IN THE COURT OF APPEALS OF THE
STATE OF OREGON

AMERICAN WHOLESALE PRODUCTS,
Plaintiff-Appellant,
v.
ALLSTATE INSURANCE COMPANY,
Defendant,
and
ELPRO INVESTMENTS
Defendant-Respondent.

Lane County Circuit Court
161418610; A160215

R. Curtis Conover, Judge.

Argued and submitted December 1, 2016.

Clinton L. Tapper argued the cause for appellant. With him on the briefs was Taylor & Tapper Insurance Attorneys.

Michael H. Long argued the cause for respondent. With him on the brief was Gaydos, Churnside & Balthrop, P. C.

Before DeVore, Presiding Judge, and Garrett, Judge, and Wollheim, Senior Judge.

GARRETT, J.

Affirmed.

GARRETT, J.

Plaintiff, which leased warehouse space from defendant, brought this action alleging that defendant's negligent failure to maintain the premises resulted in water intrusion that damaged plaintiff's personal property. The trial court granted defendant's motion for summary judgment on the ground that the lease agreement precludes defendant's liability "for any loss or damage caused by water damage." On appeal, plaintiff argues that the trial court erred because the lease does not release defendant from liability for its own negligence in unequivocal and conspicuous terms, and because the lease contains conflicting provisions that create ambiguity regarding defendant's liability for its own negligence. For the reasons explained below, we reject plaintiff's arguments and affirm the judgment.

We review the trial court's grant of summary judgment for legal error. *Johnson v. State Board of Higher Education*, 272 Or App 710, 714, 358 P3d 307, *rev den*, 358 Or 527 (2015). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. ORCP 47 C. In reviewing the trial court's grant of summary judgment, we view the facts in the light most favorable to the nonmoving party. *Morehouse v. Haynes*, 350 Or 318, 320, 253 P3d 1068 (2011).

We state the facts in accordance with that standard. Plaintiff, a distributor of automotive parts, entered into an agreement in 2013 to lease warehouse space from defendant. The lease was drafted by defendant's agent. In 2014, plaintiff's property suffered damage from rust and corrosion that was caused, according to plaintiff, by moisture that entered the warehouse due to defendant's failure to adequately maintain the structure. Plaintiff brought this action for breach of contract against defendant's insurer, Allstate, and for breach of contract and negligence against defendant. Only the claims against defendant are at issue on appeal.

Defendant moved for summary judgment based on the following provision in the lease agreement:

> "**SECTION 7. INSURANCE**
>
> "**7.1 <u>Insurance Required.</u>** Lessor shall be responsible for insuring the premises, and Lessee for insuring its personal property and trade fixtures located on the premises. Neither party shall be liable to the other for any loss or damage caused by water damage, sprinkler leakage, or any of the risks covered by a standard fire insurance policy with an extended coverage endorsement, and there shall be no subrogated claim by one party's insurance carrier against the other arising out of any such loss."

(Bold, underlining, and capitals in original.) Plaintiff responded that Section 7.1 was equivocal and inconspicuous in releasing defendant from liability for its own negligence. Plaintiff also argued that the language on which defendant relied conflicted with the following provisions:

> "**SECTION 3. REPAIRS AND MAINTENANCE**
>
> "**3.1 <u>Lessors Obligations.</u>** The following shall be the responsibility of Lessor:
>
> "(a) Repairs and maintenance of the roof and gutters, exterior walls (including painting), bearing walls, structural members, and foundations.
>
> "*****
>
> "**SECTION 12. LIABILITY AND INDEMNITY**
>
> "*****
>
> "**12.2 <u>Indemnification.</u>** *** Lessor shall have no liability to Lessee for any loss or damage caused by third parties or by any condition of the premises, except to the extent caused by Landlord's negligence or breach of duty under this Lease Agreement."

(Bold, underlining, and capitals in original.) Plaintiff contended only that the lease was ambiguous regarding the extent of defendant's liability for its own negligence; neither party disputed that the underlying damage constituted "water damage" as contemplated in the lease. The trial court entered a judgment granting defendant's motion for summary judgment.

On appeal, plaintiff reprises both arguments for why the trial court erred. Plaintiff's first argument draws

on principles of indemnity as applied to liability releases: specifically, that Section 7.1 fails to shield defendant from the consequences of its own negligence because the release from such liability is not expressed in "clear and unequivocal terms" as required by *Southern Pac. Co. v. Layman*, 173 Or 275, 145 P2d 295 (1944), and, further, is not conspicuous. Plaintiff argues that the water-damage exclusion is not clear and unequivocal because it does not explicitly mention its own negligence, and it is not conspicuous because it is not set off with contrasting font and is contained in a paragraph that generally deals with "insurance."

Plaintiff alternatively argues that the lease is ambiguous regarding whether defendant would be liable for its own negligence. Plaintiff contends that the language of Section 7.1 excluding defendant's liability for causing water damage is inconsistent with defendant's obligations under Section 3.1 for "repairs and maintenance of the roof and gutters, exterior walls (including painting), bearing walls, structural members, and foundations," and also with the language in Section 12.2 that provides that defendant shall have no liability for damages caused by the condition of the premises "except to the extent caused by [defendant's] negligence or breach of duty under this Lease Agreement." Plaintiff reasons that those two provisions plainly contemplate that defendant had certain maintenance obligations and could be liable to plaintiff for its negligence or failure to fulfill those obligations. Therefore, according to plaintiff, to the extent that Section 7.1 purports to immunize defendant from liability for water damage resulting from defendant's negligence or breach of its duties to maintain the premises, the lease provisions are in conflict and create an ambiguity that precludes summary judgment.

Although plaintiff asserts its ambiguity and indemnity-based arguments separately, their respective analyses are not entirely independent. *See, e.g.*, *Estey v. MacKenzie Engineering Inc.*, 324 Or 372, 378-79, 927 P2d 86 (1996) (holding that a liability release for defendant's own negligence was not "clearly and unequivocally" expressed because, in part, it was subject to multiple plausible interpretations); *Steele v. Mt. Hood Meadows Oregon, Ltd.*, 159 Or App 272, 278-80, 974 P2d 794, *rev den*, 329 Or 10 (1999)

(same). In analyzing whether Section 7.1 is sufficiently "clear and unequivocal," we also address whether it is unambiguous; if it is both, we then address whether it is conspicuous.

When a contracting party seeks to immunize itself from liability for its own negligence, its intention to do so must be "clearly and unequivocally expressed." *Estey*, 324 Or at 376 (quoting *Transamerica Ins. Co. v. U.S. Nat'l Bank*, 276 Or 945, 951, 558 P2d 328 (1976)); *Layman*, 173 Or at 280. In applying that standard, courts consider both "the language of the contract" and "the possibility of a harsh or inequitable result that would fall on one party" if the other party was immunized from the consequences of its own negligence. *Estey*, 324 Or at 376; *see also K-Lines v. Roberts Motor Co.*, 273 Or 242, 248, 541 P2d 1378 (1975) ("The treatment courts accord [agreements limiting a party's liability for tortious conduct] depends upon the subject and terms of the agreement and the relationship of the parties."). That latter consideration focuses on the "nature of the parties' obligations and expectations under the contract." *Estey*, 324 Or at 376-77.

Those factors suggest that the parties have expressed their intent with sufficient clarity. Section 7.1's language releasing both parties from "*any* loss or damage caused by water damage" adequately provides plaintiff—a business entity engaging in an ordinary lease transaction—notice that, if a loss occurs from water damage, neither party will be liable to the other, period. Oregon courts have rejected a requirement that the word "negligence" expressly appear in a liability release for it to effectively shield a party from the consequences of its own negligence, *Estey*, 324 Or at 378, and have accordingly enforced provisions that do not mention "negligence" explicitly. *See, e.g.*, *Commerce & Industry Ins. v. Orth*, 254 Or 226, 232, 458 P2d 926 (1969) (upholding both a construction contract's waiver of "all rights" and an insurance policy's release of liability "from whatever cause arising," neither of which explicitly mentioned "negligence"); *So. Pac. Co. v. Morrison-Knudsen Co.*, 216 Or 398, 417, 338 P2d 665 (1959) (upholding a broad indemnity clause and liability waiver between two businesses, which did not mention "negligence" and spoke broadly of "all liability").

Moreover, no "harsh or inequitable result" would befall plaintiff in enforcing Section 7.1 in light of the "parties' obligations and expectations under the contract." The clause's primary effect is to allocate risk between the parties, as evidenced by plaintiff's (and defendant's) agreement in the same paragraph to insure itself against this very type of loss. *Cf. Commerce & Industry Ins.*, 254 Or at 232-33 (concluding that the liability waiver in a construction contract did not cause a harsh result on the plaintiff, in part because the "total effect of all the contracts was to distribute the risks incidental to construction to an insurance carrier"). Plaintiff agreed in Section 7.1 to turn to its insurer, not defendant, for recovery in the event of loss of personal property from water damage. In return, plaintiff was entitled to the same immunity from liability as defendant. This scenario starkly differs from the potential scenarios that past cases have held "harsh or inequitable": for example, "subjecting a farmer to a ruinous liability" from a railroad company's negligence in operating its trains, in return for the farmer's privilege to use a private road crossing the railroad company's tracks. *Layman*, 173 Or at 283.

Plaintiff argues, however, that the language of Section 7.1 is ambiguous regarding the scope of defendant's liability in light of other provisions in the lease: Sections 3.1 and 12.2. Ambiguity means that a provision, or multiple provisions read together, have no definite meaning or are capable of more than one sensible and reasonable interpretation. *Northwest Pine Products v. Cummins Northwest, Inc.*, 126 Or App 219, 223, 868 P2d 21 (1994); *Deerfield Commodities v. Nerco, Inc.*, 72 Or App 305, 317, 696 P2d 1096, *rev den*, 299 Or 314 (1985). We construe an ambiguous liability release against its drafter. *Steele*, 159 Or App at 280 (citing *Estey*, 324 Or at 376).

Standing alone, Section 7.1 is not ambiguous. On the contrary, it clearly and unambiguously allocates responsibility and risk. The landlord bears the responsibility for insuring the "premises"; the lessee bears the responsibility for insuring its "personal property and trade fixtures located on the premises." The provision also states that "[n]either party shall be liable to the other for any loss or damage

caused by water damage, sprinkler leakage, or any of the risks covered by a standard fire insurance policy with an extended coverage endorsement", and that there shall be no subrogated claim by one party's insurance carrier against the other arising out of any such loss." For purposes of this case, Section 7.1 makes clear that neither defendant, nor defendant's insurer by way of subrogation, can be liable for the damages that plaintiff alleges.

The question posed by plaintiff's arguments on appeal is whether that apparent meaning of Section 7.1 conflicts with the language in Sections 3.1 and 12.2, in a way that creates an alternative plausible interpretation of Section 7.1. *See Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002) ("Where provisions of a contract are mutually inconsistent, the contract is ambiguous as to the subject matter of those provisions."). Section 3.1 makes defendant responsible for "maintenance of the roof and gutters, exterior walls (including painting), bearing walls, structural members, and foundations." Plaintiff's argument, as we understand it, is that that language would be "nullified" if Section 7.1 is understood to immunize defendant from liability for water damage. We disagree. The foreseeable damage resulting from defendant's failure to fulfill the obligations under Section 3.1 includes water damage, but it is not limited to that. Failure to perform under Section 3.1 would, presumably, be grounds for a claim for breach of the lease, with damages being available so long as they were not attributable to "water damage, sprinkler leakage, or any of the risks covered by a standard fire insurance policy with an extended coverage endorsement," which are specifically excluded by Section 7.1. In short, Section 7.1 and Section 3.1 can be read to co-exist without doing violence to the plain meaning of either, and are thus consistent.

The same is true for Section 12.2. As noted above, that paragraph, entitled "Indemnification," provides in part that "[defendant] shall have no liability to [plaintiff] for any loss or damage caused by third parties or by any condition of the premises, except to the extent caused by [defendant's] negligence or breach of duty under this Lease Agreement."

Plaintiff appears to interpret that language to mean that defendant *shall* be liable to plaintiff for *any* loss or damage that results from the "condition of the premises" if it is attributable to defendant's "negligence or breach of duty." Without necessarily agreeing with plaintiff's view that that language affirmatively creates liability, plaintiff's argument still fails, because any liability under Section 12.2 is general in nature, whereas the language in Section 7.1 regarding water damage is highly specific. We do not read ambiguity into a contract by finding that a general and a specific provision cover the same subject matter in inconsistent ways; rather, when one is a more particular provision, it controls because it is taken to be the clearer manifestation of the contracting parties' intent. ORS 42.240 ("In the construction of an instrument the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it."). Thus, even if one reads Section 12.2 generally to impose liability on defendant for its own negligence, Section 7.1 operates to create a particular exception for water damage.

In short, we conclude that the lease agreement is not ambiguous, and clearly and unequivocally precludes defendant's liability for loss due to water damage even when caused by defendant's negligence.

We next consider plaintiff's argument that Section 7.1 is not sufficiently "conspicuous" to shield defendant from its own negligence. Plaintiff asserts that, because the liability clause does not appear in contrasting font and is "sandwiched" in the middle of a provision concerning insurance, it is unenforceable. Defendant responds that the disclaimer is conspicuously placed in Section 7.1 because it is directly related to allocation of risk and who is responsible for insuring against loss.

"A disclaimer in a contract can limit tort liability if it was either bargained for, brought to a party's attention or conspicuous." *Anderson v. Ashland Rental, Inc.*, 122 Or App 508, 510, 858 P2d 470 (1993) (citing *Atlas Mutual Ins. v. Moore Dry Kiln*, 38 Or App 111, 114, 589 P2d 1134 (1979)).

In this case, defendant does not contend that Section 7.1 was specifically discussed before the agreement was signed. Thus, we examine the liability disclaimer only to determine whether it is conspicuous under Oregon law.

In determining whether a contract provision is "conspicuous," we have considered the Uniform Commercial Code (UCC) definition of that term, as providing useful guidance, even when the contract at issue is not governed by the UCC. *See Anderson*, 122 Or App at 513. "'Conspicuous,' with reference to a term, means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is 'conspicuous' or not is a decision for the court." ORS 71.2010(j). The statute provides a nonexclusive list of what makes a provision conspicuous, including, "A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type *** to the surrounding text of the same or lesser size." *Id.*

Here, the language limiting defendant's liability appears in a short paragraph, Section 7.1, that contains only two sentences. The paragraph has a heading, "Insurance Required," that is set off from the rest of the text with boldfaced, underscored, and capitalized letters, and itself appears in clear, black font that is large enough to read without difficulty. *See Duyck v. Northwest Chemical Corp.*, 94 Or App 111, 118, 764 P2d 943 (1988), *rev den*, 307 Or 405 (1989) (holding a limitation of liability provision conspicuous as a matter of law when it appeared under a boldface heading "NOTICE OF WARRANTY" and was printed in contrasting capital letters); *Northwest Pine Products*, 126 Or App at 222-23 (holding a warranty disclaimer conspicuous because its title was set off from the surrounding text in larger bold print); *Atlas Mutual Ins.*, 38 Or App at 114 (holding a limitation-of-liability provision conspicuous, in part, because it began with a boldfaced disclaimer of all warranties, and also because it was not "hidden in small print"). The relevant language is not surrounded by other text bearing distracting colors, font sizes, font types, or other "attention-getting devices" that would divert the reader's attention. *See Anderson*, 122 Or App at 510-11 (holding a warranty disclaimer not conspicuous because the contract used "various

attention-getting devices" on surrounding text, like seven different font sizes, boldface type, capital letters, red type, and reverse lettering, which diminished the visual impact of the relevant provision).

Plaintiff argues nevertheless that the disclaimer of liability is not conspicuous because it appears in a paragraph concerning "insurance." If the paragraph at issue were quite lengthy and included a disclaimer of liability that was buried in the middle of detailed language about other subjects, it might be more difficult to conclude that "a reasonable person against which it is to operate ought to have noticed it." ORS 71.2010(j). But that is not the case here. As noted, the paragraph is short and relatively simple, with only two sentences, both concerning risk allocation. Moreover, the insurance paragraph is not an illogical place to have located the disclaimer, as it is directly related to the mutual waiver of subrogation clause. For all of those reasons, we conclude that a reasonable person in plaintiff's position would have noticed the disclaimer. Accordingly, it is sufficiently conspicuous to be enforceable.

Affirmed.