# STATE OF MICHIGAN

# COURT OF APPEALS

WILLIAM TOWNES,

Plaintiff,

v

DEMARIA BUILDING COMPANY, INC.,

Defendant/Third-Party Plaintiff-Appellant,

v

MATRIX CONSTRUCTION SERVICES, L.L.C., and STATE AUTO MUTUAL INSURANCE COMPANY,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 6, 2006

No. 267401
Macomb Circuit Court
LC No. 01-002272-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant/third-party plaintiff DeMaria Building Company, Inc., appeals as of right from the trial court's order concluding that it is not entitled to contractual indemnification and granting third-party defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

## I. FACTS

Plaintiff William Townes was an employee of third-party defendant Matrix Construction Services, L.L.C. (Matrix). Matrix was a subcontractor working on a construction project at Fraser Junior High School. Matrix was hired by DeMaria Building Company (DeMaria), the general contractor of the project. While performing construction work on the upper deck of the roof of the facility, plaintiff attempted to jump from the upper deck to the lower deck when he fell approximately four and one-half feet, sustaining injuries including a torn knee ligament. Plaintiff filed a negligence complaint against DeMaria, alleging that DeMaria had failed to ensure that the construction site was reasonably safe and to take reasonable steps within its

supervisory and coordinating authority to guard against any unreasonable risk of harm to workers at the construction site.

DeMaria filed a third-party complaint against subcontractor Matrix and its insurer, third-party defendant State Auto Mutual Insurance Company, alleging that Matrix had agreed to maintain commercial general liability coverage listing DeMaria as an additional insured and that State Auto, having issued such a policy, was required to indemnify and defend DeMaria. Matrix's subcontract agreement provided in relevant part:

> . . . [T]he Subcontractor shall secure, defend, protect, hold harmless and indemnify the . . . Contractor . . . against any liability, loss, claims, demands, suits, costs, fines and expenses whatsoever, arising from bodily injury . . . arising out of or in connection with the performance of any work relating to this Subcontract . . . based upon any act or omission, negligence or otherwise, of (a) the Subcontractor or any of its agents, employees or servants, (b) any sub/subcontractor, supplier or materialman of the Subcontractor, or any agents, employees or servants thereof, (c) any other person or persons. *The obligation of indemnification contained herein shall exclude only those matters in which the claim arises out of allegations of the sole negligence [sic] the Owner, the Architect, the Contractor or any of their respective agents, servants and employees.* [Emphasis supplied.]

The trial court issued an opinion and order granting State Auto's and Matrix's motion for summary disposition pursuant to MCR 2.116(C)(8), (C)(10), as to DeMaria's third-party complaint. The trial court held that the subcontract agreement clearly and unambiguously provided that Matrix's obligation to indemnify DeMaria did not attach in the event that allegations of sole negligence were brought against DeMaria. DeMaria, as the only named defendant in plaintiff's complaint, was the object of allegations of sole negligence. The trial court further held that there was no merit to DeMaria's contention that, inasmuch as it had raised in its pleadings the issues of plaintiff's comparative negligence and Matrix's ordinary negligence, allegations of sole negligence had not been raised against it. The trial court held that the controlling allegations must arise out of the principal complaint, rather than any defensive pleadings; otherwise, "it would be allowing DeMaria to circumvent the express intention of the parties, which was to relieve Matrix of its indemnification obligation under the circumstances at hand."

Following entry of a final order disposing of all outstanding claims in this matter,[1] DeMaria filed this appeal, arguing that it is entitled to a trial concerning allocation of fault before

[1] Following the grant of summary disposition at issue in this appeal, DeMaria was permitted to file an amended third-party complaint alleging breach of contract with respect to Matrix's alleged failure to procure insurance naming DeMaria as an additional insured. An order was eventually entered dismissing the breach-of-contract claim without prejudice. This Court dismissed DeMaria's ensuing appeal for lack of jurisdiction. (Unpublished order of the Court of Appeals, entered January 26, 2004 [Docket No. 252169].) Subsequently, the trial court entered a stipulated order reinstating the case and dismissing it with prejudice, with the stated purpose of

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any determination should be made regarding the validity of the indemnification provision. DeMaria contends that, because the indemnity clause excepts only those matters in which "the claim arises out of allegations of [DeMaria's] sole negligence," summary disposition was prematurely granted since DeMaria raised allegations of comparative negligence and the negligence of Matrix and since no finding of fact had yet been made with respect to those allegations.

## II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp,* 266 Mich App 27, 32; 697 NW2d 552 (2005). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), and "[t]he motion must be granted if no factual development could justify the plaintiff's claim for relief," *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 238; *Maiden, supra* at 119-121; see also MCR 2.116(G)(6). The proper interpretation of a contract is also a question of law that is subject to de novo review. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

## III. ANALYSIS

Indemnity contracts are construed in the same manner as are contracts generally. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005); *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). Where the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law. *Zurich, supra* at 603. An unambiguous indemnity contract must be enforced according to the plain and ordinary meaning of the words used. *Badiee*, *supra* at 351, quoting *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

Indemnity clauses may, if the parties so intend, provide coverage for the indemnitee's own negligent acts. *Sherman v DeMaria Building Co, Inc*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994); *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987); *Paquin v Harnischfeger Corp*, 113 Mich App 43, 52-53; 317 NW2d 279 (1982). However, pursuant to MCL 691.991, indemnification clauses in construction contracts are void and unenforceable to the extent that they "purport[] 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." (Emphasis supplied.)

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allowing DeMaria to appeal from the original summary disposition order.

The contractual indemnification language at issue was previously examined by this Court in *Sherman*, *supra*, in which the principal plaintiff, an injured employee of a subcontractor, had sued general contractor DeMaria, the project architect, and the premises owner. Noting that the plaintiff's complaint indicated that his injuries were not caused by the sole negligence of any of the three principal defendants and that DeMaria had raised allegations of comparative negligence, this Court held that MCL 691.991 was not violated by enforcement of the indemnification clause because DeMaria was "not seeking indemnification from damages based on injuries caused solely by DeMaria." *Id*. at 601. Further, the panel rejected the subcontractor's contention that the contractual exclusion applied to the facts of the case and precluded indemnification: "[B]y raising allegations against more than one defendant, [the plaintiff] implied that each defendant was negligent for his injuries. Therefore, the exclusionary clause does not apply to [the plaintiff's] complaint." *Id*. at 601-602.

Applying the principles set forth in *Sherman*, we conclude that the trial court in this case properly determined that the contractual exclusionary clause applies to plaintiff's claim and that the indemnification provision is therefore inapplicable. The language in the exclusionary clause precludes indemnification where "*the claim* arises out of *allegations* of the sole negligence" of the indemnitee.[2] The focus of this contractual exclusion is on the allegations in the plaintiff's *claim* and, contrary to DeMaria's assertion, not on the cause of the injury as determined by the trier of fact. While the plaintiff in *Sherman* raised allegations against more than one defendant and, therefore, his claim obviously did not arise out of allegations of the sole negligence of the indemnitee, plaintiff's claim in this case presents *only* allegations of the negligence of DeMaria. Accordingly, the contractual exclusionary clause applies as a matter of law.[3]

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette

[2] Compare the language of the indemnity provisions at issue in *Paquin*, *supra* (excluding indemnity "for damages *caused by or resulting from*" the indemnitee's own negligence) and *Fischbach-Natkin*, *supra* (indemnifying the indemnitee for all actual losses, with no express exception). Compare also the language of MCL 691.991, which refers to indemnification "for damages *arising out of bodily injury* to persons . . . *caused by or resulting from* the sole negligence" of the indemnitee (emphasis supplied).

[3] It is unnecessary, in light of our holding, to address the trial court's comment that MCL 691.991 would presumably be violated were the contractual indemnification provision enforced. Cf., *Sherman*, *supra* at 601 ("the proper focus is on the whole injury sustained by the injured party rather than on the portion of damages attributable to the indemnitee").