

NO. 36216-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMERICAN BUILDING MAINTENANCE COMPANY
WEST, dba ABM JANITORIAL SERVICES,

Appellant/Defendant,

v.

MORRIS & MORRIS, dba MORRIS PROPERTIES, a
domestic partnership and FRANK E. MORRIS and
CARROLL A. MORRIS, and JAMES A. MORRIS and
CHERYL L. MORRIS,

Respondents/Defendants.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This appeal arises from a premises liability case. The plaintiff in that case had sued two sets of defendants: (1) commercial building owners (collectively, “Morris Properties” or Respondents), and (2) a janitorial company (“ABM” or Appellant) for injuries she sustained in a slip and fall accident. ABM denied any fault for the condition of the premises leading to Plaintiff’s fall. It alleged that it was therefore entitled to contractual defense and indemnification from Respondents in a timely pleaded counter cross claim.

Later, Plaintiff’s claims against ABM were dismissed on summary judgment. In ruling on ABM’s motion against the Plaintiff, the trial court accepted the Plaintiff’s contention that there was some slippery substance on the floor in Respondents’ building, but ruled that there was no evidence to create a genuine issue of material fact as to ABM’s liability for that substance.

Because it had been judicially determined that ABM was not at fault for the condition of the premises, ABM renewed its request to Respondents for reimbursement of its defense costs, pursuant to its contract with Respondents. Respondents refused the request, and both parties cross moved for summary judgment on the defense and indemnification claim. The trial court erroneously denied ABM’s motion

for summary judgment on the indemnification claim, and granted Respondents' cross motion on the claim. ABM requests the Court of Appeals to reverse the trial court, and to direct it to enter judgment in favor of ABM on the indemnification claim for attorneys' fees and costs incurred in defending against Plaintiff's claims in the trial court.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in entering the order of March 23, 2007 to the extent that order denied ABM's motion for summary judgment on its counter cross claim for contractual indemnification, and granted Respondents' motion for summary judgment dismissing ABM's counter cross claim for contractual indemnification

B. Issues Pertaining to Assignment of Error

1. Where the trial court has ruled as a matter of law that ABM was not at fault for the condition on Respondents' premises that gave rise to the plaintiff's lawsuit, and there is a contract between ABM and Respondents that requires Respondents to defend and indemnify ABM in the event AMB is sued for a condition of Respondents' premises that is not ABM's fault, should the trial court have granted ABM's motion for summary judgment on the contract, and required Respondent to indemnify

ABM for fees and costs incurred in defending against Plaintiff's lawsuit?
(Assignment of Error I.)

III. STATEMENT OF THE CASE

This case arose out of a slip and fall. CP 222- 229. The plaintiff in the underlying action had alleged that she stepped on a slippery substance in a bathroom in a building owned by Respondents (i.e. on Respondents' premises). Id. She further claimed that this substance caused her to fall and injure herself. Id. Her theory of liability was based in premises liability law, and involved landowners' duties to invitees. Id.

However, plaintiff unfortunately did not limit her claim to Respondents. Id. Instead, she also sued ABM, a company that provided certain, limited, evening-only janitorial services in the bathroom where plaintiff fell. Id. Plaintiff sued ABM despite the fact that her fall occurred in the morning, after the building had been open for some time, and after others likely would have used the bathroom. CP 211-213, 240-243; 427-434.

In its summary judgment motion against plaintiff, ABM contended that there was no evidence that it had liability to the plaintiff in this matter. CP 200-210. Specifically, ABM demonstrated that it had completed its work in the bathroom where plaintiff fell approximately 14 hours before she fell, and untold numbers of women had used that bathroom in between

the time that ABM completed its work and the time that plaintiff fell. CP 200-210; 211-213, 240-243; 427-434. Not only that, but no one knows what the substance was that plaintiff slipped on, and no one knows when the substance came to be on the floor. Id.

On January 12, 2007, with all parties to the case present and participating in the hearing, including Respondents, the Honorable Gary R. Tabor of the Thurston County Superior Court heard ABM's motion against plaintiff. He agreed with ABM and granted ABM's motion, dismissing plaintiff's claims against it with prejudice. CP 470-472. In pertinent part, Judge Tabor explained his ruling as follows:

In this particular case, the plaintiff does not know what the substance was, does not know how it got there, does not know when it got there. We have the mystery substance that someone has characterized as being invisible, although they say that it appeared to be of a nature like something sprayed from a spray bottle, that it was clear – maybe that's why they said invisible – that it was not water. The plaintiff herself indicated that it definitely was not water, it was not wax, and it was not oily in texture. I don't know what the substance is. Nevertheless, the problem here for the plaintiff is, there's no showing of how that substance got there or when it got there.

It's my finding that summary judgment should be granted on behalf of ABM, the janitorial company, because there's no showing that they ever had any opportunity

to deal with the substance in any way, shape or form. Obviously, duty, breach, injury and proximate cause are the standard points that have to be made in a claim of negligence. As to the janitorial service, there's absolutely no showing, in this Court's opinion, that there was any breach of duty. While one might argue, well, a janitorial company has a duty to clean up anything that might be on the floor, there's no showing that this was on the floor at the time, and so, there's no showing of a breach as to the janitorial company.

VRP (January 12, 2007) p. 25 line 25 – p. 27, line 2. Thus, plaintiff's claim against ABM was dismissed. Id.; CP 470-472

ABM had also asked the trial court to rule on January 12 that Respondents were required to pay for its defense fees and costs pursuant to its contract with Respondents. However, the trial court declined to rule on that issue at the time, stating simply, "I don't want to go forward today," and telling the attorneys to renote the motion if they wanted it heard after they discussed its issues. VRP (January 12, 2007) p. 28 lines 8-17.

Counsel for ABM and Respondents determined that they did want the motion heard, and the issue was renoted for hearing on March 23, 2007. CP 485-493. At that time, ABM explained that its demand for defense and indemnity from Respondents arises out of the contract for

services between the two. Id. The contract contained an indemnity clause, which provided in pertinent part:

Owner [Respondent] shall indemnify, defend, and hold harmless Contractor [ABM] from claims for injuries to Contractor's employees and others resulting from the condition of Owner's premises or equipment but only to the extent same are not caused by Contractor's fault.

CP 236.

In other words, the plain language of the contract required Respondent to hold ABM harmless and provide it a defense and indemnity if someone, such as the plaintiff in the underlying case, made a claim against ABM for injuries resulting from the condition of Respondents' premises, to the extent that those injuries were not ABM's fault. *Id.*; CP 235-238. ABM contended that that was precisely what had happened in the underlying case. CP 485-493.

The argument was straightforward: Plaintiff had made a claim against ABM because she fell and injured herself due to a condition of Respondents' premises (regardless of whenever, and however, that condition was created). Id. Plaintiff's fall and injury were judicially determined to not to have been the fault of ABM. Therefore, pursuant to the indemnity provisions of ABM's contract with Respondents, Respondents were obligated to defend, indemnify, and hold ABM

harmless for the fees and costs incurred in defending against plaintiff's claims. Id.

In light of this straightforward reading of the contract and application of the facts, it was ABM's contention that not only were Respondents *not* entitled to dismissal of ABM's claim against it, but ABM was entitled to summary judgment against Respondents on this claim. Id. The Court rejected ABM's contention, instead ruling:

Well, counsel, I have to call them like I see them, and this is a strange case in my thinking. It's not a tort case, although that's what the original case was, it's a contract case, I guess, on the issues. I realize that in many tort matters when you look at duty, breach and proximate cause, the duty may be based upon contract duty.

In this particular case, some time ago this Court granted summary judgment to the defendants in this case stating that the plaintiff in this so-called slip and fall matter had not met their burden of showing that the slip and fall was caused by anything that could be established by fact. This mystery substance that was there was not water, and there was no indication that there was any fault on the part of either the janitorial service or the property owner.

In granting summary judgment, I was told that the defense parties wanted some additional time to consider their positions, and I'll candidly tell you that I wasn't sure what your positions were going to be. Having read your briefs, now I understand

what this is all about is attorney's fees and costs, that each you would like the other to pay those based upon the so-called indemnification set forth in the contract.

Now I know what I want to do; how I do it is the real issue. Normally, if a person argues a summary judgment motion, and I deny the summary judgment motion, then that means that the matter is going to go forward to trial. I want to put this matter at rest. I'm not granting either summary judgment motion, but I am saying that I don't believe that any party has an issue to go forward.

My reading of the indemnification clause, if you will, is that there are certain requirements for one side to go against the other for indemnification for their cost of defense, and in this particular case it appears in order for the property owner to go against the janitorial service, there would be have to be some showing of negligence on the part of the janitorial service. I don't find any such negligence, nor could there be in light of my previous ruling.

As to the janitorial service going against the owner, the applicable language, I guess, that was argued about was the condition of the premises. I don't think there's any showing that the condition of the premises had anything to do with this. I realize that there is a subtle difference between a claim of liability and a finding of liability, but based upon my ruling before denying the plaintiff the opportunity to go forward and granting summary judgment by the defendants, I clearly stated that I didn't think that there were facts that could be set forth under the

scenario given me to prove anything about what caused this slip and fall. I think that impacts the claim as far as indemnity is concerned.

So, counsel, I understand that you may very well disagree and that you may ask a higher court to look at this. That's certainly your right. In denying each of your summary judgment motions, I am, in effect, I guess granting summary judgment against your claim on indemnity, although that isn't really the – if you have suggestions about how that conceptually can be more clear, I'll entertain those.

VRP (March 23, 2007) p. 13, line 23 – p. 16, line 16. In effect, the trial court ruled that, because plaintiff was unable to sustain her burden of proof against Respondents under a premises liability analysis on summary judgment, plaintiff's claim was not about a condition of Respondents' premises and the indemnification provisions were not triggered. *Id.*; see also VRP (March 23, 2007) p. 16, line 17 – p. 17, line 9. As is explained in more detail below, ABM believes that this ruling was error.

IV. ARGUMENT

A. Standard of Review:

The standard for summary judgment is well known. Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. E.g., Herron v. Tribune

Pub. Co., 108 Wn.2d 162, 171, 736 P.2d 249 (1987); CR 56(c). On appeal, the Court of Appeals reviews a trial court's summary judgment determination *de novo*, with the Court of Appeals engaging in the same inquiry as the trial court. Id. at 170. Here, applying the proper standard, summary judgment should have been granted in ABM's favor, against Respondent.

B. The contract between ABM and Respondent should be interpreted to give effect to its plain language, which requires Respondent to indemnify ABM on the facts before this Court.

In considering this case on review, the Court must be mindful of the fact that, when the Court is interpreting an indemnity provision, the fundamental rules of contract construction apply. Northern Pacific Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 922, 540 P.2d 1387 (1975). It is black letter law that the parties to a contract are bound by its terms. Adler v. Fred Lind Manor, 153 Wn.2d 331, 345, 103 P.3d 773 (2004).

Equally fundamental is the proposition that, when the terms of a contract are clear and unambiguous, the court should not read ambiguity into the contract. James S. Black & Co. v. P & R Co., 12 Wn. App. 533, 535, 530 P.2d 722 (1975). Instead, it should enforce the terms of the contract as it was written, looking to its plain language. See Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (the meaning of an

agreement must be determined according to the words used). The pertinent language of the contract between these parties here provides:

Owner [Respondent] shall indemnify, defend, and hold harmless Contractor [ABM] from **claims for injuries to Contractor's employees and others resulting from the condition of Owner's premises or equipment but only to the extent same are not caused by Contractor's fault.**

CP 236 (emphasis added).

When the plain language of the indemnification provision at issue here is analyzed, Respondents' liability to ABM in this case is clear. The contract requires Respondents to indemnify ABM (1) "from claims for injuries to [ABM's] employees and others" when (2) the claim results from the condition of Respondents' premises or equipment and (3) the claim was not caused by ABM's fault.

Therefore, in determining whether Respondents are liable to ABM on ABM's contractual indemnification claim, the trial court was first required to consider whether plaintiff's claim was a claim for an injury to an ABM employee or "others." Without analysis, Respondent asked the trial court to read the term "others" out of this contract, and argued that the indemnification provision only applies when there has been an injury to an ABM employee. CP 480-481.

A similar effort to read words out of an indemnification clause was recently rejected in MacLean Townhomes, L.L.C. v. P.J. Interprize, Inc., 133 Wn. App. 828, 138 P.3d 155 (2006). In MacLean, a general contractor had sued its subcontractor, seeking, among other things, to enforce an indemnity clause in the subcontract. The indemnity clause required the subcontractor to defend and indemnify the general contractor for “any and all claims” arising from the subcontract. The subcontractor moved for partial summary judgment, arguing that the indemnity clause applied only to tort-based claims and not to construction defect claims, based on the use of language pertaining to negligence in the indemnification agreement (because construction defect claims are contract-based claims).

The Court explained that it would not construe the contract in a manner that would make any term absurd or meaningless. Id. at 831 (citing Seattle-First Nat’l Bank v. Westlake Park Assocs., 42 Wn. App. 269, 274, 711 P.2d 361 (1985)). Thus, it could not and would not read the term “all claims” out of the contract. Id. at 832. Similarly, here, the Court can not interpret this contract in a manner consistent with the fundamental

principles of contract construction and also read the term “others” out of the contract. Plaintiff is an “other” who made a claim for an injury.¹

Second, in its de novo review this Court must analyze whether Plaintiff’s claim “results from the condition of Respondents’ premises or equipment.” ABM never argued that this claim resulted from a piece of equipment. Rather, ABM contended that it arose out of a condition of Respondents’ premises. Since the term “condition of the premises” is not defined in this contract, it is given its ordinary meaning. Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987).

To determine the ordinary meanings of words, our Courts are permitted to turn to standard English language dictionaries. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

¹ “Claims” is a defined term in the contract meaning: loss, liability, cost or expense (including reasonable attorney’s fees) for bodily injury, death and property damage. CP 236. That is the only defined term in this portion of the contract. Thus, the remaining terms must be given their ordinary meaning. Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987).

Merriam-Webster Collegiate Dictionary, Eleventh Edition defines condition as “a state of being.” Using this definition, the “condition of the premises” is the state the premises is in. This is precisely how Washington premises liability law interprets this phrase as well.

For example, in slip and fall cases just like this case, our Supreme Court and Court of Appeals have discussed whether a defendant had notice that the slippery substance was on the floor. The Courts phrase the inquiry as whether the defendant was on notice of the dangerous “condition” on the premises that ultimately caused the injury. See Falconer v. Safeway Stores, 49 Wn.2d 478, 479-480, 303 P.2d 294 (1956) (fatty animal tissue on the sidewalk was a “condition of the premises” in a slip and fall premises liability case); Placanica v. Riach Oldsmobile Co., 53 Wn.2d 171, 174-175, 332 P.2d 47 (1958) (snow and ice on the floor was a “dangerous condition” of the premises in a slip and fall premises liability case); Ciminski v. Finn Corp., 13 Wn. App. 815, 853, 537 P.2d 850 (1975) (food, grease, or other debris on the floor was a “condition causing the injury” on the premises in a slip and fall premises liability case); Carlyle v. Safeway Stores Inc., 78 Wn. App. 272, 275, 896 P.2d 750 (1995), rev. denied, 128 Wn.2d 1004 (1995) (shampoo on the floor was an “unsafe condition” or “dangerous condition” of the premises in a slip and fall premises liability case); See also Pimentel v. Roundup Co.,

100 Wn.2d 39, 49, 666 P.2d 888 (1983) (Plaintiff claimed injury from a falling paint can. The Court defined the proper liability inquiry in these terms: “To impose liability for failure to maintain business premises in a reasonably safe condition generally requires the plaintiff to prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or constructive notice of the dangerous condition.”).

Clearly, a slippery substance on the floor is a condition of the premises while the substance is on the floor. As is explained above, this interpretation is compelled both by the ordinary meaning of the words and by the interpretation given to these words by our Courts.² Indeed, it is so readily understood that a slippery substance on the floor constitutes a condition of the premises that the Washington Pattern Jury Instructions that pertain to premises liability claims including slip and fall claims, and that discuss dangerous conditions of premises do not even include a definition for what constitutes a “condition of the premises.” See WPI 120.06 and 120.07.

² Moreover, Frank Morris, a principal of Respondent Morris Properties, and a Respondent in his own right, is not only a landowner charged with familiarity with premises liability law, but is also an attorney.

However, instead of looking to the meaning of these words, at the trial court, Respondents argued that this provision must have meant a rundown or dilapidated building or equipment. CP 480-481. If that was what the parties meant, they could have -- and should have -- said “rundown or dilapidated building or equipment.” That was not what they said. They said, “a condition of the Owner’s premises.”

As discussed above, this Court must enforce the contract as it was written, looking to its plain language. See Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (the meaning of an agreement must be determined according to the words used). While the trial court explained in its oral ruling that it had rejected ABM’s contention that there was a condition of the premises that gave rise to plaintiff’s claim because there was not sufficient evidence to hold Respondent liable to plaintiff under premises liability law, ABM believes that this determination was made in error.

The plain language of the indemnification clause does not require liability to be imposed on Respondent before Respondents’ obligations to ABM are triggered; it only requires that there be a condition of the premises that gives rise to a claim against ABM for which ABM has not fault. As the trial court explained at length during the January 12, 2007

hearing in this case, the evidence was undisputed that there was a slippery “mystery substance” on the floor in the bathroom that caused plaintiff to fall. Accordingly, it was undisputed that there was a condition of the premises that led plaintiff to make a claim against ABM.

The third, and final, step in the analysis is for the Court to determine whether plaintiff’s claim was a result of ABM’s fault. This issue is the subject of a previous judicial determination that ABM had no fault for plaintiff’s claims. No party has challenged this determination, and it stands. Therefore, all three areas of inquiry, and the plain and unambiguous language of this contract compel only one conclusion in this case: Respondent is obligated to reimburse ABM for its defense costs incurred in this action.³ The trial court erred when it ruled otherwise.

V. CONCLUSION

³ Contrary to Respondents’ argument in the trial court, the fact that this portion of the clause does not contain the phrase “customers, tenants or business visitors” is irrelevant and does not change the proper interpretation of the clause.

For these reasons and those contained in ABM's briefing below, ABM requests the Court Appeals to reverse that portion of the trial court's March 23, 2007 order that granted Respondents' Motion for Summary Judgment on ABM's counter cross claim for contractual indemnification and denied ABM's cross motion for summary judgment on its counter cross claim for contractual indemnification. It further requests that the Court of Appeals direct the trial court to enter judgment in ABM's favor and against Appellant, requiring Appellant to reimburse ABM for the attorney's fees and costs ABM incurred below defending against Plaintiff's claims (the specific amount to be determined by the trial court). Finally, ABM requests an award of its costs on appeal pursuant to RAP 14.2.

DATED this 27th day of August, 2007.

Respectfully submitted,

MERRICK, HOFSTEDT & LINDSEY, P.S.



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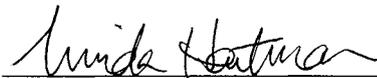
THIS IS TO CERTIFY that a copy of Appellant's Opening Brief was served August 27, 2007, on the following individual:

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The original and a copy of Appellant's Opening Brief were sent via U.S. mail to the Court of Appeals for filing on August 27, 2007.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 27th day of August, 2007, at Seattle, Washington.



Trinda Hartman, Legal Assistant

STATE OF WASHINGTON
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