STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA FOLDI and RICHARD T. FOLDI,

Plaintiffs,

v

YOUNG MEN'S CHRISTIAN ASSOCIATION, d/b/a SOUTHGATE FUN & FITNESS CENTER HOME OF THE DOWNRIVER YMCA, and CITY OF SOUTHGATE,

Defendants,

and

BARTON MALOW,

Defendant/Cross-Plaintiff-Appellee,

and

ARTISAN TILE, INC.,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
April 21, 2009

No. 282434
Wayne Circuit Court
LC No. 06-608336-NO

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Cross-defendant Artisan Tile, Inc. ("Artisan"), appeals as of right from the trial court's judgment granting summary disposition in favor of Barton Malow pursuant to MCR 2.116(C)(10) on its cross-complaint for indemnification. We affirm.

This case arises from an injury to plaintiff Patricia Foldi ("Foldi"), who slipped and fell on a slate tile floor in the lobby of the city of Southgate YMCA. Artisan installed the floor pursuant to a subcontract with Barton Malow, the construction manager. Foldi filed an action asserting a negligence claim against the YMCA, Barton Malow, and Artisan, a premises liability claim against the city of Southgate, and a nuisance claim against all defendants. Barton Malow filed a cross complaint for indemnification against Artisian. The trial court granted Barton

Malow's motion for summary disposition, concluding that Artisan was required to indemnify Barton Malow for its costs and attorney fees expended in the case pursuant to an indemnification provision in the parties' subcontract.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Id.* at 363. In accordance with MCR 2.116(G)(6), evidence that is submitted to either support or oppose a motion "shall only be considered to the extent that the *content or substance* would be admissible as evidence to establish or deny the grounds stated in the motion." (Emphasis added.) In discussing the "content or substance" aspect of this rule, the Court has recognized "[t]he evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at trial[,][b]ut it must be admissible in content." *Maiden, supra* at 124 n 6.

Questions of statutory interpretation are reviewed de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Similarly, the interpretation of a contract is a question of law to be reviewed de novo. See *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714-715; 580 NW2d 8 (1998).

Artisan's subcontract with Barton Malow in addition to a duty to defend agreement, contains the following indemnification provision:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless Barton Malow and its agents, employees, officers and successors from and against *any and all* liabilities, *claims, causes of action or lawsuits seeking damages on account* of claimed extras of a subcontractor or violation of safety requirements or *of personal injury or death to any person*, including employees of the Subcontractor, or property damage, including claims for loss of use, *which arise out of or result from, or are in any way connected with any work covered by this Agreement* or the operations or acts of commission or omission of the Subcontractor, including those of its employees, agents or officers or its sub-subcontractors, or sub-subcontractors [sic] employees, agents or officers, unless the injuries are caused by the sole negligence of a party indemnified hereunder.
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> The Subcontractor's indemnification obligation shall include:
>
> (1) Indemnity for all damages and judgment interest, *all costs and fees, including all defense costs, expenses and reasonable attorney's fees, relating to or arising out of, resulting from or in any way connected with any claim*, cause of action or lawsuit requiring indemnity by the Subcontractor.
>
> (2) *All expenses, including costs, expenses and reasonable attorney fees, incurred in securing indemnity from the Subcontractor* if the Subcontractor

> fails to or wrongfully refuses to fulfill any of the indemnity obligations specified and assumed under this Contract;
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> * * *
>
> The Subcontractor's obligation to indemnify shall not include any obligation to indemnify which is prohibited by Michigan MCLA 691.991 or other comparable state law. [Emphasis added.]

"In interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." *Id.* "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.* Conversely, a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Further, "[a]n indemnity contract is construed in the same fashion as are contracts generally." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001).

We disagree with Artisan's argument that the indemnification clause must be strictly construed against Barton Malow, as the drafter of the subcontract. "This is known as the rule of contra proferentem." *Klapp, supra* at 471. However, the rule of contra proferentem is not a rule of construction, but rather is a "rule of last resort" that should be applied only as a tie-breaker, i.e., "merely to ascertain the winner and the loser in connection with a contract whose meaning has . . . [remained unclear] despite all efforts to apply conventional rules of interpretation." *Id.* at 473-474. Artisan does not argue, nor do we find, that the indemnification clause is ambiguous. Thus, the rule of contra proferentem does not apply. Rather, Artisan argues that the contract requires a showing of fault before the obligation to indemnify Barton Malow is triggered.[1] We disagree.

The indemnification clause requires that Artisan indemnify Barton Malow for "*any and all* liabilities, *claims*, causes of action or lawsuits seeking damages . . . which arise out of or result from, or *are in any way connected with* any work covered by this Agreement." [Emphasis added.] The clear language of the indemnification clause does not require a showing of liability. A "claim" that is "in any way connected" to Artisan's work is sufficient to trigger Artisan's indemnification obligation. Artisan's obligation does not depend on a showing that Artisan was negligent, or that its negligence caused the alleged injury.

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[1] As noted by Barton Malow, Artisan improperly refers to Barton Malow's case evaluation summary in support of its argument. MCR 2.403(J)(4) provides that case evaluation summaries are not admissible in any court proceeding. However, the depositions attached to the YMCA's and the city of Southgate's joint motion for summary disposition are part of the lower court record and, therefore, can properly be considered by this Court. In those depositions, Patricia Foldi, Richard Foldi, and Brenda Shaw each testified that they did not know what caused Patricia Foldi's fall.

Plaintiffs' complaint alleged that Foldi tripped and fell on a raised floor tile installed by Artisan. Therefore, plaintiffs' "claim" is "connected" to Artisan's work, which is sufficient to trigger Artisan's indemnification obligation. It is immaterial whether plaintiffs are able to show that Artisan's work proximately caused Foldi's fall. As long as the claim is connected to Artisan's work, the clear language of the indemnification clause applies, whether Artisan was at fault or not.

Under the subcontract, Artisan's "indemnification obligation shall include . . . all costs and fees, including all defense costs, expenses and reasonable attorney's fees, relating to or arising out of, resulting from or in any way connected with any claim, cause of action or lawsuit requiring indemnity by the Subcontractor."

Artisan argues that even if the indemnification clause applies without a showing of fault, it is void under MCL 691.991 because Foldi's injury was caused by Barton Malow's sole negligence.

MCL 691.991 sates:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Consistent with this statute, the parties' indemnification clause states that Artisan must indemnify Barton Malow "unless the injuries are caused by the sole negligence of a party indemnified hereunder." The clause also states "[t]he Subcontractor's obligation to indemnify shall not include any obligation to indemnify which is prohibited by Michigan MCLA 691.991 or other comparable state law."

Plaintiffs' complaint alleged that several parties were negligent, and that their negligence caused Foldi's injury. On appeal, Artisan repeatedly asserts that Barton Malow was solely negligent because it selected the slate tile, which contains natural variations in thickness that may have caused Foldi to trip and fall. However, Artisan did not submit any affidavits, depositions, or other documentary evidence in support of this allegation. The parties' subcontract agreement does not mention the type of tile to be used, or who selected it. The letter from the tile supplier likewise does not state who selected the tile. Further, Artisan did not protest the use of slate tile in this application. Artisan had the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of material fact existed with respect to whether Barton Malow was solely negligent, which it failed to do so. *Quinto*, *supra* at 361-362. Thus, Artisan has not shown that MCL 691.991 applies to void the application of the parties' indemnification clause. See *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 601-602; 513 NW2d 187 (1994). Accordingly, the clear language of the indemnification clause stands, and entitles Barton Malow to judgment as a matter of law. Therefore, the trial court did not err in granting Barton Malow's motion for summary disposition.

Artisan next argues that the trial court erred in awarding Barton Malow its requested attorney fees pursuant to the indemnification provision without conducting an evidentiary hearing to determine the reasonableness of the attorney fees. Because Artisan did not request an evidentiary hearing below, this issue is unpreserved. Unpreserved issues are forfeited absent a plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

In the context of case evaluation sanctions, this Court has held that "[a] trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed." *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488; 652 NW2d 503 (2002), overruled on other grounds in *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005). In the present case, Barton Malow did not submit itemized bills with its request for attorney fees. However, Artisan did not file a response to Barton Malow's motion for entry of judgment, or to Barton Malow's supplemental brief. At the hearing on the motion, Artisan asserted its position that the fees were excessive for a simple trip and fall case, but did not request an evidentiary hearing, did not ask for itemized bills, and did not argue that based on counsel's hourly rate, which it did not challenge, an excessive number of hours were spent on this case. Thus, Artisan failed to show that a factual dispute existed to warrant an evidentiary hearing, and the failure to conduct an evidentiary hearing was not plain error.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio