

STATE OF MICHIGAN
COURT OF APPEALS

D. MALIN, INC., d/b/a STRETCH A BUCK
DISCOUNT AND JEWELRY SALES,

UNPUBLISHED
October 29, 1999

Plaintiff-Appellant,

v

AUDIO CENTRAL ALARM COMPANY,

No. 212480
Saginaw Circuit Court
LC No. 96-016386 NO

Defendant-Appellee.

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and partially granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(4). We affirm.

In 1976, plaintiff leased a burglar and fire alarm system from defendant to be installed at its commercial premises. The parties' lease agreement contained a liquidated damages provision that limited defendant's liability for negligence to the greater of three months' rental service charge or \$250. In early February 1996, defendant installed backup equipment to the alarm system. On February 18, 1996, plaintiff was burglarized and purportedly lost approximately \$650,000 of inventory and cash when the alarm system failed. Thereafter, plaintiff brought an action alleging negligence and gross negligence by defendant in the design, installation, and maintenance of the alarm system.

After hearing oral arguments on defendant's motions for summary disposition, the trial court held that the parties are bound by the liquidated damages provision in the lease, and therefore, defendant's liability for ordinary negligence is limited to \$250. However, the trial court found that there was a genuine issue of material fact as to whether the backup equipment installed shortly before the burglary was subject to the original lease. Accordingly, the trial court partially granted defendant's motion for summary disposition under MCR 2.116(C)(4) on plaintiff's negligence claim relating to the original alarm system, but denied defendant's motion in part regarding the applicability of the liquidated damages provision in the original lease to the backup equipment. In addition, the trial court found that "viewing the evidence in the light most favorable to plaintiff, plaintiff has not provided any documentary

evidence that defendant was grossly negligent in performing its contractual duties.” Therefore, finding no genuine issue of material fact, the trial court granted defendant’s motion for summary disposition under MCR 2.116(C)(10) on plaintiff’s gross negligence claim.

On appeal, plaintiff first argues that the trial court erred in granting summary disposition to defendant under MCR 2.116(C)(10) and dismissing its gross negligence claim. We disagree. This Court reviews a trial court’s decision to grant summary disposition de novo to determine whether a genuine issue of material fact exists that would prevent entering judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we consider all the evidence in a light most favorable to the nonmoving party, affording the benefit of any reasonable doubt to the nonmovant. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

After a thorough review of the record, we conclude that the trial court did not err in granting defendant’s motion for summary disposition on plaintiff’s gross negligence claim. Generally, the question whether a party’s conduct was reasonable under the applicable standard of care is one for the factfinder; however, in light of the evidence presented, if reasonable minds could not differ, then summary disposition is appropriate. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). Gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994); *Haberl v Rose*, 225 Mich App 254, 265; 570 NW2d 664 (1997). To establish its gross negligence claim, plaintiff presented testimony from Richard Cantor, the president of an alarm company in New York, who identified several instances of alleged reckless conduct by defendant which, in his opinion, constituted gross negligence. We note that although expert witness testimony may include opinion evidence, when a proper foundation is laid, an expert witness may not opine on the issue of a party’s gross negligence. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996). Indeed, to permit a witness to give his opinion or interpretation of the facts would invade the province of the jury. *Id.* In any event, upon review of the record, we agree with the trial court’s finding that Carson’s testimony does not establish gross negligence by defendant, and thus, plaintiff has not provided any documentary evidence to support its claim.

Further, plaintiff does not indicate how defendant’s conduct constituted gross negligence rather than ordinary negligence or breach of contract; nor does defendant specify the alleged acts of gross negligence that proximately caused plaintiff’s damages. Moreover, plaintiff does not provide any factual support from the record for its bare assertions. Plaintiff merely alleges that defendant did not provide the services that it had promised to provide. Conclusory allegations, unsupported by facts contained in the record, do not provide sufficient basis for reversal. Therefore, the trial court did not err in granting summary disposition to defendant and dismissing plaintiff’s claim for gross negligence.

Plaintiff next claims that the trial court erred in granting partial summary disposition to defendant under MCR 2.116(C)(4). The parties do not challenge the trial court’s ruling that a genuine issue of material fact exists regarding whether the backup equipment was subject to the liquidated damages provision in the original lease. Instead, plaintiff challenges the trial court’s grant of summary disposition to defendant on the basis that the liquidated damages provision limited defendant’s liability for ordinary negligence concerning the original equipment. Plaintiff argues that since the backup equipment was

installed shortly before the burglary, and was not covered by any contract, the original equipment was transformed into a new and completely integrated system with the backup equipment, and therefore, the liquidated damages provision contained in the original lease is inapplicable to the entire system. Defendant, on the other hand, argues that it is not difficult to separate the originally installed equipment from the backup equipment installed in early 1996, and in any event, if there was no additional contract covering the 1996 installation, as plaintiff submits, then those services are within the scope of the original contract and are subject to the liquidated damages provision.

This Court has previously upheld the validity of similar liquidated damages provisions limiting liability where alarm systems failed. *USAA Group v Universal Alarms, Inc*, 158 Mich App 633; 405 NW2d 146 (1987); *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278; 320 NW2d 244 (1982). Indeed, it is not contrary to public policy for a party to contract against liability for damages caused by ordinary negligence. *Universal Gym Equipment, Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 367; 526 NW2d 5 (1994), *aff'd* 209 Mich App 511 (1995); *St Paul Fire & Marine Ins Co, supra* at 283. Here, plaintiff has provided no legal authority for its assertion that the installation of backup equipment transformed the alarm system into one new system such that the original lease, with its liquidated damages provision, was inapplicable to the original equipment. Further, plaintiff has presented no compelling argument nor referred this Court to any case law that would support its position. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Morris v Allstate Ins Co*, 230 Mich App 361, 370; 584 NW2d 340 (1998). On this record, we conclude that the trial court did not err in rejecting plaintiff's "integration" argument and partially granting defendant's motion for summary disposition on plaintiff's negligence claim.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder