

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HALL ROAD SHOPPING PLAZA, INC., d/b/a  
POINTE VILLAGE PLAZA,

Plaintiff-Appellee,

v

U AND M, INC., d/b/a BUSCEMI'S  
INTERNATIONAL,

Defendant-Appellant.

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UNPUBLISHED

August 4, 2000

No. 213061

Macomb Circuit Court

LC No. 96-003872-CK

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant U and M, Inc., d/b/a Buscemi's International (U & M) appeals as of right from an order granting summary disposition in favor of plaintiff Hall Road Shopping Plaza, Inc., d/b/a Pointe Village Plaza, in this breach of contract case. We affirm.

I. Basic Facts And Procedural History

U & M is a tenant in Hall Road Shopping Plaza's shopping center, where it operates a retail establishment. The lease agreement contains an indemnity provision that states, "The Tenant agrees to indemnify and hold harmless the Landlord from any liability for damages to any person or property in, on or about said leased premises from any cause whatsoever . . . ." In early-December 1995, a woman slipped and fell on the sidewalk outside of U & M's retail establishment, injuring herself. The injured woman filed a complaint against Hall Road Shopping Plaza and U & M, alleging that they were negligent in maintaining the premises.

In late-March 1996, Hall Road Shopping Plaza filed suit against U & M, alleging that U & M had breached its legal obligation to provide insurance to protect Hall Road Shopping Plaza. Hall Road Shopping Plaza also claimed that U & M had breached its contractual agreement and common law duty to indemnify Hall Road Shopping Plaza and, therefore, it was entitled to contribution from U & M.

Hall Road Shopping Plaza later moved for partial summary disposition against U & M, under MCR 2.116(C)(10), arguing that U & M had entered into the lease agreement in which U & M agreed to indemnify Hall Road Shopping Plaza from any liability and to obtain insurance for Hall Road Shopping Plaza's benefit. U & M filed a counter-motion for summary disposition arguing that the intent and conduct of the parties established that Hall Road Shopping Plaza was solely responsible for the maintenance of the common areas. U & M also contended that it was only obligated to provide Hall Road Shopping Plaza with insurance and a defense if someone was injured inside U & M's store.

The trial court concluded that Hall Road Shopping Plaza was entitled to indemnification from U & M under the express terms of the contract. Accordingly, the trial court granted Hall Road Shopping Center's motion for summary disposition on one count of Hall Road Shopping Center's complaint. The trial court also granted U & M's counter-motion for summary disposition concerning Hall Road Shopping Plaza's claim that U & M breached the common law duty to indemnify.

## II. Indemnification And Ambiguity

### A. Standard Of Review

U & M argues on appeal that the trial court erred when it granted summary disposition in favor of plaintiff. We review the trial court's ruling on a motion for summary disposition de novo.<sup>1</sup>

### B. Legal Standard

In ruling on a summary disposition motion, the trial court considers pleadings, depositions, affidavits, admissions, and documentary evidence in the light most favorable to the nonmoving party.<sup>2</sup> Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.<sup>3</sup> "The moving party is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome."<sup>4</sup>

### C. Construing Indemnification Provisions

U & M contends that the indemnity provision was ambiguous in light of the facts and circumstances surrounding the lease agreement. Relying on *Pritts v JI Case Co.*,<sup>5</sup> U & M argues that the parties' intentions concerning an indemnity clause are determined from the language of the contract, the situation of the parties, and the circumstances surrounding the contract. U & M contends that the circumstances surrounding the lease agreement show that the parties intended for Hall Road Shopping Plaza to be solely responsible for maintaining the sidewalks and U & M was merely responsible for the

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<sup>1</sup> *Henderson v State Farm Fire and Casualty Co.*, 460 Mich 348, 353; 596 NW2d 190 (1999).

<sup>2</sup> *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

<sup>3</sup> *Id.*; MCR 2.116(C)(10).

<sup>4</sup> *Eerdmans v Maki*, 226 Mich App 360, 363; 573 NW2d 329 (1997).

<sup>5</sup> 108 Mich App 22; 310 NW2d 261 (1981).

interior of its store, which is therefore relevant to establishing the scope of the indemnification agreement.

“An indemnification contract is construed in the same fashion as are contracts generally.”<sup>6</sup> U & M is correct that the parties’ intentions are of primary importance when interpreting a contract.<sup>7</sup> The law presumes that the parties understood and intended the language as written.<sup>8</sup> Where the intentions of the parties are clearly expressed in the contract language, the contract is construed in accordance with those intentions, pursuant to the plain language, which is why unambiguous contract language cannot be contradicted with extrinsic evidence.<sup>9</sup>

#### D. Ambiguity Versus Unexpressed Intent

We conclude that U & M’s argument is not supported by case law. The defendant in *Zurich, supra*, argued that extrinsic evidence could be considered in construing unambiguous indemnification clauses.<sup>10</sup> The *Zurich* Court determined that the defendant had misconstrued the importance of earlier decisions that stated that the parties’ intentions could be determined from the situation of the parties and the circumstances surrounding the contract.<sup>11</sup> Thus the *Zurich* Court stated that the rules governing contract interpretation limited considering circumstances surrounding the contract to cases in which a term of the contract was “otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity.”<sup>12</sup>

The *Zurich* Court defined the term, “circumstances of the parties” as it applied to resolve an ambiguity by way of illustration. According to the Court, a contract that provided a sum of money in exchange for a number of eagles had one meaning if the contracting parties were a sporting goods store and a professional golfer, and a different meaning if the contracting parties were the Boy Scouts of America and a scout leader.<sup>13</sup> Noting that the “circumstances of the parties” was not the same as unexpressed intent, the *Zurich* Court concluded that the defendant had failed to identify a circumstance that would create an ambiguity in the plain language of the contract.<sup>14</sup>

U & M claims that deposition testimony and an affidavit create circumstances that alter the plain language of the indemnity provision that requires it to indemnify Hall Road Shopping Plaza “for damages to any person or property *in, on or about*” its store.<sup>15</sup> However, this other evidence merely

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<sup>6</sup> *Zurich Ins Co v CCR and Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 604.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 606-607.

<sup>11</sup> *Id.* at 607.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 609, n 4.

<sup>14</sup> *Id.* at 608-610.

<sup>15</sup> Emphasis added.

demonstrates U & M's *unexpressed* intent. Although U & M may have intended that Hall Road Shopping Plaza would be solely responsible for sidewalks and common areas, the lease's indemnification provision does not distinguish between U& M's store and the area outside the store. Because the language of the contract is not ambiguous or subject to more than one possible construction within the four corners of the lease agreement, neither the deposition nor the affidavit can be used to create an ambiguity regarding the parties' positions as landlord and tenant. Therefore, the circumstances of the parties did not create an ambiguity regarding the plain language of the indemnity provision, and the plain language of the contract cannot be contradicted with extrinsic evidence.

U & M also argues that the indemnity provision must be strictly construed against Hall Road Shopping Plaza because it is the indemnitee and drafted the provision. "While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee, it is also true that indemnity contracts should be construed to give effect to the intentions of the parties."<sup>16</sup> Where, as here, the intentions of the parties are clearly expressed in the contract language, we must apply the contract as written.<sup>17</sup> The language in the contract in this case make it abundantly clear that the parties expressly intended for U& M to indemnify Hall Road Shopping Plaza in cases where the injury occurred on a sidewalk about the leased premises. That is precisely what happened in the underlying tort suit. There was no issue of genuine material fact concerning the meaning of the indemnity language. Therefore, we conclude that summary disposition for Hall Road Shopping Plaza was proper.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Michael J. Kelly  
/s/ William C. Whitbeck

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<sup>16</sup> *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596; 513 NW2d 187 (1994).

<sup>17</sup> *Zurich*, *supra* at 604.