STATE OF MICHIGAN

COURT OF APPEALS

SUSIE POOLE,

Plaintiff,

v

CINTAS CORPORATION,

Defendant/Cross-Plaintiff-Appellant

and

DOWN RIVER COMMUNITY FEDERAL CREDIT UNION,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
July 27, 2010

No. 291716
Wayne Circuit Court
LC No. 08-018382-NO

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant Cintas Corporation appeals by leave granted from a circuit court order denying its motion for summary disposition of its cross claim against defendant Down River Community Federal Credit Union (the "Credit Union") pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant Cintas supplies hand soap and floor mats for use at the Credit Union's office. Plaintiff filed this action against both defendants alleging that, while visiting the Credit Union office, she was injured when she tripped and fell on a rolled up floor mat that a Cintas employee had placed behind her. Cintas filed a cross claim alleging that the Credit Union was required to indemnify and hold it harmless pursuant to an indemnification provision in its service agreement with the Credit Union. The trial court rejected the Credit Union's argument that the provision was unenforceable under MCL 691.991, but concluded that the indemnification provision was ambiguous and, accordingly, denied Cintas's motion for summary disposition.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

We agree with the trial court and Cintas that MCL 691.991 is not applicable. That statute states:

> 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, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, 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.

The agreement for Cintas to provide floor mats and hand soap is not an agreement "relative to the . . . maintenance of a building, structure, appurtenance and appliance . . . ." Although the agreement arguably concerns the "maintenance" of floor mats and hand soap, the presence of these items and Cintas's servicing *in* the building does not mean that Cintas was maintaining the building. Therefore, the statute is inapplicable.

Next, we agree with the trial court's determination that the indemnification provision is ambiguous. "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).

> The extent of the duty must be determined from the language of the contract, itself. All contracts, including indemnity contracts should be construed to ascertain and give effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. This Court has generally observed that if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning. [*Zahn v Kroger Co of Michigan*, 483 Mich 34, 40; 764 NW2d 207 (2009) (citations omitted).]

The indemnification provision at issue in this case states:

> Customer hereby agrees to defend, indemnify and hold harmless Company from any claims and damages arising out of or associated with this agreement, including any claims arising from defective products.

The contract is silent as to situations involving negligence by Cintas employees while maintaining mats at the Credit Union. However, courts will not automatically assume that a clause covers an indemnitee's acts. Rather, "the goal of the court is to determine the parties' intent from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." *Baidee v Brighton Area Sch*, 265 Mich App 343, 353; 695 NW2d 521 (2005) (quotation marks and citations omitted). Consideration of the "surrounding circumstances" means "that if a contractual term is otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity, the Court must inquire into them in performing its interpretive function." *Zurich Ins Co*, 226 Mich App at 603. Further, "indemnity contracts are construed strictly against the party who drafts them and against the indemnitee." *Id.* at 352. In this case, Cintas is both the drafter and the indemnitee.

We reject the proposition that the term "any" is necessarily the same as the term "all." Word choice is important and courts must discern the intent behind the selection of one word rather than another. Thus, we assume that the parties intended the choice of "any" rather than "all" and it must be determined why that selection was made. Indeed, as noted in the case discussions below, many indemnity provisions reference "any and all" claims. To construe the terms as identical would render one or the other surplusage or nugatory, something our construction rules do not permit. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Consequently, rather than immediately ruling that the term "any" guarantees immunity to Cintas for the negligence of its employees, the court must ascertain whether the parties had that intent by looking at the contract, surrounding circumstances, or aim of the contract.

The indemnity provision does not explicitly state that Cintas would be held harmless for its own negligence and does not provide any reference to personal injury or events occurring as a result of actions of a Cintas employee. Although the use of the term "all" could be construed as applicable to such claims as that brought by the plaintiff, the affidavit from the Credit Union CEO creates a factual question as to whether the parties intended to protect Cintas against its own negligence in maintaining the floor mats. Further, nothing in the other contractual language supports a finding of indemnity for the negligence of Cintas employees—the contract only provides for the rental, maintenance, and possible replacement of floor mats.

We note that there are no binding cases directly on point and we find the persuasive caselaw distinguishable and inapplicable. In *Chrysler Corp v Churchill Transp, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 1997 (Docket No. 183854), the plaintiff sued the defendant transportation carrier for indemnification. The parties' contract contained a lengthy indemnification provision that contained more specific language, providing indemnity for "any and all" claims and specifically included liabilities for "injury to or the death of any person." The contract also required the transportation carrier to maintain insurance in amounts that were satisfactory to the plaintiff. The provision in the present case does not require indemnity for "any and all" claims, but only "any" claims, and does not specifically include personal injury claims. It also makes no reference to insurance requirements. Thus, the provision in this case is substantially dissimilar to that in *Chrysler Corp*.

In *McBride v Pinkerton's, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 202147), the defendant security contractor included language in the contract that the amounts charged were "insufficient to guarantee that no loss will occur, and Pinkerton makes no guarantee, implied or otherwise, that no loss will occur," that the indemnification included claims for bodily injuries, and that it applied even when the allegation included the negligence of Pinkerton and its employees "in whole or in part." Based on the specific inclusion of language not found in the present indemnification agreement, *McBride* is inapposite.

In *Sentry Ins Co v Nat'l Steel Corp*, 147 Mich App 214; 382 NW2d 753 (1986), the plaintiff sought indemnification from the defendant for an underlying personal injury claim. The contract provided that the defendant "shall be solely responsible for and shall indemnify, defend and hold harmless Owner from and against any and all claims . . . for or on account of injuries to or death of any person" and expressly stated that the indemnification applied even in cases "based upon or result[ing] in whole or in part from the active or passive negligence of Owner, its

employees or agents." As with the previous cases, this agreement provided for "any and all" claims and specifically included references to personal injury claims and the negligence of the indemnitee's employees. Because these provisions are not found in the present agreement, we find the reasoning in *Sentry Ins Co* unpersuasive.

Because the indemnity provision in this case uses the term "any" rather than "all," or even "any and all," and contains no express provision for personal injury claims or claims that involve the negligence of Cintas employees, we agree that the provision in this case is ambiguous. That ambiguity, coupled with the factual question raised by the affidavit from the Credit Union CEO, is sufficient to uphold the trial court's denial of Cintas's motion for summary disposition of its cross claim.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto