STATE OF MICHIGAN

COURT OF APPEALS

KATHY RAYMOND,

Plaintiff-Appellant,

V

MARK BOWERS,

Defendant-Appellee.

UNPUBLISHED
June 11, 2002

No. 228201
Oakland Circuit Court
LC No. 99-015528-NO

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition of this premises liability action pursuant to MCR 2.116(C)(10). We affirm.

In May 1996, plaintiff contracted with defendant to lease office space in his building for the purpose of operating a massage therapy business. The three-year lease agreement contained an indemnity clause, which provided in relevant part as follows:

> The Tenant agrees to indemnify and hold harmless the Landlord from any liability for damages to any person or property in, on or about said leased premises from any cause whatsoever . . . .

In 1998, plaintiff advised defendant that two of three metal arms that supported an awning outside her office window were broken. In January 1999, as plaintiff was knocking icicles off the awning, the ice-covered awning collapsed and injured her. Plaintiff filed a negligence action against defendant, and the trial court granted defendant summary disposition on the basis of the lease's indemnity provision.

Plaintiff contends that defendant was not entitled to summary disposition on the basis of the indemnity provision because it is ambiguous and void as against public policy pursuant to MCL 691.991. This Court reviews de novo a trial court's summary disposition ruling. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 NW2d 725 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing the motion, this Court considers the pleadings, affidavits, depositions and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. The motion is properly granted if no genuine issue of material facts exists, thereby entitling the

moving party to judgment as a matter of law. *Quinto v Cross & Peters, Inc*, 451 Mich 358, 362; 547 NW2d 314 (1996).

An indemnity contract is construed in accordance with the rules for the construction of contracts in general. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). The initial question whether a contract is ambiguous involves a question of law, which this Court reviews de novo. *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). An indemnity contract is to be strictly construed against the drafter and against the indemnitee. *Triple E Produce Corp*, *supra*. The court must look for the intent of the parties in the words used in the instrument, and may not make a different contract for the parties or look to extrinsic evidence to determine their intent when the words comprising the contract are clear and unambiguous and have a definite meaning. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603-604; 576 NW2d 392 (1997). Contractual language must be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). If the contractual language is clear and unambiguous, its meaning also is a question of law. *Id*. at 491.

In *Wagner v Regency Inn Corp*, 186 Mich App 158; 463 NW2d 450 (1990), this Court interpreted an indemnity provision in a lease agreement that was nearly identical to the instant indemnity provision. The indemnity provision at issue in *Wagner* stated that the lessee agreed to "indemnify and hold harmless [the lessor] *from any liability for damages to any person or property in, on or about said premises from any cause whatsoever*." *Id*. at 167 (emphasis added). This Court concluded that the provision required that the lessee indemnify the lessor, explaining that "[t]he plain and unambiguous language of this particular indemnity agreement is so broad it can only be construed as applicable to [the] plaintiff's claim." *Id*. at 168.

Despite that defendant drafted the instant indemnity clause, the provision likewise is plain and unambiguous and "so broad it can only be construed as applicable to plaintiff's claim." *Id*. Furthermore, it is not contrary to Michigan public policy for a party to contract against liability for damages caused by its own ordinary negligence. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994).[1] With regard to plaintiff's claim concerning her intent, we find the broad, all inclusive language of the indemnity clause a clear indicator that the parties intended to protect defendant against the type of liability that plaintiff here seeks to impose. *Pritts v J I Case Co*, 108 Mich App 22, 29-31; 310 NW2d 261 (1981). We reiterate that we may not look to extrinsic evidence to determine the parties' intent when the words comprising the contract are clear and unambiguous and have a definite meaning. *Zurich Ins Co*, *supra*. Furthermore, contrary to plaintiff's suggestion, the phrase "any person" is unambiguous and cannot be reasonably understood to encompass only plaintiff's customers. The term "any" does not denote a precise specification or identification, and thus plainly does not limit the category of persons who may be affected by the indemnification provision. *Random House Webster's College Dictionary* (1997), p. 60.

[1] We note that this case does not involve a claim that plaintiff's injuries were solely the result of an intentional act. See *Wagner*, *supra* at 169 (explaining that the indemnity provision would be invalid if applied to require that the lessee indemnify the lessor for the lessor's intentional or willful and wanton conduct).

We also reject plaintiff's contention that the indemnification provision is void and unenforceable as against public policy pursuant to MCL 691.991. This statute does not apply to the instant case because it provides that an indemnity clause within a *construction contract* that seeks to protect the promisee from liability for personal or property damages arising from the promisee's sole negligence will be unenforceable as against public policy. *Peeples v Detroit*, 99 Mich App 285, 302-303; 297 NW2d 839 (1980); *Robertson v Swindell-Dressler Co*, 82 Mich App 382, 399; 267 NW2d 131 (1978).

Accordingly, we conclude that the trial court correctly granted defendant summary disposition pursuant to MCR 2.116(C)(10) on the basis of the broad indemnification clause within the parties' lease agreement.

We note plaintiff's further argument that a genuine issue of material fact exists with respect to whether defendant intentionally waived his right to indemnification by undertaking responsibility to repair the awning. We decline to consider this unpreserved issue, however, because plaintiff failed to raise it before the trial court and on appeal fails to present sufficient facts to facilitate our resolution of it. *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).[2]

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray

[2] In light of our conclusion regarding the indemnification issue, we need not address plaintiff's remaining claim regarding the applicability of the open and obvious danger doctrine.