STATE OF MICHIGAN

COURT OF APPEALS

EDW. C. LEVY COMPANY, d/b/a KILLINS CONCRETE COMPANY,

Plaintiff-Appellant,

v

HAMMER TRUCKING, INC.,

Defendant-Appellee,

and

NIETHAMMER TRANSPORT, INC.,

Defendant.

UNPUBLISHED
September 29, 2009

No. 284400
Wayne Circuit Court
LC No. 07-704247-CK

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

In this case concerning contractual indemnification, plaintiff Edw. C. Levy Company, d/b/a Killins Concrete Company, appeals as of right a circuit court order granting defendant Hammer Trucking, Inc. summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings, and decide this appeal without oral argument in conformity with MCR 7.214(E).

Plaintiff manufactures, sells and delivers concrete. For some time, Hammer Trucking transported stone and stone aggregate to plaintiff's facility. In March 2000, plaintiff and Hammer Trucking entered into an indemnification agreement that set fort, in relevant part:

> A) [Hammer Trucking] hereby indemnifies and holds harmless [plaintiff] . . . from and against any and all expenses, (including actual, reasonable attorneys' fees), claims, suits, injuries, damages, losses, judgements [sic], loss of profits, loss of business and consequential losses and damages (collectively, "Loss" or "Losses") sustained either by reason of, or arising out of, or in any way connected with, services supplied or failure of [Hammer Trucking] to comply with [plaintiff's] instructions or directions, whether or not such Losses result from claims by third parties.

> B) In addition, [Hammer Trucking] shall defend, at [its] sole expense, any action or proceedings brought against [plaintiff] . . . with respect to any Losses, including the settlement or compromise thereof; provided that [plaintiff] may participate in the defense of any claim or action, including compromise or settlement without relieving [Hammer Trucking] of any obligation hereunder.
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> E) The indemnity, hold harmless and defense provided hereunder shall be fully operative in every instance, *except where the Loss is occasioned or caused by the negligence of [plaintiff],* whether by act or omission. This indemnity, hold harmless and defense provision shall survive the performance of service hereunder without limit. [Emphasis added.]

In December 2004, Christopher Dauterman, a truck driver employed by Hammer Trucking, brought a premises liability action against plaintiff, alleging that he fell while delivering limestone to plaintiff's premises. Dauterman claimed that black ice covering the delivery area caused him to fall and sustain serious injury. Plaintiff notified Hammer Trucking of Dauterman's lawsuit, tendered a defense, and requested indemnification, but Hammer Trucking failed to respond. Plaintiff sought summary disposition of Dauterman's complaint on the basis that the ice on which he fell qualified as open and obvious under *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). A Washtenaw Circuit Court judge denied plaintiff's motion, finding that genuine issues of material fact precluded summary disposition. Plaintiff and Dauterman later entered a settlement agreement resolving the case. The settlement agreement required plaintiff to pay Dauterman $75,000 "solely to compromise disputed claims and to avoid the expenses and inconvenience of litigation," and added that the settlement did "not constitute . . . an admission of [plaintiff's] liability . . . ."

After plaintiff and Dauterman settled their dispute, plaintiff sued Hammer Trucking for indemnification of the $75,000 settlement, plus costs and attorney fees. Hammer Trucking moved for summary disposition under MCR 2.116(C)(10), insisting that the indemnification agreement relieved it of any duty to indemnify plaintiff for losses "occasioned or caused by" plaintiff's negligence, precisely the claim that Dauterman lawsuit's had alleged against plaintiff. Plaintiff responded that "absent a judicial determination that [plaintiff] was negligent," or Hammer Trucking's presentation of some independent evidence of plaintiff's negligence, Hammer Trucking owed plaintiff a duty to indemnify "because the 'loss' incurred by [plaintiff] arises out of services provided by Hammer [Trucking]." Plaintiff stressed that the prior settlement with Dauterman did not amount to a finding of its liability for negligence. After a hearing, the circuit court granted Hammer Trucking's motion, explaining that a contrary result would "set up . . . an absurd result." The circuit court opined that if the indemnification agreement obligated Hammer Trucking to defend against the underlying lawsuit, Hammer Trucking would have an incentive to lose.

Plaintiff now challenges the circuit court's summary disposition ruling, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR

2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App 621. "Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

This Court applies to indemnity contracts the same contract construction principles that govern any other type of contract. *Zahn v Kroger Co of Michigan*, 483 Mich 34, 40; 764 NW2d 207 (2009). A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Our interpretation of contractual language finds further guidance in the following precepts:

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).]

"We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

Pursuant to the pertinent clause in the parties' indemnification agreement, ¶ E,

> The indemnity, hold harmless and defense provided hereunder shall be fully operative in every instance, *except where the Loss is occasioned or caused by the negligence of [plaintiff]*, whether by act or omission. This indemnity, hold harmless and defense provision shall survive the performance of service hereunder without limit. [Emphasis added.]

Plaintiff asserts that its settlement with Dauterman does not amount to a determination that its negligence caused the "loss" for which it seeks indemnification, and that *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566; 525 NW2d 489 (1994), premised on "nearly identical" facts, governs the outcome in its favor.

Walbridge Aldinger arose from a construction site injury sustained by Robert Reagan, an employee of Walcon Corporation. Walbridge Aldinger served as the general contractor of the construction project, while Walcon was a subcontractor. Reagan sued Walbridge Aldinger asserting claims sounding in negligence. Walbridge Aldinger filed a third-party complaint against Walcon seeking indemnification in accordance with contractual language contained in Article X of a subcontract agreement. *Id*. at 568. Article X "broadly require[d]" Walcon to indemnify Walbridge Aldinger for "any claim, injury, [or] damage . . . arising out of, resulting

from or occurring in connection with the performance of the Work by the Subcontractor or its agents or employees . . . ." *Id*. at 573. Walcon responded that another portion of the subcontract, Attachment G, precluded indemnification "for Walbridge's own breach of duty." *Id*. at 569. Attachment G stated, "Indemnity. The subcontractor shall not indemnify the contractor against the contractor's breach of warranty or duty." *Id*. The circuit court granted Walcon's motion for summary disposition because "Walcon owed no duty to indemnify Walbridge under the . . . subcontract" as a matter of law. *Id*. at 570.

This Court found that Attachment G "unambiguously provides that Walcon is under no duty to indemnify Walbridge for Walbridge's breach of duty. It follows that Walbridge's breach of the duties alleged in plaintiffs' complaint would prevent Walbridge from receiving indemnity from Walcon." *Walbridge Aldinger*, 207 Mich App 573. But despite the contractual language precluding indemnification for Walbridge's breach of duty, this Court held that the circuit court erred by granting Walcon summary disposition:

> However, no breach of duty by Walbridge within the meaning of Attachment G was established in this case. The settlement of the primary action for $600,000 merely admitted the existence of a dispute and the payment of money to get rid of the controversy. Without the establishment of a breach of duty by Walbridge, the broad provision of Article X, in which Walcon agrees to indemnify Walbridge against any claim arising out of Walcon's employees' actions, applies and Walbridge is entitled to be indemnified by Walcon. [*Id*. at 573-574.]

Like the indemnification agreement at issue in *Walbridge Aldinger*, the indemnification agreement here contains both a general paragraph broadly requiring indemnification, and a paragraph exempting indemnification in the presence of negligence committed by plaintiff, the indemnitee. Although the precise language of ¶ E differs from that of Article X construed in *Walbridge Aldinger*, the difference qualifies as inconsequential. Paragraph E unambiguously contemplates that indemnification need not occur when the "loss" triggering indemnification "is occasioned or caused by the negligence" of plaintiff. But as the Court in *Walbridge Aldinger* observed, plaintiff's settlement with Dauterman does not constitute an admission or a finding that it committed negligence. Furthermore, Hammer Trucking presented in the circuit court no independent evidence of plaintiff's negligence, instead relying on the allegations contained in Dauterman's complaint. We conclude that *Waldbridge Aldinger* does govern the outcome of this case, specifically the conclusion that ¶ E does not bar indemnification absent the actual establishment of plaintiff's negligence.

We additionally reject Hammer Trucking's contention that the abolition of joint and several liability in MCL 600.2956 precludes indemnification. Our Supreme Court rejected an identical argument in *Zahn*, 483 Mich 38-40. Furthermore, (1) Hammer Trucking's suggestion that we apply common law indemnity principles ignores that the parties' clear and unambiguous agreement forms the basis of the indemnification analysis here, and (2) regardless whether Hammer Trucking's assumption of plaintiff's defense in the underlying action may have given rise to an "absurd result," the unambiguous language of the indemnification agreement excuses Hammer Trucking's contractual duty to indemnify only "where the Loss is occasioned or caused by the negligence" of plaintiff. Because the parties have not yet litigated whether plaintiff's

negligence caused Dauterman's injury, and thus occasioned a "loss," the circuit court improperly granting Hammer Trucking summary disposition pursuant to subrule (C)(10).

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

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher