STATE OF MICHIGAN

COURT OF APPEALS

KENNETH D. HESSE, Personal Representative of the Estate of JASON L. HESSE, Deceased, KENNETH D. HESSE, CYNTHIA R. HESSE, and AMY R. HESSE, a minor, by her next friend, KENNETH D. HESSE,

Plaintiffs-Appellees,

v

CHIPPEWA VALLEY SCHOOLS, JAMES J. RIVARD, JAMES P. MURPHY, and RUTH ANN BOOMS,

Defendants-Appellants,

and

ASHLAND OIL, INC., a/k/a ASHLAND INC., and VALVOLINE INSTANT OIL CHANGE, d/b/a VALVOLINE OIL COMPANY,

Defendants.

UNPUBLISHED
January 12, 2001

No. 209080
Macomb Circuit Court
LC No. 95-004893-NO

Before: Owens, P.J., and Jansen and R.B. Burns*, JJ.

PER CURIAM.

Defendants-appellants Chippewa Valley Schools, James J. Rivard, James P. Murphy, and Ruth Ann Booms (hereinafter "defendants") appeal by leave granted the trial court's order denying their motions for summary disposition of plaintiffs' breach of contract and gross negligence claims under MCR 2.116(C)(7) and (C)(10). We reverse and remand for further proceedings.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On March 3, 1995, Jason Hesse, the deceased, defendant James P. Murphy,[1] and Steven Schneider[2] signed a document entitled "Chippewa Valley High School Work Study Plan." The plan provided that defendant Ashland Oil would hire sixteen-year-old Jason to perform "basic automotive service" and "basic cleaning services" at Ashland Oil's automotive service center located in Clinton Township. Also on March 3, 1995, Schneider completed a standard "CA-7 Work Permit and Age Certificate" concerning Jason's employment with defendant. The work permit provided that Jason was to work a total of 23 hours per week, at an hourly wage of $5, and also provided that Jason would not work past 7:00 p.m. Additionally, the work permit provided that defendant "must provide competent adult supervision at all times" and provided that Jason's employment "will conform to all federal, state, and local laws and regulations." Steven Schneider, Jason Hesse, and Cynthia Hesse signed the CA-7 permit. On March 6, 1995, defendant Ruth Ann Booms, acting as Chippewa Valley Schools' agent, signed and issued the work permit.

In 1995, Ashland Oil accepted used oil products from the general public at its automobile service centers. When customers dropped off used motor oil, they would identify the substance on a pre-printed form, record the amount they were leaving at the service center, provide their address and sign their name. The used motor oil was poured into a 1,000-gallon storage tank located in the basement of the service center.

On June 2, 1995, seventeen-year-old Bradley Dryer was working at defendant's Valvoline service center along with Jason and others. Schneider had left Dryer in charge of the business while he was away from the service center. That day, Dryer accepted approximately five gallons of a black liquid in a paint bucket from an unknown man. As Dryer explained, when Ashland Oil's employees accepted waste products from people, they "would look at them a little bit," but generally would not smell them unless they noticed "a certain smell." Dryer did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil. However, when he poured the liquid into the storage tank, he noticed that there had been a paintbrush and some industrial plastic wrap in the paint can, along with the black liquid. A fire investigator concluded later that the substance Dryer accepted from the unknown person actually was gasoline, not motor oil.

At closing on June 2, 1995, it was Dryer's responsibility to check the level of the storage tank located in the basement. Dryer opened the top of the tank to look inside and determine its level. However, according to the fire investigator, he used the flame from his Bic lighter in order to see inside the storage tank. This caused an explosion and fire, which killed Jason, who had been standing nearby when Dryer checked the storage tank.

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[1] Defendant Murphy was Jason Hesse's school counselor.

[2] Steven Schneider was the store manager of defendant Ashland Oil's "Valvoline Instant Oil Change" automobile service center in Clinton Township.

On appeal, defendants argue the trial court erred by refusing to grant their motion for summary disposition of plaintiffs' breach of contract claims[3] under MCR 2.116(C)(10). We agree.

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). On appeal, the trial court's decision is reviewed de novo. *Id.*[4]

To establish a breach of contract, a party must show, as pertinent to this case, (1) the existence of a valid contract or agreement, and (2) the non-performance of a duty, whether imposed by a promise stated in the contract or by a term supplied by the court. See *Woody v Tamer*, 158 Mich App 764, 771-772; 405 NW2d 213 (1987). The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). This Court construes contractual language according to its plain and ordinary meaning, avoiding technical or constrained constructions. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). The construction of unambiguous contractual language is a question of law that this Court reviews de novo. *Id.*

The first problem with plaintiffs' breach of contract claim against defendants, and one the parties have failed to address on appeal, arises from the physical aspects of the alleged contract, which is comprised of two separate documents, the work-study plan and the work permit. Both parties' arguments are premised on the assumption that this Court must read these documents together in order to determine whether plaintiffs have established the existence of a valid contract. However, while two documents may be read together to ascertain the terms of a single contract, one writing must reference the other instrument for additional contract terms. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Here, the plan and the permit are two separate documents, neither of which contains terms referencing the other for the purpose of supplying contractual terms. Therefore, in the absence of any indication in the documents that

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[3] The Estate of Jason Hesse and the individual plaintiffs filed two separate breach of contract claims against defendants.

[4] Defendants also motioned the trial court for summary disposition pursuant to MCR 2.116(C)(7), which allows for summary disposition where, as pertinent, a "claim is barred because of . . . immunity granted by law." Generally, governmental entities such as defendant school are immune from tort liability. MCL 691.1407; MSA 3.996(107); *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999) (Taylor, J). However, governmental immunity does not extend to contract actions, even when the contract action arises out of the same facts that would support a tort action. *Id.*

the parties intended them to be read together to form a complete contract, we must examine each separately.

Turning first to the work permit, we find that this document, by its clear and unambiguous terms, does not constitute a contract between defendants and the parents or Jason Hesse. An examination of the clear, unambiguous terms of the work permit leads to one conclusion only: that the document is not a contract because defendants did not obligate themselves to do anything at all insofar as the parents and Jason Hesse were concerned. By her signature on the permit, defendant Booms merely *confirmed* that, based on information with which she was provided, the listed job duties and hours of employment were in compliance with state and federal regulations. MCL 409.105; MSA provides that "the issuing officer *shall* issue a work permit upon application by the minor desiring employment and after having examined, approved, and filed" (emphasis supplied) papers that contain

> (a) A statement of intention to employ, signed by the prospective employer . . . setting forth the general nature of the occupation in which the employer intends to employ the minor, the hours during which the minor will be employed, the wages to be paid and other information the department of education, in cooperation with the department of labor, requires.
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> (b) Evidence showing that the minor is of the age required by this act. . . .

The work permit certificate indicates that the prospective employer provided the required information and Jason completed the section of the form that pertained to him. Booms certified only: (1) that Jason personally appeared before her, (2) that the form was properly completed, (3) that the listed job duties (basic automotive service and basic cleaning operations) were in compliance with state and federal laws and regulations, (4) that the listed hours of employment (between 8:00 a.m. and 7:00 p.m. and not more than 23 total hours each week) were in compliance with state and federal laws and regulations, and (5) that the form was signed by both the student and the employer. Clearly, Booms undertook no responsibility on the part of defendant school to continuously monitor Jason's employment for Jason's or his parents' protection. The unambiguous language of the permit does not support such a construction. Because none of the defendants obligated themselves to do anything by issuing the permit pursuant to the statute, it does not constitute a contract between defendants and Jason Hesse or his parents.

Next, defendants argue that the trial court erred in finding a triable issue with regard to whether the work-study plan constituted a valid contract between the parties. The plan, a pre-printed form, contains the name and address of Chippewa Valley High School and lists defendant James Murphy as "Coordinator." Jason Hesse is named as the student about whom the plan is concerned. Defendant Valvoline Instant Oil Change is listed as the employer. In relevant part, the plan states that Jason was to work a maximum of 23 hours per week doing "basic automotive service" and "basic cleaning services." The plan sets forth the following "General Conditions":

> 1. The school will designate a staff member to arrange for inschool [sic] consultations and advise the parties involved in this agreement.

2. This agreement will not be interrupted without consulting the student, employer, and work-study coordinator.

3. The employer agrees to provide the student with the broadest occupational experience in keeping with the job activities listed above.

4. This employment shall conform to all federal, state and local laws and regulations, including non-discrimination against any employee because of race, color, creed, handicap, or national origin.

5. The student agrees to abide by the regulations and policies of his/her employer and school.

6. The school's designee will, at least once every 20 school days, visit the student and the student's supervisor to check attendance, evaluate the student's progress, and evaluate the placement in terms of the health, safety, and welfare of the student.

The trial court erred in finding that the work-study plan presented a triable issue of fact concerning the existence of a valid, enforceable contract because plaintiffs have not submitted evidence to show that the promises contained in the work-study plan, if any, were supported by valid consideration. Consideration is a legal detriment that has been bargained for and exchanged for a promise. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978) (Moody, J). The parties to a contract must have *agreed and intended* that the benefits each derived be the consideration for a contract. *Id.* at 20-21. As this Court observed in *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992), "a valid contract requires a 'meeting of the minds' on all the essential terms." Quoting from its opinion in *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), this Court stated:

> In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [citing *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988).]

Plaintiffs interpret the plan along the following lines: plaintiffs contend that the Youth Employment Standards Act [YESA], MCL 409.101 *et seq.*; MSA 17.731(1) *et seq.*, prohibited Jason's employment with defendant Ashland Oil because his duties at the oil change center were inherently hazardous.[5] Plaintiffs explain that Jason could not have obtained a work permit for

[5] MCL 409.103(1); MSA 17.731(3)(1) provides, in pertinent part: "A minor shall not be employed in, about, or in connection with an occupation that is hazardous or injurious to the minor's health or personal well-being or that is contrary to standards established under this act . . . ."

employment at the oil change center unless defendant school and Ashland Oil entered into a contract exempting Jason from the strictures of the YESA pursuant to MCL 409.118; MSA 17.731(18), which provides:

> This act does not apply to or prohibit the employment of a student minor 14 years of age or older by an employer if a written agreement or contract is entered into between the employer and the governing body of the school district . . . at which the minor is enrolled. The employment shall not be in violation of a federal statute or regulation and a signed copy of the agreement shall be on file in the place of employment before the minor begins employment.

Plaintiffs contend that the Work Study Plan is the kind of contract contemplated by MCL 409.118; MSA 17.731(18), not a mere scholastic plan pursuant to Jason's enrollment in the school's work-study program. Indeed, plaintiffs insist that Jason was not even eligible to participate in the work study program pursuant to the school's own policies. They further argue that this alleged contract is supported by valid consideration. Plaintiffs state in their brief:

> In this case, the Plaintiff parents gave consideration by allowing their son to be employed without the protections of the Youth Employment Standards Act, in exchange for Defendant's agreement to perform certain functions and duties which are set forth above under the contract. The school district divested itself of direct financial and other responsibility for Jason during his hours at the Ashland store. The school district cannot be allowed to retain the benefits of the transaction while avoiding its obligations under the agreement.

We do not accept plaintiffs' novel arguments. First, there is absolutely no indication that the plan was intended by Ashland Oil and defendant school to be a contract exempting Jason from the YESA. The express terms of the plan make no reference to the YESA. Although plaintiffs have cited statutes and regulations to show that Jason's employment at the oil change center was inherently dangerous, this does not shed light on the issue whether the plan constituted an enforceable contract. Instead, if Jason's employment actually was hazardous, and thus illegal, this would only mean that defendant Booms issued Jason's work permit erroneously. See MCL 409.103(1); MSA 17.731(3)(1) and MCL 409.104(1); MSA 17.731(4)(1). In the absence of objective evidence to support their interpretation of the plan, plaintiffs' subjective understanding of the document is largely irrelevant. See *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 317; 575 NW2d 324 (1998).

Second, the fact that Jason was issued a work permit indicates, contrary to plaintiffs' position, that the YESA applied to his employment at the oil change center. MCL 409.104(1); MSA 17.731(4)(1) states, as pertinent, "a minor shall not be employed in an occupation regulated by this act until the person proposing to employ the minor procures from the minor and keeps on file at the place of employment a copy of the work permit or a temporary permit." Pursuant to MCL 409.118; MSA 17.731(18), the YESA completely exempts from its regulation the employment of a minor 14 years of age or older if a written agreement is entered into between the employer and *the school board*. Such a contract would necessarily divest the employer of the

responsibility for obtaining a work permit to employ the exempted minor under the YESA. The fact that the parties sought and obtained a *work permit* for Jason Hesse – rather than entering into a written agreement between Ashland Oil and the school board – indicates that the plan is not the kind of contract of exemption contemplated by MCL 409.118; MSA 17.731(18).

Accordingly, we find a complete absence of a bargained-for exchange of consideration between the parties. While plaintiffs argue that the parents "allow[ed] their son to be employed without the protections of the YESA, in exchange for Defendant's agreement to perform certain functions and duties which are set forth above under the [Work Study Plan]," they have failed to provide evidentiary support for their position that this was the mutual intent and agreed-upon exchange of the parties when they executed the work-study plan. Without supporting evidence, plaintiffs have attempted to show the existence of a valid contract merely based on their own, subjective view of the work-study plan. *Kamalnath*, *supra* at 548; *Marlo Beauty Supply*, *supra* at 317.

In any event, even if the plan constituted a valid contract between the parties, we would still conclude that the trial court erred by refusing to grant defendants' motion for summary disposition of plaintiffs' breach of contract claims, primarily because plaintiffs failed to submit evidence to establish a triable issue of fact regarding whether defendants actually breached the express terms of the alleged contract. For the sake of argument, we assume that the parents agreed to allow Jason to participate in defendants' work-study program and that Jason agreed to participate. Indeed, this is exactly what the plan, by its clear terms, indicates.[6] In turn, defendant school obligated itself to "designate a staff member to arrange for inschool [sic] consultations and advise the parties involved in this agreement" and to avoid interrupting the work-study plan "without consulting the student, employer, and work-study coordinator."[7] Plaintiffs have not

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[6] Plaintiffs have taken great pains to establish that the work-study plan was not just what it clearly purports to be, i.e., a plan pursuant to which Jason was enrolled in the school's work-study program. By advancing this argument, plaintiffs urge this Court to view the work-study plan as a valid, enforceable contract, yet one that is not controlled by its express terms. We will not accept plaintiffs' invitation. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (courts are not permitted "to look to extrinsic testimony to determine [contracting parties'] intent when the words used by them are clear and unambiguous and have a definite meaning" quoting *Sheldon-Seatz, Inc, v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947), in turn quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941)); *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 449; 571 NW2d 548 (1997) ("Contractual language is to be given its plan and ordinary meaning . . . .").

[7] The Schools also agreed that its "designee [would], at least once every 20 school days, visit the student and the student's supervisor to check attendance, evaluate the student's progress, and evaluate the placement in terms of the health, safety, and welfare of the student." However, this is not a valid, enforceable contractual term. According to 1999 AC, R 340.1733(m), "[t]he superintendent of the district shall designate a staff member to visit the [work-study student] and the [student]'s supervisor at the job site at least once every 20 school days to check attendance, evaluate the [student]'s progress, and evaluate the placement in terms of the health, safety, and welfare of the [student]." A pledge to undertake a preexisting statutory duty is not supported by adequate consideration. *General Aviation, Inc v Capital Region Airport Authority (On Remand)*,

(continued…)

submitted evidence to show that defendants failed to honor their obligations under the plan. The contract itself clearly named defendant Murphy as the "Coordinator" of the work-study plan. There is no indication that any of the parties ever requested him to "arrange for inschool consultations" or to give advice to "the parties involved in this agreement." Further, there is no indication that any of the defendants interrupted the agreement without consulting the proper parties according to the contract's clear terms. Thus, plaintiffs failed to establish a triable issue of fact with regard to whether a breach of the work-study plan occurred.

Plaintiffs base a great portion of their argument on the statement in the work-study plan, "This employment shall conform to all federal, state and local laws and regulations, including non-discrimination against any employee because of race, color, creed, handicap, or national origin." Plaintiffs argue that, with this language, defendants undertook the responsibility of policing Jason's employment to insure that it complied with safety regulations. However, this position ignores that this provision does not expressly charge a party to the contract with the obligation of ensuring that Jason's employment complied with existing safety regulations. Moreover, 1999 AC, R 340.1733(m) expressly obligated defendant Chippewa Valley Schools to "designate a staff member to visit [Jason] and [his] supervisor at the job site at least once every 20 school days to . . . evaluate the placement in terms of [Jason's] health, safety, and welfare." Because the administrative rule already required the school to evaluate Jason's employment at the oil change center in terms of his "health, safety, and welfare," we conclude that whatever responsibility, if any, the "state and local laws and regulations" provision of the plan imposed on defendant school, this responsibility was included in the preexisting legal duty that defendant school already owed Jason because he participated in the work-study program. A pledge to undertake a preexisting statutory duty is not supported by adequate consideration. *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich App 710, 715; 569 NW2d 883 (1997).

Accordingly, because plaintiffs have failed to show the existence of a valid, enforceable contract, and, in the alternative, have failed to show that any alleged contract was breached, the trial court erred in denying defendants' motion for summary disposition of plaintiffs' breach of contract claims.

Next, defendants Murphy and Booms argue that the trial court erred in denying their motions for summary disposition of plaintiffs' gross negligence claims under MCR 2.116(C)(7) and (C)(10). We agree.

MCR 2.116(C)(7) allows for summary disposition of a claim where, *inter alia*, "[t]he claim is barred because of . . . immunity granted by law." When reviewing a motion under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties. *Codd v Wayne County*, 210 Mich App 133, 134; 537 NW2d 453 (1995). All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. To survive the motion, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* at 134-135.

(…continued)

224 Mich App 710, 715; 569 NW2d 883 (1997).

MCL 691.1407(2); MSA 3.996(107)(2) provides, in pertinent part:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
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> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Once a standard of conduct is established, the reasonableness of the actor's conduct under the standard generally is a question for the factfinder, not the court. *Jackson v Saginaw County*, 458 Mich 141, 146; 580 NW2d 870 (1998); *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). However, if on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Jackson*, *supra*; *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

First, as to defendant Booms, the trial court erred in denying summary disposition of plaintiffs' gross negligence claim because there is no evidence whatsoever to support the notion that Booms acted so recklessly as to demonstrate a substantial lack of concern for Jason's safety. As discussed, there is no support for plaintiffs' position that Booms was in any way contractually obligated to plaintiffs to supervise Jason or otherwise ensure his safety in the workplace. As the school official who authorized the issuance of Jason's work permit, Booms was required to issue the permit after examining and approving "[a] statement of intention to employ, signed by the prospective employer or by a person authorized by the prospective employer, setting forth the general nature of the occupation in which the employer intends to employ the minor, the hours during which the minor will be employed, the wages to be paid and other information the department of education, in cooperation with the department of labor, requires," and verifying Jason's age. MCL 409.105; MSA 17.731(5). Plaintiffs have failed to cite any authority indicating that the departments of education and labor expected Booms to further supervise the terms and conditions of Jason's employment. Pursuant to MCL 409.107(1)(b); MSA 17.731(7)(1)(b), Booms was authorized to revoke the permit if Jason's employment was "in violation of federal or state law or of a regulation or rule promulgated under federal or state law," but *only* if the department of labor informed her of the violation. There is no indication that Booms received such notice from the department of labor and chose to ignore it. See also MCL 109.121; MSA 17.731(21) ("The department of labor shall enforce [the YESA] and assist in the prosecution of this act."). In light of these considerations, the trial court erred in denying Booms'

motion for summary disposition of plaintiffs' gross negligence claim. There is simply no evidence that Booms acted recklessly in issuing Jason's work permit.

Likewise, plaintiffs failed to submit evidence to raise a triable issue of fact with regard to whether defendant Murphy's conduct was so reckless as to demonstrate a substantial lack of concern for Jason's safety. As discussed, Murphy was responsible, at most, for visiting Jason's workplace every 20 school days and evaluating Jason's work-study placement in terms of his health, safety, and welfare. The evidence shows that Murphy visited the job site twice, at which times he did not notice anything unusual or unsafe about Jason's place of employment. This does not evidence reckless conduct. On the contrary, the evidence shows that Murphy *was* concerned for Jason's welfare and visited his place of employment to determine its fitness in terms of safety and health. Based on his observations, he had no reason to suspect the oil change center was hazardous or posed a threat to Jason's safety. While the evidence may support Murphy's mere negligence, it certainly does not indicate that he acted recklessly, with a substantial lack of concern for Jason's safety and health. Accordingly, we find that the trial court erred in denying Murphy's motion for summary disposition of plaintiffs' gross negligence claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns