MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

The Green Gang, Inc.,
Appellant-Defendant,

v.

Arnold Phillips,
Appellee-Plaintiff.

January 25, 2023

Court of Appeals Case No. 22A-CT-1013

Appeal from the Marion Superior Court

The Honorable Gary L. Miller, Judge

The Honorable David J. Dreyer, Senior Judge

Trial Court Cause No. 49D03-1901-CT-2818

Tavitas, Judge.

Case Summary

[1] The Green Gang, Inc., ("Green Gang") appeals the judgment for Arnold Phillips. Phillips filed a complaint against Green Gang, a snow and ice removal contractor hired by ConAgra Dairy Foods ("ConAgra"), for injuries that Phillips suffered when he fell on ice during his employment at ConAgra. The trial court denied Green Gang's motion for summary judgment, and a jury found for Phillips and apportioned fault between Green Gang, ConAgra, and Phillips. On appeal, Green Gang challenges: (1) the denial of its motion for summary judgment; (2) the trial court's admission of evidence during the jury trial; and (3) the trial court's denial of its motion for judgment on the evidence. Concluding that the trial court did not err, we affirm.

Issues

[2] Green Gang raises three issues, which we restate as:

I. Whether the trial court erred by denying Green Gang's motion for summary judgment.

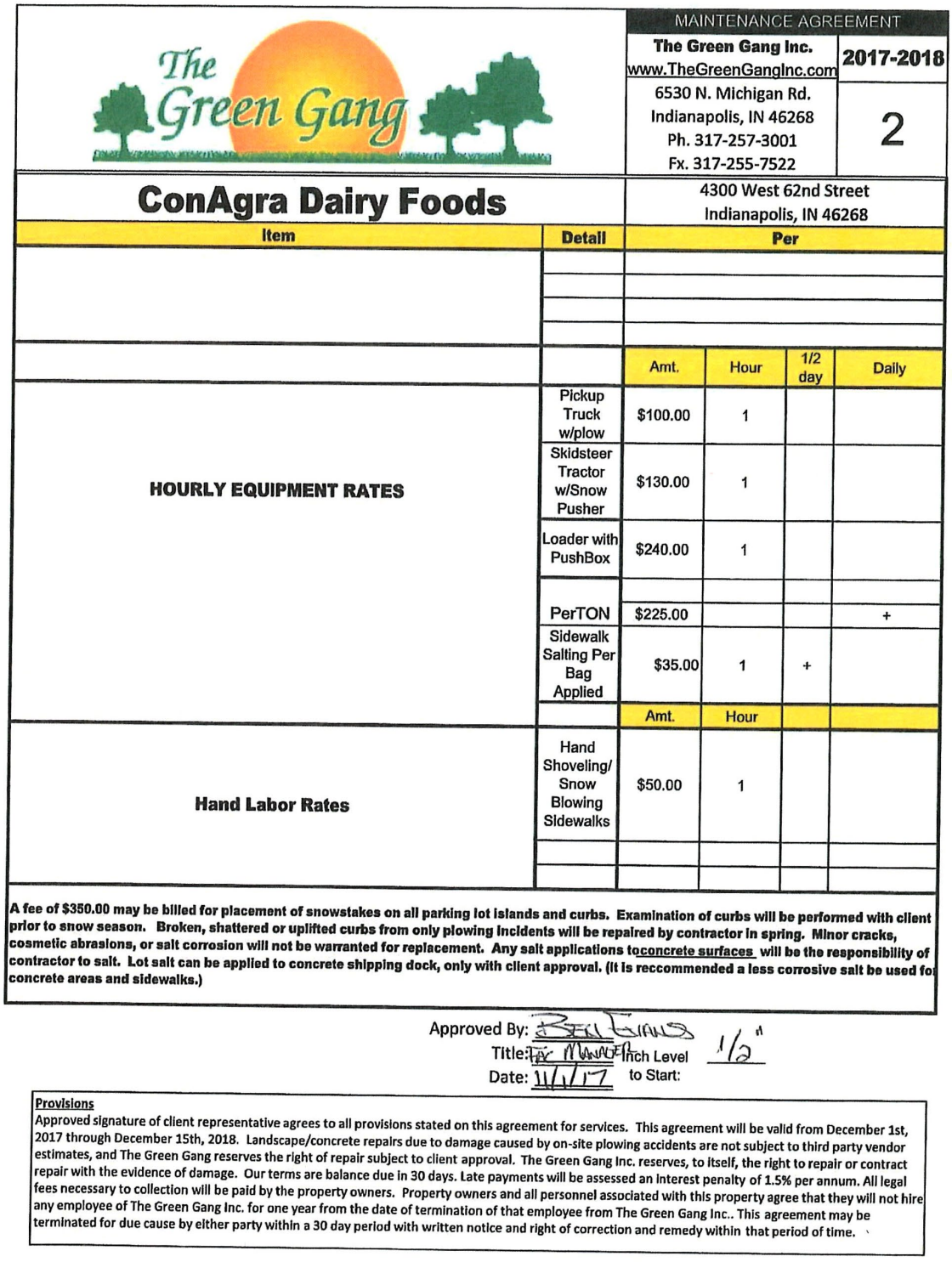
II. Whether the trial court abused its discretion by admitting the testimony of Jerrod Harrison.

III. Whether the trial court erred by denying Green Gang's motion for judgment on the evidence.

Facts

[3] In November 2017, Green Gang entered into a maintenance agreement with ConAgra in Indianapolis to provide services between December 1, 2017, and December 15, 2018 ("Maintenance Agreement"). *See* Figure 1.

[4] *Figure 1 – Ex. Vol. IV p. 14.*



MAINTENANCE AGREEMENT

The Green Gang Inc.
www.TheGreenGangInc.com
6530 N. Michigan Rd.
Indianapolis, IN 46268
Ph. 317-257-3001
Fx. 317-255-7522

2017-2018

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ConAgra Dairy Foods

4300 West 62nd Street
Indianapolis, IN 46268

Item	Detail	Per			
		Amt.	Hour	1/2 day	Daily
HOURLY EQUIPMENT RATES	Pickup Truck w/plow	$100.00	1		
	Skidsteer Tractor w/Snow Pusher	$130.00	1		
	Loader with PushBox	$240.00	1		
	PerTON	$225.00			+
	Sidewalk Salting Per Bag Applied	$35.00	1	+	
		Amt.	Hour		
Hand Labor Rates	Hand Shoveling/ Snow Blowing Sidewalks	$50.00	1		

A fee of $350.00 may be billed for placement of snowstakes on all parking lot islands and curbs. Examination of curbs will be performed with client prior to snow season. Broken, shattered or uplifted curbs from only plowing incidents will be repaired by contractor in spring. Minor cracks, cosmetic abrasions, or salt corrosion will not be warranted for replacement. Any salt applications to concrete surfaces will be the responsibility of contractor to salt. Lot salt can be applied to concrete shipping dock, only with client approval. (It is reccommended a less corrosive salt be used fo concrete areas and sidewalks.)

Approved By: [illegible]
Title: [illegible] Inch Level 1/2"
Date: 11/1/17 to Start:

Provisions
Approved signature of client representative agrees to all provisions stated on this agreement for services. This agreement will be valid from December 1st, 2017 through December 15th, 2018. Landscape/concrete repairs due to damage caused by on-site plowing accidents are not subject to third party vendor estimates, and The Green Gang reserves the right of repair subject to client approval. The Green Gang Inc. reserves, to itself, the right to repair or contract repair with the evidence of damage. Our terms are balance due in 30 days. Late payments will be assessed an interest penalty of 1.5% per annum. All legal fees necessary to collection will be paid by the property owners. Property owners and all personnel associated with this property agree that they will not hire any employee of The Green Gang Inc. for one year from the date of termination of that employee from The Green Gang Inc.. This agreement may be terminated for due cause by either party within a 30 day period with written notice and right of correction and remedy within that period of time.

[5] The language from the Maintenance Agreement at issue here is: "Any salt applications to concrete surfaces will be the responsibility of contractor to salt. Lot salt can be applied to concrete shipping dock, only with client approval. (It is recommended a less corrosive salt be used for concrete areas and sidewalks.)." Appellant's App. Vol. II p. 40; Ex. Vol. IV p. 14. The Maintenance Agreement was drafted by Green Gang without negotiation from ConAgra.

[6] On January 12, 2018, snow fell in Indianapolis, and Green Gang removed the snow and applied salt at the ConAgra facility but did not apply any type of salt on the concrete shipping dock ramp. Green Gang completed the work at 10:13 p.m. According to Green Gang, Green Gang did not salt the "shipping docks . . . unless requested" by ConAgra, and ConAgra did not request that Green Gang apply salt to the concrete shipping dock on January 12, 2018. Tr. Vol. II p. 127.

[7] Phillips, an employee of ConAgra who loaded trailers, worked on January 12-13, 2018, from 10:30 p.m. to 7:00 a.m. Door 40 at the ConAgra facility exited onto a concrete ramp, which was part of the concrete shipping dock. The ramp has a handrail on one side. Although Phillips could have used a different entrance, during his shift, Phillips used the ramp at Door 40 and observed that the ramp was covered with snow and ice. Toward the end of his shift on January 13, Phillips walked down the ramp to a trailer that he had just loaded. Phillips did not use the handrail, he fell, and he was injured.

[8] On January 18, 2019, Phillips filed a complaint against Green Gang for negligence related to Phillips' fall. In March 2020, Green Gang filed a motion for summary judgment. Green Gang argued that it did not owe Phillips a duty because: (1) it did not have the contractual authority to apply salt to the concrete shipping dock without ConAgra's permission and, therefore, did not owe a duty to Phillips; and (2) under the Restatement (Second) of Torts Section 343 and Section 343A, Green Gang is not liable to Phillips because the danger of the snow and ice was known and obvious to Phillips.

[9] In response, Phillips argued that, under the plain language of the Maintenance Agreement, Green Gang had a duty to remove snow and ice from all concrete areas and that the Maintenance Agreement only differentiated the type of salt to be applied to the loading dock area. Thus, Phillips argued that Green Gang had a duty to remove snow and ice from the concrete ramp and that Green Gang breached its duty. On October 23, 2020, the trial court found "that there is a question of material fact to be determined by the trier of fact" and denied Green Gang's motion for summary judgment. Appellant's App. Vol. II p. 13.

[10] A jury trial was held in April 2022. After the parties presented evidence, Green Gang moved for judgment on the evidence based upon the same arguments presented in the motion for summary judgment, and the trial court denied the motion. The jury entered a verdict finding damages of $382,433.14 and found the following fault percentages: (1) Phillips, ten percent; (2) Green Gang, sixty percent; and (3) nonparty ConAgra, thirty percent. The trial court, thus,

entered judgment against Green Gang for $229,459.88. Green Gang now appeals.

Discussion and Decision

I. Summary Judgment

[11] Green Gang challenges the trial court's denial of its motion for summary judgment. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[12] The summary judgment movant bears the burden of making a *prima facie* showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden shifts to the non-moving party which must then show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "'[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party.'" *Id*. (quoting *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016)). We review the trial court's ruling on a motion for summary judgment

de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013).

Duty Owed by Green Gang to Phillips

[13] Green Gang challenges whether it owed a duty to Phillips. "[T]o prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin,* 62 N.E.3d at 386. "Absent a duty there can be no negligence or liability based upon the breach." *Id.* "Whether a duty exists is a question of law for the court to decide." *Id.* at 386-87. "[B]reach is usually a question of fact for the jury." *Megenity v. Dunn*, 68 N.E.3d 1080, 1083 (Ind. 2017).[1]

[14] The issue is, thus, whether an independent contractor owes a duty to a third party to the contract. Our Supreme Court decided this issue in *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004). Prior to *Peters*, Indiana followed the rule that "contractors do not owe a duty of care to third parties after the owner has accepted the work." *Peters*, 804 N.E.2d at 738 (quoting *Blake v. Calumet Constr.*

[1] Proximate cause, however, is "generally a question of fact for the jury to decide." *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004). "Only in plain and indisputable cases, where only a single inference or conclusion can be drawn, are the questions of proximate cause . . . matters of law to be determined by the court." *Id.*

Corp., 674 N.E.2d 167, 170 (Ind. 1996)). In *Peters*, however, the Court abandoned this "acceptance rule." *Id.* at 737.

[15] The Court held that, "[i]n general a contractor has a duty to use reasonable care both in his or her work and in the course of performance of the work." *Id.* at 743. "[T]he duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty." *Id.* A "contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor's negligence." *Id.* at 742.

[16] Green Gang's sole argument is that Phillips failed to designate evidence to rebut Green Gang's argument regarding the Restatement (Second) of Torts § 343A(1). That section provides: "A **possessor** of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." (emphasis added). According to Green Gang, Phillips was aware of the ice, understood the risk, and failed to protect himself. Green Gang argues, accordingly, that the danger was known and obvious to Phillips and that it was entitled to summary judgment.

[17] The Restatement (Second) of Torts § 343A(1), however, is inapplicable here. This Restatement section applies to a "possessor of land"[2]; Green Gang was an independent contractor, not a possessor of land. *See, e.g., Kader v. State, Dep't of Correction*, 1 N.E.3d 717, 729 (Ind. Ct. App. 2013) (holding that premises liability principles did not apply to a private contractor hired to operate a state-owned correctional facility; rather, the contractor was a custodian with a duty "to take reasonable steps under the circumstances for the life, health, and safety of the detainee"). Accordingly, Green Gang's argument fails.

[18] Instead, the duty of care outlined in *Peters* is applicable here. Green Gang's argument is more of a question of proximate cause—whether Phillips' actions were a cause of his injuries. "[W]hether [Phillips] engaged in any form of negligent conduct that contributed to his injury—under either a comparative or a contributory negligence scheme—is ordinarily a question left to a finder of fact to decide." *See Kader*, 1 N.E.3d at 729. Green Gang has failed to demonstrate that the trial court erred by denying its motion for summary judgment.

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[2] The Restatement (Second) of Torts § 328E provides:

> A possessor of land is
>
> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

II. Admission of Testimony

[19] Next, Green Gang argues that the trial court abused its discretion by admitting a portion of testimony by Jerrod Harrison, ConAgra's shipping supervisor. At the jury trial, Green Gang called Harrison, and on cross-examination by Phillips' counsel, Harrison testified as follows:

> Q There was a time on this job that you put Ice Melt on the ramp when it was slick?
>
> A That is correct.
>
> Q And it wasn't anyone at Conagra's job to put Ice Melt on the ramp, on there, right?
>
> A Correct.
>
> Q And that's because Conagra contracts that-
>
> [Green Gang's Counsel]: Objection. He already brought up the fact that he has no knowledge of the contract and now he's asking that same question? I would object.
>
> [Phillips' Counsel]: I'll rephrase the question.
>
> Q And the reason you know that it's not anyone at Conagra's job to put Ice Melt on the ramps is because that's . . . someone else's job?
>
> A Correct.

> Q And that someone else is The Green Gang?
>
> [Green Gang's Counsel]: Objection, same objection . . . no knowledge of the contract . . . how could he state that when he gets that question. It's not like they could bring in his opinions, here on the sly.
>
> THE COURT: Objection overruled. Go ahead, can you answer?
>
> A Yes. At that time, I believe the contractor was The Green Gang for the salting and snow removal.

Tr. Vol. II p. 229.

[20] Green Gang contends that the testimony violated Evidence Rule 701, which provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Green Gang argues that the trial court allowed Harrison to opine that Green Gang was responsible for salting the ramp even though Harrison had no knowledge of the terms of the Maintenance Agreement. Green Gang further contends this was "the only testimony that the jury heard that The Green Gang should have salted the ramp on January 12, 2018." Appellant's Br. p. 19.

[21] We afford a trial court broad discretion in ruling on the admissibility of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). We will disturb the

trial court's ruling only where the trial court has abused its discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*. In addition, Indiana Appellate Rule 66(A) provides: "No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." *See also* Ind. Trial Rule 61. "Likewise, reversible error cannot be predicated upon the erroneous admission of evidence that is merely cumulative of other evidence that has already been properly admitted." *Sibbing v. Cave*, 922 N.E.2d 594, 598 (Ind. 2010).

[22] It appears Green Gang is arguing that Harrison did not have a basis for his statement that Green Gang was responsible for salting the ramp. We need not address Green Gang's argument regarding Evidence Rule 701 in detail because any error in the admission of the testimony did not impact Green Gang's substantial rights. The Maintenance Agreement speaks for itself and provides, in part: "**Any salt applications to concrete surfaces will be the responsibility of contractor to salt**." Appellant's App. Vol. II p. 40. The dispute here was whether Green Gang was required to salt the ramp with a less corrosive salt during every snow event as outlined in the Maintenance Agreement. Harrison's opinion as to who had the responsibility to salt the ramp was cumulative of the plain language of the Maintenance Agreement. Under these

circumstances, any error in the admission of the testimony did not impact Green Gang's substantial rights and was harmless.

III. Motion for Judgment on the Evidence

[23] Next, Green Gang argues that the trial court erred by denying its motion for judgment on the evidence. Indiana Trial Rule 50(A) governs a motion for judgment on the evidence and provides: "Where all or some of the issues in a case tried before a jury . . . are not supported by sufficient evidence . . . the court shall withdraw such issues from the jury and enter judgment thereon . . . . A party may move for such judgment on the evidence." We review "a trial court's issuance of judgment on the evidence by applying the same standard that the trial court uses, looking only to the evidence and reasonable inferences most favorable to the non-moving party." *Purcell v. Old Nat. Bank*, 972 N.E.2d 835, 839 (Ind. 2012). "The purpose of a party's motion for judgment on the evidence under Rule 50(A) is to test the sufficiency of the evidence presented by the non-movant." *Id.*

[24] "Judgment on the evidence is proper where all or some of the issues are not supported by sufficient evidence." *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 492 (Ind. Ct. App. 2021), *trans. denied*. "[T]he motion should be granted only where there is no substantial evidence to support an essential issue in the case." *Id.* "If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper." *Id.*

[25] Our Supreme Court has explained "the means by which a trial court may determine whether evidence is 'sufficient' to survive a motion for judgment on the evidence." *Purcell*, 972 N.E.2d at 840. Determining whether evidence is sufficient "'requires both a quantitative and a qualitative analysis.'" *Id.* (quoting *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 184 (Ind. 1983)). "Evidence fails quantitatively only if it is wholly absent; that is, only if there is no evidence to support the conclusion." *Id.* "If some evidence exists, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial enough to support a reasonable inference in favor of the non-moving party." *Id.*

> "Qualitatively, . . . [evidence] fails when it cannot be said, with reason, that the intended inference may logically be drawn therefrom; and this may occur either because of an absence of credibility of a witness or because the intended inference may not be drawn therefrom without undue speculation." The use of such words as "substantial" and "probative" are useful in determining whether evidence is sufficient under the qualitative analysis. Ultimately, the sufficiency analysis comes down to one word: "reasonable."

Id. (internal citations omitted).

[26] After the presentation of evidence, Green Gang made a motion for judgment on the evidence and argued: (1) Green Gang was entitled to judgment on the evidence pursuant to the Restatement (Second) of Torts § 343A because the danger was open and obvious; and (2) under the Maintenance Agreement,

Green Gang had no obligation to salt the ramp where Phillips was injured. The trial court denied Green Gang's motion for judgment on the evidence.

[27] On appeal, Green Gang argues that the Maintenance Agreement prohibited Green Gang from salting the ramp without ConAgra's approval and that Phillips failed to present evidence that Green Gang was responsible for salting the ramp where Phillips fell.[3] This argument requires us to interpret the Maintenance Agreement. "'The goal of contract interpretation is to determine the intent of the parties when they made the agreement.'" *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017) *(quoting Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)), *trans. denied*. "If contract language is unambiguous, this court may not look to extrinsic evidence to expand, vary, or explain the instrument but must determine the parties' intent from the four corners of the instrument." *Id.* "If, however, a contract is ambiguous, the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact." *Id.*

[28] In support of Green Gang's argument that it was not responsible for the ramp, Green Gang relies, in part, upon *Buckingham Mgmt. LLC v. Tri-Esco, Inc.*, 137 N.E.3d 285, 289 (Ind. Ct. App. 2019). There, a snow removal company, Tri-

[3] Green Gang does not address the Restatement (Second) of Torts argument, which we rejected when discussing Green Gang's motion for summary judgment.

Esco, entered into an agreement to remove snow and ice at Bradford, an apartment complex. The agreement provided:

> If it snowed at least two inches, Tri-Esco was to clear the ice and snow at Bradford without an explicit request by Bradford's management to do so. The initial proposal and the "snow removal specifications" set forth in the Agreement provided that Tri-Esco would salt the driveways or parking lots *only* upon Bradford's specific request. Another clause stated that "[s]alting shall be performed without request as warranted by ice/snow conditions for all communities. . . ." Finally, the Agreement provided that the "[s]alting of streets will be authorized by the Maintenance Supervisor or Property Manager."

Id. at 288 (internal citations omitted; brackets and emphasis in original). We observed, regarding the agreement:

> It was undisputed that discretionary salting by Tri-Esco never occurred, and there was no requirement that Tri-Esco was to make periodic inspections of the property. In short, Tri-Esco salted only upon Bradford's express request that it do so. All provisions of the Agreement were initialed by a Tri-Esco representative.

Id. A visitor was injured when she fell due to ice in the parking lot. Tri-Esco had removed snow at Bradford two days before the visitor fell. The visitor filed a complaint against Tri-Esco and Bradford, and the trial court granted summary judgment to Tri-Esco. Bradford then appealed.

[29] On appeal, we concluded that it was not reasonably foreseeable to Tri-Esco that the visitor would be injured two days after Tri-Esco completed its work.

Moreover, Tri-Esco did not have control over the premises after the initial snow removal and "absent any presence, control, or express request from Bradford that Tri-Esco be onsite or perform further snow removal, there is no basis on which to find that Tri-Esco owed a duty" to the visitor. *Id.* at 291. Finally, we concluded that the conflicting provisions of the agreement did not create a genuine issue of material fact "as to whether Tri-Esco should have applied salt and other snow removal services after February 21 without Bradford's request." *Id.*

[30] We find *Buckingham Mgmt*. distinguishable. Here, Phillips presented evidence of the Maintenance Agreement, which provided: "Any salt applications to concrete surfaces will be the responsibility of contractor to salt. Lot salt can be applied to concrete shipping dock, only with client approval. (It is recommended a less corrosive salt be used for concrete areas and sidewalks.)." Appellant's App. Vol. II p. 40. The Maintenance Agreement clearly and unambiguously provided that Green Gang was responsible for applying salt to all concrete surfaces, and the ramp at issue was a concrete surface. The next sentence provided that "[l]ot salt"—a specific type of salt—can only be applied with the approval of ConAgra. The last sentence, however, clarified that a less corrosive salt than lot salt is recommended for concrete areas.

[31] We conclude that the Maintenance Agreement clearly and unambiguously required Green Gang to apply "salt" on all concrete areas. If no consent by ConAgra was given to use "lot" salt, then Green Gang was required to use a "less corrosive" salt for all concrete areas, including the ramp at issue here.

Accordingly, there was evidence that Green Gang was required to apply an appropriate type of salt to the ramp at issue and failed to do so. The jury could have determined it was reasonably foreseeable that a ConAgra employee would be injured on the ice-covered ramp. The evidence presented was substantial enough to support a reasonable inference in favor of Phillips. Accordingly, the trial court did not err by denying Green Gang's motion for judgment on the evidence.

Conclusion

[32] The trial court properly denied Green Gang's motion for summary judgment. Any error in the admission of Harrison's testimony was harmless, and the trial court did not err by denying the motion for judgment on the evidence. Accordingly, we affirm.

[33] Affirmed.

Altice, C.J., and Brown, J., concur.