STATE OF MICHIGAN

COURT OF APPEALS

CRAIG LINDSAY AND PAULETTE LINDSAY,

Plaintiffs,

v

CITY OF DETROIT, BEST AMERICAN INDUSTRIAL SERVICES,

Defendant/Third-Party Plaintiffs/ Appellants,

and

EAGLE MECHANICAL COMPANY,

Defendant,

v

BEN WASHINGTON & SONS PLUMBING & HEATING, INC.

Third-Party Defendant/Appellee.

UNPUBLISHED
January 17, 1997

No. 183512
LC No. 93-332211 NO

Before: Young, P.J., and Taylor and R. C. Livo,* JJ.

PER CURIAM.

Third-party plaintiffs, Best American Industrial Services and the City of Detroit, appeal as of right from a circuit court order granting summary disposition of their claims for indemnification and breach of contract against third-party defendant, Ben Washington & Sons Plumbing & Heating, Inc. We reverse.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Washington was subcontracted by Best to assist in the performance of Best's ongoing maintenance contract with the City at the Detroit Waste Water Treatment Plant. In the course of this work, Washington's employee, Craig Lindsay, injured his foot when he jumped from a catwalk to the floor three feet below as he ran to avoid what he thought was a methane gas ignition in a pipe that he was welding. Lindsay filed a lawsuit against the City and Best, alleging his injury was the result of the City's and Best's failure to monitor, protect and warn him against the dangers of the accumulation of methane gas in the work area. The City and Best filed a third-party complaint against Washington, seeking indemnification pursuant to the indemnification clause in the subcontract and alleging a breach of contract pursuant to a clause requiring Washington to add Best as an additional named insured on certain insurance policies. Washington moved for summary disposition, arguing it was entitled to summary disposition because (1) it had not agreed to indemnify Best and the City against the consequences of their own negligence, (2) Lindsay's injury did not arise out of or result from the performance of its work under the contract, (3) Lindsay's claim was not caused by any negligent act or omission of itself, (4) Best had waived the contract provision regarding insurance, and (5) it is against public policy for a subcontractor to procure insurance that includes coverage for the general contractor's sole negligence. The circuit court agreed with Washington's arguments and granted Washington's motion for summary disposition of the third-party complaints under MCR 2.116(C)(10).

Summary disposition is appropriate under MCR 2.116(C)(10) where there is no genuine issue of material fact with respect to a particular claim, except on the issue of damages, and the moving party is entitled to judgment as a matter of law. *Radtke* v *Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Id*. This Court reviews a trial court's grant of summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

Best and the City (hereinafter collectively referred to as "Best") argue that the trial court erred in finding that the indemnification provision of the subcontract was inapplicable to Lindsay's claim on the basis that the indemnification provision did not provide indemnification for Best's own negligence. We agree.

Indemnity contracts are construed in accordance with the general rules for construction of contracts. *Triple E* v *Mastronardi*, 209 Mich App 165, 172; 530 NW2d 772 (1995). As such, the indemnity provision should be construed to effectuate the intentions of the parties. This may be determined by the language of the provision, the situation of the parties, and the circumstances surrounding the making of the contract. *Id*.; *Sherman* v *DeMaria Bldg Co*, 203 Mich App 593, 596; 513 NW2d 187 (1994). However, an indemnity contract is to be strictly construed against the drafting party and the indemnitee. *Sherman*, *supra* at 596. It is no longer true that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence absent that intent being clearly and explicitly expressed in the contract. *Id*. at 596-597. Rather, a broad indemnification clause may be interpreted to protect an indemnitee against its own negligence if that intent can be found in other

language of the contract, the circumstances surrounding the contract, or from the purposes sought to be accomplished by the parties. *Id*. at 597.

The subject clause provides in pertinent part:

> To the fullest extent permitted by law, the Subcontractor [Washington] shall indemnify and hold harmless the Owner [City] [and] Contractor [Best] . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Thus, the indemnification clause states that Best is to be indemnified to the fullest extent permitted by law from claims arising out of Washington's work provided such a claim is caused in part by the negligent acts or omissions of Washington regardless of whether such claim is caused in part by Best. Lindsay alleged that his injury was a result of negligence by Best. The affirmative defenses filed by Best alleged that Lindsay had been comparatively negligent. The third-party complaint alleged that Washington did not take all reasonable safety precautions with respect to the subcontract and did not comply with all safety laws. The third-party complaint further alleged that Lindsay's injury arose out of or resulted from the negligent performance of Washington's work under the contract. The indemnification clause allows for Best to be indemnified even if Best partially caused Lindsay's injury so long as the injury also arose out of or resulted from the performance of Washington's work under the subcontract.

Washington claims that because Lindsay alleged Best had been grossly negligent that a finding of indemnification is precluded. This is incorrect because even were a jury to find gross negligence accompanied by a finding of comparative negligence on the part of Lindsay or Washington, then indemnification would be triggered. Moreover, the indemnification clause merely seeks indemnification to the fullest extent permitted by law, i.e., it does not allow for indemnification in the case of Best's sole negligence occasioning the accident which would be contrary to MCL 691.991; MSA 26.1146(1). This statute is in derogation of the common law, *Blazic v Ford Motor Co*, 15 Mich App 377, 380-381; 166 NW2d 636 (1968), and therefore we read it narrowly. *Craig v Larson*, 432 Mich 346, 356; 439 NW2d 899 (1989). Whether Best was grossly negligent, however defined, or merely negligent, is of no consequence because the statute allows indemnification unless Best was solely negligent. Lindsay's complaint alleged that the City and Best had been negligent. Thus neither the City nor Best was seeking indemnification for their sole negligence, i.e., it was possible that each was partially negligent, not to mention the fact that Lindsay may have been partially negligent.

Best also asserts that the trial court erred in finding that the indemnification clause did not cover Lindsay's claim because it was premised on acts and omissions that were outside Washington's subcontract work. We agree.

The indemnification provision specifically states that it is intended to protect against claims "arising out of or resulting from performance of" Washington's work under the subcontract. The subcontract specifically states that Washington's "work included: [the] supply of skilled, union labor forces; the quantity and disciplines to be determined by D.W.S.D." Yet, other portions of the contract raise a question of fact regarding whether the scope of Washington's work was broader than the mere providing of labor. Section 4.3.1 of the subcontract required Washington to take reasonable safety precautions. Section 4.4.1 required Washington to keep the premises free from the accumulation of waste materials and rubbish caused by operations performed under the subcontract. Both these provisions may suggest that more than the provision of labor was being done by Washington. Indeed, inclusion of an indemnification clause arguably would have been unnecessary if Washington was only going to be supplying labor. Further, Best cited deposition testimony showing Washington had a foreman on site. Accordingly, the contract is ambiguous as to the scope of the work. In this circumstance, the court must defer to the factfinder as to the scope of the work. Thus, we are satisfied that a genuine issue of material fact existed regarding whether Lindsay's claim arose out of or resulted from the performance of Washington's work under the subcontract. Under such circumstances the factfinder must determine the exact scope of Washington's undertaking. *DeMaria, supra* at 596.

Next, Best contends that the trial court erred in granting summary disposition of its claim of breach of contract with respect to the subcontract's insurance provision. We agree.

The subcontract contained the following pertinent provisions regarding insurance:

> 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:
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> > Types of coverage and limits of liability shall be in strict accordance with the types of coverage and limits of liability required in the Prime Contract, consisting of the Agreement between Owner [the City] and Contractor [Best] and the other Contract Documents enumerated therein. Coverages, except Worker's Compensation, shall name the Contractor, Owner and Prime Contractor as additional named Insured.
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> 13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. . . .
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> 13.4 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

These provisions require reference to the general contract to determine what coverage Washington was required to supply. The provision of the general contract applicable to the subcontract and the instant issue provided as follows:

> If any Work is sublet, the Contractor [Best] shall require each Subcontractor not otherwise fully and adequately protected under the Contractor's Public Liability and Property Damage insurance policies, to procure, purchase and maintain, during the period of Subcontractor's respective operations and performance of the Work at the Site, Public Liability and Property Damage Insurance which names the City of Detroit and Subcontractor as named insureds. The Engineer [an employee of the City] shall determine the dollar amount of coverage of such insurance policies based on the nature and potential hazards of the operations and performance of the Work at the Site by the respective Subcontractors. Unless greater amounts of coverage for insurance is provided in the Contract Documents, the minimum amount of coverage for public liability shall be $100,000 for each and $300,000 for aggregate operations. The amount for property damage shall be a minimum of $100,000 for each occurrence and $300,000 for aggregate operations.

Given the fact that the scope of Washington's work must be determined by the factfinder, the trial court erroneously held that Lindsay's claim did not come within the required insurance. We also reject the argument that summary disposition of the breach of contract claim was proper because Best waived this contract provision. Washington failed to obtain the necessary endorsement indicating Best was an additional named insured. Washington argued this clause was waived by Best because Best let it perform its work without requiring the endorsement. The record does not suggest that Best knowingly waived this contractual requirement. There is a genuine issue of material fact regarding whether Washington breached the subcontract by failing to provide the endorsement naming Best as an additional insured and whether Best discovered this breach. Thus summary disposition of the breach of contract claim on this ground was error. Finally, the argument that the insurance provision was void because it required Washington to provide insurance against Best's sole negligence is without merit. If the insurance that the parties intended Washington to procure for Best's benefit was coverage for Best's sole negligence, then that coverage would be void as against public policy. *Peeples v Detroit (On Rehearing)*, 99 Mich App 285, 302-303; 297 NW2d 839 (1980). However, the extent of coverage to be provided by the insurance provisions of the subcontract was only intended to protect against Washington's performance of its subcontract work. As such, the insurance provisions were not designed to cover Best's sole negligence.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Robert P. Young
/s/ Clifford W. Taylor
/s/ Robert C. Livo