

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LANZO CONSTRUCTION CO,  
Plaintiff-Appellant,

UNPUBLISHED  
January 26, 2006

v

WAYNE STEEL ERECTORS,  
Defendant-Appellee.

No. 264165  
Wayne Circuit Court  
LC No. 04-408824-CK

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Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

**I. FACTS**

Plaintiff was the general contractor for the construction of the Leib Screening and Disinfection Facility in Detroit. Plaintiff subcontracted with defendant to perform certain construction duties related to the project. The subcontract contained an indemnification provision in which defendant assumed “entire responsibility and liability for any and all damage or injury of any kind or nature whatever” and agreed to hold plaintiff harmless and indemnify plaintiff for “any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements” arising from claims brought against plaintiff. Fernando Agueros, an employee of defendant, was injured at the construction site and filed suit against plaintiff on April 3, 2002, alleging that plaintiff “and/or its other subcontractors” negligently failed to remove debris from a common work area. On March 17, 2004, plaintiff’s insurer wrote a letter to defendant seeking to tender plaintiff’s defense of Agueros’ suit to defendant and requesting indemnification. Defendant refused to undertake plaintiff’s defense in the case. Agueros and plaintiff ultimately settled the underlying lawsuit in the amount of \$125,000. Counsel for defendant attended the settlement hearing, but declined to contribute to the settlement. Following the settlement, plaintiff filed suit against defendant, alleging breach of contract and seeking indemnification in the amount of \$125,000, plus costs and attorney fees.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it had no duty to indemnify plaintiff because plaintiff was the sole negligent party in the accident in which Agueros was injured and that defendant therefore had no duty to indemnify under MCL 691.991, which provides that indemnification provisions in construction contracts that provide

for indemnification for a party who is solely negligent are void and unenforceable. Plaintiff also moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court found that plaintiff was solely negligent and therefore denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition. The trial court subsequently denied plaintiff's motion for reconsideration.

## II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* In ruling on a motion under MCR 2.116(C)(10), the trial court must view the pleadings, affidavits and other documentary evidence in a light most favorable to the nonmoving party. *Greene v A P Products, Ltd*, 264 Mich App 391, 398; 691 NW2d 38 (2004), lv gtd 474 Mich 886 (2005). Summary disposition is appropriate when there is no genuine issue regarding any material fact. *Id.*

The proper interpretation of a contract, which is a question of law, is also reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

## III. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. According to plaintiff, the trial court erred in concluding that plaintiff's negligence was the sole cause of the underlying plaintiff's injuries. Resolution of the issue on appeal requires this Court to undertake a two-part analysis. First, we must determine whether the indemnification agreement at issue in this case provides for indemnity under the facts of the case. Second, we must consider whether there was a genuine issue of material fact regarding whether plaintiff's sole negligence was the cause of the underlying plaintiff's injuries.

Regarding the first aspect of our analysis of this case, we find that the indemnity provision in the contract between plaintiff and defendant provides for indemnity under the facts of this case. The contract between plaintiff and defendant contained an indemnity provision, which provides, in relevant part:

The Subcontractor [defendant] hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) be made or asserted, whether or not such claims are based upon [plaintiff's] alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of [plaintiff], the Subcontractor [defendant] agrees to indemnify and save harmless [plaintiff], its officers, agents, and employees from and against any and all such claims, and further from and against any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements, that [plaintiff], its officers, agents, or employees may directly or indirectly sustain, suffer or incur as a result thereof and the Subcontractor [defendant] agrees to and does hereby assume, on behalf of [plaintiff], its officers, agents or employees, the defense of any action at law or in equity which may be brought against [plaintiff], its

officers, agents or employees upon or by reason of such claims and to pay on behalf of [plaintiff], its officers, agents and employees, upon its demand, the amount of any judgment that may be entered against [plaintiff], its officers, agents or employees in any such action. . . .

“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). “[A]n unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument.” *Id.* Indemnity contracts are construed strictly against the party who drafts them and against the indemnitee; however, indemnity contracts should be construed to give effect to the intentions of the parties. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596; 513 NW2d 187 (1994). In ascertaining the intention of the parties, the court must consider the language of the contract as well as the situation of the parties and the circumstances surrounding the contract. *Id.* “Where an indemnity agreement is unclear or ambiguous, the intent of the parties is to be determined by the trier of fact.” *Id.* However, if the language of a contract is not ambiguous, its construction is for the court to determine as a matter of law. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

The indemnification provision in the instant case unambiguously provides for indemnification to plaintiff for damages or injuries resulting from plaintiff’s own negligence. The language in the indemnification provision unambiguously provides for broad indemnification to plaintiff for “any and all<sup>1</sup>] damage or injury of any kind or nature whatever (including death resulting therefrom) be made or asserted, whether or not such claims are based upon [plaintiff’s] alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of [plaintiff.]” The indemnity provision clearly provides for indemnification for “[plaintiff’s] alleged active or passive negligence” and therefore is broad enough to provide for indemnity to plaintiff for injuries that resulted from plaintiff’s own negligence. “An unambiguous contract must be enforced according to its terms.” *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). By its unambiguous terms, the indemnity provision clearly intended to provide plaintiff with indemnity protection for injuries or damages resulting from its own negligence. We observe that the parties could not have intended the contractual indemnity provision to apply to injuries caused by plaintiff’s sole negligence because such provisions are prohibited by MCL 691.991. We therefore conclude, based on the plain and unambiguous language in the indemnity provision, that the parties intended to provide for indemnity in all cases involving plaintiff’s own negligence, except where plaintiff’s sole negligence was the cause of the injury or damage. See *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 457; 403 NW2d 569 (1987).

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<sup>1</sup> “[T]he use of the term ‘all’ in an indemnity clause has been interpreted to provide for the broadest possible indemnification.” *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 173; 530 NW2d 772 (1995).

The second inquiry in this case is whether there is a genuine issue of material fact regarding whether the injury to the underlying plaintiff was the result of the sole negligence of plaintiff. MCL 691.991 provides that an indemnity agreement in a construction contract is “void and unenforceable” if the indemnitee is seeking indemnification for damages arising from the indemnitee’s “sole negligence[.]” The statute provides, in relevant part:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [MCL 691.991.]

We conclude that there is no genuine issue of material fact regarding whether the injury to the underlying plaintiff was the result of the sole negligence of plaintiff. The trial court therefore did not err in concluding that plaintiff was solely negligent and granting defendant’s motion for summary disposition. Plaintiff attached to its motion for summary disposition the complaint in the underlying case. In the complaint, the underlying plaintiff alleged that plaintiff “and/or its other subcontractors” negligently failed to remove debris from a common work area. However, there is no indication from the record that the underlying plaintiff filed suit against any other subcontractors for any alleged negligence. The underlying plaintiff’s broad allegation of the potential negligence of numerous parties was a strategic pleading decision. However, the underlying plaintiff’s mere allegation, without independent evidence that another party was actually negligent, was insufficient to create a genuine issue of material fact. Mere allegations in pleadings are insufficient to create an issue of material fact; rather, the party “must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In support of its motion for summary disposition, plaintiff also attached the transcript from the settlement hearing in the underlying case in which the underlying plaintiff admitted that he may have been partially at fault for the accident. We find that this transcript does not establish a genuine issue of material issue of fact because it was motivated by the underlying plaintiff’s desire to reach a settlement with plaintiff in that case and because it specifically contradicts his deposition testimony that plaintiff was the only liable party. An issue of fact cannot be created through contradiction of prior sworn statements. See *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000).

In sum, because the underlying complaint and the underlying plaintiff’s testimony at the settlement hearing do not create a question of fact regarding whether plaintiff was solely negligent, we hold that the trial court was correct in concluding that plaintiff was seeking indemnity for liability based on its sole negligence and in granting defendant’s motion for summary disposition.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Stephen L. Borrello  
/s/ Alton T. Davis