STATE OF MICHIGAN

COURT OF APPEALS

BARBARA RUSSELL,

Plaintiff,

v

DAN'S EXCAVATING, INC.,

Defendant/Third-Party Plaintiff-Appellant/Cross-Appellee,

v

A & B TRUCKING, INC.,

Third-Party Defendant-Appellee,

and

A & B TRUCKING, INC.,

Plaintiff-Appellee,

v

AMERICAN STATES INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellee,

and

STATE AUTO INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 20, 2012

No. 304514
Macomb Circuit Court
LC No. 2009-003751-NI

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Dan's Excavating, Inc. (DEI), appeals as of right the trial court's order granting A & B Trucking, Inc.'s motion for summary disposition and denying its motion for summary disposition. Additionally, State Auto Insurance Company cross-appeals the trial court's order denying its motion for summary disposition. We reverse and remand.

I. BACKGROUND

In 2006, DEI, a general contractor, entered into an agreement with A & B Trucking, a subcontractor. Pursuant to the terms of the contract, A & B Trucking provided trucking services to DEI at a road construction project located on 23 Mile Road near I-94 in Macomb County. Included within the contract was the following indemnification provision:

> The Subcontractor [A & B Trucking] shall be solely responsible for and shall defend and hold DEI, and the Engineer, and the Owner, and their individual officers, agents and employees, free and harmless from any and all liability,[] losses, expenses, demands and claims of any type or nature, arising out of or related to: (a) any act or representation of the Subcontractor, its agents or employees; (b) any physical injury (including death) or damage to any person and/or property in any way sustained or alleged to have been sustained in connection with or by reason of the performance of the work by the Subcontractor and/or its agents, employees or subcontractors; and (c) any infringement or alleged infringement of any patents or for the misuses of any patented article by Subcontractor and/or its agents, employees or subcontractors.

In September 2008, while driving a semi-truck at the construction project, A & B Trucking's employee David Kilbourn was involved in an automobile accident with plaintiff Barbara Russell. The accident resulted in injuries to Russell, and on August 14, 2009, she filed a complaint against DEI, A & B Trucking, and Kilbourn. Counts I & II asserted that A & B Trucking and Kilbourn were liable for Kilbourn's negligent driving, while count III alleged that DEI was negligent because it failed to conduct traffic control reasonably and with due care.

Shortly after Russell filed her complaint, A & B Trucking entered into a settlement agreement with her regarding counts I & II. Thereafter, the parties stipulated to dismissing Kilbourn and A & B Trucking with prejudice and without costs. Once DEI became aware that A & B Trucking settled counts I & II, but failed to settle count III, it filed a third-party complaint against A & B Trucking. DEI alleged that A & B Trucking breached its agreement to indemnify DEI against all claims arising out of or related to any physical injury sustained in connection with the work performed by A & B Trucking. DEI also alleged that A & B Trucking violated the terms of the contract when it failed to provide appropriate general liability and automobile insurance to DEI and/or failed to name DEI as an additional insured on its insurance policies.

Subsequently A & B Trucking filed a separate action with the trial court seeking declaratory relief against American States Insurance Company.[1] A & B Trucking asserted that American States, as A & B Trucking's automobile insurance carrier, was required to indemnify DEI against Russell's claim.[2] Shortly thereafter, A & B Trucking filed a motion for consolidation and necessary joinder of parties, arguing that in the interests of judicial economy, its declaratory action should be consolidated with DEI's third-party complaint and that State Auto Insurance Company should be added as a necessary party. On January 10, 2011, the trial court granted the motion for consolidation and added State Auto as a party to the consolidated action.[3]

Once the cases were consolidated, A & B Trucking filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that DEI's active negligence regarding the traffic control relieved A & B Trucking from its obligation to indemnify because the indemnification provision limited A & B Trucking's obligation to events that arose directly or indirectly out of A & B Trucking's work performance. However, if the trial court determined that A & B Trucking must indemnify DEI against Russell's claim, then A & B Trucking left it to the trial court to determine whether American States, A & B Trucking's automobile insurance carrier, or States Auto, A & B Trucking's general liability insurance carrier, must indemnify DEI.

DEI responded to A & B Trucking's motion for summary disposition and filed a counter-motion for summary disposition pursuant to MCR 2.116(I)(2). DEI noted that the contractual indemnify provision provided coverage to DEI regardless of whether DEI acted negligently. Additionally, DEI argued that the indemnification provision required A & B Trucking to indemnify DEI against any and all claims sustained or alleged to have been sustained in connection with, or arising from A & B Trucking's work performance.

Additionally, State Auto filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that DEI was not listed as an additional insured in the general liability policy, and thus, it was not obligated to indemnify DEI. State Auto also asserted that Russell's claim was an automobile accident, and therefore, it had no obligation to provide insurance coverage.

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[1] The original complaint for declaratory judgment improperly named American States as "Indiana Insurance Company."

[2] In response, American States filed a motion for summary disposition, arguing that it was not required to indemnify DEI because Russell's claim against DEI was not based in automobile negligence. However, the trial court did not rule on this motion because, as discussed *infra*, it concluded that its rulings on A & B Trucking's and DEI's motions for summary disposition resolved all claims and closed the case.

[3] Meanwhile, DEI settled with Russell for $15,000, and in December 2010, the trial court dismissed Russell's complaint with prejudice and without costs.

In May 2011, after hearing the parties' oral arguments, the trial court determined that A & B Trucking was not obligated to indemnify DEI because it concluded that Russell had alleged a separate count of negligence that was not covered under the terms of the indemnification provision. Subsequently, the trial court entered an order granting A & B Trucking's motion for summary disposition and denying DEI's motion for summary disposition. In light of these rulings, the trial court declined to rule on the motions for summary disposition brought by American States and State Auto. From this order, DEI appeals as of right and State Auto cross-appeals.

II. ANALYSIS

A. INDEMNIFICATION

We begin with DEI's assertion that the trial court erred when it granted A & B Trucking's motion for summary disposition and denied its motion for summary disposition because it is entitled to indemnification pursuant to the contract terms. Although the trial court did not specify the grounds for granting the motion for summary disposition, this Court may review it as having been granted pursuant to MCR 2.116(C)(10) because the trial court considered evidence outside of the pleadings. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Contract interpretation is a question of law that is reviewed de novo. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011).

DEI argues that the contractual agreement between it and A & B Trucking obligates A & B Trucking to indemnify DEI for the $15,000 DEI paid to Russell when it settled count III. "A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). An indemnity contract is governed by the same principles that govern contracts in general, *Zahn v Kroger Co of Mich*, 483 Mich 34, 40; 764 NW2d 207 (2009), and "an unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument[,]" *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). Thus, "[w]here parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). In interpreting a contractual term, a court must give effect to every word, phrase, and clause in a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Furthermore, an interpretation that would render any part of the contract language nugatory is to be avoided. *Id*.

As previously noted, the indemnity provision included within the purchase agreement between DEI and A & B Trucking for trucking services states:

> The *Subcontractor* [A & B Trucking] *shall be solely responsible for and shall defend and hold DEI,* and the Engineer, and the Owner, and their individual officers, agents and employees, *free and harmless from any and all liability*,[] losses, expenses, demands and claims of any type or nature, *arising out of or related to*: (a) any act or representation of the Subcontractor, its agents or employees; (b) *any physical injury* (including death) or damage *to any person* and/or property *in any way sustained or alleged to have been sustained in connection with* or by reason of the performance of *the work by the Subcontractor* and/or its agents, employees or subcontractors; and (c) any infringement or alleged infringement of any patents or for the misuses of any patented article by Subcontractor and/or its agents, employees or subcontractors. [Emphasis added.]

In determining the plain and ordinary meaning of an undefined contract term, a dictionary may be consulted. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). Arise is defined as "to result; spring or issue[.]" *Random House Webster's College Dictionary* (2001). Connection is defined as "the act or state of connecting[]" or "anything that connects; link" and connect is defined as "to join, link, or fasten together; unite." *Random House Webster's College Dictionary* (2001). Accordingly, these definitions make clear that A & B Trucking must indemnify DEI for injuries alleged to have been sustained as a result of the work completed by A & B Trucking and/or for injuries alleged to be linked to the work completed by A & B Trucking.

According to the purchase order between DEI and A & B Trucking, DEI purchased "hourly trucking" services. Russell's complaint alleged that A & B Trucking's vehicle "failed to yield the right of way to [Russell] . . . by turning left into [Russell]'s lane of travel striking her vehicle. While at the same time . . . [DEI] failed to properly conduct traffic control." Consequently, Russell's allegation of negligence by DEI is linked with A & B Trucking's negligence because the complaint alleged that DEI failed to conduct traffic while A & B Trucking's employee negligently drove. In other words, DEI's negligent traffic control traffic is connected to A & B Trucking's negligent work performance. Thus, these allegations were sufficient to trigger the indemnification clause.

This interpretation is consistent with this Court's interpretation of nearly identical indemnification language in *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240; 760 NW2d 828 (2008). In that case, an employee who worked for a business intermediary of Wesco was injured while working at a DaimlerChrysler plant. The employee sued DaimlerChrysler, and DaimlerChrysler sought indemnification from Wesco pursuant to a contractual agreement. *Id*. at 242-244. The indemnification provision at issue provided: "'Seller . . . shall protect, defend, hold harmless, and indemnify DaimlerChrysler from and against any and all loss . . . arising out of or related to the performance of any work in connection with this contract.'" *Id*. at 249. This Court found that pursuant to the contractual terms, Wesco was obligated to indemnify DaimlerChrysler, and stated that the "plain and unambiguous [contract] language makes clear that indemnification applies only to any loss that is related to work performed in connection with the . . . contract." *Id*.

Similarly, in this case, the plain language of the indemnification contract clearly provides that A & B Trucking is obligated to hold DEI harmless against any and all liability arising out of or related to physical injury in any way sustained or alleged to have been sustained in connection with the work performed by A & B Trucking. Thus, the trial court erred in granting A & B Trucking's motion for summary disposition and denying DEI's motion for summary disposition.[4]

B. CROSS-APPEAL

State Auto argues that if A & B Trucking is required to indemnify DEI, then this Court should find that American States, as A & B Trucking's automobile insurance carrier, and not State Auto, A & B Trucking's general liability carrier, is responsible for indemnifying DEI. This issue is unpreserved because the trial court did not rule on State Auto's motion for summary disposition. This Court generally does not review an issue undecided by the trial court unless it is a question of law and all the facts needed for resolution are present. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Because the question presented in this case involves the interpretation of insurance contracts, which is a question of law, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), we may review this issue. Questions of law are reviewed de novo, *id*., as are motion for summary disposition, *Walsh*, 263 Mich App at 621. We review this motion under MCR 2.116(C)(10) because State Auto attached evidence outside of the pleadings to its motion. *Hughes*, 277 Mich App at 273.

An insurance contract is subject to the same rules that govern contracts generally. *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). And, as previously indicated, the court must give effect to each word, phrase, and clause in a contract when interpreting a contractual term and avoid an interpretation that would render any part of the contractual language nugatory. *Klapp*, 468 Mich at 468.

To properly decide this issue, we must determine which insurance company is responsible for providing coverage for the accident between Russell and Kilbourn. Although Russell's complaint lists DEI's negligent traffic control as a separate count, this fact alone does not dictate how this Court views the cause of action. Rather, we review the complaint to determine the gravamen of the claim. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710; 742 NW2d 399 (2007). Here, Russell's complaint alleged that A & B Trucking's vehicle "failed to yield the right of way to [Russell] . . . by turning left into [Russell]'s lane of travel striking her vehicle. While at the same time . . . [DEI] failed to properly conduct traffic control." Hence, Russell's cause of action was based on the automobile accident between her

[4] We reject A & B Trucking's argument that it is free from indemnifying DEI because of DEI's active negligence. Whether a party was actively negligent needs to be determined only when that party seeks indemnification through an implied contract or the common law. *Dep't of Transp v Christensen*, 229 Mich App 417, 426; 581 NW2d 807 (1998). Here, there is an express contractual agreement to indemnify between A & B Trucking and DEI.

and Kilbourne that was caused by the alleged negligence of DEI and A & B Trucking. See *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995) (a cause of action for negligence arising out of a motor vehicle accident requires proof of four elements: (1) a legal duty owed by the defendant to the plaintiff; (2) the breach of such duty by the defendant; (3) a proximate causal relationship between the defendant's breach of duty and the plaintiff's injury; (4) damages suffered by the plaintiff).

State Auto's commercial general liability insurance policy, § I.2.g., provides that this insurance does not include bodily injury or property damage "arising out of the ownership, maintenance, [or] use . . . of any aircraft, 'auto' or watercraft[.]" Consequently, this provision clearly excludes automobile accidents from the policy. Because the cause of action was based on an automobile accident, and automobile accidents are excluded from coverage under State Auto's commercial general liability insurance policy, State Auto is not obligated to indemnify DEI.[5]

This means that American States, as the automobile insurance carrier, may be obligated to indemnify DEI if the terms of the automobile policy provide for such coverage. According to American States's business auto coverage insurance policy, § II.A., the automobile insurance applies when bodily injury or property damage is "caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." Moreover, § II.B.2. provides that the policy also covers a third-party when there is a contractual indemnification agreement:

> This insurance does not apply to any of the following:
>
> * * *
>
> **2. Contractual**
>
> Liability assumed under any contract or agreement.
>
> *But this exclusion does not apply to liability for damages*:
>
> **a**. *Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement*; or
>
> **b**. That the "insured" would have in the absence of the contract or agreement. [Emphasis added.]

§ V.H.5. defines an "insured contract" as:

[5] Because we agree with State Auto's first argument, we do not discuss State Auto's alternative argument that even if the general liability insurance policy applies, State Auto is not obligated to indemnify DEI because DEI was not listed as an additional insured within the policy.

> *That part of any other contract or agreement* pertaining to your business . . . *under which you assume the tort liability of another to pay for "bodily injury"* or "property damage" *to a third party* or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement[.] [Emphasis added.]

Finally, the auto plus endorsement for the business auto coverage form, § II.A.1.e., defines a blanket additional insured as:

> **e**. *Any person or organization for whom you are required by an "insured contract" to provide insurance is an "insured"*, subject to the following additional provisions:
>
> **(1)** The "insured contract" must be in effect during the policy period shown in the Declarations, and must have been executed prior to the "bodily injury" or "property damage".
>
> **(2)** This person or organization is an "insured" only to the extent you are liable due to your ongoing operations for that insured, whether the work is performed by you or for you, and only to the extent you are held liable for an "accident" occurring while a covered "auto" is being driven by you or one of your employees.
>
> **(3)** There is no coverage provided to this person or organization for "bodily injury" to its employees, nor for "property damage" to its property.
>
> **(4)** Coverage for this person or organization shall be limited to the extent of your negligence or fault according to the applicable principles of comparative negligence or fault.
>
> **(5)** The defense of any claim or "suit" must be tendered by this person or organization as soon as practicable to all other insurers which potentially provide insurance for such claim or "suit". [Emphasis added.]

In reading these provisions together, it is clear that American States must indemnify DEI. Russell's injuries were caused by an accident and resulted from Kilbourne's use of A & B Trucking's covered vehicle. The indemnification provision qualifies as an "insured contract" under the automobile policy because A & B Trucking contractually agreed to assume liability on behalf of DEI for any injury relating to or connected with the performance of trucking services. Moreover, because the indemnification provision is a valid insured contract under the automobile policy, DEI qualifies as an additional insured under the automobile policy terms. The trial court should have granted State Auto's motion for summary disposition.

Reversed and remanded for entry of an order granting DEI's motion for summary disposition, denying A & B Trucking's motion for summary disposition, and granting State Auto's motion for summary disposition. We do not retain jurisdiction.

No costs. MCR 7.219(A).

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray