

STATE OF MICHIGAN
COURT OF APPEALS

W. G. WADE SHOWS, INC.,

Plaintiff-Appellee,

v

RICHARD HAMAN,

Defendant-Appellant,

and

BONNIE HAMAN,

Defendant.

UNPUBLISHED

March 1, 2012

No. 299987

Wayne Circuit Court

LC No. 2007-723226-CZ

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Richard Haman (Haman), appeals as of right from an order awarding \$117,172.83 in attorney fees and costs to plaintiff, W. G. Wade Shows, Inc. (Wade). We reverse and remand for entry of an order granting summary disposition in favor of Richard Haman.

This indemnity action arises out of an underlying lawsuit in which Marilyn Lukas (Lukas) claimed that a ball struck her in the face at a carnival in Taylor, Michigan, on July 11, 2003. In the underlying action, Lukas sued Wade and Haman, claiming that they operated a game known as the Beer Bust game at the carnival in Heritage Park during the Taylor Summer Fest. As Lukas was walking down the carnival midway with her husband and children, “a softball-type ball” coming from the Beer Bust game allegedly hit her, breaking her nose and cutting her cheek. Lukas alleged that Wade and Haman were negligent in their design, construction, and operation of the Beer Bust game, including their failure to install sufficient netting or other barriers, failure to use a reasonably safe ball, failure to locate the game in an isolated area, failure to adequately warn people to watch out for flying balls, failure to adequately monitor the throwing of balls, and failure to properly train employees. Lukas also alleged vicarious liability. Lukas failed to serve Haman before the expiration of the statute of limitations, so the underlying case proceeded against Wade only.

Before the Lukas suit was resolved, Wade filed an indemnity action against Haman. According to Wade, Haman owned and operated the Beer Bust game. Wade did not own, manage, or control the game; rather, Wade leased to Haman the carnival space where the Beer Bust game was operated. Wade alleged that the lease agreement required Haman to maintain the premises in good repair and to operate the game in a reasonably safe manner. Wade sought express contractual indemnification on the ground that Lukas's injuries arose out of Haman's performance or nonperformance of his contractual obligations. Wade contended that the terms of the lease agreement required Haman to indemnify Wade against all claims, losses, and damages, including attorney fees and expenses, in the underlying matter.

The Lukas action proceeded to trial. The jury found that Wade was not negligent in its operation of the festival with respect to the Beer Bust game. The jury also found that Haman was not negligent. Wade moved for summary disposition in the indemnification action, pursuant to MCR 2.116(C)(10), arguing that the parties' agreement obligated Haman to indemnify Wade for its costs and attorney fees incurred in the defense of the underlying Lukas lawsuit. Haman responded that the indemnity provision was not triggered. The Lukas jury agreed that Haman was not negligent; thus, Lukas's claim did not arise out of any action or inaction of Haman. Haman argued that Wade was collaterally and judicially estopped from asserting that Haman was negligent and that Lukas's mere *allegation* that Haman's actions or inactions caused her injury was not sufficient to trigger the indemnity provision. The trial court granted Wade's motion, finding that the indemnification language was sufficiently broad to encompass Lukas' allegations.

Thereafter, Wade filed a motion for attorney fees and costs. Haman's counsel argued that the attorney fees needed to be apportioned because Wade incurred separate fees in defending itself against Lukas' allegations of direct negligence. The trial court disagreed and ultimately awarded Wade \$117,172.83. Haman now appeals as of right.

On appeal, Haman first argues that the trial court erred in granting summary disposition to Wade regarding its express contractual indemnity claim because the contract does not provide for indemnification for suits merely *alleging* that injuries arose out of Haman's actions or inactions and there was no evidence that the underlying claim or suit *actually* arose out of any actions or inactions of Haman. We agree that summary disposition in Wade's favor was inappropriate.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Davenport v HSBC Bank*, 275 Mich App 344, 345; 739 NW2d 383 (2007). "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 v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

This case also involves the interpretation of an indemnification contract. "A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App

288, 291; 642 NW2d 700 (2002). “An indemnity contract is construed in the same fashion as are contracts generally.” *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997).

The proper interpretation of a contract is a question of law that this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). In interpreting a contract, this Court's obligation is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003). This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. *Wilkie, supra* at 47. If the contractual language is unambiguous, courts must interpret and enforce the contract as written. *Quality Products, supra* at 375. “Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law.” *Id.*[*In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007)].

Interpretation of an ambiguous contract, however, is a question of fact that must be decided by a jury. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 469; 663 NW2d 447 (2003). A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other. *Id.* Where a contractual provision is ambiguous and where there is no extrinsic evidence that might shed light on the proper interpretation of the provision, the rule that ambiguities should be construed against the drafter—the rule of *contra proferentem*—is to be applied. *Id.* at 474.

Here, the indemnity provision of the parties' agreement provides:

Hold Harmless - The Concessionaire [Haman] agrees to indemnify and hold the Operator [Wade] harmless from any claim or suit brought for damages, losses or any payment, arising out of Concessionaire's actions or inactions, the deemed employment of the Concessionaire by the Operator, or the employment, termination or use of any person by Concessionaire for the purpose of discharging its contractual obligations with and to the Operator. This hold harmless provision also includes costs and legal fees incurred.

The parties' contract does not define the phrase “arising out of.” “Unless otherwise defined, contractual language is given its plain and ordinary meaning.” *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922. “Courts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined in an agreement.” *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). The most relevant meaning of the term “arise” is “to result; spring or issue (sometimes fol. by *from*): *the consequences arising from this action.*” *Random House Webster's College Dictionary* (2001) (emphasis in original). Similarly, Black's Law Dictionary (7th ed) defines “arise” as “[t]o originate; to stem (from)” or “[t]o result (from).”

Here, Wade has presented no evidence that Lukas's claim or suit resulted, sprang, issued, originated, or stemmed from Haman's actions or inactions. Although Lukas *alleged* that Haman's conduct regarding the design, construction, and operation of the Beer Bust game

caused a ball from the game to hit her, the record contains no evidence that the allegation is true. Further, the jury in the underlying trial found that Haman was *not* negligent (Jury verdict form). Wade correctly observes that the contract does not require *negligent* conduct to trigger indemnity because the contract refers merely to actions or inactions by Haman. Also, it may well be that a claim or suit could *theoretically* arise from non-negligent conduct. However, Wade has failed to identify any non-negligent actions or inactions of Haman out of which Lukas's claim arose. In particular, Wade has presented no evidence that the ball that struck Lukas came from Haman's Beer Bust game. Indeed, Wade argued in the underlying case that Lukas had failed to show that the ball that hit her came from the Beer Bust booth. In the absence of any such evidence, Wade falls back on Lukas's *allegations* regarding Haman's conduct. Thus, while Lukas's claim arose out of being injured at the carnival, it has not been established that her claim *actually* arose out of Haman's conduct in designing, constructing, and operating the Beer Bust game.

That being said, the word "actually" does not appear before the phrase "arising out of" any more than the word "allegedly" appears. Indemnification is simply available under the contractual language for "any claim or suit brought for damages, losses or any payment, arising out of Concessionaire's actions or inactions. . ." An argument could thus be easily made that *any* interpretation of the phrase "arising out of" necessarily requires the insertion of an additional word before it for unequivocal understanding. Without the insertion of an additional word, the interpretation of the contractual language presented by Haman (that the suit actually arise from his actions in order to trigger indemnity) and the interpretation presented by Wade (that a mere allegation that the suit arises out of Haman's actions is enough to trigger indemnity) are both arguably reasonable. A contract is said to be ambiguous when its words may reasonably be understood in different ways. *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). The contractual language at issue is thus ambiguous.

As previously indicated, where a contract is ambiguous, a question of fact is presented as to its meaning, requiring the factfinder to ascertain the intent of the parties. *Klapp v United Ins Group Agency, Inc.*, 468 Mich at 469. Where a contractual provision is ambiguous, and where there is no extrinsic evidence that might shed light on the proper interpretation of the provision, the rule that ambiguities should be construed against the drafter—the rule of *contra proferentem*—is to be applied. *Id.* at 474. Here, there has been no extrinsic evidence presented that would assist in discerning the parties' intent with respect to the ambiguous provision. Thus, the contract is appropriately construed against Wade, as the drafter of the document. Construed to favor Haman, the indemnity provision would only be triggered if Lukas' claim or suit actually arose out of Haman's actions or inactions. There has been no evidence of the same and, in fact, a jury found Haman not to be negligent. The trial court therefore erred in granting summary disposition in Wade's favor and in denying Haman's request for summary disposition in his favor.

Reversed and remanded for entry of an order granting summary disposition in favor of Richard Haman. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot