STATE OF MICHIGAN

COURT OF APPEALS

BARBARA CONNER, Personal Representative of the Estate of TERRELL CONNER, Deceased,

Plaintiff-Appellee,

v

WHITING CORPORATION,

Defendant-Appellant,

and

NORTHERN ENGINEERING CORPORATION, CRANETROL CORPORATION and HALL ENGINEERING,

Defendants-Not Participating.

UNPUBLISHED
December 4, 1998

No. 201859
Wayne Circuit Court
LC No. 94-426397 NP

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court order denying its motions for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

On April 3, 1992, plaintiff's decedent was employed as an electrician by the Budd Corporation. The plant at which the decedent worked contained three overhead cranes. Plaintiff alleges that when the crane designated as crane 24 malfunctioned, the decedent climbed an access ladder to determine the reason for the malfunction. The decedent was crushed to death between the bridge wheel assembly of another crane, known as crane 19, and the access ladder frame. Defendant had sold crane 24 and the trolley component of crane 19 to the Budd Corporation.

I

A

Defendant first argues that it was entitled to summary disposition pursuant to MCR 2.116(C)(7) because plaintiff's claims were barred by the statute of repose, MCL 600.5839; MSA 27A.5839. Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. When reviewing a motion for summary disposition decided pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. This Court reviews a summary disposition determination de novo as a question of law. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1996).

The statute of repose provides:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. [MCL 600.5839(1); MSA 27A.5839(1).]

A "contractor" is defined as "an individual, corporation, partnership, or other business entity which makes an improvement to real property." MCL 600.5839(4); MSA 27A.5839(4).

The trial court found that crane 24 and the crane 19 trolley constituted improvements to real property.[1] However, the trial court held that defendant did not qualify as a contractor under the statute of repose because it "is basically a manufacturer of cranes." We conclude that the trial court erred. In *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511; 573 NW2d 611 (1998), the Supreme Court stated that the statute does not make a distinction on the basis of whether a defendant provides a mass-produced product. Instead, the focus is on whether a defendant "makes an improvement to real property." *Id*. at 518, n 8. Thus, in *Frankenmuth*, the manufacturer of a prefabricated home was a contractor under the statute.[2] *Id*. at 514-518. In the present case, the record establishes that the Budd Corporation contracted with defendant for the design and manufacture of the improvements in question. Accordingly, defendant is a contractor, and the statute of repose applies. Because it is undisputed that the accident that killed plaintiff's decedent occurred more than six years after crane 24 and the crane 19 trolley were affixed to the Budd Corporation's plant, plaintiff's claim is barred by the statute of repose.

B

Defendant also asserts that the trial court erred in finding that plaintiff was entitled to the benefit of the one-year discovery rule set forth in MCL 600.5839(1); MSA 27A.5839(1). We agree. The one-year discovery rule only applies when gross negligence has been pleaded. *Michigan Millers Ins Co v West Detroit Bldg Co*, 196 Mich App 367, 371; 494 NW2d 1 (1992). Plaintiff did not specifically plead gross negligence. Contrary to the finding of the trial court, the complaint cannot be read to plead gross negligence. Although "gross negligence" is not defined for purposes of the statute of repose, the Supreme Court has recognized that it generally falls somewhere between ordinary negligence and an intentional act. See *Jennings v Southwood*, 446 Mich 125, 135; 521 NW2d 230 (1994). We conclude that plaintiff's allegation that defendant "negligently, recklessly and/or carelessly" violated various duties is not equivalent to pleading gross negligence. Because plaintiff failed to plead gross negligence, the trial court erred in finding that she is entitled to the benefit of the one-year discovery rule.

II

Defendant next argues that the trial court erred in denying its motion for partial summary disposition pursuant to MCR 2.116(C)(7) based on the expiration of the three-year period of limitation for product liability actions. Defendant asserts that plaintiff's amended complaint, which was filed more than three years after the cause of action accrued, raises a new claim regarding crane 24 that does not arise out of the occurrence described in the original complaint. See MCL 600.5805(9); MSA 27A.5805(9). We disagree.

An amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. MCR 2.118(D). It is irrelevant whether "the amendment introduces new facts, a new theory, or even a different cause of action, as long as it springs from the same transactional setting as that pleaded originally." *LaBar v Cooper*, 376 Mich 401, 406; 137 NW2d 136 (1965). In the instant case, the accident that killed plaintiff's decedent is the occurrence that gives rise to plaintiff's cause of action. Plaintiff's amended pleading does not allege a new accident involving crane 24, but rather that crane 24 was involved in the accident described in the original complaint. Moreover, defendant was not entirely without notice of crane 24's possible involvement in the accident; although the original complaint does not specifically mention crane 24, it does allege that two cranes were involved in the accident.

III

Next, defendant claims that it was entitled to summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to offer any evidence that the trolley on crane 19 was the cause in fact of the injuries to plaintiff's decedent. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

A prima facie product liability case requires proof of a causal connection between an established defect and the plaintiff's injury. *Skinner v Square D Co*, 445 Mich 153, 159; 516 NW2d 475 (1994). Mere speculation is insufficient to establish causation; a causation theory must have some basis in established fact. *Id*. at 164.

After reviewing the record, we conclude that plaintiff has not offered evidence to support a reasonable inference that any defect associated with crane 19 was a cause in fact of the decedent's injuries. Plaintiff has presented no evidence that defendant made any portion of crane 19 other than the trolley. Plaintiff has also failed to contradict defendant's evidence indicating that the trolley played no role in decedent's accident because the trolley could not physically travel far enough to have come into contact with the decedent. In fact, plaintiff has failed to offer any explanation, based upon facts in evidence, regarding how the trolley played a causal role in decedent's accident.

IV

In addition, defendant contends that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to offer any evidence that the trolley on crane 19 was defective. We agree. A plaintiff bringing a products liability action must show that the defendant supplied a product that was defective and that the defect caused the injury. *Auto Club v General Motors*, 217 Mich App 594, 604; 552 NW2d 523 (1996). Plaintiff does not identify a specific defect in defendant's product.[3] Accordingly, her claim must fail. See *id*. Manufacturers and sellers are not insurers, and they are not absolutely liable for any and all injuries sustained from the use of their products. *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137, 145; 564 NW2d 74 (1997).

V

Finally, defendant argues that it was entitled to summary disposition under MCR 2.116(C)(10) because plaintiff failed to establish that defendant owed a duty to plaintiff's decedent with regard to crane 19. We agree. Defendant has presented undisputed evidence that the only component on crane 19 manufactured or designed by it was the trolley. Plaintiff has not offered any evidence that contradicts the testimony presented by defendant indicating that the trolley could not have come into contact with the decedent. Moreover, plaintiff has not identified any defect in the trolley that contributed to the accident. Under these facts, we cannot find that the imposition of a duty is justified. See *Halbrook v Honda*, 224 Mich App 437, 441-442; 569 NW2d 836 (1997) (discussing the policy considerations to be taken into account in determining whether a duty exists).

Plaintiff also argues that defendant owed the decedent a duty based upon postmanufacture visits by Whiting to the Budd plant. However, such visits do not justify imposing a duty here because plaintiff has not presented evidence of any unique or controlling relationship between Whiting and Budd so as to establish that defendant assumed a continuing duty. See *Gregory v Cincinnati Inc*, 450 Mich 1, 25-28; 538 NW2d 325 (1995).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] In her appellate brief, plaintiff argues that the crane and trolley are not improvements to real property. Because plaintiff has not cross appealed the trial court's contrary ruling, this issue is not preserved, and we decline to address it. See *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

[2] The trial court relied on *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 219 Mich App 165; 555 NW2d 510 (1996), which was subsequently reversed by the Supreme Court decision cited above. However, even under this Court's opinion in *Frankenmuth*, defendant qualifies as a contractor. This Court held that the statute of repose "is meant to protect providers of individual expertise who render particularized services for the construction of improvements to particular pieces of real property." *Id*. at 172. Defendant does not produce large quantities of identical products, but rather engineers and manufactures cranes to meet the specifications of clients. Because defendant provided individual expertise and particularized service to the Budd Corporation for the construction of improvements to Budd property, defendant is entitled to the protection of the statute of repose.

[3] Plaintiff argued below that crane 19 should have had a better warning system, proximity sensors, permanent rail stops, and adequate clearance to the access ladder. However, plaintiff failed to adequately support these assertions with documentation, and, in any event, there is no evidence that such defects were attributable to defendant. As a matter of law, defendant had no duty to warn of the hazards of using products manufactured by someone else. See *Brown v Drake Willock Int'l, Ltd*, 209 Mich App 136, 145; 530 NW2d 510 (1995).