

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

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CITY OF BIRMINGHAM,

Plaintiff-Appellant,

v

ROYAL OAK LANDSCAPING & SNOW  
REMOVAL SERVICE, INC.,

Defendant-Appellee.

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UNPUBLISHED

May 3, 2005

No. 251863

Oakland Circuit Court

LC No. 2003-048040-NO

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff filed this action against defendant seeking indemnification for damages that plaintiff paid in a slip and fall case. The trial court denied plaintiff's motion for summary disposition and granted summary disposition for defendant under MCR 2.116(C)(10) and (I)(2). Plaintiff appeals as of right. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

The parties entered into a contract for defendant to remove snow in plaintiff's shopping district. The parties' agreement included the following indemnification clause:

15. To the fullest extent permitted by law, the CONTRACTOR and any entity or person for whom the CONTRACTOR is legally liable, agrees to be responsible for any liability, defend, pay on behalf of, indemnify, and hold harmless the PSD and the City of Birmingham, their elected and appointed officials, employees and volunteers and others working on behalf of the PSD or the City of Birmingham against any and all claims, demands, suits, or loss, including all costs connected therewith, and for any damages which may be asserted, claimed or recovered against or from the PSD or the City of Birmingham, their elected and appointed officials, employees, volunteers or others working on behalf of the PSD or the City of Birmingham, by reason of personal injury, including bodily injury and death and/or property damage, including loss of use thereof, which arises out of or is in any way connected or associated with this contract. Such responsibility shall not be construed as liability for damage caused by or resulting from the sole act or omission of the PSD or the City of Birmingham, their elected or appointed officials, employees, volunteers or others working on behalf of the PSD or the City of Birmingham.

On January 5, 2001, Barbara Bozzo fell on a sidewalk in plaintiff's shopping district and fractured her ankle. Bozzo filed a lawsuit against plaintiff, which was settled for \$18,000. Bozzo also filed a lawsuit against defendant based on the same fall, and obtained a \$2,500 settlement.

Plaintiff subsequently filed this action against defendant and moved for summary disposition under MCR 2.116(C)(10). Plaintiff argued that defendant was required to indemnify it for the \$18,000 amount that it paid to Bozzo pursuant to the indemnification clause in the parties' snow removal contract and that plaintiff was entitled to judgment in its favor. The trial court denied plaintiff's motion because Bozzo testified at her deposition that uneven concrete may have caused or contributed to Bozzo's fall, and there had not been a definitive finding that plaintiff was not partially responsible for the condition that caused Bozzo's fall. On reconsideration, the trial court granted summary disposition for defendant.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The law regarding express contracts for indemnification is summarized in *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2002):

A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other. *Langley v Harris Corp*, 413 Mich 592, 596; 321 NW2d 662 (1982); *Dale v Whiteman*, 388 Mich 698, 704; 202 NW2d 797 (1972). An indemnity contract is construed in the same fashion as are contracts generally. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law. *Id.* at 604. Further, "[t]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Id.* at 603, quoting *Klever v Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952). This Court must determine the intent of the parties to a contract by reference to the contract language alone. This Court may not look outside the contract to assess the parties' intent. *Zurich, supra* at 603-604.

Where indemnification is premised on an express contract, the indemnitee is not required to prove freedom from causal fault. *Chrysler Corp v Brencal Contractors, Inc*, 146 Mich App 766, 770-771; 381 NW2d 814 (1985). An express contract for indemnification may provide the indemnitee with protection from its own negligence only if it was not solely negligent. 18 Michigan Law & Practice, 2nd Ed, Indemnity, § 2, p 363. This Court has enforced indemnification contracts that protect the indemnitee from its own negligence, provided the indemnitee is not solely negligent. See *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995); *Sherman v DeMaria Building Co, Inc*, 203 Mich App 593, 596-602; 513 NW2d 187 (1994); *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452-456; 403 NW2d 569 (1987). Moreover, a contract can provide

indemnification for the indemnitee's own concurrent negligence without expressly stating so. *Chrysler Corp, supra* at 773-774.

The indemnification agreement in this case is similar to the agreement discussed in *Paquin v Harnischfeger Corp*, 113 Mich App 43; 317 NW2d 279 (1982). In *Paquin*, the indemnitee protected itself from liability for a contractor's performance, except that the contractor was not liable for any damages resulting from the indemnitee's sole negligence. *Id.* at 46-47. This Court held that because the contract required the contractor to pay for any and all damages arising out of the work performed under the agreement, except those solely caused by the indemnitee, the contractor was liable for any damages that may have resulted from the indemnitee's contributory negligence. *Id.* at 52-53. The agreement did not need to expressly state that the indemnitee would be shielded from its own negligence. *Id.* at 52.

In this case, the agreement provides that defendant is liable for all damages arising out of the performance of the contract to remove snow, unless the damages are due to plaintiff's sole negligence. The trial court incorrectly interpreted the parties' agreement as limiting defendant's liability only to the extent that it was negligent. This is inconsistent with the language in the agreement, which provides that defendant is liable for all damages relating to the performance of this contract, the only exception being if plaintiff was solely negligent. Cf. *MSI Construction, supra* at 343-344.

Here, Bozzo sued both parties for her injuries. She claimed that plaintiff was liable for inadequate lighting and a defect in the sidewalk, and that defendant was liable for not properly clearing the sidewalk of snow and ice. At her deposition, Bozzo faulted both parties for causing her injuries. Because Bozzo's claims were premised on the concurrent negligence of both parties, the trial court erred in holding that defendant was not obligated to indemnify plaintiff. The indemnification clause unambiguously requires defendant to assume liability for all damages arising out of its performance of the snow removal contract, and plaintiff was not solely liable for Bozzo's injuries. Therefore, plaintiff is entitled to indemnification from defendant. We therefore reverse the trial court's order of summary disposition for defendant and remand for entry of judgment in favor of plaintiff. See *Sherman, supra* at 601-602.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder