STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN MCCLAIN and NATASHA MCCLAIN, individually and as next friend of ASAD MCCLAIN,

Plaintiffs-Appellants,

v

DENNIS BEEMER, PHILLIP MOL, ACC-SELL MANAGEMENT, EDWARD WRIGHT, and ED'S CLEAN UP & RUBBISH REMOVAL LLC,

Defendants-Appellees,

and

DTE ENERGY, INC. f/k/a MICHIGAN CONSOLIDATED GAS CO.,

Defendant.

UNPUBLISHED
December 15, 2015

No. 322543
Kent Circuit Court
LC No. 12-009672-CZ

Before: SERVITTO, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants-appellees. Because plaintiffs have failed to establish any question of material fact, we affirm.

I. Facts

Plaintiffs were tenants of an apartment rental unit, unit "C", in a 4-unit rental building owned by defendant Dennis Beemer and managed by defendant Acc-Sell Management which, in turn, is owned by Phillip Mol (hereafter "owner/management defendants"). The owner/management defendants hired defendant Ed's Clean Up and Rubbish Removal, LLC, owned by defendant Edward Wright, (collectively "Ed's") to remove debris from and paint the rental units when needed. According to plaintiffs, during the debris removal process of the unit adjoining theirs, unit "B", Ed's had access to the basement where natural gas pipes to the unit were located. Ed's allegedly performed their hired acts on unit B without reasonable care which

allowed natural gas to accumulate in unit B and, as further alleged by plaintiffs, contributed to and/or caused a subsequent explosion in the unit. The explosion demolished unit B, caused plaintiffs' unit to collapse, and, tragically, resulted in injuries to plaintiffs who were in their unit at the time of the explosion. Plaintiffs asserted that Ed's was liable to them for negligence and that the owner/management defendants were liable on grounds of negligence/premises liability and gross negligence.[1]

The owner/management defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). They first argued that the lease agreement for the apartment unit was between plaintiffs and defendant Acc-Sell Management-not defendant Phillip Mol. As a result, plaintiffs failed to state a claim against defendant Mol and he should be dismissed. The owner/management defendants further argued that it is undisputed that the cause of the natural gas accumulation, explosion, and fire is undetermined and that plaintiffs thus cannot, as matter of law, establish that the owner/management defendants were in any way negligent. Instead, plaintiffs' claims are, according to the owner/management defendants, based upon conjecture and speculation. The owner/management defendants also argued that they had no notice of the gas leak/accumulation and had no duty to repair a defect about which they had no knowledge.

Ed's also moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Ed's asserted that the work done in the units on May 15, 2010, was billed to and performed by Ed's Clean Up and Rubbish Removal, LLC's owner and that plaintiffs thus failed to state a claim against Edward Wright, individually. Ed's also claimed, as the owner/management defendants did, that where the cause of the natural gas accumulation, the explosion, and the resulting fire remains unknown, plaintiffs have failed to establish that Ed's was negligent. Finally, Ed's asserted that undisputed testimony shows that they did not go into the basement on the day of the explosion and that this testimony, coupled with expert testimony that the gas accumulated a maximum of three hours prior to the explosion, defeated plaintiffs' claims against Ed's.

The trial court granted summary disposition in favor of all defendants on all of plaintiffs' claims. It opined that there was no showing of willful and wanton conduct on the part of any of the defendants and that summary disposition was thus appropriate with regard to plaintiffs' claim of gross negligence. As to plaintiffs' premises liability claim, the trial court opined that when the apartment where the explosion had occurred had been vacant since May 3, 2010, and reports concerning the explosion indicated that it had occurred due to a gas buildup that had occurred within 1 to 3 hours of the actual explosion on May 15, 2010, plaintiffs cannot show that the owner/management defendants had a duty to inspect the premises within that three-hour period or that they knew or should have known about the recent condition. The trial court determined that plaintiffs' negligence claim failed as to all defendants because they submitted only a theory of causation that, while perhaps factually supportable, was just as possible as other alternative causation theories. According to the trial court, plaintiffs did not present substantial evidence from which a jury could conclude that more likely than not, but for the specific conduct by

[1] Plaintiffs also brought suit against DTE Energy f/k/a Michigan Consolidated Gas Co., but this defendant was dismissed per stipulation and order entered February 10, 2014.

defendants complained of, the injuries would not have occurred. The trial court thereafter entered a written order granting summary disposition in favor of all defendants and dismissing plaintiffs' case in its entirety. This appeal followed.

On appeal, plaintiffs first contend that summary disposition was not warranted under MCR 2.116(C)(8) because they sufficiently pleaded facts to support all of the claims alleged in their first amended complaint. Plaintiffs also assert that they sufficiently demonstrated genuine issues of material fact in satisfaction of MCR 2.116(C)(10). While the trial court's written order reflects that it granted summary disposition pursuant to both MCR 2.116(C)(8) and (10), its rationalization for dismissal on the record relied upon evidence and documents outside of the pleadings. Thus, we will review this matter as though dismissal were premised solely upon MCR 2.116(C)(10).

We review de novo a trial court's decision on a motion for summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim, *id*., and requires this Court to consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate under this subrule if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiffs assert that they raised several genuine issues of material fact sufficient to withstand defendants' summary disposition motions. Plaintiffs' claims consisted of (1) negligence/premises liability and (2) gross negligence as to the owner/management defendants and (3) negligence as to Ed's. Each claim will be addressed in turn.

II. Negligence/Premises Liability of Beemer, Acc-Sell and Mol

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). In a premises liability action, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id.* at 692. "Terms such as 'premises possessor' and 'dangerous condition on the land' relate to the elements of a premises liability, rather than ordinary negligence, claim." *Jahnke v Allen*, 308 Mich App 472, 475; 865 NW2d 549 (2014). And, alleging that a defendant owner, possessor, or occupier of land created the condition does not necessarily transform the claim into one for ordinary negligence. *Buhalis*, 296 Mich App at 692. An action in premises liability, however, "does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . ." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In this matter, plaintiffs affirmatively stated that their claim sounded in premises liability.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart*

Props, 270 Mich App 437, 440; 715 NW2d 335 (2006). "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id.* Tenants are regarded as their landlord's invitees. *Woodbury v Bruckner*, 248 Mich App 684, 691; 650 NW2d 343 (2001). A landlord "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Benton*, 270 Mich App at 440. (quotation marks and citation omitted). The landowner has a duty of care to warn the invitee of any known dangers, but to also make the premises safe, "which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), *as amended*. "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger." *Id.*

The primary evidence presented to the trial court consisted of an incident report concerning the apartment complex explosion/fire prepared by the Michigan State Police (MSP), and a report concerning the incident prepared by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The MSP report detailed that the explosion/fire was reported on May 15, 2010, at approximately 8:31 p.m. The report stated that after the scene examination, it was determined that an explosion caused by natural gas had occurred in the basement of the vacant apartment B of the four apartment structure and was followed by a fire that destroyed three of the four apartments and severely damaged the fourth apartment. The explosion was determined to be intentionally caused by human intervention.

The report contained information that the basement area of unit B contained a natural gas line which fed into a gas water heater and furnace. A natural gas line was also available for a gas dryer, but none was present. The report noted that the blue valve for the natural gas line specified for a gas dryer, located on the south wall near the water heater, was in the "on" position. The end of the gas supply line, located along the east wall, was open with no cap or plug, thereby allowing natural gas to freely flow into the basement. According to the report, investigators sifted through the debris along the wall but found no evidence of a cap or plug to the gas line. The MSP report also noted that the supply line was affixed to the wall approximately 29 inches from the floor but at some time during this incident the end of the gas line was bent upward at an approximate 45 degree angle to about 48 inches from the floor. The MSP investigator opined that an "unknown person had to open and turn on the gas valve in the basement of unit B which eventually caused an explosion and fire to the structure." The MSP report contained a notation that DTE had contacted the investigator and advised that DTE engineers had calculated the lower explosive limit[2] of about 1 hour and an upper explosive limit[3]

[2] Lower explosive limit (LEL) is the lowest concentration of a gas in the air capable of producing a flash of fire in the presence of an ignition source. Concentrations lower than the LEL are "too lean" to burn. BusinessDictionary.com

of just less than 3 hours. Thus, according to information in the MSP report, the concentration of natural gas capable of producing fire in the presence of an ignition source was present from an outside time of just under three hours prior to the explosion to an inside time of about one hour prior to the explosion.

The ATF investigator similarly concluded that the cause of the explosion and fire was incendiary or an intentional act. The ATF investigator concluded that the gas line was uncapped prior to the explosion because the threads on the end of the gas line's interior threaded reducer were rusted. Furthermore, the AFT examination of the debris likewise did not produce a cap or plug for the gas line. The ATF investigator interviewed several witnesses, including the residents of the apartments in the building where the explosion occurred. According to the report, neither plaintiffs nor any other interviewed resident smelled gas on the day of or in the days prior to the incident. The prior resident of unit B advised the ATF investigator that she had moved out on May 3, 2010, and had an electric dryer while she resided in the unit. She did not smell gas at any time when she resided in unit B. The ATF report also contained information gathered from Ed Wright wherein Mr. Wright stated that he had been in unit B on May 10, 2010, to remove discarded items from the basement. Mr. Wright indicated that a small washer was all that remained in the basement following his removal of other items. He had also been in the unit on May 15, 2010 (the date of the incident), from 7:30 a.m. until approximately 4:30 or 5:00 p.m. preparing the unit for painting, but had not been in the basement on that date. Mr. Wright advised the ATF investigator that when he arrived at unit B on May 15, 2010, the sliding glass door to the unit was open. He could not recall if he closed and locked the door when leaving the unit. However, the ATF report noted that the sliding glass door handle to unit B was in the locked position when it was recovered as evidence during their investigation.

Based upon the investigations conducted by authorities, it is unrefuted that someone turned on the gas line in the basement of unit B and that this allowed gas to freely enter the unit. There has been no claim or indication that the incident occurred as a result of faulty gas lines and thus, any claim that the owner/management defendants failed to properly maintain the gas lines fails. Moreover, to the extent that plaintiffs assert that the gas line being turned on resulted from a breach of the owner/management defendants' duty to maintain the common areas of the premises in reasonable repair, the basement of unit B was not a common area. Common areas are "those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). The basement of unit B was not shared by two or more of the building tenants and, more importantly, the gas line at issue ended in the basement of unit B so that it, too, was not shared by two or more of the building tenants. While the natural gas pipes, in general, were shared by all tenants, the specific uncapped gas line that was determined to have caused the explosion was designated as a hookup for a gas dryer in the basement of unit B only.

Plaintiffs' argument that the owner/management defendants breached a duty to ward off criminal behavior also fails. It is true that a landlord has "a duty to use reasonable care to protect

[3] Upper explosive limit (UEL) is the highest concentration of a gas in the air capable of producing a flash of fire in the presence of an ignition source. Concentrations higher than the UEL are "too rich" to burn. BusinessDictionary.com

tenants from foreseeable criminal activities in common areas inside the structures they control." *Stanley v Town Square Cooperative*, 203 Mich App 143, 149; 512 NW2d 51 (1993). As previously indicated, however, neither the basement of unit B nor the gas line that caused the explosion were in common areas. In addition, a landowner's duty is only to exercise reasonable care for his invitee's protection. "Consequently, the landlord's duty does not extend to conditions from which an unreasonable risk cannot be anticipated . . . . The duty exists only when the landlord created a dangerous condition that enhances the likelihood of criminal assaults." *Stanley*, 203 Mich App at 150. Here, assuming without deciding that the landlord left the sliding glass door to unit B unlocked or open, it did not enhance the likelihood of criminal assaults and the risk that someone would enter the apartment simply to turn on the gas line could not be anticipated.

Plaintiffs' assertion that the owner/management defendants breached a duty to inspect the basement of unit B is without merit. "Michigan courts have long recognized that the law will impute knowledge of the dangerous condition to the premises possessor if the premises possessor should have discovered the dangerous condition in the exercise of reasonable care." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 573; 844 NW2d 178 (2014). The deposition testimony of Lisa Mol, Phillip Mol's wife, indicated that she inspected the premises on the morning of May 8, 2010. Mrs. Mol testified that she walked down five or six steps into the basement and took a couple of pictures of the condition of the basement. While Plaintiffs argue that Mrs. Mol's inspection was inadequate because she failed to discover the uncapped gas line, there is no evidence that Mrs. Mol's failure to discover the uncapped line or her failure to place a cap on the line is causally connected to the explosion. Caps on gas lines are an added safety feature and can be temporary and removable for later use of the gas line. Plaintiffs and all other witnesses interviewed reported to the ATF that they did not smell gas in the days or hours leading up to the explosion. The MSP report contained information that the gas accumulation required for ignition in the basement of unit B occurred from one to three hours prior to the explosion. Therefore, based upon the evidence presented, the only reasonable timeframe in which the owner/management defendants could have discovered the condition leading up to the explosion would have been, at most, three hours prior to the explosion. Plaintiffs have directed us to no authority or circumstances under which a premises owner would be required, under ordinary and reasonable standards of inquiry, to inspect a particular portion of his premises in a specific, limited timeframe in order to discover a newly occurring defect without notice of the same. Here, the timeframe is particularly limited to the basement of unit B during a 3-hour time frame on May 15, 2010, when no tenant smelled gas. Plaintiffs have presented no evidence creating a question of material fact that the owner/management defendant knew or should have known that someone turned the gas on in unit B within the relevant timeframe or that someone would do so. Summary disposition with respect to plaintiffs' claim of negligence/premises liability against the owner/management defendants was appropriate.

III. Gross Negligence of Beemer, Acc-Sell and Mol

In this claim, plaintiffs merely directed the trial court to its prior assertions and stated that "the aforementioned actions by some or all of Defendants Beemer, Mol and/or Acc-Sell constituted gross negligence and/or were a willful and wanton disregard of the rights of the plaintiffs under the circumstances." Plaintiffs have essentially alleged two separate causes of action under one heading.

In the context of civil liability, wherein a defendant's conduct is alleged to be grossly negligent, "Michigan courts have generally applied the standard articulated in the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, which defines gross negligence as 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.' MCL 691.1407(8)(a)." *Cichewicz v Salesin*, 306 Mich App 14, 28-29; 854 NW2d 901 (2014). Willful and wanton misconduct, on the other hand, is tantamount to "an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Jennings v Southwood*, 446 Mich 125, 138; 521 NW2d 230 (1994), quoting *Burnett v City of Adrian*, 414 Mich 448, 455-456; 326 NW2d 810 (1982).

Plaintiffs have failed to adequately develop any argument with respect to their gross negligence claim. Plaintiffs have also failed to cite to any authority concerning gross negligence or willful and wanton misconduct in their brief on appeal. "It is not enough for an appellant in his brief simply to . . . assert an error and then leave it up to this Court to . . . unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 220; 761 NW2d 293 (2008), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We therefore consider this argument abandoned on appeal.

IV. Negligence of Ed's

Plaintiffs alleged that Ed's had access to unit B prior to and on May 15, 2010, including access to the basement where one or more pipes carrying natural gas were located. Plaintiffs asserted that Ed's owed them a duty to use reasonable care when cleaning and removing rubbish from unit B and that they breached that duty by failing to properly maintain, and/or secure the premises to which they were given access and by performing acts without reasonable care which allowed natural gas to accumulate and/or build up which contributed to or caused a gas leak and explosion.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Proof of causation requires both cause in fact and proximate cause. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). "Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation." As explained in *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), to be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation or conjecture.

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

> [*Skinner*, 445 Mich at 164, quoting *Kaminski v Grand Trunk W.R. Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

According to *Skinner*, 445 Mich at 164, "at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." The existence of cause in fact is generally a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the trial court. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

Plaintiffs liken this case to that of *Gadde v Michigan Consol Gas Co*, 377 Mich 117; 139 NW2d 722 (1966). In that case, a serviceman for defendant Michigan Consolidated Gas went to the home of Mrs. Gadde to work on her gas stove. He had to work with the gas line as part of his service. After the service was completed, the serviceman tested the stove for leaks and, finding none, left. A short time later Mrs. Gadde opened the door to light her oven, at which point a flame shot out of the oven causing her serious injuries. *Id*. at 119-120. A gas leak was later found in the stove. Our Supreme Court found:

> The circumstantial evidence and possible inferences might lead to a finding of negligence. Defendant's employee worked on the stove. No one used or touched the stove afterwards except Mrs. Gadde. She did nothing she had not done many times in the 18 years she owned the stove. The gas exploded when she opened the oven door. The fact that the explosion occurred a matter of hours after the serviceman left would be consistent with a theory that it took that long for enough gas to accumulate to cause an explosion . . . . The above facts and [the repairman's] proximity to the occurrence are sufficient circumstances from which reasonable men might conclude that he caused or was responsible for the explosion. [*Id*. at 126-27.]

This case differs from *Gadde* in that there is no person who was seen or who had admitted to touching the gas line in unit B on the day of the explosion (or at any time prior for that matter). As previously indicated, Mr. Wright told the ATF investigator he had been in unit B on May 15, 2010, (the date of the incident) from 7:30 a.m. until approximately 4:30 or 5:00 p.m. preparing the unit for painting, but had not been in the basement on that day. He also testified at deposition some years later that he could not recall whether he had even been in unit B on the day of the explosion but stated that the statements he provided to the ATF investigator were true. As indicated in *Skinner*, given that Mr. Wright was admittedly in unit B approximately 3 ½ hours prior to the explosion, that Mr. Wright turned the gas line on in unit B is an explanation consistent with known facts or conditions. But, it is not deducible from the facts as a reasonable inference.

Plaintiffs have provided no evidence that Mr. Wright had any malice toward the owner/management defendants or the tenants, for example, or that anyone saw Mr. Wright in the basement on May 15, 2010. While the evidence indicated that Mr. Wright removed items from the basement at one time during his work at the premises, there is absolutely no evidence that Mr. Wright's work in the basement caused the blue gas valve located on the south wall near the water heater to be in the open position on May 15. Further, the evidence indicated that Mr.

Wright had provided services for Acc-Sell Management for approximately 25 years. Plaintiffs' circumstantial evidence as to causation is thus no more than conjecture. And, speculation and conjecture are insufficient to create an issue of material fact. 465 *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Therefore, we find that plaintiffs failed to establish an issue of material fact regarding whether Ed's was the proximate cause of the explosion, and we conclude that the trial court properly granted summary disposition to Ed's on plaintiffs' claim of negligence.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane M. Beckering
/s/ Mark T. Boonstra