STATE OF MICHIGAN

COURT OF APPEALS

EMPIRE FIRE & MARINE INSURANCE COMPANY, as Subrogee of GENERAL RV CENTER, INC.,

Plaintiff,

v

MINUTEMAN INTERNATIONAL, INC.,

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

and

ANDERSON POWER PRODUCTS, INC.,

Defendant-Cross-Defendant,

and

LESTER ELECTRICAL,

Third-Party Defendant-Appellee.

UNPUBLISHED
January 15, 2008

No. 274660
Oakland Circuit Court
LC No. 2004-055918-CK

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Third-party plaintiff, Minuteman International, Inc. (Minuteman), appeals as of right, challenging the trial court's orders granting summary disposition in favor of third-party defendant, Lester Electrical, on Minuteman's third-party complaint for contractual indemnification, and awarding Lester Electrical $20,000 as case evaluation sanctions. We reverse the trial court's summary disposition order, vacate the order and judgment awarding sanctions, and remand for further proceedings.

In February 2004, plaintiff, Empire Fire & Marine Insurance Company (Empire), as subrogee of General RV Center, Inc. (General RV), filed the instant action against Minuteman, Anderson Power Products, Inc. (Anderson), and unnamed "John Doe" parties, to recover damages arising from a fire at General RV's facility in March 2001. Empire's complaint alleged

that Minuteman sold a 320 Auto Scrubber Machine (hereafter the "Minuteman floor scrubber") to General RV and that the "root cause" of the fire was "an electrical fault in the Minuteman floor scrubber, specifically in a power connector manufactured by Anderson and incorporated into the floor scrubber." In January 2005, Minuteman filed a cross-claim against Anderson and a third-party complaint against Lester Electrical for indemnification. Following the dismissal of plaintiff's claims against Minuteman and Anderson pursuant to stipulated court orders, the trial court heard Lester Electrical's and Minuteman's cross-motions for summary disposition on Minuteman's third-party complaint. The trial court granted summary disposition in favor of Lester Electrical after determining that Lester Electrical had no duty to defend or indemnify Minuteman under the terms of the parties' agreement. The trial court later denied Minuteman's motion for reconsideration and awarded Lester Electrical case evaluation sanctions under MCR 2.403.

On appeal, Minuteman raises various challenges to the trial court's grant of summary disposition in favor of Lester Electrical on its claim for contractual indemnification. We review de novo a trial court's decision on a motion for summary disposition. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 263; 715 NW2d 914 (2006). Although the trial court did not state the subrule under which it granted summary disposition, it is apparent that summary disposition was granted under MCR 2.116(C)(10), because the court considered evidence beyond the pleadings to determine whether there was a genuine issue of fact for trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). This case also requires consideration of the parties' agreement. We review the trial court's construction and interpretation of the parties' agreement de novo as a question of law. *St Clair Medical, supra* at 264.

> The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson* [*v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999)]. "Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Id*. [*St Clair Medical, supra* at 264.]

The indemnity provision is contained in a standard purchase order drafted by Minuteman, as buyer, for its purchase from Lester Electrical of a battery charger used to recharge batteries of the Minuteman floor scrubber at the General RV facility. Under the indemnity agreement, Lester Electrical, as seller, agreed

> to exculpate, defend, indemnify and hold harmless the Buyer and its customers from and against all claims, liabilities, lawsuits, expenses (including attorneys' fees and other defense costs) and penalties, including those based on Buyer's or its customer's negligence, which arise, directly or indirectly, out of any of the following: (i) *personal injury or death or property damage or destruction arising out of alleged defects in material or work furnished hereunder*; (ii) violations of OSHA, state or local safety arising out of the use or resale of material or work

> furnished hereunder; (iii) personal injuries or death of Seller or Seller's agents, employees or subcontractor's personnel and damage to or destruction of Seller's or its subcontractor's property; and (iv) the infringement by material or work furnished hereunder of any United States or foreign patent or trademark. [Emphasis added.]

We agree with Minuteman that the trial court erred to the extent it found the allegations in Empire's complaint were dispositive of Minuteman's third-party complaint for indemnification of its litigation expenses, including attorney fees and defense costs.[1] "An indemnity contract is construed in the same manner as other contracts." *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). Therefore, "an unambiguous indemnity agreement must be enforced according to the plain and ordinary meaning of the words used in the instrument." *Id.* The meaning of the words used is considered in the context of the contract. *Sturgis Nat'l Bank v Maryland Cas Co*, 252 Mich 426, 429-430; 233 NW 367 (1930); see also *Koontz v American Services*, 466 Mich 304, 318; 645 NW2d 34 (2002) (under the doctrine of *noscitur a sociis*, a word or phrase is given meaning by its context or setting).

Under the indemnity agreement, Minuteman was entitled to indemnification of its expenses that arose, directly or indirectly, out of property damage "arising out of alleged defects in material or work furnished" by Lester Electrical. The phrase "arising out of" has been defined in different contexts, but generally requires a causal connection. See *People v Warren*, 462 Mich 415, 428 n 23; 615 NW2d 691 (2000) (noting that several out-of-state courts interpreting "arising out of" in the context of an insurance contract have found a broad, comprehensive meaning synonymous with the phrase "grows out of," "originating from," "having its origin in" or "flowing from"), and *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 340; 632 NW2d 525 (2001) (in the area of worker's compensation, employee must show injury occurred "as a circumstance or incident to employment relationship," while in the area of automobile insurance law, a causal connection must be "more than incidental, fortuitous, or remote"). The material question in this case is whether there was a sufficient causal connection between Minuteman's expenses and the property damage at the General RV facility "arising out of alleged defects" in the battery charger, or its components, furnished by Lester Electrical.

We may consider dictionary definitions to ascertain the plain meaning of contract language. *DaimlerChrysler Corp, supra* at 186-187. The word "alleged" is commonly defined as: "1. declared or stated to be as described; asserted: *an alleged murder*. 2. doubtful, suspect; supposed: *an alleged cure*." *Random House Webster's College Dictionary* (1997), p 35

---

[1] In its motion for summary disposition, Minuteman asserted that it was not seeking indemnification for its settlement with Empire. In light of that concession, as well as Minuteman's failure to address any claim for indemnification of the settlement amount on appeal, any claim for indemnification of the settlement amount is deemed abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

(emphasis in original). Thus, the word "alleged" is not limited to formal declarations in a pleading filed in a lawsuit. In general, "parties are free to contract as they see fit." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Since "alleged" is used to describe the word "defect" in the indemnity agreement, "alleged" plainly cannot be construed as being limited to an allegation in a pleading. To hold otherwise would, in substance, rewrite the agreement. A court "will not make a new contract for parties under the guise of a construction of the contract, when in so doing it will ignore the plain meaning of words." *Sturgis Nat'l Bank*, *supra* at 429.

But because Minuteman's indemnity claim is for expenses incurred in Empire's lawsuit, it is logical to look to the allegations in Empire's complaint to determine what is being alleged. "The purpose of the complaint is to give notice of the claim sufficient to permit the opposite party to take a responsive position." *Simonson v Michigan Life Ins Co*, 37 Mich App 79, 83; 194 NW2d 446 (1971). Empire's complaint alleged that the "root cause of the fire was an electrical fault in the Minuteman scrubber, specifically in a power connector manufactured by Anderson and incorporated into the floor scrubber." The complaint contains no allegation regarding the Lester Electrical battery charger or any component part of that charger.

Nonetheless, Empire was not required to plead its factual allegations with particularity. MCR 2.111(B)(1); MCR 2.112(B)(1); *Iron Co v Sundberg, Carolson & Assoc, Inc*, 222 Mich App 120, 125; 564 NW2d 78 (1997). The "exploratory processes of discovery," which include interrogatories requesting greater factual specificity regarding plaintiff's claims, a motion for a more definite statement under MCR 2.115(A), amendments to pleadings under MCR 2.118(A), pretrial conferences, and motions for summary disposition "are designed to carry the burden of framing the particular issues to be tried." *Simonson*, *supra* at 83; *Iron Co*, *supra* at 125.

Moreover, if Minuteman's ability to take advantage of the indemnity agreement were limited to the allegations in Empire's complaint, it would make indemnity dependent on Empire's skill in pleading. In the context of an insurer's duty to defend an insured under an insurance policy, this Court has rejected the notion that technicalities of a third-party's pleading control whether there is a duty to defend. See *Shepard Marine Constr Co v Maryland Cas Co*, 73 Mich App 62, 65; 250 NW2d 541 (1976). Instead, the insurer has a duty to look beyond the third party's allegations to determine if coverage is possible. *Id.*; see also *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451-452; 550 NW2d 475 (1996).

Although this case does not involve an insurance contract, based on the plain and unambiguous language of the parties' indemnity agreement, we hold that the allegations in Empire's complaint are not dispositive of Minuteman's entitlement to indemnification from Lester Electrical for its litigation expenses. Rather, it is appropriate to consider the other evidence offered by the parties regarding the nature of Empire's allegations to determine if either party was entitled to judgment as a matter of law.

Evidence offered in support of or in opposition to a motion under MCR 2.116(C)(10) may be considered only to the extent that its content or substance would be admissible as evidence. MCR 2.116(G)(6). Here, we agree with Minuteman that its evidence, including the answers to interrogatories provided by Empire's agents, establish that Empire alleged a defect in the Lester Electrical battery charger and, specifically, in the power connector attached to the battery charger cable, as a cause of the fire.

Although we agree with Lester Electrical that not all of the answers to interrogatories on which Minuteman relies indicate that they were signed under oath, the rules of evidence establish the admissibility of the answers. MCR 2.309(D)(3). The major problem in admitting such evidence, even when made under oath, is the hearsay rule. *Hanlon v Firestone Tire & Rubber Co*, 391 Mich 558, 574-575; 218 NW2d 5 (1974) (opinion of Coleman, J.). Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. MRE 801(c). Here, however, the purpose of the statements in the answers to interrogatories, like the statements in Empire's complaint against Minuteman and other documents filed in the case, is to show that the statements were made. "Statements offered to show that they were made or to show their effect on the listener are not hearsay." *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998).

Although not the sole basis for Empire's claim against Minuteman, we conclude that Minuteman's evidence established factual support for its position that it incurred expenses in the lawsuit that arose, directly or indirectly, out of property damage to the General RV facility arising out of an alleged defect in the Lester Electrical battery charger or its component parts. The evidence established more than an investigation by Empire regarding whether the battery charger or its component parts was a cause of the fire. Through the course of discovery and other proceedings, Empire alleged that a defect in the battery charger or its component parts was a cause of the fire.

Contrary to Lester Electrical's argument on appeal, the affidavit of one of Empire's attorneys does not support the trial court's summary disposition decision. The affidavit adds nothing to what can be deduced from the actual statements in Empire's complaint, discovery materials, and other documents in this case preceding the stipulated dismissal of Empire's claim against Minuteman. Conclusory averments do not create genuine issues of material fact. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Viewing the evidence in a light most favorable to Lester Electrical, we conclude that the trial court erred in denying Minuteman's motion for summary disposition because Lester Electrical failed to show a genuine issue of material fact for trial regarding its liability under the indemnity agreement. *DaimlerChrysler Corp*, *supra* at 185-186.

Because Minuteman, and not Lester Electrical, should have been granted summary disposition under MCR 2.116(C)(10) on the issue of Lester Electrical's liability, we reverse the trial court's order of summary disposition. In light of our decision to reverse the trial court's order of summary disposition, we also vacate its order and judgment for case evaluation sanctions under MCR 2.403(O), which was predicated on the summary disposition ruling.

We reverse the trial court's summary disposition order, vacate the order and judgment for case evaluation sanctions, and remand the case for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter