STATE OF MICHIGAN

COURT OF APPEALS

ERNIE MORGAN and KATHY MORGAN,

Plaintiffs,

v

MENASHA CORPORATION,

Defendant-Third-Party Plaintiff-Appellant,

v

FAIRHAVEN WOOD HARVESTING

Third-Party Defendant-Third-Party Plaintiff-Appellant,

and

ESSEX INSURANCE COMPANY,

Intervenor.

UNPUBLISHED
June 15, 2010

No. 289826
Allegan Circuit Court
LC No. 03-34763-NO

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Fairhaven Wood Harvesting, Inc. (Fairhaven), appeals as of right from the trial court's order granting summary disposition in favor of Menasha Corporation (Menasha). We affirm.

I. FACTS

The Morgan plaintiffs filed a two-count complaint against Menasha, alleging negligence and loss of consortium on behalf of Morgan's wife. The complaint alleged that Morgan was on Menasha's premises for the purpose of delivering wood chips when he stood upon a platform and a Menasha employee negligently caused the platform to open, resulting in Morgan being knocked off the platform and incurring serious injuries and extensive damages.

Subsequently, Menasha filed a third-party complaint against Fairhaven, alleging that a contract between Menasha and Fairhaven covered the delivery of woodchips by Morgan at the time of the injury. Initially, Menasha pointed to Article 9 of the contract in support of its claim that Fairhaven was responsible for defending, indemnifying, and reimbursing Menasha. Menasha moved for summary disposition under MCR 2.116(C)(10). An order granting summary disposition in favor of Menasha was entered, providing that Fairhaven was to defend, indemnify, and to pay the reasonable attorney fees incurred by Menasha relative to the action.

A jury trial later took place on the underlying claim, and the jury found that Menasha's employee negligently operated the truck-dumping platform, that the negligence was the proximate cause of Morgan's injuries, that Morgan suffered damages. After Morgan secured his judgment, Fairhaven, and its insurance carrier, Essex, contended that Morgan's judgment was not covered by Fairhaven's comprehensive general liability insurance policy through Essex. Fairhaven and Essex declined Menasha's demand that Fairhaven and/or Essex satisfy the Morgan judgment.

Fairhaven appealed the order of summary disposition in favor of Menasha on the third party contractual-indemnification claims. In *Morgan v Menasha*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2007 (Docket No. 272837), this Court reversed the trial court's ruling that Fairhaven was contractually obligated, pursuant to the terms of the agreement, to indemnify Menasha. Menasha filed a motion for reconsideration wherein it asserted that it was entitled to judgment on its separate breach of contract claims based on Article 10 of the agreement. This Court denied the motion for reconsideration. Menasha appealed to our Supreme Court and our Supreme Court affirmed the ruling of this Court with respect to the interpretation of the indemnity provisions of the agreement, but vacated this Court's opinion insofar as it directed the trial court to enter a final judgment in favor of Fairhaven.

Menasha filed a motion with the circuit court for summary disposition arguing that Fairhaven breached its obligation under Article 10 to procure and maintain insurance coverage. Fairhaven filed a cross-motion for summary disposition arguing that Menasha failed to state a claim for breach of Article 10. The circuit court granted Menasha's motion for summary disposition. Fairhaven now appeals as of right.

II. ANALYSIS

Fairhaven argues that the trial court erred in granting Menasha's motion for summary disposition. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). Similarly, whether contract language is ambiguous is a question of law that will be reviewed de novo. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). The proper interpretation of a contract is also a question of law that is reviewed de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Article 10 of the Agreement between Fairhaven and Menasha states:

> Article 10. [Fairhaven] shall secure, maintain in force, and pay for such insurance as will protect [Menasha] and [Fairhaven] from any and all claims under workers compensation, and from any other claim for damage to property or personal injury including death, which may arise from actions under this agreement, whether such operations be conducted by themselves or by any subcontractor, or anyone directly or indirectly employed by either of them as follows.

Fairhaven urges this Court to conclude that the word "themselves" refers only to Fairhaven and not to Menasha and that the phrase "either of them" refers to "either Fairhaven or its subcontractors or employees" and not to Menasha. We decline to make such a conclusion.

A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 MichApp 575, 593; 760 NW2d 300 (2008). The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear and unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). However, if contractual language is ambiguous, its meaning is a question of fact for the jury to decide. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469, 663 NW2d 447 (2003).

A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). Under ordinary contract principles if contractual language is clear, construction of the contract is a question of law for the court. *Id.* If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Id.* A court may not rewrite clear and unambiguous language under the guise of interpretation. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, courts must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 463.

In this case, despite Fairhaven's arguments, the terms "themselves" and "either of them" are not ambiguous. Fairhaven and Menasha are the two entities specifically mentioned in Article 10. To conclude that the terms "themselves" and "either of them" do not include Menasha is contrary to common sense, and common grammatical interpretation. All of the cases cited by Fairhaven in support of its argument rely on the premise that where contract language is ambiguous, courts may turn to extrinsic evidence to determine the meaning. Here, the trial court concluded, and we agree, that there simply is no ambiguity in the language of Article 10. The provision clearly obligates Fairhaven to secure insurance that protects Menasha from claims for damage to property or personal injury, including death, arising from actions under the parties' agreement, irrespective of whether the operation was performed by Menasha or Fairhaven, by any subcontractor or anyone directly or indirectly employed by either of them.

Fairhaven's argument that because Menasha obtained its own general liability insurance coverage from Wausau, Menasha must have recognized that Article 10 did not require Fairhaven to obtain insurance covering Menasha, is also unpersuasive. Additionally, Fairhaven's argument

that the Essex liability policy issued to Fairhaven would not cover the Morgans' claims against Menasha even if Menasha were named as an additional insured is without merit. Even if Essex did not name Menasha as an additional insured under the comprehensive general liability policy issued to Fairhaven, it was Fairhaven's duty, under Article 10, to insure that Menasha was covered by the policy.

Next, Fairhaven argues that even if Article 10 did require Fairhaven to procure insurance for Menasha, Menasha waived this requirement because prior to the accident in the underlying case, no certificate of insurance was provided to Menasha documenting that it had been added to Fairhaven's policy and therefore, Menasha must have been aware of the breach.

"'Waiver,' when used in connection with the required performance of a condition, has its usual meaning of a voluntary relinquishment of a known right." 17A Am Jur 2d, Contracts, § 638, p 596. Albeit in a different context, our Supreme Court has held that "[a] true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." *Kelly v Allegan Co Circuit Judge,* 382 Mich 425, 427; 169 NW2d 916 (1969). It necessarily follows that a waiver cannot be effectuated through conduct that does not express the intent to relinquish a known right, and a waiver can never be inferred from mere silence. *Moore v First Security Cas Co,* 224 Mich App 370, 376; 568 NW2d 841 (1997). Similarly, although "parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause," "[m]ere knowing silence generally cannot constitute waiver." *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 364-365; 666 NW2d 251 (2003) (emphasis in original). A waiver will not be found absent some evidence that the parties to a contract mutually agreed to waive the provision at issue. *Id.*

Fairhaven has not shown that Menasha waived the requirements of Article 10. At no time did Menasha voluntarily express a clear intent to relinquish its contractual rights, and this Court may not infer a waiver of the conditions precedent from Menasha's silent conduct, even if that conduct was knowing. *Quality Products,* 469 Mich at 364-365.

Furthermore, the Agreement had an anti-waiver clause. Article 12 provided:

> **Article 12.** Failure by [Menasha] at any time to require strict performance of any provision contained herein shall in no way affect [Menasha's] right hereunder to enforce such provision, nor shall any waiver by [Menasha] of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision, or as a waiver of the provisions itself.

Thus, even if there had been a waiver, Article 12 would preserve any breach regardless of Menasha's actions. Therefore, Fairhaven's waiver argument is without merit.

Finally, Fairhaven argues that Menasha's damages should be limited to the amount of insurance premiums and deductibles that Menasha paid to its insurer Wausau under the doctrine of mitigation of damages.

A plaintiff has a duty to mitigate damages by making efforts that are reasonable under the circumstances to minimize the economic harm caused by the wrongdoer. *Lawrence v Will*

Darrah & Assoc, Inc, 445 Mich 1, 15; 516 NW2d 43 (1994). The burden is on defendants to prove that plaintiffs failed to mitigate their damages. *Id.* at 15. Fairhaven has not provided any evidence that Menasha knew that Fairhaven had failed to procure coverage before the Morgan accident. Until Menasha was aware of the breach, they had no duty to mitigate damages. In fact, it appears from the record, that Menasha did not realize that Essex and/or Fairhaven were asserting that Menasha was not covered under the Essex comprehensive general liability policy until after Morgan secured his judgment.

Furthermore, Fairhaven's argument that because Menasha was covered by its Wausau policy, it cannot prove damages, is without merit. As our Supreme Court stated in *Auto Club Ins Assoc v New York Life Ins Co*, 440 Mich 126, 135-136; 485 NW2d 695 (1992):

> The identity of a cause of action is not changed by the subrogation of an insurer thereto. Thus, the subrogation results only in a change in the beneficial ownership of the cause and has no effect on the character or underlying basis of the cause of action.
>
> "The right of subrogation is purely derivative as the insurer succeeds only to the rights of the insured, and no new cause of action is created. In other words, the concept of subrogation merely gives the insurer the right to prosecute the cause of action which the insured possessed against anyone legally responsible for the latter's harm; and this is so even though the right of subrogation is expressly declared by statute." 16 Couch, Insurance, 2d, § 61:37, p 121. [*Id*. at 135-136].

Thus, no matter if Menasha or Wausau were in the position of plaintiff in this case, Fairhaven would still be liable for the damages incurred as a result of its breach of Article 10. To conclude, as Fairhaven advocates, that Menasha cannot prove damages because Wausau could potentially have covered the Morgans' claim under the comprehensive general liability policy, would merely protract the litigation surrounding this case and require Wausau to then assert a cause of action against Fairhaven. The Morgans secured a judgment against Menasha, thus Menasha has suffered damages in that amount.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot