

MICHIGAN COURT OF APPEALS

Redfern v. R. E. Dailey & Co., 146 Mich. App. 8

379 N.W.2d 451 (1985) · No. 73542 · Decided October 7, 1985

OPINION

WAHLS, J.

146 Mich. App. 8 (1985) 379 N.W.2d 451 REDFERN v. R. E. DAILEY & COMPANY Docket No. 73542. Michigan Court of Appeals. Decided October 7, 1985. Dykhouse & Wise (by Robert A. Marsac and Joseph E. Hurley), for Union Carbide Corporation. Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C. (by Fred W. Gerow and Ernest R. Bazzana), for Midwest Mechanical Contractors, Inc. *11 Before: WAHLS, P.J., and J.H.

GILLIS and S. EVERETT,[*] JJ. WAHLS, P.J. Midwest Mechanical Contractors, Inc., appeals as of right from a judgment in favor of Union Carbide Corporation finding contractual indemnity and awarding attorney fees. This case arose out of an accidental death in connection with warranty repair work at the Wyandotte Waste Water Treatment Facility. Midwest had been subcontracted to install a UNOX waste water treatment system.

The design and manufacture of the UNOX was contracted to Union Carbide, which in turn contracted the design and manufacture of agitator components to Chemineer, Inc. Midwest installed the system and, pursuant to a contract with Union Carbide, was responsible for the warranty repair work. Plaintiff's decedent, Roy Redfern, was an employee of Midwest and a supervisor of both the original installation of and the warranty repair work on the UNOX system.

On April 30, 1976, Redfern was on the job site in connection with warranty repair work. A nonfunctioning agitator was discovered to have a broken component manufactured by Chemineer. Redfern sought to retrieve the component and was seriously injured when the agitator moved. His wounds were contaminated by the waste material in the agitator cell and he died 39 days later.

Plaintiff filed suit on April 28, 1977, seeking damages for the alleged wrongful death of her husband. Plaintiff settled her claim four years later on April 17, 1981. The parties stipulated that Redfern and Chemineer were partly negligent and Chemineer would pay \$311,500. Union Carbide denied liability and negligence, but agreed to contribute *12 \$141,500 toward the settlement.

Claims against the general contractor and the Board of County Road Commissioners were dismissed with prejudice. Of the amount paid by Union Carbide, \$70,000 was contributed by Midwest. The remaining \$71,500 was subject to a later determination in Union Carbide's third-party indemnity action against Midwest. Union Carbide's third-party complaint alleged contractual indemnity.

Prior to trial, Union Carbide moved to amend its complaint to include a theory of recovery based on breach of an implied warranty of workmanlike performance by Midwest. The motion was denied, as was Midwest's motion for summary judgment claiming that the indemnification agreement was void pursuant to MCL 691.991; MSA 26.1146(1). Trial came on before the court, and a judgment of no cause of action was entered in favor of Midwest.

The court found that Redfern alone was negligent, but concluded that his negligence could not be imputed to Midwest. Union Carbide then moved for a new trial or, in the alternative, a judgment notwithstanding the verdict.[1] The trial court granted judgment notwithstanding the verdict, concluding that its prior opinion was in error and Redfern's negligence could be imputed to Midwest through the doctrine of respondeat superior.

I Midwest first argues that the court erred reversibly *13 in denying Midwest's motion for summary judgment. Midwest argues that, because the indemnity agreement between Midwest and Union Carbide was broad enough to provide indemnification of Union Carbide for liability arising out of its sole negligence and, to that extent was void,[2] and because the void section could not be severed from the rest of the agreement, the entire indemnity agreement was void.

The indemnity agreement between Midwest and Union Carbide provides: "Contractor [Midwest] shall indemnify and save harmless Owner [Union Carbide], its employees and agents, against all claims, liabilities, losses, damages and expenses, of every character whatsoever, for bodily injury, sickness and/or disease, including death at any time resulting from such bodily injury, sickness and/or disease sustained by any person (including but not limited to employees of Owner, of Contractor or of a Subcontractor of Contractor) while in, on or about the premises of Owner or the site of the Work, if or where such injury, sickness, disease and/or death arose out of or was in any way connected with the Work or with the performance of or failure to perform the Work, whether or not such injury, sickness, disease and/or death was caused by, resulted from or was in any way connected with the negligence of Owner, its employees, or agents."

(Emphasis added.) *14 In *Tope v Waterford Hills Road Racing Corp*, 81 Mich. App. 591, 594-596; 265 NW2d 761 (1978), lv den 405 Mich. 822 (1979), this Court considered a contract with language similar to that emphasized above and concluded that, construing the indemnity clause strictly against the indemnitee, the language was unequivocal in exempting the indemnitee from liability for damages sustained by the plaintiff because of the indemnitee's own negligence.

However, the Court was not faced with the question of the applicability of the language to liability for damages caused by the indemnitee's sole negligence.[3] The question appears to be one of first impression. The indemnity agreement in this case occupies a middle ground between other indemnity agreements in construction contracts reviewed by this Court.

On the one side are agreements which expressly provide that indemnity does not extend to liability for damages caused by the indemnitee's sole negligence. This Court has obviously approved such agreements and has concluded that they provide indemnity against liability for damages caused by the indemnitee's concurrent negligence. *Harbenki v Upper Peninsula Power Co*, 118 Mich. App.

440; 325 NW2d 785 (1982), lv den 417 Mich. 1078 (1983); *Giguere v Detroit Edison Co*, 114 Mich. App. 452; 319 NW2d 334 (1982), lv den 414 *15 Mich 961 (1982); *Hayes v General Motors Corp*, 106 Mich. App. 188; 308 NW2d 452 (1981).

On the other side are agreements which expressly provide for indemnification against liability for damages caused in whole or in part by the indemnitee's negligence. In such cases, this Court has severed the offending language relating to the indemnitee's sole negligence and upheld the contract as it related to the indemnitee's concurrent negligence. *Robinson v A Z Shmina & Sons Co*, 96 Mich. App.

644; 293 NW2d 661 (1980); *Ford v Clark Equipment Co*, 87 Mich. App. 270; 274 NW2d 33 (1978); *Robertson v Swindell-Dressler Co.*, 82 Mich. App. 382; 267 NW2d 131 (1978), lv den 403 Mich. 812 (1978). The court below relied on the latter cases and ruled that the indemnity agreement between Midwest and Union Carbide was void "insofar as the language relates to one hundred percent negligence on the part of the indemnitee, * * * [b]ut insofar as it relates to the concurrent negligence, that is, the negligence of one percent to ninety-nine percent on the part of the indemnitee, it is valid".

Midwest is correct in noting that the court did not and could not sever offending language as was done in the above cases. Nonetheless, we approve the result reached by the trial court. The issue here is very similar to that presented to this Court in *Klann v Hess Cartage Co*, 50 Mich. App. 703; 214 NW2d 63 (1973).

In that case, the parties had a lease agreement providing that the lessee would not be liable for loss of, or damage to, the leased equipment, "however caused". Plaintiff sued for loss of the equipment, alleging that the loss was due to the defendants' negligence. This Court stated, "Plaintiff contends that the words `however caused' *16 could be construed to exempt defendants from liability for gross negligence or intentional acts of misconduct.

If this clause was so construed, it would, to that extent, violate public policy. But here, plaintiff alleges only negligence. An indemnity provision which would be invalid if applied to indemnify a person from liability for his wilful and wanton wrongdoing may, nevertheless, be validly applied to indemnify him from liability for his negligent acts. *Thomas v Atlantic C L R Co*, [201 F2d 167, 170 (CA 5, 1953)]."

Klann, *supra*, p 709. We find the analysis of Klann applicable to the instant case. Union Carbide has denied that it was solely negligent (or negligent at all, for that matter) and has not sought to interpose the indemnity agreement in the event of a finding of sole negligence. Union Carbide is allowed every presumption in favor of a legal purpose for the indemnity agreement.

Roland v Kenzie, 11 Mich. App. 604, 611; 162 NW2d 97; 62 ALR3d 912 (1968). We will not construe the agreement so as to make it illegal if such construction can be reasonably avoided. *Millen v Potter*, 190 Mich. 262, 273; 157 N.W. 101 (1916); *Roland*, *supra*. See *Parliament Construction Co v Beer Precast Concrete, Ltd*, 114 Mich. App. 607, 615; 319 NW2d 374 (1982).

We are persuaded that the indemnity agreement is not void on its face. Accordingly, Midwest's motion for summary judgment pursuant to GCR 1963, 117.2(1) was properly denied. If Midwest next argues that the trial court erred in imputing Roy Redfern's negligence to Midwest, his employer, and in determining that Union Carbide's liability was not the result of its sole negligence.

We note initially that the trial court made the *17 factual finding that Union Carbide was not negligent with respect to Redfern's death. Midwest has not challenged that finding as clearly erroneous on the basis that the finding is not supported by record evidence. GCR 1963, 517.1, see now MCR 2.613(c). Midwest's only argument that Union Carbide was negligent seems to be based on the faulty logic that, because Union Carbide has a liability for \$71,500 and Midwest was not negligent, then the liability must be due to Union Carbide's negligence.

However, Union Carbide's liability was the result of a settlement (which Midwest does not challenge on appeal) and was not the result of a finding or admission of negligence. Accordingly, Union Carbide's freedom from negligence is a basic premise of our analysis. According to the unequivocal terms of the indemnity agreement, Midwest promised to indemnify Union Carbide against liability for bodily injury, including death at any time resulting from such injury, sustained by any Midwest employee while on the work site, where the injury or death arose out of or was in any way connected with the work.

Union Carbide's liability for Redfern's death fits within these terms, so Midwest must honor its agreement. Because Union Carbide was not negligent, Midwest cannot rely on the public policy stated in MCL 691.991; MSA 26.1146(1) to avoid its obligation under the agreement. Midwest relies on an oft-cited statement in *Nanasi v General Motors Corp*, 56 Mich. App.

652, 660; 224 NW2d 914 (1974), that, although a contract clearly provides for indemnity for the indemnitee's negligence, the indemnitor will not be liable under the contract, as a matter of public policy, unless it is also negligent.

However, it should be clear that this Court's statement in *Nanasi* assumed that the indemnitee was negligent. In the instant case, *18 Union Carbide, the indemnitee, was found not negligent.

Because Midwest's negligence or lack thereof is thus irrelevant under the facts of this case, it is unnecessary to decide whether Redfern's negligence can be imputed to Midwest.[4] Midwest also relies on Parliament Construction Co, supra, which it cites for the proposition that, "where there is a finding of no negligence by the party from whom contractual indemnity is sought, indemnification cannot be had".

Midwest misinterprets what occurred in that case. Because the indemnitee was negligent, but the deceased, the employer, and the two indemnitors were all not negligent, this Court could only conclude that the indemnitee was solely negligent.

The indemnitee's claim was, therefore, at odds with MCL 691.991; MSA 26.1146(1) and could not be allowed to stand. For the reasons stated above, the trial court properly concluded that Union Carbide was entitled to indemnification. III Midwest lastly argues that the trial court erred in awarding attorney fees in favor of Union Carbide.

The attorney fees were awarded in the judgment notwithstanding the verdict. Specifically, *19 the judgment provided for "71,246.98 plus statutory interest accruing from April 17, 1981 as a result of expenses incurred by Union Carbide Corporation in connection with the defense of the principal action herein". Midwest contends that the language of the indemnity agreement is not sufficiently clear and unequivocal to afford Union Carbide the right to recover attorney fees.

We disagree. It will be recalled that the agreement provided that Midwest would indemnify and save harmless Union Carbide "against all claims, liabilities, losses, damages and expenses of every character whatsoever" (emphasis added).

We conclude that Union Carbide is entitled to attorney fees pursuant to the terms of the agreement. Midwest relies on the rule of strict construction of indemnity agreements. Hayes, supra, pp 201-202. But cf. Paquin v Harnischfeger Corp, 113 Mich. App. 43, 50-52; 317 NW2d 279 (1982).

We would be more sympathetic to Midwest's position if we considered attorney fees to be extraordinary relief. However, the general rule concerning the assessment of attorney fees in an indemnity action is that an indemnitee may recover his "necessary defensive fees". Hayes, supra. p 200, quoting 41 Am Jur 2d, Indemnity, § 36, pp 725-727. See also 42 CJS, Indemnity, § 13, pp 585-587.

This Court has recognized the right of a party to recover attorney fees where the party is entitled to common law indemnification. Hartmen v Century Truss Co, 132 Mich. App. 661; 347 NW2d 777 (1984). In Hayes, supra, however, this Court was hesitant to apply the general rule literally to a case involving an express contract of indemnity.

The Court's hesitancy is understandable upon an examination of the indemnity provision before it for review. The indemnity agreement provided that the "Contractor *20 shall indemnify, hold harmless and defend the Owner * * * from and against any and all claims and demands of whatever nature, regardless of the merit thereof". Hayes, *supra*, p 194. It is not at all clear whether this language applies to costs incidental to defending a claim.

In contrast, the indemnity agreement in the instant case is much broader in scope and includes "losses, damages and expenses". Midwest contends that, in any event, the trial court never inquired into the reasonableness of the fees. Union Carbide responds that, because the attorney fees were awarded on the contract, the issue of reasonableness is not relevant.

Union Carbide also asserts that Midwest's argument has not been preserved for appeal. Before addressing the parties' contentions, we will set forth the factual background for the claim of attorney fees. In its third-party complaint, Union Carbide requested "reimbursement for any and all expenditures in connection with the defense herein, including attorney's fees, costs and interest".

At trial, Union Carbide introduced evidence by way of its Exhibit 11 and testimony that its expenses were \$9,336.00. Subsequently, Exhibit 17 was offered as representative of the bills submitted to Union Carbide for legal fees.

The exhibit showed a total of \$60,910.98 and was received subject to determination of Midwest's objections to its relevancy and reasonableness. When the court granted judgment of no cause of action, it did not address the issue of attorney fees and expenses, not did it do so in its opinion granting judgment notwithstanding the verdict. Nevertheless, Union Carbide proposed a judgment including expenses of \$71,246.98.

Midwest objected on the grounds that the above figure was of unknown origin and was exorbitant. At a hearing on June 25, 1982, the *21 parties indicated that the main issue was whether attorney fees were allowed under the indemnity agreement. Midwest's attorney also indicated that the fees were "expensive".

The court indicated that Union Carbide should supply exhibits reflecting the attorney fees and it reserved judgment pending review of the parties' briefs. On August 11, 1983, judgment notwithstanding the verdict was entered as proposed by Union Carbide.

The court did not specify any findings of fact or conclusions of law on the issue of attorney fees. We conclude that Midwest has preserved the issue for appeal. Midwest objected on several occasions to the reasonableness of the attorney fees requested by Union Carbide.

We have not found any waiver of the objection. We further believe that Midwest is entitled to findings of fact and conclusions of law on the "contested matter" of the reasonableness of the

attorney fees. GCR 1963, 517.1, 527.1, and 527.7; see now MCR 2.517(A), 2.611(A)(2), and 2.611(F).

We review awards of attorney fees for abuse of discretion. *Superior Products Co v Merucci Bros, Inc.* 107 Mich. App. 153; 309 NW2d 188 (1981), lv den 415 Mich. 851 (1982). To perform that review, we must have a record from which we can determine how the court exercised its discretion. *Butt v DAIIE*, 129 Mich. App. 211, 222-223; 341 NW2d 474 (1983); *Sturgis Savings & Loan Ass'n v Italian Village, Inc.*, 81 Mich. App.

577, 584; 265 NW2d 755 (1978). The record in this case is inadequate for us to carry out our review function in a legitimate fashion. Accordingly, we remand for further proceedings to prepare a record for review of the reasonableness of attorney fees.

As to Union Carbide's contention that reasonableness is irrelevant where a request for attorney fees is brought pursuant to a contract, we refer to *22 the general rule stated in the encyclopedia that "an indemnitee is entitled to recover, as part of the damages, reasonable attorneys' fees" (emphasis added). 41 Am Jur 2d, Indemnity, § 36, p 725.

In *Hayes*, supra, this Court, upon finding that the indemnitee was entitled to attorney fees under an indemnity agreement, remanded for assessment of reasonable attorney fees. Although we have construed the parties' indemnity agreement to include attorney fees, we will stop short of a construction condoning unreasonable attorney fees. See Code of Professional Responsibility, DR 2-106.

Union Carbide acknowledges that the total dollar amount for the expenses award was derived from trial exhibits 11 and 17. Union Carbide further agrees that the total expenses from Exhibit 11 (\$9,336.00) and the total attorney fees from Exhibit 17 (\$60,910.98) add up to a sum total of \$70,246.98, not the awarded figure of \$71,246.98.

Accordingly, on remand, the total expenses after reasonable attorney fees are determined shall not exceed \$70,246.98. IV Because we affirm Union Carbide's right to indemnification, we need not address the issue raised in the cross-appeal of whether Union Carbide's motion to amend its third-party complaint was properly denied. Affirmed in part and remanded for further proceedings to determine the reasonableness of attorney fees.

We retain jurisdiction. NOTES [*] Circuit judge, sitting on the Court of Appeals by assignment. [1] Union Carbide's motion should have been denominated for new trial only. The relief Union Carbide sought was fully provided for under GCR 1963, 527.1. See now MCR 2.611(A). There was no occasion to seek relief under GCR 1963, 515.2 for judgment notwithstanding the verdict, because there was no verdict.

This case involved a bench trial concluding in a decision and judgment of the court. "Verdict" refers to a decision of a jury. See Black's Law Dictionary (Rev 4th Ed), p 1730. [2] MCL 691.991; MSA 26.1146(1) provides: "A covenant, promised, 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 act's stated purpose is "to invalidate certain requirements for indemnity in the construction industry". The act changed the common law. *Blazic v Ford Motor Co*, 15 Mich. App. 377; 166 NW2d 636 (1968), lv den 382 Mich. 758 (1969).

[3] The relevant contract in *Tope* was not a construction contract so MCL 691.991; MSA 26.1146(1) did not apply. Therefore, any distinction between "own" and "sole" negligence was irrelevant. With regard to other cases where the question arose whether indemnity agreement language applied to an indemnitee's own negligence, this Court said in *Peoples v Detroit*, 99 Mich. App.

285, 296, FN1; 297 NW2d 839 (1980): "When we refer to the indemnitee's 'own negligence', we do not refer to the situation where he is solely or 100 percent liable for the resulting injury. Instead, we refer to those situations involving concurrent negligence, where both the indemnitee and the indemnitor are negligent.

The indemnitee's 'active' negligence can be anywhere from 1 percent to 99 percent." [4] In *Paquin v Harnischfeger Corp*, 113 Mich. App. 43; 317 NW2d 279 (1982), this Court found indemnification was required by the contract although the indemnitee was negligent and no determination had been made whether the indemnitor was also negligent.

The Court did not explain or acknowledge its apparent departure from the *Nanasi* rule. While the Court relied on the negligence of the indemnitor's employee, it never imputed that negligence to the indemnitor but reached the simple conclusion that the indemnitee could not be solely negligent.

Because in the instant case the indemnitee was not negligent, it is unnecessary to our decision for us to attempt a resolution of the differences between *Paquin* and *Nanasi* or *Smith v O'Harrow Construction Co*, 95 Mich. App. 341; 290 NW2d 141 (1980), lv den 409 Mich. 873 (1980). See *Burdo v Ford Motor Co*, 588 F Supp 1319 (ED Mich, 1984), which favored *Paquin* over *Smith*.

