STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY C. MARIA, Personal Representative of the Estate of CHRISTOPHER C. MARIA, Plaintiff-Appellant, v JUDSON CENTER, INC. and LAHSER RESPITE CENTER, Defendants-Appellees.	UNPUBLISHED July 11, 2006 No. 266394 Oakland Circuit Court LC No. 2004-059732-NO

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm in part, reverse in part, and remand.

Anthony C. Maria and Barbara A. Maria[1], parents and co-personal representatives of the estate of Christopher C. Maria[2], brought suit against defendants Judson Center, Inc. and Lahser Respite Center for injuries sustained by their son while staying in defendants' care. Christopher suffered from a congenital disabling condition known as carbohydrate deficient glycoprotein syndrome and seizure disorder and required around-the-clock care. Christopher stayed at Lahser on various occasions from 1998 through February 2002 to provide relief to his parents from the regimen of 24-hour care. Barbara made arrangements with Lahser to have Christopher stay there from February 4, 2002 through February 8, 2002. Barbara signed an agreement entitled "Lahser Respite Home Respite Care Agreement" setting out the time frame and payment terms of Christopher's stay. The agreement also contained a section entitled "release of liability" which provided, in part: "I [i.e, Barbara Maria] release the provider, Judson Center and the Michigan

[1] Although Barbara A. Maria's name appears on all pleadings in the lower court and on appeal, she is not listed as a party on the trial court's opinion and order granting summary disposition; therefore, this opinion refers to "plaintiff" in the singular.

[2] Christopher died in July 2003, at age 18—not as a result of injuries sustained in this case.

Department of Mental Health from all liability resulting from the above-named participant [i.e., Christopher] in the respite care program."

In arranging for Christopher's stay, Barbara reviewed the "Lahser Respite Home Plan of Service" that had been formulated for his care while staying at the home. The "Alerts/Specific Needs" section provided in part: "Does not have defense mechanism to protecting himself when falling; ****Can remove seatbelt/needs chest strap on at all times!**** . . . CAN LOCK/UNLOCK BRAKES ON WHEELCHAIR." The plan of service also provided that Lahser was to provide "24-hour supervision and protection from hazards."

On February 6, 2002, Christopher was being transported from the bedroom to the bathroom when his wheelchair struck something causing Christopher to fall out and land on the floor. Christopher suffered substantial injuries to his mouth and body, including losing eight teeth which required repeated surgeries for bone grafts and dental implants. Plaintiff brought suit alleging that defendants' failure to follow the plan of service regarding the mandatory use of Christopher's chest strap and transportation of Christopher while not properly secured in his wheelchair constituted negligence, gross negligence, and willful and wanton misconduct. Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7), (8), and (10). *Beauford v Lewis*, 269 Mich App 295, 297; 711 NW2d 783 (2005). A motion under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). If such material is submitted to the court, it must be considered. MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be supported by the pleadings. MCR 2.116(G)(5). A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All this supporting and opposing material must be considered by the court. MCR 2.116(G)(5). Although the trial court did not indicate under which subsection of MCR 2.116(C) it was granting summary disposition, it is undisputed that the trial court considered evidence outside of the pleadings; therefore, review is appropriate under the standard set out in MCR 2.116(C)(7) and (10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

It is well settled that a party may contract against liability for damages caused by its own negligence. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 618; 513 NW2d 428 (1994). The scope of a release is controlled by the intent of the parties as it is expressed in the release. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996). If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. *Id*. While the fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity, a contract is ambiguous if its language is reasonably susceptible to more than one interpretation. *Id*. The initial question whether contract language is ambiguous is a question of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

"In order for a party to disclaim liability for its own negligence, the contract must contain a clear and unequivocal expression of such an intent." *American Empire Ins Co v Koenig Fuel & Supply Co*, 113 Mich App 496, 499; 317 NW2d 335 (1982). And "[p]rovisions of a[][release] purporting to indemnify a party against the consequences of its own negligence must be strictly construed against the drafting party . . . ." *Id*. "However, it is also true that [releases] should be construed so as to give effect to the intentions of the parties," and "[i]n ascertaining the intentions of the parties, one must consider not only the language used in the contract, but also the situation of the parties and circumstances surrounding the contract." *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987).

Here, the critical language purporting to release defendants from "all liability resulting from . . . [Christopher]" could be construed to mean that defendants were released only from liability that might arise as a result of Christopher's actions. There was certainly no mention of liability resulting from defendants' negligence. Further, Barbara averred that it was her understanding that if she did not sign the respite care agreement, Lahser would not provide care for Christopher; at no time did she discuss with anyone any waiver of liability or release of liability to which she would be agreeing if she signed the agreement; and at no time would she have agreed to give up any right to pursue a claim for injuries sustained by Christopher.

Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Port Huron*, *supra* at 323. Accordingly, because factual questions exist concerning the scope and validity of the release, the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(7) was improper.

Plaintiff also argues that Barbara's signature on the respite care agreement only operated to release claims belonging to her personally and did not operate to release claims belonging to Christopher or Anthony. However, plaintiff raises this argument for the first time on appeal, and an issue is not properly preserved if it is not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Further, in light of a remand to the trial court for a factual determination concerning the scope and validity of the release, manifest injustice does not result by declining to address this issue. *Id*. at 95-96.

Given the conclusion that the release was ambiguous, we need not address plaintiff's argument that the release is invalid as against public policy. Further, we need not address the issue because it was not decided by the trial court, and plaintiff may renew this argument on remand. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

It is well settled that although a party may contract against liability for harm caused by its ordinary negligence, a party may not insulate itself against liability for gross negligence or willful and wanton misconduct. *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002). Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendants on the gross negligence and willful and wanton misconduct claim under MCR 2.116(C)(10) on the basis that plaintiff failed to create a genuine issue of material fact that such conduct occurred. We disagree. Gross negligence is defined as "'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003), quoting *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994), quoting MCL 691.1407(7)(a). Willful and wanton misconduct is established

"if the conduct alleged shows 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, supra* at 138, quoting *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). See also *Xu, supra* at 269-270 n 3.

Here, plaintiff came forward with insufficient evidence of gross negligence and willful and wanton misconduct to create a genuine issue of material fact that such conduct occurred. The deposition testimony of Christopher's caregiver, that he strapped Christopher into the wheelchair shortly before the accident, was unrebutted. Even if he failed to later check to see if the straps were still secure before transporting Christopher, that failure would amount only to negligence, not "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results" or conduct showing "such indifference to whether harm will result as to be the equivalent of a willingness that it does." Accordingly, the trial court properly granted summary disposition in favor of defendants on this issue.

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens