STATE OF MICHIGAN

COURT OF APPEALS

ERNIE MORGAN and KATHY MORGAN,

Plaintiffs-Appellees,

v

MENASHA CORPORATION,

Defendant-Third-Party Plaintiff-Appellee,

v

FAIRHAVEN WOOD HARVESTING, INC.,

Third-Party Defendant-Third-Party Plaintiff-Appellant,

v

D & K CHIPS and GWEN KNIGHT a/k/a GWEN DIGBY,

Third-Party Defendants.

UNPUBLISHED
November 15, 2007

No. 272837
Allegan Circuit Court
LC No. 03-034763-NO

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Third-party defendant Fairhaven Wood Harvesting, Inc. (Fairhaven), appeals as of right an order granting summary disposition in favor of defendant Menasha Corporation (Menasha). This action arises out of injuries suffered by plaintiff Ernie Morgan (Morgan) as he unloaded wood chips that were being delivered from Fairhaven to Menasha. The injuries were allegedly caused by the negligent operation of a loading or delivery platform by a Menasha employee on Menasha property. The delivery of wood chips was being made pursuant to a contract between Fairhaven and Menasha, a pulp and paper mill, that included language that Fairhaven would defend and indemnify Menasha, under certain circumstances, relative to lawsuits brought against Menasha. The trial court found, as a matter of law, that the contract required Fairhaven to defend and indemnify Menasha with respect to plaintiffs' action against Menasha. The trial court interpreted the contract's duty-to-defend and indemnification language as encompassing

negligent acts committed by Menasha's employees during the performance of the contract, i.e., the delivery and unloading of wood chips, and not just the negligence of Fairhaven's employees and contractors. Subsequently, following a jury trial, a judgment was entered in favor of plaintiffs and against Menasha in the amount of $422,817, and in light of the earlier summary disposition order, Fairhaven is ultimately responsible for indemnifying Menasha in that amount. We reverse the order granting summary disposition in favor of Menasha and remand for entry of judgment in favor of Fairhaven.

I. Basic Facts and Procedural History

On November 24, 2003, plaintiffs filed a two-count complaint against Menasha, with the first count alleging negligence and the second count claiming loss of consortium on behalf of Morgan's wife. The complaint alleged that on July 10, 2002, Morgan was on Menasha's premises for the purpose of delivering purchased product (wood chips) when he stood upon a platform used for delivering the wood chips.[1] The complaint further alleged that a Menasha employee negligently caused the platform to open, resulting in Morgan being knocked off the platform and incurring serious injuries and extensive damages.[2] We note that the trial testimony differed slightly, indicating that the Menasha employee caused the mechanical platform to rise at an angle, which forced Morgan to jump off the platform, falling four feet to a cement floor.

Subsequently, Menasha filed a third-party complaint against Fairhaven, alleging that a "Chip Purchase Agreement" (contract) between Menasha and Fairhaven covered the delivery of woodchips by Morgan at the time of the injury. Menasha pointed to Article 9 of the contract in support of its claim that Fairhaven was responsible for defending Menasha, was responsible for indemnifying Menasha, and was responsible for reimbursing Menasha for any legal fees paid relative to the action by Morgan against Menasha. Before quoting Article 9 of the contract, we note that the contract provides that Fairhaven is in the business of producing and delivering wood chips and other forest products, that Menasha was contracting for the purchase and delivery of wood chips and forest products, that Fairhaven agrees to load and transport wood chips to Menasha's plant in Otsego, Michigan, in specially designed truck-trailer units, and that the wood chips would be unloaded using Menasha's "truck dumper."[3] The contract further states that Menasha agrees "to provide a safe, properly maintained truck dumper[.]" With respect to

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[1] Apparently, Morgan was employed by third-party defendant D & K Chips (D & K), which company was performing independent contract work for and on behalf of Fairhaven when the accident occurred. Fairhaven sued D & K on various theories, including claims seeking indemnification from D & K; however, those claims were summarily dismissed.

[2] The complaint alleged that Morgan suffered a "displaced bimalleolar ankle fracture of his distal tibia and fibula," which required surgeries and physical therapy, and which resulted in work loss, inability to perform daily activities, pain and suffering, and various other losses.

[3] Trial testimony indicated that the platform referenced in the complaint from which Morgan fell was part of the "truck dumper." A small shed or shack next to the platform/truck dumper is where the Menasha employee works control buttons to operate and move the platform in the process of unloading and delivering the wood chips.

Article 9 of the contract, which expressly pertains to liability to third persons, it provides as follows:

> [Fairhaven] agrees to indemnify and save harmless [Menasha] and its respective properties and officers, employees, agents, contractors and licensees (herein in this paragraph included as the term [Menasha]) from any and all costs expense, damages, liens, charges, claims, demands or liabilities whatsoever ("claim") resulting from the operations hereunder of [Fairhaven] and the servants, employees, independent contractors and assigns of [Fairhaven], as the case may be, which may be asserted by any third party whomever, including but not limited to, [Fairhaven's] employees and subcontractors. [Fairhaven] shall at [Fairhaven's] own cost and expense defend against any and all actions, suits or other legal proceedings that may be brought or instituted against [Menasha] on any such claim or demand, and shall pay or satisfy any judgment or decree that may be rendered against [Menasha] in any such action, suite [sic] or legal proceeding, or which may result therefrom, and [Fairhaven] further agrees to reimburse [Menasha] for any legal fees [Menasha] may incur in defense against any action, suit or such legal proceeding.

Menasha moved for summary disposition under MCR 2.116(C)(10), arguing that Article 9 required the trial court to find and order that Fairhaven was obligated to defend, indemnify, and pay the attorney fees of Menasha. The trial court agreed, finding that the language of Article 9 was clear, unambiguous, and broad, and that it encompassed negligent acts even if committed by Menasha and its employees during the delivery and unloading process. An order granting summary disposition in favor of Menasha was entered, providing that Fairhaven was to defend, indemnify, and to pay the reasonable attorney fees incurred by Menasha relative to the action.

A two-day jury trial later took place, and the jury found that Menasha's employee negligently operated the truck-dumping platform, that the negligence was the proximate cause of Morgan's injuries, that Morgan suffered damages to the present in the amount of $216,000, that he will suffer future damages in the amount of $178,500, that Morgan himself was negligent, with his percentage of fault being allocated at 13.33 %, and that Morgan's wife suffered $14,700 in damages. The final judgment, after consideration of the allocation of fault, statutory interest, and case evaluation sanctions, totaled $422,817. The judgment also reflected that Fairhaven had paid all the legal fees and costs incurred by Menasha, totaling $16,517, as required by the order granting Menasha's motion for summary disposition.

II. Analysis

A. Tests for Summary Disposition under MCR 2.116(C)(10) and Standards of Review

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing

MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Construction and interpretation of a contract constitutes a question of law that we review de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). The question of whether contract language is ambiguous is also reviewed de novo. *Id.*

B. Contractual Indemnification - Governing Principles

In *Badiee v Brighton Area Schools*, 265 Mich App 343, 351-352; 695 NW2d 521 (2005), this Court set forth the following governing principles with regard to contractual indemnification:

> This Court construes indemnity contracts in the same manner it construes contracts generally. "An unambiguous contract must be enforced according to its terms." If indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties. "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." [Citations omitted.]

With respect to contracts that allegedly provide indemnification when the indemnitee commits the act of negligence, this Court in *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994), stated:

> Michigan courts have discarded the . . . rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract. Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from "other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." [Citations omitted.]

With these principles in mind, we shall now proceed to discuss and analyze the arguments presented by the parties.

C. Discussion

Fairhaven contends that the language in Article 9 is vague, but surrounding circumstances favor a finding that there was no intent to indemnify Menasha for Menasha's own negligence. Fairhaven maintains that ultimately it must be concluded that the trial court misinterpreted Article 9 because of other clearly articulated indemnification provisions in the

contract, Articles 2.1, 2.7, and 5.3, and the deposition testimony of its president, Thomas Ruth, which all establish that there was no intent whatsoever to defend and indemnify Menasha for the negligent acts of Menasha's own employees. Fairhaven argues that this conclusion is further supported by the principle that an indemnification contract must be construed strictly against the party who drafted the contract, and Menasha drafted the contract at issue. Menasha relies on the argument that the plain, unambiguous, and broad language of Article 9 mandates us to conclude that the parties intended indemnification in favor of Menasha even where a claim or suit arose from the negligence of a Menasha employee.

Article 2.1 of the contract, which concerns the environment and pertains to "harvesting on [Menasha's] stumpage," provides that Fairhaven "agrees to indemnify, defend, and hold harmless Menasha . . . from any and all liability, including attorney fees arising under or in any manner related to [Fairhaven's] performance under this contract, and for activities performed on job sites which would be covered by any Local, State or Federal environmental law[.]" Contrary to Menasha's construction of Article 2.1, this provision clearly contemplates indemnification only when "Fairhaven's performance" gives rise to liability, not negligent performance by Menasha.

Article 2.7 of the contract, which again concerns harvesting operations on Menasha's stumpage, provides that Fairhaven "agrees to hold [Menasha] harmless and indemnify it from any and all claims, damage or expenses, including, but not limited to attorney fees arising out of [Fairhaven's] failure to comply with any Section of this Article." Despite Menasha's argument to the contrary, this provision also clearly contemplates indemnification for Fairhaven's failures, not Menasha's failures.

Article 5.3 of the contract, which covers wood chip transport and unloading and which we briefly referred to in our factual discussion above, provides:

> [Menasha] agrees to provide a safe, properly maintained truck dumper, and will furnish personnel to perform the unloading operation and indemnify [Fairhaven] for damages to its truck-trailer units caused by negligent operation of the equipment by [Menasha]. [Fairhaven] will be responsible to position and secure truck-trailer units preparatory to dumping, and will indemnify [Menasha] for any damage incurred through their negligence.

While this provision does not require Menasha to indemnify Fairhaven in relation to the type of injury that occurred in the case at bar, the fact that Menasha agreed to provide a safe and properly maintained truck dumper suggests some conflict with an interpretation of Article 9 that Fairhaven was agreeing to indemnify Menasha for negligence by Menasha in operating the platform/truck dumper. Also, Fairhaven's duty to indemnify under Article 5.3 arises only from its own negligence.

Although Article 9 is not quite as concise as Articles 2.1 and 2.7 in relegating indemnification to only negligent acts performed by Fairhaven and its employees and contractors, we nonetheless conclude that it plainly and unambiguously precludes indemnification, a duty to defend, and an award of attorney fees where a negligent act committed by a Menasha employee gives rise to liability to a third person. The key language in Article 9 refers to claims, damages, or liabilities "resulting from the operations hereunder of [Fairhaven]

and the servants, employees, independent contractors and assigns of [Fairhaven.]" "Operations hereunder" plainly refers to the delivery and unloading of wood chips under the contract, which, without any additional limitation, might indicate that Menasha was to be held harmless even if it was negligent in those operations. The sentence, however, does not stop with "operations hereunder," but goes on to modify that language by referencing "of [Fairhaven] and the . . . contractors . . . of [Fairhaven]." This language is thus speaking of Fairhaven's performance under the contract, and the damages or claims here resulted from the performance of Menasha's employee under the contract. The following sentence in Article 9, which provides that "[Fairhaven] shall at [Fairhaven's] own cost and expense defend against any and all actions, suits or other legal proceedings that may be brought or instituted against [Menasha] on *any such* claim or demand, and shall pay or satisfy any judgment or decree that may be rendered against [Menasha] in *any such* action" (emphasis added), clearly refers back to the preceding sentence and the necessity that the negligence flow from Fairhaven's acts under the contract.[4] Accordingly, the trial court's ruling constituted error and reversal and remand for entry of judgment in favor of Fairhaven is warranted.[5]

Moreover, summary judgment in favor of Fairhaven is appropriate, where there is no genuine issue of material fact that indemnification and a duty to defend were not implicated, given the surrounding indemnification provisions in the contract and the uncontroverted deposition testimony of Ruth that reflected no intent to indemnify Menasha for its own negligence. Articles 2.1, 2.7, and 5.3, as discussed above, reveal a general, overall intent to indemnify and defend Menasha only when the actions of Fairhaven's employees, agents, and contractors result in damages, claims, or liability. Ruth, who signed the contract on behalf of Fairhaven, testified in his deposition that it was not his intent under the contract to indemnify Menasha for Menasha's own negligence. He understood that Fairhaven would only be responsible under the contract for the negligent or wrongful actions of Fairhaven's employees and contractors or matters within Fairhaven's control. Mark Janke, a senior forester for Menasha,

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[4] Both parties mistakenly fail to appreciate and place importance on the first sentence of Article 9, instead focusing and fixating their arguments on the second sentence. It is evident, however, that the first sentence is vital in determining the issue presented here and that the second sentence is a continuation of the concepts from the first sentence with respect to which parties' negligent acts implicate indemnification, but now also drawing in the duty to defend and to pay attorney fees.

[5] Any reliance by Menasha on *Pritts v J I Case Co*, 108 Mich App 22; 310 NW2d 261 (1981), is misplaced. *Pritts* involved a lessee-indemnitor and lessor-indemnitee, the lease of a travel lift (equipment) pursuant to a lease agreement containing an indemnification clause, a plaintiff who was injured when the travel lift was driven over his legs, a subsequent negligence claim against the lessor, and an argument by the lessor that the lessee was required to indemnify it even if the lessor was the negligent party. The lease language at issue provided for indemnification by the lessee for all claims and damages arising out of, connected with, or resulting from the use of the equipment, and this Court held that this all encompassing language protected the indemnitee (lessor) against its own negligence. *Id.* at 32. In the case at bar, however, we have limiting language that refers to operations of or the performance by Fairhaven, and not delivery and unloading operations in general.

testified in his deposition that, although he signed the contract, Menasha's corporate legal counsel drafted the contract, including Article 9. He further testified that he never had any conversations with anyone from Menasha or Fairhaven regarding the meaning of Article 9, that he was not aware of any documents that would explain Menasha's position on Article 9, and that he was not aware of Fairhaven's position on Article 9. While Janke stated that his understanding of Article 9 was that Fairhaven was "holding Menasha harmless from – from anything," Menasha does not direct us to any documentary evidence that reveals the intent or understanding of the person or persons who drafted the contract on behalf of Menasha.

III. Conclusion

Given the plain and unambiguous language of Article 9, the surrounding indemnification provisions in the contract, and the testimony of Ruth and Janke, all as discussed above, and considering that indemnity contracts are construed strictly against the drafter of the contract and the indemnitee, here Menasha, we hold that the trial court erred in its ruling and reverse and remand for entry of judgment in favor of Fairhaven.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter