STATE OF MICHIGAN

COURT OF APPEALS

NORMAN E. JEFFERSON,

Plaintiff-Cross Appellant,

v

BENTELER AUTOMOTIVE CORP.,

Defendant/Third Party Plaintiff-Appellee/Cross Appellee,

v

CUSTODIAL HOUSEKEEPING STAFFING, INC.,

Third Party Defendant-Appellant/ Cross Appellee.

UNPUBLISHED
March 25, 2014

No. 312860
Kent Circuit Court
LC No. 11-005806-NO

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this premises liability and contract interpretation case, third party defendant Custodial Housekeeping Staffing, Inc. ("Custodial") and plaintiff Norman Jefferson each appeal as of right the trial court's order granting summary disposition in favor of defendant/third party plaintiff Benteler Automotive Corp. ("Benteler"). Because we conclude that Benteler was entitled to summary disposition in regard to Jefferson's premises liability claim and in regard to its claim against Custodial for indemnification under the parties' contract, we affirm.

This case arises from a slip and fall accident that occurred in Benteler's parking lot. Jefferson, an employee of Custodial, was on Benteler's premises to provide cleaning services pursuant to an ongoing contractual agreement between Benteler and Custodial. As Jefferson was unloading cleaning equipment from his work van in the parking lot, he slipped and fell on black ice. Jefferson sustained several injuries as a result of the fall, including injuries to his shoulder and knee that required surgical repair. As a result, Jefferson filed a complaint against Benteler, alleging that Benteler negligently maintained its parking lot. Benteler answered the complaint and denied liability; it also obtained permission to file a third party complaint against Custodial. In its complaint against Custodial, Benteler alleged that pursuant to the parties' purchase order contract, Custodial was required to hold Benteler harmless and defend Benteler with regard to

Jefferson's lawsuit. Custodial disputed Benteler's interpretation of the contract and the contract's enforceability.

Eventually, Benteler moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) against both Jefferson and Custodial. Custodial also moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) against Benteler. Following a hearing on all the summary disposition motions, the trial court ruled that Benteler was entitled to summary disposition against both Jefferson and Custodial. Specifically, the trial court found that Jefferson failed to demonstrate that Benteler had notice of the dangerous condition in the parking lot. Regarding the claim against Custodial, the trial court concluded that the indemnity clauses in the parties' contract were applicable to the situation, and ruled that Custodial was required to reimburse Benteler for its attorney fees and costs. Custodial now appeals as of right the trial court's order and Jefferson cross appeals.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). While the trial court did not indicate the grounds for its decisions, we review its grant of summary disposition under MCR 2.116(C)(10) because the record demonstrates that the trial court considered evidence outside the pleadings. *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Coblentz*, 475 Mich at 567. The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

On appeal, Custodial first argues that Jefferson's injuries and resulting lawsuit did not "result from" the performance or obligations of Custodial under the purchase order contract, and thus, the indemnity clause is not applicable.

The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If the language is clear and unambiguous, the contract must be interpreted and enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). We interpret the words in a contract according to their ordinary meaning, and a dictionary may be used to determine the ordinary meaning of a word or a phrase. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009).

Relevant to the claims in this case, the purchase order contract contains two clauses regarding indemnity. The first clause appears on page one of the contract, and provides: "Supplier agrees to defend, protect, and hold harmless Benteler Automotive, its successors, agents, consultants, and employees against any and all third party claims for injury, damage, or infringement of any kind resulting from these products and/or services." Custodial is identified as the supplier at the beginning of the contract.

A second indemnity clause is located on page five, in paragraph 10(a). That clause provides:

> 10. Defense, Indemnity, and Insurance. Seller acknowledges and agrees as follows:
>
> a. To the fullest extent permitted by law, Seller agrees to indemnify, hold harmless and defend buyer and its affiliated companies, their directors, officers, employees, agents and customers ("Indemnitees") from and against any loss, liabilities, costs, expenses, suits, actions, claims and all other obligations and proceedings, including without limitation all judgments rendered against and all fines and penalties imposed upon, Indemnitees and all attorneys' fees and any other costs of litigation ("Liabilities") that are in any way related to Seller's performance or obligations under the Order, including claims arising out of a breach hereof or thereof, warranty claims, product recall claims, product liability claims, injuries to persons, including death, or damage to property caused by Seller, its employees, agents, subcontractors, or in any way attributable to the performance of Seller, including without limitation, breach of contract, breach of warranty or product liability. Seller's obligation to defend and indemnify under this section will apply regardless of whether the claim arises in tort, negligence, contract, warranty, strict liability or otherwise except for claims that arise as a result of the sole negligence of Buyer. Seller agrees to indemnify, hold harmless and defend Indemnitees from and against all Liabilities arising out of actual or alleged infringement, including infringement of any patent, trademark, or copyright relative to the Parts.

The first indemnification clause is narrower than the second because it limits Custodial's obligation to indemnify Benteler to liabilities "resulting from" the services Custodial contracted to provide. This is the clause that Custodial focuses on in its first argument on appeal. Thus, to determine whether this clause requires Custodial to indemnify Benteler we must decide whether Jefferson's slip and fall accident and ensuing lawsuit "resulted from" the services Custodial contracted to provide to Benteler.

The term "result" is defined as "to arise or proceed as a consequence from actions, circumstances, premises, etc.; be the outcome." *Random House Webster's College Dictionary* (1992). Further, relevant in this context, the dictionary explains that "from" is "used to indicate cause or reason."

In light of these definitions, we conclude that Jefferson's slip and fall accident and the subsequent lawsuit "resulted from" Custodial's agreement to provide cleaning services to Benteler. At the time he was injured, Jefferson was on the property in his official capacity, was driving a company vehicle, and was attempting to unload the company's cleaning equipment in order to take it into the facility and perform cleaning services pursuant to the contract. Thus, Jefferson would not have fallen and injured himself and brought the subsequent lawsuit if he had not been on the property attempting to provide cleaning services pursuant to the contract. Accordingly, we find that the injury claim by Jefferson "resulted from" the services Custodial

contracted to provide to Benteler, and Custodial is bound under the terms of the parties' contract to indemnify Benteler.

However, even if we agreed with Custodial and concluded that the first indemnity clause was not applicable, the second indemnity clause is much broader and does not contain the same "resulting from" limitation. Under the second clause, Custodial is obligated to indemnify Benteler unless the claims arise as a result of the sole negligence of Benteler. Thus, Custodial is clearly obligated to indemnify Benteler in this case pursuant to the second clause because the trial court correctly held, as discussed *infra*, that Benteler was not negligent. Accordingly, under the terms of either indemnity clause, the trial court correctly granted summary disposition in favor of Benteler and ordered Custodial to indemnify it for the costs of defending Jefferson's lawsuit.

Custodial also argues that the second indemnity clause is unconscionable. While we need not reach this issue in light of our conclusion that Custodial was required to indemnify Benteler under the first indemnity clause, we nevertheless find that the second clause is not unconscionable.

A party may only avoid enforcement of a contract, even a contract of adhesion, by establishing a traditional contract defense, such as fraud, duress, unconscionability, or waiver. *Rory v Continental Ins Co*, 473 Mich 457, 489; 703 NW2d 23 (2005). "In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* at 144. However, if the weaker party was free to accept or reject the term, there was no procedural unconscionability. *Id.* "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* "However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other." *Id.* A term is only substantively unreasonable where "the inequity of the term is so extreme as to shock the conscience." *Id.*

In this case, Custodial did not present any evidence to suggest that it had no realistic alternative but to agree to provide cleaning services to Benteler and to accept Benteler's terms of service. Custodial, as an independent contractor, could have refused the cleaning services contract with Benteler or it could have attempted to negotiate the contract terms. While Benteler is a much larger company than Custodial, Custodial is also a sophisticated business. Custodial does not claim that it ever objected to the terms of the contract or attempted to negotiate alternative terms. Moreover, Custodial did not offer any evidence that tended to demonstrate that it was in a position where it had to accept work with Benteler. Thus, there is no evidence to suggest that Custodial lacked any meaningful choice but to accept employment under the terms dictated by Benteler, and we conclude that there was no procedural unconscionability. See *id*. at 144 (finding no procedural unconscionability where no evidence that the plaintiff lacked any meaningful choice but to accept the terms was submitted).

Similarly, we also conclude that there was no substantive unconscionability because the indemnity clause constitutes a standard boilerplate clause and is not inherently unreasonable, nor

is it so extreme that it shocks the conscience. While broad, the indemnity clause does contain an exception for liability caused by the sole negligence of Benteler. Thus, we conclude that the clause is not inherently unreasonable and does not shock the conscience. Accordingly, the contract defense of unconscionability does not bar the enforcement of the terms of the contract at issue in this case.

On cross appeal, Jefferson argues that the trial court erred by granting summary disposition in favor of Benteler because there was a genuine issue of material fact in regard to whether the black ice was open and obvious. However, we note that the trial court did not grant summary disposition on the basis of the open and obvious doctrine. Rather, the trial court determined that Benteler was entitled to summary disposition because there was no genuine issue of material fact in regard to whether it had notice of the dangerous condition. We agree with the trial court's conclusion, and decline to address whether there was a genuine issue of material fact in regard to the application of the open and obvious doctrine.

To prevail on a negligence claim, a plaintiff must show duty, breach, causation, and damages. *Hampton v Waste Management of Mich, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Our Supreme Court has observed that "[t]he starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes those who come onto his land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). There is no dispute in this case that Jefferson was an invitee; thus, Benteler had a duty "to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on [its] land." *Id.* A premises possessor is liable for a breach of its duty when "the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id.* Regarding snow and ice specifically, the Court held that "a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Id.* at 464 (quotation marks and citation omitted).

Said differently, the Court in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), explained that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger.

A plaintiff may establish notice by presenting evidence that the hazard existed for a sufficient length of time that the premises possessor should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

In this case, the evidence demonstrates that the parking lot had been plowed and salted recently, and that there had been no precipitation since the last time the lot was plowed and

salted. Moreover, there was no evidence that any other person slipped in the parking lot, or noticed any ice accumulation and informed Benteler of an unsafe condition. Thus, there was no reason for Benteler to further inspect its parking lot or take any measure to clear it because the lot was already clear and there had been no precipitation or reports of ice accumulation. Further, the patch of ice Jefferson slipped on was apparently small and isolated. Jefferson himself admitted that he did not see the patch of ice until after he fell. He described the patch of ice as being no larger than an 8-1/2-by-11 inch piece of paper. The security guard also testified in her deposition that she did not observe any ice in the lot on the day of Jefferson's fall, and that the lot appeared to be clear. Accordingly, the record demonstrates that Benteler did not know, and through the exercise of reasonable care would not have discovered, the dangerous condition. Therefore, summary disposition in favor of Benteler was appropriate because there is no evidence that Benteler breached its duty to Jefferson.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell