STATE OF MICHIGAN

COURT OF APPEALS

CAROL ESSELL,

Plaintiff,

v

GEORGE W. AUCH COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

NAGLE PAVING COMPANY,

Defendant,

and

SUNSET EXCAVATING, INC.,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 240940
Oakland Circuit Court
LC No. 00-025356-NO

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant/cross-defendant Sunset Excavating, Inc., appeals as on delayed leave granted from an order granting defendant/cross-plaintiff George W. Auch Company's motion for summary disposition. We affirm.

On October 23, 1997, Carol Essell tripped and fell in the parking lot of Providence Hospital where excavation work was being performed. Essell filed a negligence action against the contractor for the project, George W. Auch Company (Auch). Upon receipt of a notice that

subcontractor Sunset Excavating, Incorporated (Sunset) was a nonparty at fault, Essel amended her complaint to raise a claim of negligence against the subcontractor.

The contractor, Auch (hereinafter plaintiff), then filed a cross-claim against the subcontractor, Sunset (hereinafter defendant).[1] This complaint sought to obtain damages from defendant based on express contractual indemnity, breach of contract, and negligence. Plaintiff moved for summary disposition based on the indemnification provision of the contract. In support of the dispositive motion brought pursuant to MCR 2.116(C)(10), plaintiff filed affidavits from two corporate agents. The affidavits provided that defendant was the only subcontractor assigned to the area where Essell's injury occurred and that defendant was required to barricade the work area to prevent pedestrian injuries. While the motion was pending, plaintiff settled its dispute with Essell for $27,500. Defendant opposed the dispositive motion, without filing documentary evidence, relying on the legal theory that the abolition of joint and several liability precluded recovery in favor of plaintiff. Therefore, defendant requested summary disposition in its favor pursuant to MCR 2.116(I)(2). The trial court ruled that plaintiff was entitled to indemnification because defendant had failed to present documentary evidence to create a genuine issue of material fact. On April 12, 2002, defendant also settled the litigation with Essell. This claim of appeal by defendant followed to challenge the ruling of the trial court regarding the indemnification.

Our review of the grant or denial of summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden*, *supra*.

This case also involves issues of contract[2] and statutory construction.[3] The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit*

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[1]The original and underlying tort action was settled. Thus, the only issue on appeal involves the cross-complaint. For ease of reference, the terms "plaintiff" and "defendant" are utilized to refer to the cross-plaintiff and the cross-defendant.

[2] Indemnification may arise from three possible sources: an express contract, an implied contract, and the common law. *Transportation Dep't v Christensen*, 229 Mich App 417, 425; 581 NW2d 807 (1998). There is no dispute that the indemnification in this case is based on an express contract. Therefore, the principles of contract construction are applicable.

[3] Although raised below, the trial court did not rule on the statutory issue presented by defendant. Rather, the trial court held that summary disposition was appropriate because defendant did not file documentary evidence in opposition. Although unpreserved, we may address the statutory argument raised by defendant because it presents an issue of law for which all necessary facts

(continued…)

Industries, Inc v Hobbs Int'l, Inc (After Remand), 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent from the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If contract language is clear and unambiguous, its meaning presents a question of law for the courts to determine. *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. See *Hottman v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

Issues of statutory construction also present questions of law that are reviewed de novo. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by examining the plain language of the statute itself. *Id*. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The parties contract contained the following provision addressing indemnification:

> ARTICLE 12 – INDEMNIFICATION
>
> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that:
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

In *MSI Construction Managers, Inc v Corvo Iron Works, In*c, 208 Mich App 340, 342-343; 527 NW2d 79 (1995), this Court examined a nearly identical indemnification provision at its essence and noted that it essentially provided:

(…continued)

have been presented. *Miller v Inglis*, 229 Mich App 159, 168; 567 NW2d 253 (1997).

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor from and against all claims arising out of the Subcontractor's work to the extent caused in whole or in part by any negligent act or omission of the Subcontractor. [*Id*. at 344.]

This Court concluded that the language "to the extent caused in whole or in part by any negligent act or omission of the subcontractor" limited the extent of the liability of the subcontractor to its own negligence and was not required to indemnify the contractor for its own acts of negligence. *Id*. at 344-345. Indeed, the language "to the extent" acts as a proviso, it restricts the operative effect of the contract language to less than what its scope of operation would be otherwise. See *ISB Sales, Co v Dave's Cakes*, 238 Mich App 520, 529-530; 672 NW2d 181 (2003). Thus, the defendant's liability pursuant to the indemnification provision was limited to its own acts of negligence.

In the present case, defendant takes a novel approach to avoid the imposition of liability as set forth in the indemnification contract. Defendant posits that the elimination of joint and several liability by the Legislature results in each party being held responsible for their own acts of negligence. Therefore, knowing of the abolition of joint and several liability, plaintiff could only be held responsible for its own acts of negligence, and any settlement was not the result of any negligence by defendant. Although novel, the argument is also contrived because it selectively implicates the underlying negligence complaint and ignores the substance of the cross-complaint, an action based in contract.[4]

In 1995, as part of tort reform, the Legislature replaced the common law doctrine of joint and several liability among multiple tortfeasors with the doctrine of several liability. *Smiley v Corrigan*, 248 Mich App 51, 53; 638 NW2d 151 (2001). The prior multiple tortfeasor legislation was inequitable because it allowed any one of multiple tortfeasors to be responsible for all of the damages awarded to the plaintiff, regardless of the fact that the individual was only partially at fault for the damages sustained. *Id*. Under the new system, defendants are now only accountable for damages in proportion to their percentage of fault. *Id*. This change was labeled "fair share liability" because it allowed fault to be apportioned among the parties and did not impose the unnecessary burden on the "deep pocket" defendants. *Id*. at 53 n 3. MCL 600.2956 now provides:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint.

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[4] We note that the cross-complaint contained three counts: (1) express indemnity, (2) breach of contract, and (3) negligence. However, the summary disposition motion was based on the indemnification claim. Furthermore, review of the negligence claim reveals that is merely a restatement of the contract actions and does not allege a duty separate and distinct from the duty alleged in the contract actions. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 47-48; 649 NW2d 783 (2002).

> However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Defendant alleges that there are two exceptions to several liability, vicarious liability in an employment relationship and medical malpractice, but both exceptions are inapplicable. However, defendants ignores the first sentence of MCL 600.2956, that limits its application to "an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death …" While the underlying complaint by Essel is a tort action seeking damages for personal injury, the action at issue in this cross-complaint is an action based on contract theory. Plaintiff's lawsuit seeks reimbursement for monies paid, not for its own personal injury, property damage, or wrongful death. There is no indication that the Legislature, by amending MCL 600.2956, sought to limit or eliminate the parties' freedom of contract to allocate damages should a breach of contractual duty occur. Indeed, MCL 600.2956 contains the proviso that it applies to tort actions or actions where the legal theory results in damages for personal injury, property damage, or wrongful death. *ISB, supra*. If the Legislature had intended to include all other actions, including contract actions, it expressly would have done so and would not have placed any restricting language within the statute. Courts may not legislate or read into legislation that which is not there. See *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422-423; 616 NW2d 243 (2000).

Although defendant alleges, for purposes of joint and several liability, that the tort action is at issue, the brief on appeal acknowledges that: "Auch's [plaintiff's] claim against Sunset [defendant] is for contractual indemnity."[5]

Having concluded that MCL 600.2956 does not extend to imposing limitations on contractual indemnification actions, defendant's liability as set forth in the contract was limited to the "extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the subcontractor [defendant] …." Defendant had the opportunity to address this issue in the lower court, but did not do so. After the filing of the motion for summary disposition, defendant raised a statutory argument and concluded that any settlement by plaintiff accounted for its own acts of negligence. Defendant did not file documentation opposing plaintiff's settlement with Essell and did not seek an apportionment of liability of each party's alleged negligence. Thus, summary disposition was proper where defendant failed to create a genuine issue of material fact with regard to the extent of its negligence. *Maiden, supra*; *Quinto, supra*.

Furthermore, the decision in *Transportation Dep't v Christensen*, 229 Mich App 417, 418-419; 581 NW2d 807 (1998), should be noted. In *Christensen*, the Farmers were traveling behind the defendant Christensen when his semi trailer truck struck a highway overpass. The impact knocked a gravel hopper off the truck onto the highway where it was struck by the Farmers' vehicle. The Farmers filed a negligence action against Christensen and the Department of Transportation (MDOT), and MDOT filed a third-party claim against Christensen. Although

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[5] Defendant's brief on appeal, page 4.

the overpass was marked with a clearance height of fourteen feet, it was alleged that this measurement was inaccurate. Nonetheless, by statute, a vehicle could not exceed a height of 13 feet 6 inches, and liability was imposed upon the owner of a vehicle that collided with the overpass, regardless of whether the height was posted. MCL 257.719(1). MDOT paid a settlement to the Farmers and sought indemnification from Christensen based on an implied indemnification provision. This Court rejected Christensen's challenge to the settlement agreement:

> Although there was no tender-of-defense requirement, Christensen argues that the MDOT took on the status of a volunteer when it settled with plaintiffs, notwithstanding its vigorously argued claim that Christensen was solely liable to plaintiffs under § 719(1). While this argument has certain appeal, on closer inspection we find that it also lacks merit. Notably, despite an opportunity to challenge the reasonableness of the settlement in the lower court and in this Court, Christensen has not done so. Thus, we must presume that Christensen believes the settlement amount to be a fair and accurate reflection of the amount of the judgment he would have sustained had this matter gone to trial. …
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> Moreover, our review of the record reveals ample justification for the MDOT's decision to enter into a consent judgment with plaintiffs. First, the policy of this state is to encourage the settlement of lawsuits because it benefits both the parties and the public. … Nonetheless, an indemnitor's due process interests would be adversely affected if it were bound by its indemnitee's unilateral acts without providing notice and an opportunity to be heard. … 'Deciding whether to try a case to judgment or to settle it involves elements of legal evaluation, of financial capacity to take risk, and of appetite for court room conflict which vary widely among litigants.' [*Id*. at 428-429 (citations omitted).]

This Court then noted that MDOT, by settling the action involving the Farmers, avoided the expense of an imminent trial, ensured that the Farmers were compensated without delay, and were able to pursue the legal issue of the interpretation of MCL 257.719 on appeal. *Id*. at 429-430.

In the present case, there is no indication that defendant objected to the settlement between Essell and plaintiff. Moreover, defendant did not seek to quantify its negligence when raised in the dispositive motion. Accordingly, summary disposition was proper. *Christensen, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood