is necessarily drawn from the provision as a whole. While appellant may not have anticipated a finding such as that made by the jury in this case, and may have contemplated that a finding of negligence would be accompanied by a finding of culpability, the language preceding "or" in the settlement ("negligence") plainly and precisely describes the jury's verdict in the instant case.