STATE OF MICHIGAN

COURT OF APPEALS

LIVONIA GOLD & SILVER, INC.,

Plaintiff-Appellant,

v

WONDERLAND SHOPPING CENTER, VENTURE LTD. PARTNERSHIP,

Defendant/Cross-Plaintiff-Appellee,

and

WILLIAM DAVIS & ASSOCIATES SECURITY SERVICES, INC.,

Defendant/Cross-Defendant-Appellee,

and

GUARDIAN ALARM COMPANY OF MICHIGAN,

Defendant.

UNPUBLISHED
April 14, 2000

No. 209946
Wayne Circuit Court
LC No. 97-700525-CK

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

In this negligence action, plaintiff, who lost over $200,000 worth of jewelry to a burglar, appeals by right from the trial court's orders granting summary disposition to defendant Wonderland Shopping Center, Venture Ltd. Partnership ("Wonderland"), from whom plaintiff leased a store in a shopping mall, and defendant William Davis & Associates Security Services, Inc. ("Davis"), who provided security services to Wonderland. We affirm.

Plaintiff argues that the trial court erred in granting Wonderland's motion for summary disposition. Wonderland moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court did not explicitly state under which of these rules it granted the motion. Because the court looked beyond the pleadings, however, we will review the ruling under MCR 2.116(C)(10). See *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

We review a trial court's grant of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party and decide if there exists a genuine issue of material fact. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Plaintiff argues that because the contract between it and Wonderland indicated that Wonderland would "police" the common area of the mall, Wonderland owed plaintiff a duty to act with reasonable care to prevent intruders from entering the common area of the mall during non-business hours (during which the theft occurred). Plaintiff contends that (1) Wonderland breached this alleged duty by providing inadequate security services, and (2) Wonderland's breach ultimately led to the theft of the jewelry and plaintiff's accompanying damages.

In a merchant-customer relationship, a merchant who voluntarily provides security services cannot be held liable if the security measures were less effective than they could or should have been. See *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993), and *Krass, supra* at 684. In a landlord-tenant relationship, however, such a theory of liability remains viable under the current state of the law. See *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992), and *Scott, supra* at 452 n 15. Here, the relationship between plaintiff and Wonderland was a landlord-tenant relationship, and plaintiff's theory was therefore viable. Moreover, even though the contract provided that Wonderland would police only the "common area" of the mall, and the theft of the jewelry took place entirely within plaintiff's leased premises, it is at least arguable that an inadequate policing of the common area proximately caused plaintiff's damages (because the burglar had to first access the common area to reach plaintiff's store).

Accordingly, it appears that the necessary elements for a viable negligence claim – duty, breach, causation, and damages – existed in this case: (1) Wonderland's duty to police the common area, (2) Wonderland's alleged breach of this duty by providing inadequate security services, (3) the theft allegedly caused by the breach, and (4) plaintiff's damages. See *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999) (setting forth necessary elements of a negligence action). However, the contract between plaintiff and Wonderland specifically indicated that "[a]ll property kept, stored or maintained in the . . . premises shall be so kept, stored or maintained at the risk of tenant only." As stated in *Paterek v 6600 Ltd*, 186 Mich App 445, 448; 465 NW2d 342 (1990), "it is not contrary to this state's public policy for a party to contract against liability for damages caused by ordinary negligence." See also *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278, 283; 320 NW2d 244 (1982). An intention to absolve oneself of liability "need not be expressed in any particular language or form." *Klann v Hess Cartage*, 50 Mich App 703, 705; 214 NW2d 63 (1973). Following *Klann*, we conclude that the clause in question in the instant case clearly

absolved Wonderland of responsibility for negligently causing any loss to property that plaintiff stored in its leased premises.[1] See *Klann, supra* at 705-709. Accordingly, the trial court did not err in granting Wonderland's motion for summary disposition.

Next, plaintiff argues that the trial court erred in denying its motion for reconsideration with regard to the grant of summary disposition to Wonderland. Specifically, plaintiff contends that discovery completed after the grant of Wonderland's motion revealed new facts related to Wonderland's alleged negligence. We review a denial of a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification for the decision. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc,* 237 Mich App 43, 47; 601 NW2d 879 (1999). Here, because of the contractual disclaimer discussed above, any new facts plaintiff uncovered that related to Wonderland's negligence were irrelevant to the summary disposition ruling. Accordingly, the trial court did not err in denying plaintiff's motion for reconsideration.

Finally, plaintiff claims that the trial court erred in granting summary disposition to Davis. Davis moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court, again, did not explicitly state under which of these rules it granted summary disposition. Because the court looked beyond the pleadings, however, we will review the ruling under MCR 2.116(C)(10). See *Krass, supra* at 664-665.

The relationship between plaintiff and Davis was not a landlord-tenant relationship. Therefore, plaintiff cannot hold Davis responsible on the theory that the security services Davis provided were less effective than they could or should have been. See *Scott, supra* at 452, and *Krass, supra* at 684. Cf. *Holland, supra* at 64-65, and *Scott, supra* at 452 n 15. Moreover, there was no provision in the contract between Wonderland and Davis indicating that Davis was to provide services specifically for plaintiff. Accordingly, plaintiff was not a third-party beneficiary of the contract, and it had no legal basis on which to sue Davis. See *Krass, supra* at 665-666. The trial court did not err in granting Davis' motion for summary disposition.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] We note that the clause in question cannot be validly construed to limit Wonderland's liability for acts of *gross* negligence. *Klann, supra* at 709 (contractual provision absolving a party for acts of gross negligence is void as against public policy). However, plaintiff did not claim that Wonderland acted in a *grossly* negligent fashion.