# STATE OF MICHIGAN

# COURT OF APPEALS

---

MARY STEENSTRA and EARL STEENSTRA,

Plaintiffs-Appellees,

v

TWO THOUSAND THREE HUNDRED THIRTY 44TH STREET PARTNERSHIP, ELDON BLIEK, JAMES STEIN, MICHAEL GOETZ, STEVE KLINE, BETTY SMYTH, RAYMOND KURTZ, and PRECISION PROPERTY MANAGEMENT, INC.

Defendants/Third-Party Plaintiffs-Appellees,

and

WILMONT CORPORATION d/b/a MCS HOMECARE,

Third-Party Defendant-Appellant.

UNPUBLISHED
November 2, 2001

No. 222453
Kent Circuit Court
LC No. 97-001889-NO

---

MARY STEENSTRA and EARL STEENSTRA,

Plaintiffs-Appellees,

v

TWO THOUSAND THREE HUNDRED THIRTY 44TH STREET PARTNERSHIP, ELDON BLIEK, JAMES STEIN, MICHAEL GOETZ, STEVE KLINE, BETTY SMITH a/k/a BETTY SMYTH, and RAYMOND KURTZ,

Defendants/Third-Party Plaintiffs-Appellants,

and

No. 224852
Kent Circuit Court
LC No. 97-001889-NO

PRECISION PROPERTY MANAGEMENT, INC.,

Defendant/Third-Party Plaintiff,

and

WILMONT CORPORATION d/b/a MSC HOME CARE,

Third-Party Defendant-Appellee.

---

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Following trial, a jury awarded plaintiffs $74,347.00 in damages against defendants (hereinafter "the partnership"). In Docket No. 224852, the partnership appeals by delayed leave granted from the trial court's May 21, 1999, judgment on the verdict and the trial court's September 3, 1999, judgment of indemnification. In Docket No. 222453, third-party defendant Wilmont Corporation (hereinafter "Wilmont") also appeals as of right from the trial court's September 3, 1999, judgment of indemnification. These cases have been consolidated for review. In Docket No. 222453 we affirm in part and reverse in part. In Docket No. 224852 we affirm.

These appeals arise from a slip and fall accident that occurred in the parking lot of an office building in Kentwood. Plaintiff Mary Steenstra was injured after she slipped and fell when she got out of her car in the parking lot on February 23, 1994. The partnership owns the building where the parking lot is located. Wilmont is a lessee of office space in the building. Plaintiffs filed suit against the partnership in 1997, alleging that the partnership failed to properly maintain the parking lot. The partnership filed a third-party action against Wilmont on November 6, 1997, seeking indemnification pursuant to a clause in the parties' lease agreement.

On appeal in Docket Nos. 222453 and 224852, the partnership and Wilmont challenge the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict (JNOV). When reviewing a motion for directed verdict or judgment notwithstanding the verdict, this Court reviews the record evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Id.*, citing *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995).

Both the partnership and Wilmont contend that plaintiffs failed to prove the cause-in-fact element of a negligence claim because they did not proffer evidence regarding the exact location of Mary Steenstra's fall, and therefore could not establish that the partnership's alleged negligence caused her injury. We disagree.

> To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. [*Haliw v Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001), citing *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).]

It is the factual causation element of plaintiffs' prima facie case that the partnership and Wilmont challenge here. As our Supreme Court recognized in *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the cause in fact element of proximate cause in a negligence claim generally requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id*. Although a plaintiff may rely on circumstantial evidence to establish the requisite causal link between a defect and an injury, "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164. In *Skinner*, our Supreme Court clarified the level of circumstantial evidence necessary to establish a reasonable inference of causation.

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Skinner, supra* at 164-165.]

Plaintiffs' causation theory at trial was that Mary Steenstra slipped and fell after stepping on a ice-filled depression in the parking lot adjacent to the partnership's building. After reviewing the record evidence and all legitimate inferences in the light most favorable to plaintiffs, we agree with the trial court that plaintiffs' circumstantial evidence afforded a reliable basis from which reasonable minds could infer that more probably than not, but for the ice-filled depressions in the parking lot, Mary Steenstra would not have slipped and fell. *Skinner, supra* at 171.

During trial, Mary Steenstra testified that she slipped and fell after getting out of her car on the driver side and stepping onto the parking lot. She was able to pinpoint the approximate location of her fall using photographs admitted into evidence at trial. Plaintiffs' son, David Steenstra, testified that when he came out of his office building to help his mother after she fell, he saw where her boot had skidded on the snow-covered parking lot to reveal a small ice-filled pond. Plaintiffs also presented the testimony of Doug Crowley, a construction project manager with extensive experience in examining roadways and parking lots, who examined the parking lot at plaintiffs' request. Referring to photographs taken of the area where Mary Steenstra fell, Crowley noted the presence of a depression an inch and a half in depth. Further, Loyd Winer, a civil engineer who visited the scene and testified on plaintiffs' behalf, also noted the presence of depressions in the area of the parking lot where Mary Steenstra fell, concluding it was likely that any ice formed in the area was the result of accumulated water in the depressions.

Viewing the evidence and legitimate inferences arising therefrom in the light most favorable to plaintiffs, we are satisfied that reasonable jurors could infer the existence of a causal relationship between the partnership's actions in failing to properly maintain the parking lot and

Mary Steenstra's injuries. Because plaintiffs' causation theory had a basis in established fact, the trial court properly denied the partnership's and Wilmont's motions for directed verdict and judgment notwithstanding the verdict.

In Docket No. 224852, the partnership also argues that the trial court abused its discretion in permitting Loyd Winer to testify as an expert witness on plaintiffs' behalf. We review a trial court's decision concerning the qualification of an expert and the admissibility of expert testimony for an abuse of discretion. *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 72; 577 NW2d 150 (1998). "A person may be qualified to testify as an expert witness by virtue of the person's knowledge, skill, experience, training, or education in the subject matter of the testimony." *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995), citing MRE 702. Our Courts encourage a "broad application" of these requirements in qualifying an expert. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001). Further, the weight accorded to the expert's testimony is solely within the province of the jury. *Phillips, supra* at 401-402.

According to the partnership, the trial court abused its discretion in allowing Winer's testimony because he testified about facts that did not require an expert's interpretation or analysis. In support of this argument, the partnership cites *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603; 474 NW2d 140 (1991) vacated in part on other grounds 439 Mich 968 (1992). In *Jack Loeks Theatres*, this Court concluded that the trial court abused its discretion in admitting the expert testimony of a witness where the individual testified to simple mathematical operations "clearly within the realm of the lay person." *Jack Loeks Theatres, supra* at 612. In the present case, we are not persuaded that Winer testified to matters clearly within the expertise of the ordinary person.

As an initial matter, the record reveals that Winer is an accomplished civil engineer with over forty-five years experience in designing buildings and parking lots who inspected the accident site twice and reviewed photographs of the parking lot. Throughout his trial testimony, Winer explained that the parking lot had several depressions that could accumulate water. Winer specifically explained to the jury how these depressions are formed, and the process by which water accumulates in the depression. Weather reports pertaining to the weather conditions in Kentwood in the days leading to Mary Steenstra's fall were admitted into evidence at trial, and Winer explained to the jury that falling temperatures would have caused ice to form in the depressions present in the partnership's parking lot.

In our view, the trial court properly admitted Winer's testimony because it assisted the trier of fact in determining a fact in issue, namely whether the partnership was negligent in failing to maintain the parking lot. "'The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case.'" *People v Coy*, 243 Mich App 283, 294-295; 620 NW2d 888 (2000), quoting *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (2000). Because Winer's testimony enabled the jury to better understand how the depressions formed in the surface of the parking lot, and how water accumulated and ice formed in the depressions, it assisted the jury in determining whether the partnership failed to properly maintain the parking lot. Similarly, Winer's testimony regarding the requirements of the City of Kentwood's ordinance was also admissible because any violation, if proven, was relevant to the partnership's alleged negligence. *Candelaria v B C General*

*Contractors, Inc*, 236 Mich App 67, 82 n 5; 600 NW2d 348 (1999); *Rickrode v Wistinghausen*, 128 Mich App 240, 247; 340 NW2d 83 (1983). Hence, we find no abuse of discretion in the trial court's decision to qualify Winer as an expert and allow his testimony.

In Docket No. 222453, Wilmont further contends that the trial court erroneously interpreted the indemnity clause in the lease agreement between the partnership and Wilmont as requiring Wilmont to indemnify the partnership for damages arising from plaintiffs' lawsuit. We agree.

"An indemnity contract is construed in the same fashion as are contracts generally." *Zurich Insurance Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997).

> Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract. An indemnity contract will be strictly construed against the party who drafts the contract and the party who was the indemnitee. [*Triple E Produce Corp v Mastronardi Produce, Inc,* 209 Mich App 165, 172; 530 NW2d 772 (1995) (citations omitted).]

Further, an indemnity contract should be interpreted in a manner that affords reasonable meaning to all of its provisions. *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). "[T]he indemnitor's obligation to indemnify the indemnitee must be described clearly and unambiguously." *Skinner v D-M-E Corp*, 124 Mich App 580, 585; 335 NW2d 90 (1983). In order for an indemnity contract to be given effect, its terms must be unequivocal. *Pritts v J I Case Co*, 108 Mich App 22, 29; 310 NW2d 261 (1981).

A contract is ambiguous if its terms are reasonably susceptible of more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Whether contractual language is ambiguous is a question of law that we review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). It is well-settled that where contractual language is ambiguous, the language of a contract is to be construed against the drafter. *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 239; 324 NW2d 732 (1982); *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984).

In the instant case, the lease agreement between the partnership and Wilmont contained an indemnity provision, the pertinent portion of which provides:

> Tenant [Wilmont] shall indemnify Landlord [the partnership] and save Landlord harmless from any liability or claim for damages which may be asserted against Landlord by reason of any accident or casualty occurring *on or about the Leased Premises.* [Emphasis added.]

According to the terms of the August 11, 1992, lease agreement, the area leased by Wilmont from the partnership consisted of 1,500 square feet of office space. The parties do not dispute that the parking lot where Mary Steenstra was injured was not "on" the leased premises.

However, the parties disagree with regard to whether Steenstra was injured "about" the leased premises. The terms of the lease further provide:

> Landlord shall also make available areas and facilities of common benefit to the tenants and occupants of the Building which shall include *parking areas, driveways*, sidewalks, ramps, and services areas. *All Common Areas shall be subject to the exclusive control and management of Landlord*. (Emphasis added).

The lease also provides that subject to Wilmont's obligation to contribute to operating costs, the "Landlord shall maintain and repair the common areas, including roof and structure."

Relying on this Court's decision in *Wagner v Regency Inn Corp*, 186 Mich App 158; 463 NW2d 450 (1990), the trial court concluded that the language "on or about" in the lease agreement was clear and unambiguous and referred to the immediately surrounding area of the leased premises, including the parking lot where Mary Steenstra fell. In our opinion, *Wagner* is distinguishable from the instant case, and does not compel the result reached by the trial court.

In *Wagner*, the plaintiff rented a vehicle from Americar, whose office was located in the lobby of the Regency Inn. After completing her rental transaction, the plaintiff left to obtain her checkbook from her car in the parking lot and was assaulted. *Id.* at 160-161. One of the issues on appeal in *Wagner* was whether the trial court erred in concluding that Americar was required to indemnify the Regency Hotel with regard to the plaintiff's claim. This Court concluded that Americar was required to indemnify the Regency Hotel. *Id.* at 168. According to the terms of the lease in *Wagner*, Americar controlled office and lobby space in the hotel, *as well as portions of the parking lot*, and was required to keep these areas in good repair. *Id.* at 165. Thus, the *Wagner* Court concluded:

> The plain and unambiguous language *of this particular indemnity agreement* is so broad it can only be construed as applicable to plaintiff's claim. *Calladine v Hyster Co*, 155 Mich App 175, 183; 399 NW2d 404 (1986). While plaintiff's injury, which occurred in the hotel parking lot, may not have occurred on the actual premises leased and controlled by Americar, it occurred in proximity to, in other words, "on or about," the leased premises. See *People v Fochtman*, 226 Mich 53, 62; 197 NW2d 166 (1924) (defining "about" in a temporal context). [*Wagner, supra* at 168 (emphasis supplied).]

As the *Wagner* Court made abundantly clear, its determination that the "on or about language" at issue was unambiguous was based on the language of that "particular indemnity agreement." *Id.* Moreover, in *Wagner*, unlike the present case, the clear terms of the lease agreement provided that the leased premises included a portion of the parking lot where the plaintiff was injured. In contrast, the lease agreement here refers to indemnification for accident or casualty "occurring on or about the Leased Premises[,]" which, as described in the lease, *does not* include the parking lot or any portion of the parking lot. Indeed, as mentioned previously, paragraph 2 of the lease provides that the parking lot is a common area that falls under the *exclusive control and management* of the landlord, and paragraph 8 provides that the landlord "shall maintain and repair the common areas."

In our opinion, in *Wagner*, where the leased premises expressly included a portion of the parking lot and required the lessee to keep its premises in good repair, it could reasonably be concluded that the "on or about" language included the area immediately around the leased portion of the parking lot, and thus required Americar to indemnify the hotel for damages. Moreover, it is clear from this Court's decision in *Wagner* that it construed the terms of the lease agreement strictly against Americar, the drafter of the agreement. However, where, as in the instant case, the leased premises does not include any portion of the parking lot, and Wilmont did not draft the agreement, it would not be reasonable to construe the indemnification clause as extending to the area where Mary Steenstra fell, especially where the partnership expressly retained exclusive control and management of that area and agreed to maintain and repair the area. We do not believe an interpretation of the indemnity agreement that requires Wilmont to indemnify the partnership for an accident that occurred in an area over which the partnership had exclusive control would reasonably effectuate the terms of the agreement. *MSI, supra* at 343. Nor would such an interpretation effectuate the parties' intentions. A review of the lease agreement as a whole demonstrates that the parties intended that the partnership retain exclusive control over the parking lot and assume responsibility for its maintenance and upkeep.

Moreover, to the extent the indemnity provision in the lease agreement is subject to differing interpretations, it must be construed against the partnership as the drafter and indemnitee. *Lichnovsky, supra*; *Petovello, supra; Triple E, supra*. Accordingly, we conclude that the trial court erred in concluding that Wilmont was required to indemnify the partnership for damages incurred as a result of Mary Steenstra's fall in the parking lot.[1]

Finally, we reject the partnership's argument in Docket No. 224852 that the trial court should not have awarded evaluation sanctions after the partnership rejected the mediation panel's evaluation. The partnership does not dispute that a plain reading of MCR 2.403(O)(1) requires an award of evaluation sanctions in this case, but contends that the trial court should have declined to award sanctions based on fairness considerations. Because an award of evaluation sanctions is mandatory pursuant to the plain language of the court rule where a party rejects a mediation evaluation, the trial court properly awarded mediation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997); *Elia v Hazen*, 242 Mich App 374, 379; 619 NW2d 1 (2000).

In Docket No. 222453, we affirm in part and reverse in part. In Docket No. 224852 we affirm. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

---

[1] In light of our disposition of the foregoing issue, we need not address the partnership's separate issue in Docket No. 224852 concerning the scope of the indemnity provision.