# STATE OF MICHIGAN

# COURT OF APPEALS

---

DONNA WARE,

Plaintiff,

v

ARBOR VILLAGE CONDOMINIUM ASSOCIATION and LUCKA'S LAWN & SNOW, INC,

Defendants,

and

ARBOR VILLAGE CONDOMINIUM ASSOCIATION,

Cross-Plaintiff-Appellee,

v

LUCKA'S LAWN & SNOW, INC,

Cross-Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 195547
Wayne Circuit Court
LC No. 93-323850 NO

---

Before: McDonald, P.J., Wahls and J. R. Weber*, JJ.

PER CURIAM.

This is a contractual indemnification action. Lucka's Lawn & Snow, Inc., appeals as of right from a determination that it is required to completely indemnify Arbor Village Condominium Association for any damage award Arbor Village was required to pay in the underlying premises liability action. We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

---

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

We find that summary disposition was prematurely granted. *SSC Associates v General Retirement System*, 192 Mich App 360, 364-365; 480 NW2d 275 (1991).

The parties disagree over the meaning of paragraph five of the snow removal contract. Arbor Village claims Lucka has a continuing duty under the contract to apply salt and chloride to the premises regardless of whether there is a snow of two inches or more under paragraph three and Lucka claims it must only salt after they are required to plow under paragraph three. We conclude either interpretation is reasonable making the agreement unclear or ambiguous. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991). Thus, the intent of the parties is to be determined by the trier of fact and not a proper subject of a MCR 2.116(C)(10) motion.

After remand, if the trier of fact determines that the presence of the ice was not caused by Lucka's failure to apply chemicals to hazardous residue, then the condition precedent for Lucka's to have been on the Arbor Village premises to apply chemicals was not shown to exist. Absent the occurrence of this contractual condition precedent, Lucka's cannot have been said to have breached any obligation owed under the contract. The indemnification clause in the contract would be non-operational, therefore, on the facts of this case because plaintiff's injury could not be said to have resulted from Lucka's performance of the snow and ice removal specifications of the snow removal contract.

If, however, the facts show the ice was present on Arbor Village's premises because Lucka's failed to apply chemicals to the hazardous residue, then the trial court shall enter an order affirming its original grant of summary disposition, but only to the extent that summary disposition is granted because Lucka's must indemnify Arbor Village for any liability arising solely from Lucka's negligence.

To the extent that the trial court determined that Lucka's had to indemnify Arbor Village for the negligence of Arbor Village, the trial court erred and the court shall vacate that portion of its original order granting summary disposition. *Chrysler Corp v Brencal Contractors, Inc*, 146 Mich App 766, 772-774; 381 NW2d 814 (1995); *Pritts v J I Case Co*, 108 Mich App 22, 29; 310 NW2d 261 (1981).

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

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber