STATE OF MICHIGAN

COURT OF APPEALS

WAYNE S. SMITH and JUDY A. SMITH,

Plaintiffs,

v

GRADALL RENTAL SERVICE, INC.,

Defendant,

and

HAYES WHEELS INTERNATIONAL-MICHIGAN, INC. and HAYES WHEELS INTERNATIONAL, INC.,

Defendants/Third-Party Plaintiffs-Appellants,

and

NEDROW REFRACTORIES COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 31, 2000

No. 215505
Livingston Circuit Court
LC No. 97-015850-NO

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Third-party plaintiffs ("Hayes") appeal as of right the trial court's orders granting summary disposition in favor of third-party defendant ("Nedrow") on Hayes' claims of breach of contract and indemnity. We affirm.

I

A trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in

the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

The trial court granted summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Spiek, supra* at 337. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim; a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id*. If the party opposing the motion fails to present evidentiary proofs creating a genuine issue of material fact, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 & n 2; 597 NW2d 28 (1999).

"The construction of a contract with clear language is a question of law," which this Court reviews de novo. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996). If the contractual language is unclear or susceptible to multiple meanings, interpretation is a question of fact. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997).

II

Hayes entered into a contract with Nedrow to rebuild an aluminum furnace well at Hayes' facility. Plaintiff Wayne Smith, an employee of Nedrow, was injured during the project when he was hit on the head by a jackhammer attached to a crane boom operated by an employee of defendant Gradall Rental Service, a subcontractor of Nedrow. Smith received worker's compensation benefits from Nedrow and subsequently sought damages in a negligence claim against Hayes. Hayes paid $5,000 in settlement of the negligence claim and filed a third-party complaint against Nedrow seeking indemnification for its liability. The trial court granted summary disposition in favor of Nedrow, finding no basis for Hayes' claim of indemnity.

III

Hayes claims that the trial court erred in granting summary disposition on the issues of indemnity and that it was entitled to indemnification on the basis of a contractual agreement for indemnity or under an implied warranty of workmanship service. We disagree.

Paragraph 20 of Hayes' purchase order, entitled "Indemnification," outlines the contractual agreement for indemnification:

> Upon acknowledgment of this purchase order, Supplier [Nedrow] agrees to indemnify Hayes Wheels International, Inc. against all liability, loss, claims, actions, suits, judgements, settlements, costs or expenses (including reasonable attorney's fees) whatsoever arising out of any action brought against Hayes Wheels International, Inc. due to defective materials or workmanship supplied to Hayes Wheels International, Inc. Such indemnification shall continue notwithstanding any inspection, acceptance, payment or processing by Hayes Wheels International, Inc. Seller shall agree to maintain in full

> force and effect general liability insurance to include product liability, covering Buyer and Supplier for all goods, products and services supplied hereunder with a minimum of $1,000,000 combined single limited coverage. Maintenance of such insurance shall not relieve Supplier of liability for indemnification as set forth above.

"An indemnity contract is construed in accordance with the rules for the construction of contracts in general." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). "An indemnity contract will be construed strictly against the party who drafts the contract and the party who was the indemnitee." *Id.* Further, "a contract of indemnity will not be construed to indemnify the indemnitee against losses which are the result of his own negligence, unless such intention is expressed in clear and unequivocal terms." *Peeples v Detroit*, 99 Mich App 285, 296; 297 NW2d 839 (1980) (footnote omitted).

A

The parties' indemnity agreement limited indemnification to actions brought against Hayes "due to defective materials or workmanship." This provision is strictly construed against Hayes as the drafter and indemnitee. The indemnity provision does not clearly and unequivocally provide for indemnification of Hayes own negligence. Rather, it provides for indemnity in actions brought "due to defective materials or workmanship *supplied to Hayes* …." Hayes' reliance on the words, "all," "whatsoever," and "any" to support its contention of all-inclusive indemnification is misplaced in light of this limiting language. The Smiths' lawsuit against Hayes was grounded in claims of Hayes' own negligence, not the supplier's negligence, and, therefore, indemnification is not contractually required.

B

The trial court found that Hayes claim likewise could not be supported on a theory of implied breach of warranty of workmanship service. The trial court concluded that because Hayes' claim against Nedrow, the employer, does not fall within an express or implied agreement for indemnification, the claim is precluded under the exclusive remedy provisions of worker's compensation. The court reasoned that the action against Hayes was grounded in a theory of retained control and, as such, there was no basis for indemnification by Nedrow of Hayes' active negligence.

Hayes' claim was properly dismissed. On the facts of this case, Nedrow's duty for workmanlike service cannot be viewed as distinct from its duty to provide safe working conditions, the latter of which is exclusively within the province of worker's compensation. The worker's compensation act[1] relieves an injured worker's employer from liability to make a contribution. *Williams v Unit Handling Systems Division of Litton Systems, Inc*, 433 Mich 755, 760; 449 NW2d 669 (1989); *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 247-248; 533 NW2d 15 (1995). With regard to indemnity and breach of warranty, the third-party claim in this instance stems from Hayes' liability for its own negligence on the basis of retained control, for which Hayes is solely liable. The allegation of negligence on this basis is unrelated to the services performed by Nedrow under its contract with Hayes. Indemnity for breach of workmanlike service must be premised on performance

of the services provided by the potential indemnitor. *Williams*, *supra* at 203; *Ingram v Interstate Motor Freight Systems*, 115 Mich App, 559, 566-567; 321 NW2d 731 (1982).

IV

Hayes also claims that the trial court erred in granting summary disposition on the ground that Nedrow had no contractual duty to procure general liability insurance covering Hayes for claims arising out of the furnace project. We disagree.

Hayes bases its contention on the requirement for insurance in ¶20 and a corresponding reference to the provision of insurance in Nedrow's quotation and invoice. As noted above, ¶20 set forth the parties' agreement for indemnification and required Nedrow to secure "general liability insurance to include product liability, covering Buyer and Supplier *for all goods, products and services supplied hereunder* …."

Although it is clear that the agreement includes a requirement for insurance, we conclude, as did the trial court, that the negligence claims for which Hayes seeks indemnity do not fall within the ambit of the above provision for insurance. The Smiths alleged essentially that Hayes was directly negligent in undertaking and overseeing the furnace project, e.g., negligently prepared job specifications; failed to make proper inspections; selected and employed negligent contractors; failed to exercise proper supervision; and failed to ensure proper work plans, adequate tools and equipment, and work safety programs. The agreed-upon indemnification, and the insurance provision that follows, expressly cover defective materials or workmanship supplied to Hayes under the contract between Nedrow and Hayes, not claims related to Hayes' own negligence.

If Hayes had intended to require Nedrow to furnish insurance protecting Hayes against the Smiths' claims of liability for Hayes' alleged active negligence stemming from Nedrow's refurbishment of the furnace, then Hayes should have articulated that requirement in clear and unambiguous language outside of ¶20. Any ambiguity in the purchase order is to be construed against Hayes, the drafter of the contractual language and the proposed indemnitee. See *Beaudin v Michigan Bell Telephone Co*, 157 Mich App 185, 188; 403 NW2d 76 (1986). The trial court did not err in awarding summary disposition for Nedrow on the issue of insurance.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] MCL 418.131(1); MSA 17.237(131)(1).