STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellee,

v

CHRYSLER CORPORATION,

Defendant/Cross-Plaintiff-Appellee/Cross-Appellant,

and

OVERHEAD CRANE & SERVICE CORPORATION,

Defendant/Cross-Defendant/Third-Party Plaintiff-Appellant/Cross-Appellee,

and

COMMERCIAL UNDERWRITERS RISK MANAGEMENT, INC., a/k/a COMMERCIAL RISK MANAGEMENT UNDERWRITERS, INC., and MARY KAY SMITH,

Third-Party Defendants/Cross-Defendants-Appellees/Cross-Appellants-Cross-Appellees.

UNPUBLISHED
February 1, 2002

No. 225013
Wayne Circuit Court
LC No. 96-622826-CZ

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Defendant Overhead Crane & Service Corporation (Overhead Crane) appeals as of right from the trial court's order granting summary disposition to third-party defendants Commercial Underwriters and Mary Kay Smith (hereinafter collectively referred to as Commercial Underwriters). Commercial Underwriters cross-appeals the trial court's denial of its request for

actual costs. Defendant Chrysler Corporation (Chrysler) cross-appeals from the trial court's order granting summary disposition in favor of plaintiff Frankenmuth Mutual Insurance Company (Frankenmuth), Overhead Crane, and Commercial Underwriters on its claim for indemnification and the court's dismissal of its estoppel claim against Frankenmuth. We affirm in part, reverse in part, and remand for further proceedings.

Chrysler solicited bids for a construction project at its Indiana plant involving an overhead crane. Overhead Crane submitted the only bid for the project. A purchase order governing this project contained an indemnification provision. However, Overhead Crane recommended that the runway on which the crane was to run should be reinforced. Following additional review, Chrysler determined that reinforcement was required, and Overhead Crane performed this reinforcement. There was no separate indemnification agreement governing this reinforcement project. However, Chrysler alleged that the reinforcement was assigned the same project number and was considered a "bulletin." According to Chrysler's "General Conditions for Construction Contracts," a "construction bulletin" is a "form used to describe an intended change in plans and specifications and to request the contractor's quotation of the increase or reduction in cost of the proposed change." Various documents identifying the reinforcement project did not contain the same purchase number. However, Chrysler asserted that the documents referred to each other and any error in the project number was corrected.

In March 1994, Fred Bradburn, an Overhead Crane worker, was injured at the Indiana plant during the reinforcement and sued Chrysler. Chrysler tendered the defense of the litigation to Overhead Crane based on the indemnity provision. Overhead Crane submitted the lawsuit to its insurer, Frankenmuth, which undertook the defense of the Bradburn lawsuit. The Bradburn litigation was settled for $1.25 million. In January 1996, Frankenmuth filed suit alleging that it owed no duty to indemnify or defend and the policy did not cover the bodily injury that occurred during the completed operation. Frankenmuth later amended its complaint to expand its position that there was no coverage for this injury through Overhead Crane's policy and alleged that there was no contract of indemnity between Chrysler and Overhead Crane. Overhead Crane filed a third-party complaint against Commercial Underwriters essentially alleging breach of contract. Chrysler filed a countercomplaint against Frankemuth alleging estoppel and filed a cross-claim against Overhead Crane seeking indemnification. The trial court held that Bradburn's injury did not arise from the contract to which the indemnity clause applied and granted the motion for summary disposition brought against Chrysler. Commercial Underwriters moved for summary disposition of a claim for "attorney fees" in the third-party action filed by Overhead Crane. The trial court granted Commercial Underwriters' motion by concluding that the claim for attorney fees did not fall under the exception to the rule that each party bears the expense of litigation.[1]

Chrysler alleges that the trial court erred in granting the motion for summary disposition regarding its indemnification claim. We agree. Our review of a summary disposition motion is de novo. *Oade v Jackson National Life Ins Co*, 465 Mich 244, 251; 632 NW2d 126 (2001). If

[1] At this hearing, the parties acknowledged that Chrysler had previously filed a claim of appeal prior to the resolution of the entire action. The parties also discussed the fact that the trial court's ruling covered only partial summary disposition. Therefore, a discussion ensued regarding the language of the order in order to obtain appellate court jurisdiction.

contract language is clear, the construction of the contract presents a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). However, if the contract is subject to different, reasonable interpretations, factual development is necessary to determine the parties' intent. *Id*. While parol evidence is not admissible to vary a clear and unambiguous contract, parol evidence may be admissible to clarify the meaning of an ambiguous contract. *Id*. When a contract's meaning is obscure and its construction is contingent upon other and extrinsic facts connected to what is written, the question of interpretation should be submitted to the jury with proper instructions. *D'Avanzo v Wise & Marsac, P.C.*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

In the present case, we conclude that the question of interpretation of the contract presents a question for the trier of fact. It is undisputed that the parties entered into an initial contract that contained an indemnification provision. However, when the issue of reinforcement arose, a second indemnification provision was not executed. Chrysler employee Stanley Woodrum acknowledged that there were different numbers on correspondence between the parties. However, he also testified that the runway reinforcement was part of the same job. He categorized the reinforcement project as a bulletin or amendment to the original contract. Indeed, Chrysler's contract conditions provide that a bulletin is essentially an amendment to a contract. There is no indication in the available record that Overhead Crane was not provided with the rules governing contracts with the auto maker. Additionally, Chrysler presented numerous documents to indicate that different numbers were in error and the project number, with the reinforcement, remained consistent. Chrysler also asserted that even if purchase numbers were erroneous labeled, the documents nonetheless could be traced to refer to each other through the relevant numbers. We note that David Gaines of Overhead Crane submitted an affidavit indicating that Chrysler did not advise him that the reinforcement project would be subject to the original provisions of the contract involving the crane. The credibility of that statement, particularly in light of Chrysler's contract provisions, and the parties' intentions presents a question for the trier of fact. See *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). Accordingly, the trial court erred in granting summary disposition of the issue of indemnification.[2]

Overhead Crane argues that the trial court erred in granting summary disposition of its claim for attorney fees. We disagree. Our review of this issue is de novo. *Oade, supra*. Overhead Crane contends that it is entitled to attorney fees pursuant to the exception to the general rule that each party bears its own expenses because of wrongful conduct. However, review of the rationale of the exception reveals that it is inapplicable to this case. *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253, 257-258; 240 NW2d 765 (1976). Furthermore, any

[2] Chrysler also argues that the trial court erred in granting summary disposition when it had a pending claim of estoppel raised against Frankenmuth. The parties never briefed, raised, addressed, or argued the propriety of summary disposition of the estoppel claim. However, pursuant to the judgment of the parties, our decision to reverse the grant of summary disposition of the indemnification issue renders an analysis of the estoppel issue moot. The claim is reinstated due to our decision to reverse regarding indemnification.

allegation that an award of attorney fees is warranted based on the interests of justice is without merit.[3]

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

[3] We have addressed this issue in accordance with the briefs filed by the parties. However, review of the record reveals that the briefs do not comport with the pleadings filed by Overhead Crane. Overhead Crane filed a third-party action alleging that Commercial Underwriters deviated from its standard practice by failing to ensure that Overhead Crane signed off on any revisions to its policy. In its motion for summary disposition, Commercial Underwriters characterized the third-party complaint as an action for negligence. However, in its brief in opposition to the motion, Overhead Crane alleged that its third-party complaint alleged malpractice, breach of contract, and misrepresentation. Despite this disparity in defining the nature of the pleadings, Commercial Underwriters' motion only sought disposition of the claim of "attorney fees." Thus, Commercial Underwriters' motion only governed an element of damages and did not dispose of the third-party claim in its entirety. The parties did not acknowledge or relate the motion to the pleadings, but did acknowledge that summary disposition granted only partial relief. Thus, in order to obtain appellate court jurisdiction, the parties stipulated to dismiss all remaining claims. We conclude only that the exception warranting attorney fees does not apply. We have not reached any conclusion regarding the nature of the third-party complaint and the propriety of its continuation upon remand. While it is alleged that the judgment disposing of all claims was "stipulated," there is no accompanying signed stipulation in the record available and the pleading attached to the motion states only that it was reached through "agreement." There is no transcript provided to indicate whether the parties reached an agreement on the record. In light of the fact that the third-party complaint was not disposed of on the merits, the interests of justice do not require that the trial court grant Commercial Underwriters request for actual costs.