

STATE OF MICHIGAN
COURT OF APPEALS

ALPS AUTOMOTIVE, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

GENERAL MOTORS CORP.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

January 10, 2006

No. 256597

Oakland Circuit Court

LC No. 2002-040731-CK

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

PER CURIAM.

Plaintiff, ALPS Automotive, Inc. (ALPS), appeals as of right the trial court order dismissing its case against defendant, General Motors Corporation (GM) following a bench trial. GM cross-appeals as of right the same order. We affirm.

In a 1998 accident involving a GM pickup truck, the airbag failed to deploy, and the driver suffered severe injuries from which he later died. ALPS manufactured the clockspring in the vehicle, and Delphi, which was part of GM at the time, installed it when it assembled the steering column. The decedent's survivors sued GM. A clockspring is a component that allows electric current to run to and from the airbag in the steering wheel. The 1989 foreign supply agreement (FSA) between ALPS and GM governed the manufacture and sale of clocksprings to GM.

In March 1999, an inspection of the truck and download from the diagnostic energy reserve module (DERM) indicated high resistance in the airbag circuit, or that the circuit was open. In March 2000, another inspection occurred, and testing revealed a discontinuity somewhere in a white wire that runs through the clockspring and includes an uplead and downlead portion. Because the downlead portion of the wire was not visible, the clockspring was removed, exposing a separation in the white downlead wire.

GM settled with the decedent's plaintiffs and requested reimbursement from ALPS pursuant to an indemnification provision of the FSA. ALPS refused, claiming that GM failed to provide prompt notice as required by the FSA. ALPS filed the instant action, seeking a declaration that GM's failure to provide prompt notice barred indemnification, but ALPS did not request any damages. Following a two-day bench trial on the issue of notice, the trial court found that, although GM breached the FSA by failing to provide prompt notice following the

March 2000 inspection, ALPS suffered no damages. Thus, the trial court dismissed ALPS' claim.

ALPS argues that the trial court erred in characterizing its claim for declaratory relief as a breach of contract action. We review de novo issues involving contract interpretation and construction. *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001). "The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *AFSCME v Detroit*, 267 Mich App 255, 715-716; 704 NW2d 712 (2005). Indemnity contracts are construed in the same manner as contracts generally, and unambiguous contracts must be enforced according to their terms. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005).

ALPS maintains that the event of GM providing prompt notice was not a promise or duty, but rather a condition precedent to ALPS' duty to indemnify. A "condition precedent" is a fact or event that must take place before there is a right to performance. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999). Unlike a promise, a condition precedent creates no right or duty in and of itself, but is merely a limiting or modifying factor. "Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language of the contract." *Id.* Michigan law is rather stringent on this point.

Paragraph 10.1 of the FSA provides that, should any claim be made against GM alleging that personal injury or property damage was caused by an alleged defect in the clockspring, GM will provide to ALPS prompt notice of such claims. Paragraph 10.3 provides that ALPS will bear the cost of settlements and judgments incurred because of a defective clockspring claim. Both parties have made persuasive arguments about the impact of the notice provision on the indemnification provision.

According to the Restatement Contracts, 2d, § 225(3), p 165, non-occurrence of a condition is not a breach unless the party that failed to fulfill the condition is under an independent duty to fulfill the condition. Thus, there is a distinction between failure of a condition and breach of a duty, and damages are available for a breach of a duty but not for failure of a condition. *Id.*; see also *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995). The same distinction is found in Farnsworth, Contracts, § 8.3, pp 427-428, and 5 Williston, Contracts (3d ed), § 665, p 132. This distinction has also been applied by the New York Court of Appeals, *Merritt Hill Vineyards Inc v Windy Heights Vineyard, Inc*, 61 NY2d 106, 112; 460 NE2d 1077; 472 NYS2d 592 (1984), and the third circuit court of appeals, *In re General DataComm Industries, Inc*, 407 F3d 616, 630 (CA 3, 2005); *In re Columbia Gas Sys, Inc*, 50 F3d 233, 241 (CA 3, 1995).

We find no evidence that the parties intended the notice provision in ¶ 10.1 to be subject to the indemnity duty provided in ¶ 10.3. See *AFSCME*, *supra* at 715-716. The language of the FSA does not specifically tie the two obligations together. We can only find a condition precedent when the language agreed upon by the contracting parties clearly provides for it, and the FSA does not do so. Because the notice provision contains no words appropriate to condition, it should be construed as involving a promise or duty, rather than a condition. *Mikonczyk*, *supra* at 350; Williston, § 665. Thus, GM's failure to provide ALPS prompt notice is not the failure of a condition that excuses ALPS from indemnification. Rather, it is a breach of duty that subjects GM to liability for damages. Contrary to ALPS' reasoning, our conclusion does not render the notice provision ineffective because ALPS could recover by showing that it

was somehow prejudiced or damaged by not receiving timely notice. If ALPS intended to protect itself and guarantee timely notice, it should have included a penalty in the notice provision. Accordingly, the trial court did not err in analyzing ALPS' cause of action in a breach of contract context.

Berkshire Land Co v Moran, 210 Mich 77; 177 NW2d 205 (1920), and *MacNear v Malow*, 282 Mich 239; 276 NW 433 (1937), are consistent with our conclusion. The contract at issue in *Berkshire* clearly stated that notification, among other conditions, was a "condition precedent" to recovery. *Berkshire*, *supra* at 81. Although the contract in *MacNear* did not use the specific term "condition precedent," it did specifically condition performance and payment on notice. *MacNear*, *supra* at 241. The instant case is distinguishable from *Berkshire* and *MacNear* because the language of the FSA did not specifically require that notice be given prior to ALPS indemnifying GM for clockspring defect claims.

ALPS next challenges the trial court's dismissal of its claim on several grounds. First, it argues that the trial court erred in finding that GM was not required to provide notice of the underlying claim following the March 1999 inspection and DERM data download. The data codes revealed high resistance in the airbag circuit, or that the circuit was open. The trial court found that GM was not required to give notice at that time because there was only an allegation of a defect in the airbag system in general, not an allegation of a clockspring defect. We review a trial court's findings of fact for clear error and its legal conclusions *de novo*. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005).

Brian Everest, an expert for GM who attended both inspections, testified that he did not know the cause of the increased resistance, but he suspected that it was either the circuit running from the DERM to the airbag or the wiring to the front discriminating sensors. Everest also provided several other possible causes of the increased resistance. The vehicle had also undergone warranty repairs and repairs following two accidents, one of which involved the steering column. Everest did not suspect a manufacturing defect or assembly error because the vehicle had passed the dynamic tests performed at the assembly plant. Furthermore, ALPS' expert, Vincent Mercier, acknowledged that the DERM data did not reveal the cause of the increased resistance or indicate a clockspring defect. We therefore conclude that the trial court did not err in concluding that the March 1999 inspection did not trigger GM's duty to provide notice.

The trial court concluded that GM discovered a clockspring defect during the March 2000 inspection and breached the FSA by failing to provide prompt notice to ALPS after the inspection. After discovering a discontinuity in the white wire, the clockspring was removed, revealing a separation in the download portion. Neither Everest nor Mercier had ever seen a separation in a download wire of a clockspring. . There is no doubt that the FSA required prompt notice or that GM failed to give ALPS notice when it discovered the clockspring defect in March 2000. Accordingly, we agree with the trial court that GM breached the notice provision of the FSA.

ALPS next contends that the trial court erred in requiring it to show that it was prejudiced by GM's failure to provide prompt notice. However, as is discussed above, the distinction between failure of a condition and breach of a duty is that damages are available for a breach of a duty. *Mikonczyk*, *supra* at 350; see also Restatement Contracts, 2d, § 225(3), p 165; Farnsworth,

§ 8.3; Williston, § 665. To receive damages, the non-breaching party must show that it was injured or prejudiced by the breach.

While ALPS argues that it is not required to show that it was prejudiced by GM's failure to provide prompt notice, it fails to offer any relevant case law or other authority to support this position. In the insurance context, it is well established that an insurer must show that it was prejudiced by an insured's delay or lack of notice of claims brought against the insured. *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998). Although this Court has acknowledged that the general rules for contractual indemnity, rather than specific rules governing an insurer's duty to defend, apply to indemnity claims in commercial transactions, the Court applied this distinction because the trial court erred in resolving the case on the basis of the defendant's duty to defend, rather than on the indemnity provision. *Grand Trunk Western R v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004), applying 14 Michigan Civil Jurisprudence, Indemnity & Contribution, § 15, p 243. Unlike the commercial transaction context, an insurer's duty to indemnify is related to its duty to defend. *Id.* at 354. In comparing a surety or guaranty contract to an indemnification contract, however, the Michigan Supreme Court has stated that an indemnity contract is a form of insurance contract, under which an indemnitor undertakes to protect an indemnitee against loss arising from an unknown or contingent event. *Moore v Capital Nat'l Bank of Lansing*, 274 Mich 56, 61; 264 NW 288 (1936). Therefore, *Grand Trunk, supra* offers nothing more than a distinction without a difference, and we hold that prejudice is required outside the insurance context as well.

ALPS challenges the trial court's conclusion that it incurred no damages because it failed to show that it lost the opportunity to discover information that could be used to defend GM's indemnity claim. Although he had never seen it happen with the type of steering column used in this particular truck, Mercier's theory was that the edge of the shaft lock guard severed the wire after repeated contact over time when the steering column rotated, and he testified that he was unable to determine the position of the downlead harness. The March 2000 inspection was videotaped and photographed. The trial court reviewed the videotape, and many photographs were admitted as exhibits at trial. Mercier admitted that, before the summer of 2001, he was not aware of anything indicating that GM or ALPS caused the downlead wire to separate. Although Everest admitted that removal of the clockspring likely changed the position of the downlead wire somewhat, he also stated that he did not believe it had been moved during the disassembly process.

At trial, Everest presented testimony tending to disprove ALPS' theory. He admitted that it was possible that a wire could come into contact with the edge of the shaft lock guard and that the insulation on the wire could be cut. However, after taking measurements, Everest opined that the white downlead wire could not reach the edge of the shaft lock guard. Similarly, Everest did not see any evidence that the wire was cut as the result of a sawing motion over time, as ALPS theorized. Although GM breached the notice provision by failing to notify ALPS of the claim after the March 2000 inspection, ALPS failed to prove that the breach prejudiced its ability to defend the claim.

In its cross-appeal, GM urges us to amend the trial court order to remove an extraneous statement. We review a trial court's findings of fact for clear error and its legal conclusions de novo. *Novi, supra* at 249. We review jurisdictional issues de novo. *Detroit v Michigan*, 262 Mich App 542, 550; 686 NW2d 514 (2004).

The trial court's order dismissing ALPS' cause of action states that the action is dismissed "for the reasons set forth on the record." GM challenges the trial court's statement on the record that the March 2000 inspection changed the physical structure of the steering column and "made it impossible to determine whether the defect was attributable to Plaintiff's manufacturing process or some other cause not attributable to the Plaintiff."

As an initial matter, we believe that GM's cross-appeal involves a case or controversy. "Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Government v Attorney Gen'l*, 243 Mich App 43, 55; 620 NW2d 546 (2000). In considering GM's argument about the trial court's statement on the record, we must determine whether it is clearly erroneous. The statement concerns the effect of the March 2000 inspection on the steering column, which is related to ALPS' claim that it was prejudiced by the disassembly process. Because there was a possibility that we might have considered that statement in deciding whether the trial court erred in concluding that ALPS was prejudiced by GM's failure to provide prompt notice, the issue presents an actual case or controversy.

In its order regarding GM's motion for summary disposition, the trial court determined that the cause of the injuries in the underlying case and the issue of responsibility would be submitted to arbitration. The trial court denied the motion in part, reserving the issues of notice and prejudice for resolution at trial. Whether ALPS was prejudiced by GM's failure to provide prompt notice was one of the issues to be determined at trial, and it involved consideration of whether the March 2000 inspection altered the clockspring assembly, thereby inhibiting ALPS' ability to prepare a defense. Therefore, the comment in question was not irrelevant or dicta.

Furthermore, the FSA, ¶ 10.3 provides, in pertinent part:

If it cannot be determined whether a settlement or judgment was based on an alleged defect in the Coil Assembly Inflatable Restraint or on another part in the vehicle that plaintiff alleged was defective, then either party may submit the matter to the binding arbitration procedure described in Section 10.4 in order to determine the relative percentage that the Coil Assembly Inflatable Restraint or other allegedly defective parts caused the personal injury or property damage.

The trial court's statement, that the March 2000 inspection made it impossible to determine whether the defect was attributable to ALPS, is remarkably similar to the language of the FSA's arbitration provision. Therefore, it is apparent that the statement supports the trial court's earlier finding that the cause of injury and issue of responsibility were subject to arbitration. Accordingly, this Court need not invoke the authority provided by MCR 7.216(A)(1) to "exercise any or all of the powers of amendment of the trial court or tribunal." MCR 2.611(A)(2)(c), (d).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray