STATE OF MICHIGAN

COURT OF APPEALS

EDWARD C. LEVY COMPANY, d/b/a KILLINS CONCRETE COMPANY, Plaintiff-Appellee, v HAMMER TRUCKING, INC., Defendant-Appellant.	UNPUBLISHED March 6, 2012 No. 298137 Wayne Circuit Court LC No. 07-704247-CK

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Hammer Trucking, Inc., appeals the trial court's judgment in favor of plaintiff, Edward C. Levy Company. For the reasons set forth below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case involves an indemnification agreement between Levy and Hammer pursuant to which Hammer agreed to indemnify Levy for all expenses related to any claim, injury, damage, or judgment, except if Levy's negligence caused the loss. Levy defended an action brought by Hammer employee Christopher Dauterman who slipped and fell on snow or ice during a delivery to Levy's Ann Arbor facility. Levy settled with Dauterman for $75,000 and Levy then sued Hammer for indemnification. The trial court ruled that Hammer had no duty to indemnify Levy, but this Court reversed in an unpublished opinion, *Edward C Levy Co v Hammer Trucking, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 284400). Specifically, this Court ruled that Levy's settlement with Dauterman did not establish Levy's negligence so as to preclude indemnification under its agreement with Hammer and the Court remanded the case for the parties to litigate the issue of whether Levy's negligence caused Dauterman's injury. On remand, the trial court ruled that the hazard involved in the Dauterman lawsuit was open and obvious, that Levy was not negligent, and that, therefore, Hammer must indemnify Levy.

II. SETTLEMENT AGREEMENT

Hammer argues that the trial court should have granted its motion for summary disposition on the ground that the settlement agreement between Levy and Dauterman precludes Levy's action for indemnification. This Court reviews "a trial court's decision on a motion for

summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law." *Auto–Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009).[1]

Hammer maintains that the Dauterman settlement agreement with Levy states that neither party may commence an action "on account of any claim or matter released" by the agreement. "[A] settlement agreement is a compromise of a disputed claim." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). Settlement agreements are contracts and governed by the same rules as any other contract. *Id.* at 663, 665. Similarly, contract law is applicable to disputes pertaining to the terms of a release. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Because the parties agree that the language of the settlement agreement is unambiguous, it must be construed in its entirety and "according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

The settlement agreement and release clearly identify Dauterman and Levy as the parties to the agreement. The beginning of the agreement further states:

> WHEREAS, the parties desire to resolve the Lawsuit and all claims by [Dauterman] which were asserted or which could have been asserted in the Lawsuit against [Levy], and the parties have reached the agreements set forth below in full settlement of any and all such claims.

Hammer is not named in or otherwise identified as a party to the agreement. Nonetheless, Hammer claims a right to benefit from and enforce the terms of the agreement as a third-party beneficiary.

---

[1] The trial court's opinion reflects that the court looked beyond the pleadings and, therefore, relied on either MCR 2.116(C)(7) or (C)(10) in deciding the motions for summary disposition. *Capitol Prop Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Summary disposition under MCR 2.116(C)(7) is appropriate when the claim is barred because of immunity granted by law. MCR 2.116(C)(7); *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Under this subrule, the moving party is permitted to submit "affidavits, depositions, admissions, or other documentary evidence" in support of its motion, and the contents of the complaint are deemed fact unless contrary evidence is presented. *Id*. at 466. Summary disposition granted pursuant to MCR 2.116(C)(10) is appropriate only when the moving party is able to demonstrate there exist no genuine issues of material fact and it is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). This Court also reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

MCL 600.1405(1) states that "[a] promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." The word "directly" is of fundamental importance and "indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

To determine whether a third-party beneficiary exists, "a court should look no further than the form and meaning of the contract itself." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). "An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status." *Id.* (citations omitted). To be deemed a third-party beneficiary of this agreement, Hammer must demonstrate not only that it is in a position to benefit from performance of the Dauterman settlement agreement, but also that there is "an express promise to act to the benefit of [Hammer]." *Kisiel v Holz*, 272 Mich App 168, 171; 725 NW2d 67 (2006), quoting *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995).

The trial court correctly ruled that the settlement agreement does not preclude Levy's indemnification claim. The settlement agreement clearly states that the only parties intended to be bound by the agreement are Dauterman and Levy and that the agreement was undertaken with the intent "solely to compromise disputed claims and to avoid the expenses and inconvenience of litigation, and shall not constitute, nor be construed as, an admission of liability on the party of either party." Hammer fails to establish that the language of the agreement between Dauterman and Levy demonstrated an undertaking by Levy for Hammer's benefit. Further, and contrary to Hammer's assertion, the provision in the settlement agreement indicating that it is "binding on and inure[s] to the benefit of the heirs, successors and assigns of the parties" merely indicates that neither Dauterman or Levy may avoid their obligations under the agreement because the rights defined within the document will continue until fulfilled. The language does not suggest the waiver of any rights, particularly in light of the notable absence of any reference to Hammer.

III. ADMISSIBLE EVIDENCE

Hammer argues that the trial court erred in ruling that, although the Dauterman settlement agreement was not admissible as evidence in the indemnification action, other evidence was admissible to show the amounts incurred and owing. Hammer relies on the following provisions contained within ¶ 5 of the settlement agreement:

> The parties understand and agree that this Agreement, and the acts done and payments made hereunder, are entered into and done solely to compromise disputed claims and to avoid the expenses and inconvenience of litigation, and shall not constitute, nor be construed as, an admission of liability on the part of any party. *Further, this Agreement, and the acts done and payments made hereunder, shall not be offered into evidence in any proceedings by any party hereto, except as necessary in an action to enforce the terms hereof.* [Emphasis added.]

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). "We must look for the intent of the parties in the words used in the instrument. This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (citation omitted).

The parties agree that the contract language is unambiguous. Under the plain language of the agreement, Levy is only precluded from submitting the agreement into evidence in a subsequent action. The agreement in no way suggests, however, that Levy is precluded from introducing other evidence in a separate action for indemnification that demonstrates the payment of monies in settlement of Dauterman's claim.

IV. OPEN AND OBVIOUS NATURE OF THE CONDITION

We further hold that the trial court correctly granted summary disposition in favor of Levy on the ground that the condition leading to Dauterman's injury was open and obvious, which served to negate any proof of negligence by Levy. "In a premises liability action, the plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach caused plaintiff's injury, and (4) the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). A duty is imposed on premises owners "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Premises owners are not, however, construed to be "absolute insurers of the safety" of an invitee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). There is no requirement that a premises owner protect an invitee from dangers that are open and obvious. *Id.* at 612–613.

A danger is open and obvious when "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce*, 249 Mich App at 238-239, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Surfaces that are visibly covered by ice or snow are considered to comprise dangerous conditions that are open and obvious because of their inherent slipperiness. *Ververis v Hartfield Lanes*, 271 Mich App 61, 67 n 2; 718 NW2d 382 (2006).

There is no reasonable dispute regarding the open and obvious nature of the condition that led to Dauterman's injury. Dauterman was fully familiar with the site, he stated that he saw ice and snow on the ground, and he admitted that he stepped over the slippery spot where he fell at least three or four times immediately before his fall. Based on this testimony, the trial court correctly ruled that the condition at Levy's facility was open and obvious. Moreover, because application of the open and obvious doctrine negated Levy's duty to warn or protect Dauterman

from the alleged hazard, Hammer cannot establish that Levy was negligent in order to avoid its obligation under the indemnification agreement.

Hammer claims that the trial court failed to determine if "special aspects" of the hazard confronted by Dauterman existed, making the hazard unavoidable or unreasonably dangerous. "[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. "Special aspects" are also found to exist when a high likelihood of harm exists, such as when a condition is "effectively unavoidable." *Id*. at 517-518. Hammer asserts that the icy condition was effectively unavoidable, relying on Dauterman's assertion that ice was "all over the place." In addition, Hammer claims its drivers had no choice regarding where to dump their loads of stone.

Levy notes that the hazard was clearly avoidable because evidence showed that Dauterman stepped over the icy rut three or four times before he fell. Ample testimony also established that Dauterman had the choice to dump his load of stone at the top or bottom of the stone pile at Levy's facility. Although dumping from the top of the stone pile seemed to be the most common method of delivery, evidence showed that drivers could easily elect to dump a load of stone at the bottom of the pile if the driver believed it to be necessary for safety reasons.

Dauterman implied that the condition was unavoidable because of how he had to position his truck to dump his load. Dauterman stated that he parked on the left side of the ramp to make it easier to back up. He further asserted that his boss instructed drivers to pull to the left to avoid interfering with the flow of traffic of cement trucks at the site. Dauterman contended that the position of his truck left limited space to maneuver outside and left him in a precarious position near the edge of the stone pile. Again, however, testimony established that Dauterman could have dumped his load at the bottom of the pile. Also, testimony showed that there was ample room for Dauterman to park and to avoid the area where he slipped. Not only did he manage to step over the slippery spot several times before his fall, evidence showed that there was enough room where Dauterman parked for two trucks to park side-by-side, with "10 or 12 extra feet" to spare. Regarding the width of the dumping area at the top of the stone pile, Hammer drivers Gerald German and Darroll Trinkle both stated that Dauterman had more space to park than he suggested, with sufficient space remaining for ease of access outside the truck. Thus, the evidence did not establish that there were special aspects that made any alleged hazard unavoidable or unreasonably dangerous.

V. ORDINARY NEGLIGENCE

We reject Hammer's attempt to re-characterize the Dauterman action as one for ordinary negligence rather than premises liability. "[T]he gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). The nature or type of duty attributable to a defendant is premised on the theory of liability relied on by a plaintiff. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). "In a negligence case, the theory of liability determines the nature of the duty owed and whether the open and obvious danger doctrine is applicable. In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land.

However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct. . . ." *Id.*

All of Dauterman's allegations related to Levy's duty "to maintain its premises in a safe condition," and Dauterman's testimony concerned a condition on Levy's property as the source of his injury. Although Hammer avers that the claim sounds in ordinary negligence because it is based on the failure of Levy's staff to monitor and remove ice and snow, the end result of these purported omissions or failures to act is the same – Dauterman's slip and fall resulted from an alleged unsafe condition *on the land.* As such, the trial court correctly treated the claim as one for premises liability. As recognized by our Supreme Court:

> The plaintiff, who was allegedly injured by slipping on the icy surface of the defendant's premises, claimed that he was injured by a condition on the land, and as such, the claim was one for premises liability, as the circuit court correctly recognized. Although an injured person may pursue a claim in ordinary negligence for the overt acts of a premises owner on his or her premises, the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability. [*Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 913-914; 781 NW2d 806 (2010).]

Based on the actual allegations in this case, the claim sounded in premises liability and not ordinary negligence.

VI. NOTICE

Hammer contends that it should not be responsible for any costs or fees incurred by Levy before Hammer received notice of the claim.

We hold that the trial court correctly ruled that Hammer was aware of the Dauterman litigation and was contractually obligated to indemnify Levy in accordance with the indemnification agreement. Levy employee Robert Flucker stated that he contacted Hammer regarding its obligations under the indemnification agreement "soon after Levy learned of Mr. Dauterman's claims." Flucker asserted that, in mid-2004, he had a telephone conversation with Gwendolyn Niethammer, an owner of Hammer, and provided her with copies of documents pertaining to the Dauterman lawsuit. Niethammer acknowledged that, although Levy requested indemnification in 2006, she was aware of the Dauterman lawsuit in "late winter, early spring of 2005." She further indicated that the other owner, Robert Niethammer, confirmed the existence of the Dauterman lawsuit with Levy in "early 2005, late winter/early spring."[2] Dauterman also stated that he told his employer—Hammer—about his injury within days of his accident.

[2] A stamp indicates that the Washtenaw Circuit Court Clerk received Dauterman's complaint on December 8, 2004.

The indemnification agreement does not contain a provision specifying the manner or timing of a demand for indemnification, but includes a provision that allows for a notice to defend:

> In addition, Transporter shall defend, at transporter's sole expense, any action or proceedings brought against Levy or its Representatives with respect to any Losses, including the settlement or compromise thereof; provided that Levy may participate in the defense of any claim or action, including compromise or settlement without relieving Transporter of any obligation hereunder.

Gwendolyn Niethammer's testimony demonstrates that Hammer was aware of the litigation, but elected not to participate. "It is well-settled that if an indemnitor denies liability and refuses to assume the defense of a claim under a contract of indemnity, the indemnitee, without waiving its right to indemnification, may enter into a good faith, reasonable settlement with the claimant." *Grand Trunk Western RR, Inc v Auto Warehousing Co*, 262 Mich App 345, 358; 686 NW2d 756 (2004) (citation omitted). Under the plain terms of the indemnification agreement, Hammer is obligated to pay the settlement amount, along with "any and all expenses (including actual, reasonable attorneys' fees)" resulting from Dauterman's claims.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause