# STATE OF MICHIGAN

# COURT OF APPEALS

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| DETROIT EDISON COMPANY,<br><br>Plaintiff/Counterdefendant-Appellee, | UNPUBLISHED<br>October 2, 2001 |
| V | No. 218260<br>Wayne Circuit Court |
| DALE OSBURN TRUCKING, INC., OSBURN INDUSTRIES, and TRUCKWAY SERVICES,<br><br>Defendants/Counterplaintiffs-Appellants. | LC No. 98-822228-CK |

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff ("Edison") brought an action for breach of contract, seeking to enforce an indemnity provision against defendants (collectively referred to as "Osburn"). Osburn filed a counterclaim, alleging breach of an agreement that had settled an earlier action filed by Edison. The trial court granted Edison's motion for summary disposition, pursuant to MCR 2.116(C)(10), and directed Osburn to defend and indemnify Edison in an arbitration action brought by Amerisure Insurance Company ("Amerisure") as subrogee to Michigan Foundation Co., Inc. ("MFC"). The judgment also dismissed Osburn's counterclaim with prejudice. Osburn appeals as of right. We affirm.

## I. Facts and Procedural Background

Edison is a producer and supplier of energy. One of the byproducts of its energy generation process is a substance known as fly ash. Since February 1, 1989, MFC's operations have included the removal and sale of limestone from Sibley Quarry in Trenton, Michigan. Sibley Quarry is owned by Edison and used as a disposal site for its fly ash. Under a contract known as the Sibley Quarry Agreement, MFC manages both the mining and ash disposal operations at the quarry, while Edison is responsible for the expenses associated with the ash disposal operation, and has certain other duties. At the heart of the arbitration action that underlies the present case is a reciprocal indemnity provision in the Sibley Quarry Agreement, whereby MFC and Edison agreed to indemnify each other for risks associated with "their respective activities." The agreement does not define whether "their respective activities" refers

to the mining operation, the ash disposal operation, the parties defined duties under the Sibley Quarry Agreement, or all of the above.

Osburn is a trucking/hauling company that entered into a contract with Edison ("the Fly Ash Contract") to haul fly ash from Edison's energy generation facilities to the Sibley Quarry for disposal. A term of that contract expressly provided that Osburn would defend and indemnify Edison for a broad category of claims or charges that might be visited on Edison by virtue of Osburn's performance of the Fly Ash Contract. Shortly after the Fly Ash Contract went into effect, one of Osburn's truck drivers, Dennis Claffey, was injured when he fell from the top of an Edison-owned and MFC-provided water tanker truck that he was using to hose out his dump truck in accord with the terms of the Fly Ash Contract. Claffey and his wife sued MFC and Edison ("the Claffey suit"), alleging that his injuries were the result of their negligence.

In the Claffey suit, Edison filed a cross-claim for indemnity against MFC, but invoked its contractual right to arbitrate the dispute after MFC moved to do likewise. Edison also filed a third-party complaint against Osburn, invoking the indemnity provision of the Fly Ash Contract. Initially, Osburn opposed the third-party action, but eventually entered into a specific agreement to defend Edison in the Claffey suit ("the Defense/Settlement Agreement"). Thereafter, Osburn (through its insurer) paid $100,000 to the Claffeys in settlement of their claims against Edison. Sometime after that, Amerisure paid $150,000 to the Claffeys to settle their claims against MFC.

Following its payment to the Claffeys, Amerisure sought indemnity, as subrogee to MFC, by instituting an arbitration action against Edison. In turn, Edison made a demand on Osburn to defend and indemnify Edison in the arbitration action brought by Amerisure. Osburn refused, which led to the instant action by Edison, claiming breach of the indemnity provision of the Fly Ash Contract, followed by Osburn's countersuit, alleging breach of the Defense/Settlement Agreement. The trial court ultimately held that the indemnity provision of the Fly Ash Contract was broad enough to encompass actions against Edison seeking contractual indemnity for losses associated with Osburn's performance, and that the Defense/Settlement Agreement, by its own terms, did not reduce Osburn's indemnity duties with regard to Amerisure's claim against Edison.

## II. Standard of Review

This Court's review of a trial court's decision to grant summary disposition is de novo. *The Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). In so doing, we review the lower court record to determine if the moving party was entitled to judgment as a matter of law. *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665; 593 NW2d 573 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) when the affidavits, pleadings, depositions, admissions, and other documentary evidence show that there is no genuine issue concerning any material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In addition, in reviewing whether summary disposition was appropriate, we are to give the nonmoving party the benefit of all reasonable inferences. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618, 537 NW2d 185 (1995).

Similarly, the construction and interpretation of an unambiguous indemnity contract is a question of law that we review de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348,

353; 596 NW2d 190 (1999); *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998); see also *Mich Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998) and *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Whether terms of a contract are ambiguous is a question of law that this Court will review de novo. *Henderson*, *supra*; *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). In determining whether a contract provision is ambiguous, we are to give the language used its ordinary and plain meaning, *Mich Nat'l Bank, supra*, to see if "its words may reasonably be understood in different ways." *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 656-657; 550 NW2d 577 (1996). Thus, "if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts," summary disposition should be granted to the proper party. *Henderson*, *supra*, citing *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993).

## III. Analysis

Osburn contends that, under the terms of the indemnification provision of the Fly Ash Contract, it had no obligation to defend and indemnify Edison in the arbitration action. We disagree.

The pertinent portion of the indemnity provision of the Fly Ash Contract states:

> [Osburn] covenants and agrees that it will indemnify and hold Detroit Edison, and all of its officers, agents and employes [sic] harmless for *any* claim, loss, damage, cost, charge, expense, lien, *settlement* or judgment, including interest thereon, whether to any person, including employes [sic] of [Osburn], its Subcontractors and Suppliers, or property or both, arising *directly or indirectly* out of or in connection with [Osburn's] or any of its Subcontractor's or Supplier's performance of the Contract or in connection with the performance of the Work, to which Detroit Edison or any of its officers, agents or employes [sic] may be subject or put by reason of *any act*, *action*, neglect or omission on the part of [Osburn], any of its Subcontractors or Suppliers or Detroit Edison, or any of their respective officers, agents and employes [sic]. [Emphasis added.]

We find this language to be clear and unambiguous. Thus, we next look to the undisputed facts to determine the application of the above contractual clause. *Henderson*; *supra*; *Moll*, *supra*. In this regard, we note that Amerisure paid $150,000 in order to settle any claim the Claffey's may have had against MFC as a result of Dennis' injuries. As previously indicated, those injuries arose after Dennis, an employee of Osburn, fell from a truck owned by Edison and provided by MFC. The Fly Ash Contract specifically states that Osburn "will indemnify . . . Edison . . . for any claim [or] settlement . . . arising directly or indirectly out of or in connection with [Osburn's employees] performance of the [w]ork." Here, it is apparent that Amerisure's settlement with the Claffey's arose out of an injury that occurred while Dennis was performing work for Osburn under the Fly Ash Contract. Likewise, Amerisure's demand for indemnification from Edison arose out Amerisure's settlement with the Claffey's. As such, it is evident that Amerisure's indemnity demand arose indirectly out of the injury to Claffey. Because the indemnity clause in the Fly Ash Contract encompasses all claims and settlements brought against

Edison, either directly or indirectly as a result of work performed under the contract, Osburn is required to indemnify Edison for any contractual indemnity claim Amerisure may have against Edison pursuant to the Sibley Quarry Agreement. We find that because there is no genuine issue of material fact regarding whether Edison was entitled to indemnity from Osburn, the trial court correctly granted Edison summary disposition.[1]

Osburn also contends that the trial court misinterpreted the Defense/Settlement Agreement that Edison and Osburn entered into when Osburn agreed to defend Edison in the Claffey suit. That agreement provided, in part as follows:

> 1. OSBURN agrees to assume the defense of, indemnify, and hold harmless EDISON . . . from exposure in the lawsuit brought against EDISON . . . and [MFC], by the Plaintiff's, DENNIS CLAFFEY and VIRGINIA CLAFFEY, subject the conditions set forth in the terms below.
>
> 2. This Agreement to assume the defense, indemnify, and hold harmless, EDISON . . . shall be limited to the allegations contained in the Plaintiff's Complaint which pertain to tortious conduct on the part of EDISON and/or [Edison's employees] and shall cover only those allegations, and shall not extend to any allegations of tortious conduct on the part of [MFC]. Moreover, this Agreement to assume the defense, indemnify, and hold harmless EDISON . . . shall not apply to any claim, cross-claim, third-party claim, or other claim for contractual indemnity, common law indemnity, implied contractual indemnity, or any other form or indemnity, which may be brought by [MFC against EDISON].

Specifically, Osburn contends that this agreement exempts it from any obligation to indemnify Edison for any contractual indemnity claim that MFC may have against Edison as a result of MFC's negligence. We disagree.

Under the Fly Ash Contract, which was entered into before the Defense/Settlement Agreement, Osburn had a preexisting duty to indemnify Edison for MFC's claim indemnity claim against Edison. As our Supreme Court stated in *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000), "it is well settled that doing what one is legally bound to do is not consideration for a new promise." See also *Puett v Walker*, 332 Mich 117, 122; 50 NW2d 740 (1952). Under the terms of the indemnity clause in the Fly Ash Contract, Osburn had a preexisting contractual obligation to indemnify Edison in the arbitration action. The preexisting duty rule "bars the modification of an existing contractual relationship when the purported

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[1] To this end, Osborn's assertion that Edison must demonstrate, as a prerequisite, that either Osburn or Edison was actually at fault in order to give rise to Osburn's duties, is not consistent with the contract language. Without resort to dictionary definitions, the ordinary and plain meaning of "any claim" cannot be read to encompass only meritorious or successful claims. Likewise, "any act" cannot be equated only with negligent or wrongful acts. Therefore, regardless of whether Claffey's injury arose out of the negligence of Osburn, Edison, or a third party (e.g., MFC), because a settlement was reached with Claffey, Osburn was required to indemnify Edison.

consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement." *Yerkovich*, *supra* at 741, citing *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 22 n 3; 444 NW2d 786 (1989). We conclude, therefore, that to the extent the Defense/Settlement Agreement purported to modify Osburn's indemnity obligations under the Fly Ash Contract, the Defense/Settlement Agreement is void for lack of consideration. *Id*. at 742. Hence, we need not determine whether the trial court correctly interpreted the Defense/Settlement Agreement. *Id*. at 740.[2]

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

[2] Whether the preexisting duty rule applies to the Defense/Settlement Agreement was not a question presented, however, because it is a question of law, the facts necessary for its resolution have been presented (e.g., the agreements), and this question of law is dispositive, we may properly review the issue. *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994).