

STATE OF MICHIGAN
COURT OF APPEALS

CONSUMERS POWER COMPANY,

Plaintiff-Appellant,

v

BEECH CONSTRUCTION, INC,

Defendant-Appellee,

and

MID-MICHIGAN INSURANCE AGENCY and
MEADOWLARK INSURANCE COMPANY.

Third-party Defendants-
Appellees.

UNPUBLISHED

June 11, 1996

No. 176357

LC No. 92-001507-CK

Before: Hoekstra, P.J., and Saad and Latreille,* JJ.

PER CURIAM.

Consumers Power ("CP") entered into a construction contract with its contractor, Beech Construction, Inc. ("Beech"), which contained provisions requiring Beech to: (1) indemnify CP for injuries and deaths arising out of the construction, (2) defend any lawsuits arising out of the construction, and (3) purchase comprehensive general liability insurance, and name CP as an additional insured. In the course of the ensuing construction project, a Beech employee, Gary Beaman, was killed as a result of a gas explosion. Beaman's estate sued CP, who looked to Beech for insurance coverage based upon the contract between Beech and CP. Beech and the carrier apparently refused to defend, and CP then settled the case with the Beaman estate. CP then sued Beech for breach of contract, asserting that Beech breached its contractual obligation to purchase insurance that would have applied to the settlement. Beech argued that it had indeed purchased the insurance required by the contract

* Circuit judge, sitting on the Court of Appeals by assignment.

from Meadowlark Insurance Company through Mid-Michigan Insurance Agency, and that it had referred the case to the insurer.

CP and Beech eventually filed cross motions for summary disposition – each party apparently believing that no dispute of material fact precluded entry of judgment in its favor. Beech’s motion was premised upon its view that the accident was a result of CP’s sole negligence, and therefore, pursuant to MCL 691.991; MSA 26.1146(1) (which voids certain construction contracts), *both the indemnity and insurance provisions* were unenforceable as a matter of law. Submitted with Beech’s motion for summary disposition was evidence that tended to indicate that the accident was caused by the sole negligence of CP. Although CP did not concede below (and does not concede here) that the accident resulted from its sole negligence, CP declined the lower court’s invitation to controvert Beech’s evidence. CP’s position below was that, even assuming that the underlying loss arose from CP’s sole negligence, MCL 691.991; MSA 26.1146(1) serves only to void Beech’s obligation to *indemnify*; the statute obviates neither Beech’s contractual obligation to purchase liability insurance and name CP as an insured, or Beech’s contractual obligation to defend all claims.

The lower court granted summary disposition pursuant to MCR 2.116(C)(10) in favor of Beech, concluding that, pursuant to MCL 691.991; MSA 26.1146(1), and the case law interpreting it, the disputed contractual provisions regarding both indemnity and insurance were unenforceable if CP’s negligence were the sole cause of the underlying loss. CP appeals by right, and we reverse and remand for further proceedings.

It is evident that all parties to this appeal would like this Court to revisit the breach of contract to insure issue addressed in *Peeples v City of Detroit*, 99 Mich App 285; 297 NW2d 839 (1980). However, we decline to do so, in light of the fundamental disputes of material fact which remain unresolved. Rendering an opinion at this time would be premature and might very well be simply an advisory opinion. *Stark Steel Corp v Michigan Consolidated Gas Co*, 165 Mich App 332, 340; 418 NW2d 135 (1987). As framed on appeal, CP’s primary claim against Beech is that Beech breached the contract between CP and Beech to procure insurance which would cover CP. However, Beech asserts on appeal that it *did* procure such insurance, and Beech’s September 9, 1993, Responses to CP’s Interrogatories in fact give details about the policy allegedly obtained. If Beech in fact procured a general liability policy listing CP as an insured, we do not see how an action premised upon breach of contract to procure insurance can proceed against Beech. By these statements, we make no ruling on the applicability of MCL 691.991; MSA 26.1146(1) on a breach of contract to *insure* theory (as opposed to a contract to *indemnify*); we note simply that, if the policy of insurance was indeed provided, there was no breach, and hence no suit. Where there is evidence in the record that such a policy was provided, an extensive discussion of the ramifications of MCL 691.991; MSA 26.1146(1) may be unnecessary.

If, on remand, the finder of fact determines that the contract to insure was in fact breached, then an additional dispute of fact must also be resolved. Beech’s primary defense to the breach of contract claim appears to be that, even if the contract to procure insurance was breached, CP has no recoverable

damages (i.e., the contract to insure could not have been enforced because CP's sole negligence was the cause of the underlying loss). However, there has never been a finding or adjudication that CP was in fact, solely negligent. (In fact, despite the fact that CP declined to submit evidence in response to Beech's summary disposition motion, CP appears to be attempting to preserve the right to contest whether it was solely negligent.) Therefore, if on remand, the finder of fact determines that was a breach of contract to insure, then it must then be determined whether CP was in fact solely negligent.

It will only be in the event that the finder of fact determines that: (1) a breach of contract to insure occurred, and (2) the cause of the underlying loss was due to CP's sole negligence, that the applicability of MCL 691.991; MSA 26.1146(1) need even be addressed. On the record before this Court, we find that the trial court erred in assuming a particular resolution to these issues, and granting Beech's motion for summary disposition under MCR 2.116(C)(10). We reverse the trial court's award of summary disposition in favor of Beech, and remand this matter for resolution of these questions of fact.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Stanley J. Latreille