STATE OF MICHIGAN

COURT OF APPEALS

PLAZA TOWERS CONDOMINIUM ASSOCIATION, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED December 10, 2015
v	No. 323937 Kent Circuit Court
CITY OF GRAND RAPIDS, Defendant/Counter-Plaintiff-Appellee.	LC No. 14-005123-CZ

Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Following unusually heavy rainfall, Plaza Towers was flooded with river water in April of 2013. Plaintiff Plaza Towers Condominium Association ("Plaza Towers") filed suit against the City of Grand Rapids ("the City"), alleging claims of condemnation and trespass/nuisance based on the assertion that the City's construction of a pedestrian walkway along the river damaged the floodwall adjacent to the river and led to the flooding of Plaza Towers. The trial court granted summary disposition to the City based on a 1989 agreement in which Plaza Towers' predecessor agreed to indemnify the City and to hold the City harmless for property damage. Plaza Towers now appeals as of right. Because the agreement in question unambiguously limits the City's liability only with respect to damage arising from the City's conduct relating to the Sewer running beneath Plaza Towers and the present claims are unrelated to the Sewer, we reverse and remand for further proceedings.

In the 1980s, the Grand Rapids Downtown Development Authority ("DDA") owned property on the bank of the Grand River, including two parcels of land on the east bank of the river that the City hoped to see developed with condos, a hotel, and retail. The City invited developers to submit proposals regarding the property, and ultimately selected United Development Real Estate Corporation East Bank ("United Development") to build on the property. Thereafter, the City and United Development entered into several agreements regarding construction on the property.

Relevant to the present appeal, in 1987, the City and United Development entered into a "Development Contract," which set forth the parties' agreement with respect to the construction

project, including such topics as "financing, construction, development and operation." An important consideration in the Development Contract, and in planning for the project generally, was the existence of a sewer line, 12 feet in diameter, which ran under the property in question. As stated in the Development Contract, with the City's approval, United Development planned to build over the Sewer and, furthermore, United Development agreed to hold the City harmless for damages arising out of construction over the Sewer. Specifically, in the Development Contract, the parties agreed that:

> (b) The Developer shall indemnify the City and the DDA from and against any loss of any kind or nature arising out of the construction over the sewer line or use thereof including damage that could occur to the Project or any other property owned by third parties. The Developer's agreement to indemnify the City shall be confirmed in a separate document which shall provide that the Developer's agreement to indemnify shall run with the Project Site.

In 1989, United Development and the City entered into a separate contract, entitled the "Combined Sewer Easement and Indemnification Agreement" ("the Sewer Agreement"). As suggested from its title, the 1989 agreement contained two basic components: (1) it created an easement for the City to allow the City continued access to the Sewer under the property, and (2) it set forth the indemnification for the City required by the 1987 Development Agreement. Regarding the indemnification issue, the Sewer Agreement in fact expressly referenced the earlier Development Contract and noted that, in the Development Contract, United Development had agreed to indemnify the City "against certain losses relative to the Sewer and the Project . . . and to confirm its agreement to indemnify in a separate document." At issue in the present case is this indemnification portion of the 1989 agreement, specifically a one paragraph provision in the 1989 document. In particular, the parties' agreement with respect to United Development's indemnification of the City was set forth in paragraph 6 of the Sewer Agreement, which stated:

> 6. United hereby agrees that it shall not assert against the City or the DDA and shall protect, indemnify, and keep and save harmless the City and the DDA from and against any and all claims, suits, causes of action, judgments, costs, damages, or expenses (including reasonable attorney fees) of any kind or nature relating to any and all damages to any physical improvements, excluding the Sewer itself, constructed on the Project Site (as that term is defined in the Development Contract), including, but not limited to, damages caused by the actual or alleged negligence of the City or the DDA in reconstructing, replacing, repairing, maintaining, removing or inspecting the Sewer.

Ultimately, United Development proceeded to build on the property. The result was Plaza Towers, a 33-story mixed-use building, containing residential condos, apartments, hotel rooms, office space, a loading dock, and parking structures. The building is located along the Grand River, in Grand Rapids, Michigan. United Development no longer owns the property, but

it is uncontested that Plaza Towers, as United Development's successor, remains subject to the Sewer Agreement.[1]

After the construction of Plaza Towers, sometime in the 1990s, the City undertook the construction of pedestrian walkways along the Grand River in downtown Grand Rapids. Part of this scheme involved the construction of ramps to allow pedestrian access from a walkway along the east bank of the river to the Blue Bridge. To create this access, the City cut a breach into the floodwall that runs along the river. This breach was approximately 12.5 feet wide and 15 feet deep. Plaza Towers alleges that this gap in the floodwall "eliminated protection from flooding to the property in the direct vicinity of the breach, including Plaza Towers."

In April of 2013, Grand Rapids experienced some unusually heavy rains and, as a result of this rainfall, the river rose and water entered the Plaza Towers' parking garage through the breach in the floodwall. Plaza Towers purportedly attempted to minimize damage to the property by using a large diesel pump to remove the water, but the City ordered Plaza Towers to stop pumping out water. According to Plaza Towers' complaint, the initial flooding, and the City's subsequent order to stop the removal of water, resulted in millions of dollars in damages to Plaza Towers' parking structure and loading dock as well as personal property in the building, including generators, transformers and other such equipment. As a result, Plaza Towers filed suit against the City, alleging claims of condemnation as well as an allegation of trespass/nuisance. Plaza Towers sought reimbursement for property damage, repair costs, construction undertaken to prevent future flooding, increased insurance premiums for flood protection, and costs and attorney's fees.

In response, the City moved for summary disposition based on the assertion that Plaza Towers' claims were barred by the 1989 Sewer Agreement between the City and Plaza Towers' predecessor-in-interest, United Development. In particular, the City asserted that, under the terms of the 1989 Sewer Agreement, Plaza Towers was barred, without exception, from bringing "any and all" claims against the City for property damages.

Plaza Towers opposed the City's motion, maintaining that, when read in context, paragraph 6 did not preclude all claims of property damage by Plaza Towers against the City, but only those relating to the Sewer. Specifically, given the context of the Sewer Agreement and the Development Agreement, Plaza Towers asserted that paragraph 6 should be interpreted according to the doctrine of *ejusdem generis*. Under this approach, Plaza Towers argued that the general terms of "any and all damages to any physical improvements," must be read in light of the specific illustrative list of items denoted by the phrase "including, but not limited to, damages caused by the actual or alleged negligence of the City . . . in reconstructing, replacing, repairing, maintaining, removing or inspecting the Sewer." Read in context and applying the doctrine of *ejusdem generis*, Plaza Towers argued that only damages arising from the City's operation of the Sewer were barred by paragraph 6.

[1] Under the terms of the Sewer Agreement, the provisions of the Sewer Agreement, including the indemnification clause, were to run with the property to future successors and assigns.

After holding a hearing, the trial court granted summary disposition to the City based on paragraph 6. The trial court reasoned that paragraph 6 was clear on its face and that the provision prohibited Plaza Towers from pursuing the present lawsuit. Plaza Towers now appeals as of right.

On appeal, we are asked to decide whether paragraph 6 of the 1989 Sewer Agreement prohibits Plaza Towers from pursuing claims against the City for property damage that has nothing to do with the Sewer, but instead arose from the City's conduct with respect to the floodwall. In particular, both parties recognize that the case turns on the applicability of the doctrine of *ejusdem generis*. If the doctrine applies, Plaza Towers' claims regarding the floodwall are not barred because paragraph six's effect is limited to property damages in the same class or category as the damages caused by the City's actual or alleged negligence in "reconstructing, replacing, repairing, maintaining, removing or inspecting the Sewer." In contrast, if the doctrine does not apply, Plaza Towers suit is prohibited because the paragraph prevents Plaza Towers from pursuing any claims for property damage whatsoever, regardless of how the damages arose. In short, the dispositive issue before us is whether the doctrine of *ejusdem generis* applies to the interpretation of paragraph 6 of the Sewer Agreement.

We review a trial court's decision on a motion for summary disposition de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Likewise, questions involving the proper interpretation of a contract or the legal effect of a contractual provision are reviewed de novo on appeal. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

The primary goal of contract interpretation is to enforce the parties' intent. *Burkhardt*, 260 Mich App at 656. To ascertain the parties' intent, we interpret "the language of the contract in accordance with its plain and ordinary meaning." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). To determine the meaning of a word or phrase, we must also consider the context or setting in which the term appears. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). Contracts must be read "as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50; 664 NW2d 776 (2003). Interpretations that render any part of the contract surplusage or nugatory must be avoided. *McCoig Materials, LLC*, 295 Mich App at 694. Further, if a contract incorporates another document by reference, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207 & n 21; 580 NW2d 876 (1998). Ultimately, clear and unambiguous contract language must be enforced as written. *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

As already noted, of particular relevance to the parties' arguments in this case is the doctrine of *ejusdem generis*. The phrase *ejusdem generis* literally means "of the same kind or class." 11 Williston on Contracts § 32:10 (4th ed.) Under this doctrine, when a statute or contract includes a specific list of items, otherwise general words appearing in conjunction with the list are interpreted to refer to items of the same class or kind as the specific items. See, e.g., *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004); *Quisle v Brezner*, 212 Mich 254, 256-257; 180 NW 467 (1920). For example, "[w]here specific words follow general ones, the doctrine of *ejusdem generis* restricts application of the general term to things that are similar to those enumerated[.]" *Belanger v Warren Consol Sch Dist, Bd of Ed*, 432 Mich 575, 583; 443

NW2d 372 (1989). "In light of the specific terms, the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Huggett v Dep't of Natural Res*, 464 Mich 711, 718-719; 629 NW2d 915 (2001).

"The rule accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words." *Belanger*, 432 Mich at 583 (citation omitted). In other words, the general term must be construed in reference to the entire provision to avoid rendering the specific list of words superfluous. *Id.* at 584 & n 14. However, the doctrine should be applied only if it appears that the parties intended the specific list to limit the more general terms, and it should not be applied where a contrary intention appears. See *Benedict v Dep't of Treasury*, 236 Mich App 559, 566; 601 NW2d 151 (1999). Thus, if it appears that a broad construction of the general terms was intended, the doctrine of *ejusdem generis* should not be applied. See *In re Forfeiture of $5,264*, 432 Mich 242, 252-253 n 7; 439 NW2d 246 (1989).

In this case, we conclude that the doctrine of *ejusdem generis* should apply to the interpretation of paragraph 6 because, when this paragraph is read in context of the Sewer Agreement as a whole and in light of the Development Agreement, it is plain that the parties intended to hold the City harmless for property damages only with respect to the City's conduct pertaining to the Sewer beneath the property. Specifically, when we consider all of the 11 paragraphs in the Sewer Agreement as a whole, it is clear that the Sewer Agreement governs the parties' relationship *with respect to the Sewer* that runs under Plaza Towers and that, in this context, the indemnification clause found in the Sewer Agreement was intended to relieve the City of any and all financial liability related to Plaza Towers arising from the City's ongoing operation of that Sewer. That is, like numerous other provisions in the agreement, paragraph six delineates the parties' rights and obligations with respect to the City's work of "reconstructing, maintaining, replacing, repairing, or removing the Sewer."

Given this express list of items which appears in numerous provisions throughout the Sewer Agreement, we find unavailing the City's assertion that references in paragraph 6 to "any and all damages to any physical improvements" and "including but not limited to" must be read as terms of inclusion, encompassing without limitation all property damages caused by the City. The City's proposed interpretation construes paragraph 6 in isolation, without reference to the broader context of the Sewer Agreement as a whole, and it renders the specific list of items contained in paragraph 6 superfluous. Rather than view these specifically enumerated items in paragraph 6 as a superfluous list, we conclude that this list evinces the parties' intent, consistent with the remainder of the agreement, with respect to the scope of the Sewer Agreement and the scope of paragraph 6 in particular.

Further, from the recitals in the Sewer Agreement, it is clear that the indemnification provided in the Sewer Agreement was intended to effectuate the indemnification called for by the earlier 1987 Development Agreement. By its plain terms, the Development Agreement called for indemnification for damages "arising out of the construction over the sewer line or use thereof." The scope of this required indemnification, focused on the building's construction and use in relation to the Sewer, constituted a much a narrower grant of indemnification than what is now advanced by the City. In contrast, by applying the doctrine of *ejusdem generis*, paragraph 6

can be read in harmony with the rest of the Sewer Agreement, and in keeping with the Development Agreement, to hold the City harmless with respect to any and all claims relating to property damages arising from the Sewer underneath the property in question.

In sum, we are persuaded that the parties intended for the specific list of items in paragraph 6 to limit the otherwise broad grant of indemnification relating to property damages. Consequently, we find it appropriate to apply the doctrine of *ejusdem generis* and to limit the application of paragraph 6 to any and all claims relating to property damage in the same class or category as "damages caused by the actual or alleged negligence of the City . . . in reconstructing, replacing, repairing, maintaining, removing or inspecting the Sewer." Because the property claims in this case are wholly unrelated to the Sewer, and instead arise from the City's work on the floodwall, we conclude that Plaza Towers is not barred by paragraph 6 from pursuing the current claims. Thus, the trial court erred by granting summary disposition to the City based on paragraph 6.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Joel P. Hoekstra