STATE OF MICHIGAN

COURT OF APPEALS

JAMES ELLER, Individually and as Next friend of JAMES ELLER, III, a minor,

Plaintiffs,

v

McLOUTH STEEL, an assumed name for McLOUTH STEEL PRODUCTS CORPORATION, a Michigan Corporation, METRO INDUSTRIAL CONTRACTING, INC., a Michigan Corporation, and POWER PROCESS PIPING, INC., a Michigan Corporation jointly and severally,

Defendants.

UNPUBLISHED
June 29, 2001

No. 220337
Wayne Circuit Court
LC No. 96-610379-NO

METRO INDUSTRIAL CONTRACTING, INC., a Michigan Corporation,

Third Party Plaintiff-Appellant,

v

MID-AMERICAN GUNITE, INC.,

Third Party Defendant-Appellee.

Before: Cavanagh, P.J., and Cooper and K.F. Kelly, JJ.

PER CURIAM.

Third-party plaintiff appellant, Metro Industrial Contracting, Inc. (Metro), appeals as of right an October 10, 1997, order granting summary disposition, pursuant to MCR 2.116(C)(10), to third-party defendant appellee, Mid-American Gunite, Inc. (Gunite). Gunite cross-appeals and claims that the full indemnification of Metro has rendered this appeal moot. We reverse.

Metro was the general contractor for a construction project on the # 2 blast furnace at McLouth Steel Products Corporation. Metro contracted with Power Processing Piping, Inc. (PPP) as the prime mechanical and pipefitting subcontractor. Gunite also entered into a subcontract with Metro on June 23, 1995. The contract stated that Gunite was hired to "supply all labor, supervision, tools, equipment and materials to perform all brick and refractory work."

The common procedure for relining a blast furnace requires that the new brick be applied from the ground up, with the trades working in a "stacked" or vertical fashion. Blast furnaces contain large coolers that must be removed in order to re-brick the furnace. While relining the furnace with bricks from a scaffold, James Eller, an employee of Gunite, was seriously injured. The scaffold had two levels: the first was for Eller to stand upon and the second level was to stack bricks on and serve as a shield for falling debris.[1] As Eller and the other Gunite employees were working below, Metro and PPP were in the process of lowering the overhead coolers. These coolers weighed approximately 225 pounds. During this procedure, one of the coolers broke free from its safety wires and fell through the scaffold that Eller was standing upon. Eller suffered severe injuries to his back and side.

Eller filed a law suit in circuit court on March 8, 1996, against Metro and PPP for the injuries he sustained. Thereafter, Metro requested permission from the court to name Gunite as a third-party defendant. On February 3, 1997, the trial court entered an order allowing Metro to name Gunite as a third-party defendant. On April 18, 1997, Gunite filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied this motion on May 23, 1997, ruling that questions of fact remained concerning whether the brick scaffold was poorly constructed by Gunite.

On September 19, 1997, after the completion of discovery, Gunite filed another motion for summary disposition, pursuant to MCR 2.116(C)(10). On October 10, 1997, the trial court granted Gunite's motion for summary disposition and agreed with Gunite that no evidence was produced to suggest that Gunite was unreasonable for working beneath PPP and Metro while the coolers were being removed. Nor was there any evidence produced that the scaffolding was insufficient. The trial court also concluded that Eller's injury did not arise out of, result from, or was in any way connected with Gunite's work.[2]

On March 1, 1999, Metro filed this appeal from the trial court's grant of summary disposition for Gunite. Metro is seeking indemnification from Gunite for Metro's share of the judgment.

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[1] The scaffolding at issue was newly built and there was no evidence to indicate that it was unsafe or poorly constructed. Gunite constructed the scaffold to be used as a brick reline scaffold but it also served as a protection from falling objects. While the scaffold was sufficient to stop falling bolts, it was not built to withstand heavy falling objects.

[2] A jury later awarded Eller a $783,713.89 judgment against Metro and PPP. The fault was allotted equally between Metro and PPP. The jury did not find contributory negligence on the part of Eller.

Gunite argues on cross-appeal that Metro has been fully indemnified by PPP and that this claim should be barred for mootness. However, Gunite has presented absolutely no evidence on appeal to substantiate this argument. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Therefore, we decline to address Gunite's claim of mootness on appeal.

Metro asserts that the trial court erred in granting Gunite's motion for summary disposition. Instead, Metro claims that the evidence established that Eller's injury arose out of or in connection with Gunite's performance of its contract. Therefore, Metro argues that it is entitled to contractual indemnification as a matter of law. We agree.

A trial court's grant or denial of summary disposition is subject to de novo review on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). A trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817, reh den 461 Mich 1205 (1999).

An indemnity contract is generally construed in the same fashion as a contract. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). The primary goal in contract construction is to ascertain and give effect to the intent of the parties. *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). The intent of the parties is revealed "by considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). Ambiguities in an indemnity contract are to be strictly construed against the drafter of the contract and the party who was the indemnitee. *Id*. at 172. "A provision which seeks to indemnify a promisee against liability for its own negligence is valid in the case of concurrent negligence by multiple tortfeasors."[3] *MSI Construction, supra* at 343. This Court should interpret the indemnify clause so as to provide a reasonable meaning to all its terms. *Id.*

The indemnification contract between Metro and Gunite provided in pertinent part that Gunite would:

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[3] Michigan law also states that an indemnity contract which purports to require indemnification for the sole negligence of the indemnitee is against public policy and void. MCL 691.991; *Sherman v DeMaria Building Co, Inc*, 203 Mich App 593, 600; 513 NW2d 187 (1994);. However, this is not an issue in this case because both PPP and Metro were declared negligent. "[A]s long as the injury was not caused by the indemnitee's negligence alone, indemnification was valid." *Sherman, supra* at 600.

> indemnify, protect, defend and save harmless Company [Metro] from and against all liability for injuries, including death, to any and all persons whomsoever and for any and all property damage *arising out of or resulting from or in any way connected with the work covered by this Subcontract or the operations or acts of commission or omission of the Subcontractor [Gunite], his subcontractors, agents and employees.* [Emphasis added.]

Thus, Gunite would owe indemnity to Metro if: (1) the injury arose out of work covered by Gunite's contract; (2) the injury resulted from work covered by Gunite's contract; or (3) the injury was in any way connected with the work covered by Gunite's contract. Additionally, indemnity would arise if an injury occurred under Gunite's operations or acts of commission or omission.

We believe that given the circumstances and a reasonable interpretation of the contractual terms, the indemnity clause provided broad indemnity whether Gunite was at fault or the injury was in any way connected to Gunite's work. Several Michigan cases support the proposition that indemnity requires only a link between the work and the injury, regardless of the existence of fault. See *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448; 403 NW2d 569 (1987); *Sherman, supra*; *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566; 525 NW2d 489 (1995). We further note that Eller was, in fact, injured while performing the contracted work because he was in the process of re-bricking the blast furnace.

In *Fischbach-Natkin, supra*, the contract required indemnification for "any and all persons whomsoever and for any and all property damage *arising out of* or *resulting from* or *in any way connected with* the work covered by this subcontract or the operations or acts of commission or omission of the Subcontractor, his subcontractors, agents and employees." *Id*. at 451 (Emphasis added.). In that case, the subcontractor's employee was injured due to the negligence of the general contractor's employees, when a heavy hydraulic machine tipped over on him during installation. *Id*. The Court held that indemnification from the general contractor's own negligence was intended in the contract as seen from the parties' situation and their surrounding circumstances. *Id*. at 453-454.

To ascertain the intent of the parties, the Court in *Fischbach-Natkin* looked to the *Paquin v Harnischfeger Corp*, 113 Mich App 43; 317 NW2d 279 (1982), decision. *Fischbach-Natkin, supra* at 454. Given the surrounding circumstances and the understanding "that all the work connected with installing the machine would not be performed by defendant, and that the employees of plaintiff and other subcontractors would be present at the common work area[,]" the possibility that injuries could result from plaintiff's negligence was apparent at the time the indemnification contract was enacted. *Id*. In light of the indemnification contract's broad provisions and the parties' situation, the Court concluded that there was a clear intent to indemnify plaintiff for his own negligence. *Id*. at 455.

Michigan caselaw clearly supports the conclusion that a general contractor can be indemnified for its own negligence without a specific contractual clause to that effect.[4] *Fischback-Natkin, supra* at 452-453. Additionally, to give effect to the intentions of the parties, Michigan courts "must consider the language used in the contract as well as the situation of the parties and circumstances surrounding the contract." *MSI Construction, supra* at 343. Thus, in the construction situations discussed, our Courts have continually found that the possibility of injury or damage from other subcontractors or the general contractor was readily apparent at the time the indemnification contracts were signed. See *Fischback-Natkin, supra* at 454; *Sherman, supra* at 599; *Paquin, supra* at 53.

In the case at bar, the indemnification language was identical to that used in *Fischback-Natkin*. *Id*. at 451. While the factual situation in *Fischback-Natkin* differs somewhat from the case at bar, in that the employee was clearly injured in the process of performing the subcontractor's work, the injury was still due to the negligence of the general contractor. *Id*. at 450-451. In *Fischback-Natkin,* the circumstances surrounding the contract indicated that the subcontractor knew several other people would be working with their employees in the same area. *Id*. at 454. Consequently, the Court decided that it was apparent to the subcontractor, when he entered into the contract, that an injury could occur due to the general contractor's or another party's negligence. *Id*. at 455.

Gunite argues that the real question is whether the injury arose out of or in connection with the work Gunite was hired to do under the contract. The contested contract states that Gunite was hired to perform all the brick and refractory work and provide all the necessary equipment and materials. Gunite maintains that Eller's injury was unrelated to Gunite's subcontracted work because it arose out of and was connected with the work of Metro and PPP.

To support their argument Gunite urges us to rely on Texas law.[5] However, Texas caselaw is not binding authority on this Court. Moreover, we find that existing Michigan caselaw clearly requires us to ascertain the parties' intention in an indemnification contract by looking to their surrounding circumstances.

In the case at bar, there is no dispute that Eller was injured while he was in the process of re-bricking the blast furnace. In fact, the re-bricking was the work that Gunite contracted to do and it was the work covered under the indemnity contract. The facts indicate that Eller was not injured from re-bricking, but instead by a cooler that was dropped by employees of Metro and PPP. However, since Eller was injured while performing the contracted work, it appears that the injury was received in connection with the work covered under the subcontract.

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[4] This position is contrary to earlier Michigan cases which required an express agreement to indemnify for a general contractor's own negligence. See *Geurink v Herlihy Mid-Continent Co*, 5 Mich App 154, 158-159; 146 NW2d 111 (1966) ("The indemnifying language in the purchase order does not insulate the appellant from the consequences of his own negligent conduct unless it is clearly shown that the parties expressly agreed to this type of indemnification.")

[5] See *Brown & Root, Inc v Service Painting Co of Beaumont, Inc*, 437 SW2d 630 (1969); *Westinghouse Electric Corp v Childs-Bellows*, 352 SW2d 806 (1962).

Michigan is replete with caselaw stating that specific language indemnifying the general contractor for its own negligence is not required, and that the intent of the parties should be based on the surrounding circumstances and the situation of the parties. *Fischback-Natkin, supra; MSI Construction, supra*. Using the surrounding circumstances it appears that Gunite was aware of the working conditions in a blast furnace, with the trades working in a "stacked" fashion, and the possibility of injury from falling objects.[6] Moreover, neither party has argued that they were in an inferior position during the making of the contract or that they misunderstood its terms. See *Sherman, supra* at 597-598. The fact that Eller was injured while performing the contracted work, coupled with Gunite's awareness of the working conditions, leads this Court to conclude that Gunite initially intended to indemnify Metro for the type of injury sustained by Eller. Given the facts of this case and the broad language of the contract, we find that Metro is entitled to indemnification from Gunite.

We reverse.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

[6] Deposition testimony established that the blast furnace's design makes it common practice for the trades to work above each other, in a "stacked" fashion, during the re-bricking process.