STATE OF MICHIGAN

COURT OF APPEALS

PAULETTE KINGMARTIN,

Plaintiff,

v

GENERAL MOTORS CORPORATION,

Defendant/Third-Party Plaintiff-Appellee,

v

SECURITAS SECURITY SERVICES,

Third-Party Defendant-Appellant.

UNPUBLISHED
June 24, 2010

No. 289699
Oakland Circuit Court
LC No. 08-089005-NO

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this indemnification action, Securitas Security Services (Securitas) appeals as of right from a grant of summary disposition to General Motors Corporation (GM). We reverse and remand.

Securitas contracted with GM to provide security personnel at certain GM facilities. The contract stated, in part:

> Pinkerton[1] agrees to indemnify and hold GM harmless from and against any and all losses, liabilities, damages, fines, penalties, costs, claims, demands and expenses (including costs of defense, settlement, and reasonable attorney's fees) of whatever type or nature, including damage or destruction of any property, or personal or physical injury (including death and violation of civil rights) to any person, to the extent such losses, liabilities, damages, fines, penalties, costs, claims, demands, or expenses arise out of (1) any negligence of Pinkerton, (2) the

[1] Pinkerton was Securitas's predecessor.

strict liability of Pinkerton, or (3) the failure of Pinkerton to perform, or to comply with, the terms and conditions of this Agreement.

Plaintiff Paulette Kingmartin (plaintiff) was employed by Securitas as a security guard, and, towards the end of her shift in February 2005, she slipped on ice and injured her wrist. She sued GM for premises liability. GM sued Securitas as a third-party defendant, claiming that "[t]he negligence of Securitas and/or one of its employees (including Plaintiff Paulette Kingmartin)[2] was the cause of [the] incident." GM argued that the indemnification clause was therefore activated and that Securitas was responsible for paying any damages. GM and Securitas filed cross-motions for summary disposition regarding the third-party claim.

The trial court ruled in favor of GM, stating, in part:

> Here, the unambiguous language of the Contract obligates Securitas to indemnify GM. Specifically, Securitas is obligated to indemnify GM for "any and all" of the resulting injuries and losses arising out of "any" negligence of Securitas because they arose from the negligence of Securitas, specifically, the negligent acts of its employees, Plaintiff and Ms. [Kristen] Freidinger.[3]
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> * * *
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> . . . the "surrounding circumstances" reflect an agreement to fully indemnify GM. Specifically, the indemnity agreement provides that Securitas must indemnify GM "to the extent such losses . . . arise out of any negligence by Securitas." It is clear that this provision reflects no indemnity if losses arise out of GM's *sole* negligence. Further, the Contract also includes an insurance provision[4] that obligates Securitas to indemnify GM; this illustrates Securitas's agreement to pay all losses that arose out of performance of the Contract. [Emphasis in original.]

GM subsequently settled with plaintiff, and GM moved for entry of judgment, claiming that its total loss was $70,009.48. Securitas responded that it was not obligated to pay this amount because there had been no finding that GM itself was not solely liable for plaintiff's injuries. In response, GM contended that it was clearly not solely liable for plaintiff's injuries because the injuries resulted from the negligence of plaintiff and her supervisor.[5] Securitas replied that any injuries resulting from the negligence of plaintiff and her supervisor would never, under the doctrine of comparative negligence, be attributable to GM. Therefore, they

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[2] GM alleged that plaintiff was negligent because, among other things, she chose to walk on a dangerous route despite the availability of a less dangerous route.

[3] Kristen Freidinger was a supervisor for Securitas who, according to GM, failed to properly advise plaintiff in connection with the icy conditions.

[4] See footnote 8, *infra*.

[5] GM made this claim in the context of another motion for summary disposition.

could not be deemed "losses" for GM under the indemnity clause in the security-services contract.

The trial court found that the evidence clearly showed that GM was not solely liable for plaintiff's injuries. The trial court then stated:

> The Contract provides that all personal or physical injuries are explicitly within the scope of the indemnity provision: "all losses, liabilities, damages, fines, penalties, costs, claims, demands and expenses of whatever type or nature, including . . . personal or physical injury . . . to any person . . . [.]" The provision is clear and must be enforced as written: the parties' Agreement provides for indemnification of GM with respect to any and all claims asserted against GM arising out of the Agreement for snow removal [sic] services.

The trial court found that Securitas was obligated to fully reimburse GM.

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A motion to dismiss under MCR 2.116(C)(10) tests the factual support for a claim and may be granted where there is no genuine issue regarding any material fact. *Nichols v Clare Comm Hosp*, 190 Mich App 679, 681; 476 NW2d 493 (1991). The court must review the parties' "affidavits, pleadings, depositions, admissions, and other evidence submitted . . . in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 120. We also review de novo the interpretation of a contract. *Klapp v United Ins Grp Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

> Indemnity contracts should be construed to ascertain and give effect to the intentions of the parties. . . . In ascertaining their intentions, one must consider the language used in the contract as well as the situation of the parties and circumstances surrounding the contract. [*MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995).]

Securitas argues that the trial court erred by focusing on whether GM was solely negligent for plaintiff's injuries. Securitas notes that, under the contract, it agreed to indemnify GM for "losses . . . to the extent such losses . . . arise out of . . . any negligence of" Securitas. Securitas argues that no "loss" could result to GM as a result of plaintiff's comparative negligence because "a plaintiff may not recover the percentage of her damages attributable to her own fault." Securitas states:

> . . . even if Plaintiff's comparative negligence is imputed to SECURITAS USA, there is no indemnity obligation because there is no <u>loss</u> to GM. That is so even though the <u>injury</u> did not occur through the "sole negligence" of GM. As SECURITAS USA pointed out to the trial court, it is the <u>loss</u> which defines the indemnity obligation, <u>not</u> the <u>injury</u>. [Emphasis in original.]

Securitas similarly argues that any negligence on the part of Freidinger would not result in a "loss" to GM because GM could not be held responsible for her degree of fault. Accordingly, Securitas contends that it was not obligated to indemnify GM and the trial court erred in granting summary disposition to GM.

The contract provides that Securitas will indemnify GM for "any and all losses, liabilities, [and] *claims* . . . to the extent [they] arise out of . . . *any negligence* of" Securitas (emphasis added). It is not disputed that plaintiff's own negligence was at least *a* cause of her injuries, and it is not disputed that plaintiff's negligence was attributable to Securitas. Therefore, GM argues, her claim against GM "ar[o]se out of . . . negligence of" Securitas, and the indemnification clause was triggered. GM asserts that the fact that there may have been some negligence on the part of GM does not alter this result, because the claim did in fact "arise out of . . . negligence of" Securitas. GM cites *Sherman v DeMaria Bldg Co*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994), in which the Court stated:

> Michigan courts have discarded the additional 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. [Internal citations and quotation marks omitted.]

GM also emphasizes the broad contractual language of "*any and all* losses, liabilities, [and] claims . . ." (emphasis added). GM states that this language evidences the intent of the parties that a claim such as plaintiff's would be covered by the indemnity clause.

GM argues, in essence, that Securitas is obligated to indemnify it for any claim related to the incident. Securitas argues that it owes no indemnification at all to GM because any "loss" to GM would, by definition, have resulted from GM's own negligence. Neither of these interpretations is tenable. As noted by GM in its appellate brief, "Securitas'[s] argument is . . . flawed because its proposed interpretation of the Contract would render the indemnification provision [partly] out of existence." In other words, under Securitas's interpretation, GM would never be entitled to indemnification for a "loss" under the contract because such a "loss" can only result from GM's own negligence. "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468.

GM focuses on the word "claims" in the contract and states that because the claim here arose at least in part from Securitas's own negligence, indemnification is owed for the entirety of the claim. This interpretation, however, is untenable under the case of *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340; 527 NW2d 79 (1995). In *MSI*, the indemnification clause at issue stated, in part:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor . . . from and against all claims, damages, losses and expenses . . . provided that any such claim, damage, loss, or expense is attributable to bodily injury . . . or to injury . . . of tangible property . . . to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder." [*Id*. at 342-343.]

The Court of Appeals found that under this clause, the subcontractor was liable only "to the extent of its own negligence but is not required to indemnify MSI [the construction manager] for MSI's own negligence." *Id*. at 344. Significantly, in reaching its decision, the Court emphasized the phrase "'to the extent caused in whole or in part by any negligent act or omission of the Subcontractor.'" See *id*. The Court stated that this language "limits the extent of [the subcontractor's] liability." *Id*.

The language in the present case is comparable to that found dispositive in *MSI*. Therefore, we cannot agree with the trial court that Securitas is automatically liable to GM for the entirety of plaintiff's claim. Instead, like in *MSI*, Securitas is liable to GM "to the extent of its own negligence . . . ." *Id*.

Securitas next argues that there was no basis for a finding of negligence on the part of Freidinger[6] because GM's argument that Freidinger had a duty to "instruct . . . employees to exercise reasonable care" was untenable. We agree that GM presented insufficient evidence of negligence on the part of Freidinger. Indeed, the statement from Freidinger that GM attached to its motions related to another incident and did not contain information targeted towards plaintiff's fall. Nevertheless, as noted earlier, Securitas does not dispute that plaintiff's own negligence was a cause of the accident. Further proceedings are necessary in connection with degrees of fault.[7]

Securitas next argues that it did not breach the "liability insurance" clause of the contract because any insurance claim resulted from "GM's own . . . omissions . . . ."[8] However, the

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[6] The trial court specifically found that Freidinger had been negligent.

[7] We note that the trial court has not yet made a finding considering the existence or extent of GM's negligence in connection with the accident because it essentially concluded that Securitas was liable for the full extent of the claim, even assuming that GM had been negligent in some respects.

[8] The contract stated:

> Pinkerton shall obtain and maintain pursuant to the terms of this Agreement, at its sole expense, the following types of insurance coverage, with minimum limits as set forth below:
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> (1) Comprehensive General Liability (including liability coverage but excluding pollution or environmental coverage), at a limit of not less than $20,000,000 combined single limit for personal injury and property damage combined.
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> As an additional insured under Pinkerton's policies, GM will have coverage with respect to Pinkerton's operations under this Agreement; GM will not be covered for any claim under Pinkerton's policies to the extent that the

(continued…)

parties agree that "the entirety of the damages awarded were for alleged breach of the indemnity provision, not from breach of the insurance provision." Thus, we need not address this issue.[9]

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

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

(…continued)

> claim results from GM's own acts or omissions, or those of its employees or agents.

[9] Securitas had raised one additional issue on appeal but withdrew this issue in its reply brief.