**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 23, 2015**

Diane M. Fremgen
Clerk of Court of Appeals

**NOTICE**

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**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2014AP1882** **Cir. Ct. No. 2013CV6**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**MARY LOU ZENONI, MICHAEL ZENONI AND SOCIETY INSURANCE,**

**PLAINTIFFS,**

**V.**

**DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, ABC INSURANCE COMPANY, LMN INSURANCE COMPANY AND CAPN'S OF FORT, LLC,**

**DEFENDANTS,**

**CINTAS CORPORATION, CINTAS CORPORATION NO. 2 AND BRIAN R. MASON,**

**DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,**

**V.**

**CAPN'S STEAKHOUSE & SALOON, LLC AND VWX INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Cintas Corporation and Cintas Corporation No. 2 (collectively, Cintas) appeal the judgment dismissing their third-party complaint against and awarding costs to third-party defendant Capn's Steakhouse & Saloon.[1] The underlying action was commenced by Mary Lou Zenoni against Cintas and Capn's of Fort, LLC, a separate entity from Capn's Steakhouse and owner of the building where Capn's Steakhouse is located.[2] Zenoni, an employee of Capn's Steakhouse, alleges that she slipped on a floor mat supplied by Cintas to Capn's Steakhouse and was injured. Zenoni alleged that Cintas was negligent and that this negligence was a cause of the injuries Zenoni sustained when she slipped on the floor mat. Cintas then filed a third-party complaint against Capn's Steakhouse, alleging that Capn's Steakhouse has a "contractual obligation to defend, indemnify and/or hold harmless [Cintas] from the claims asserted by [Zenoni]" because such claims "arise out of and/or are associated with the alleged services provided by Cintas" under a service agreement entered into by Cintas and Capn's Steakhouse for the leasing of the floor mat.

[1] Although Brian R. Mason appears as an appellant in the case caption, Cintas's appellate briefs present arguments only on behalf of Cintas Corporation and Cintas Corporation No. 2. Thus, this opinion applies only to Cintas Corporation and Cintas Corporation No. 2, and does not affect the circuit court's decision with respect to Brian R. Mason.

[2] Mary's husband, Michael Zenoni, is also a plaintiff, but his role is not pertinent to any issue on appeal. Therefore, for ease of discussion, we speak as if Mary is the lone plaintiff.

¶2 Capn's Steakhouse moved for, and the circuit court granted, declaratory judgment dismissing the third-party claims against it. Cintas appeals. We conclude that Capn's Steakhouse is not entitled to declaratory judgment because: (1) Capn's Steakhouse waived its worker's compensation immunity under an express indemnity provision within the service agreement between Capn's Steakhouse and Cintas; (2) under the indemnity provision, Capn's Steakhouse is obligated to indemnify Cintas for damages not attributable to any negligence on the part of Cintas, and factual issues remain because liability for damages to which Zenoni may be entitled has not yet been determined; and (3) regardless, Capn's Steakhouse's obligations under the indemnity provision include the duty to defend Cintas against Zenoni's claims. Therefore, we reverse and remand to the circuit court for further proceedings consistent with this opinion.

## BACKGROUND

¶3 The following facts are undisputed. Capn's Steakhouse is a restaurant in Fort Atkinson, Wisconsin. Cintas leases items such as rental uniforms and mats. In 2009, Capn's Steakhouse and Cintas entered into a service agreement, in which Cintas agreed to provide and replace floor mats at Capn's Steakhouse on a weekly basis.

¶4 Mary Lou Zenoni was an employee of Capn's Steakhouse. Zenoni alleges that in January 2011, she was working in the kitchen area when she stepped onto a floor mat supplied by Cintas, slipped, and was injured. Zenoni filed a worker's compensation claim against Capn's Steakhouse.

¶5 Zenoni separately commenced the underlying action here by filing a complaint against Cintas, but not against Capn's Steakhouse, alleging that Cintas's

negligence and misrepresentation with respect to the floor mats caused her injuries.

¶6 Cintas subsequently filed a third-party complaint against Capn's Steakhouse, alleging that Capn's Steakhouse has a "contractual obligation to defend, indemnify and/or hold harmless [Cintas] from" Zenoni's claims against Cintas in the underlying tort action.

¶7 Capn's Steakhouse moved for declaratory judgment dismissing the third-party complaint, arguing that the indemnity provision in the service agreement does not require it to "defend, indemnify, or hold harmless Cintas for [Cintas's] own negligent and intentional acts." After briefing and oral argument, the circuit court granted declaratory judgment in favor of Capn's Steakhouse, dismissing the third-party claims against Capn's Steakhouse.[3]

## DISCUSSION

¶8 We begin with the applicable standard of review. We then address the three issues that require resolution in order to decide whether Capn's Steakhouse is entitled to declaratory judgment dismissing Cintas's third-party claims against it. First, we examine the service agreement's indemnity provision in light of relevant Wisconsin case law on the right to indemnification in the context of worker's compensation; and we conclude that Capn's Steakhouse waived its immunity from suit as to Cintas under Wisconsin's worker's compensation law by agreeing to indemnify Cintas for all claims and damages

[3] Although initially filed as a motion for summary judgment, Capn's Steakhouse agreed with the circuit court that it was actually seeking declaratory relief. For the purpose of this appeal, it matters not whether it was summary or declaratory judgment.

arising from or associated with the service agreement. Second, we address and reject Capn's Steakhouse's argument that it is nonetheless entitled to declaratory judgment as to indemnification. Third, we address and reject Capn's Steakhouse's argument that it has no contractual duty to defend Cintas because it has no duty to indemnify Cintas. Accordingly, and in sum, we conclude that Capn's Steakhouse is not entitled to declaratory judgment dismissing Cintas's third-party claims against it, and we reverse for further proceedings to determine: (1) Capn's Steakhouse's and Cintas's liability, if any, for damages to Zenoni; and (2) Capn's Steakhouse's resulting indemnification obligation, if any, to Cintas for damages not attributable to Cintas's alleged negligence.

### *A. Standard of Review*

¶9 "We review a circuit court's decision on declaratory judgment for an exercise of discretion. However, when the exercise of such discretion turns upon a question of law, we review the question of law independently of the circuit court's determination." ***Veto v. American Family Mut. Ins. Co.***, 2012 WI App 56, ¶6, 341 Wis. 2d 390, 815 N.W.2d 713 (citation omitted). This case requires us to interpret Wisconsin case law on indemnification agreements and to consider the language of an indemnity provision. These are questions of law that we review de novo. *See* ***State v. Starks***, 2013 WI 69, ¶28, 349 Wis. 2d 274, 833 N.W.2d 146 (the proper interpretation of case law raises a question of law that the appellate court reviews de novo); ***Heritage Mut. Ins. Co. v. Truck Ins. Exchange***, 184 Wis. 2d 247, 252, 516 N.W.2d 8 (Ct. App. 1994) ("The construction of a written contract presents a question of law which this court reviews *de novo*.").

### *B. Express Agreement for Indemnification*

¶10 Capn's Steakhouse argues that Zenoni's worker's compensation remedy precludes any duty by Capn's Steakhouse to indemnify Cintas under the indemnity provision within the service agreement. As we explain, the law is to the contrary.

¶11 Generally, "the sole liability of an employer because of the injury of an employee in the course of his employment, either to the employee or to anyone else, is under workmen's compensation law." ***Grede Foundries, Inc. v. Price Erecting Co.***, 38 Wis. 2d 502, 505, 157 N.W.2d 559 (1968); *see also* WIS. STAT. § 102.03(2) (2013-14) (Wisconsin's worker's compensation law).[4] Our supreme "court has uniformly construed sec. 102.03(2), Stats., as denying any remedy of a third party tortfeasor against an employer, because the statute makes the payment of worker's compensation the employer's exclusive liability for work-related injuries." ***Mulder v. Acme-Cleveland Corp.***, 95 Wis. 2d 173, 177, 290 N.W.2d 276 (1980). "Thus, where a negligent third party is held liable to an injured worker, it cannot require contribution from an employer even though the employer was substantially more at fault than the third party." ***Id.*** "This result is premised on the reasoning that, because an employee cannot bring a tort action against his employer, there is no common liability; and the employer cannot be impleaded for contribution as a joint tortfeasor." ***Id.***

¶12 "It has been recognized, however, that the rule of no liability of the employer over and above that imposed by the Workmen's Compensation Act does

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

not apply" when the employer has entered into "an express agreement for indemnification." ***Larsen v. J. I. Case Co.***, 37 Wis. 2d 516, 520, 155 N.W.2d 666 (1968); ***Young v. Anaconda Am. Brass Co.***, 43 Wis. 2d 36, 54, 168 N.W.2d 112 (1969) ("the employer can forego his statutory limitation of liability to third persons by an express contract"); *see also* ***Schaub v. West Bend Mut.,*** 195 Wis. 2d 181, 184, 187, 536 N.W.2d 123 (Ct. App. 1995) (referring to the giving up of the limitation of liability under Wisconsin's worker's compensation law as a "waiver of worker's compensation immunity" by the employer). An express agreement for indemnification need not use phrases such as "to be 'liable to one's own employees' or to 'waive worker's compensation' in order to give up immunity." ***Schaub,*** 195 Wis. 2d at 183. The question, then, is whether there is "an express agreement for indemnification" here. *See* ***Larsen***, 37 Wis. 2d at 520.[5]

¶13 The indemnity provision in this case reads:

> [Capn's Steakhouse] hereby agrees to defend, *indemnify* and hold harmless [Cintas] from *any claims and damages* arising out of or *associated with this agreement*, including any claims arising from defective products.

(Emphasis added.) In ***Schaub***, 195 Wis. 2d at 184, 186, this court held that an indemnity provision, similar to the one in this case, was sufficient for an employer to waive the immunity from suit that the employer would otherwise have under the worker's compensation law.[6] Following ***Schaub*****,** we conclude that the language

[5] As far as we can tell, the parties did not specifically bring ***Larsen v. J. I. Case Co.***, 37 Wis. 2d 516, 155 N.W.2d 666 (1968), to the circuit court's attention.

[6] In ***Schaub***, the indemnification provision read:

(continued)

of the indemnity agreement here is sufficient to waive Capn's Steakhouse's immunity from suit, and that, therefore, Capn's Steakhouse can be obligated to indemnify Cintas as to Zenoni's claims.

### C. *Declaratory Judgment Dismissing Indemnification Claim*

¶14 Capn's Steakhouse argues that, nonetheless, it is entitled to declaratory judgment dismissing Cintas's claim for indemnification because in the underlying tort action, Zenoni alleges negligence by Cintas alone, and Capn's Steakhouse does not have a contractual duty to indemnify Cintas for Cintas's own alleged negligence. Cintas counters that regardless of Zenoni's allegations, declaratory judgment on the issue of indemnification is premature, because Cintas has not had "an opportunity to prove that Capn's (or another party) caused [Zenoni's] injuries."[7]

¶15 As Cintas correctly points out in its brief-in-chief, our supreme court's decision in ***Larsen***, 37 Wis. 2d 516 is instructive here. In ***Larsen***, a general contractor and a subcontractor agreed to a contract pertaining to the

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> [Employer] agrees to save harmless and defend [third party] from any and all claims, demands, judgments and costs of suit or defense, including attorneys' fees, and indemnify and reimburse [third party] for any expense, damage, or liability incurred by [third party] … for personal injury … arising or alleged to have arisen, whether directly or indirectly, on account of or in connection with any work done by [employer] under this Subcontract….

195 Wis. 2d at 184 (emphasis omitted).

[7] Cintas notes that while Zenoni alleges negligence by Cintas alone, Cintas in its third-party complaint "expressly incorporates all of the affirmative defenses Cintas asserted in response to [Zenoni's] claims ... including its defense that [Zenoni's] injuries were caused by the negligence of other parties ...."

construction of a building. ***Id.*** at 518. The contract contained the following indemnity provision:

> "The sub-contractor agrees to *indemnify and hold the contractor harmless against all claims* against the sub-contractor or the contractor arising out of injuries to any person by reason of the negligence or violation of applicable safety regulations by the sub-contractor."

***Id.*** (emphasis added). An employee of the sub-contractor sustained injuries when he fell in an open pit in the building under construction; the employee recovered from the sub-contractor under worker's compensation. ***Id.*** The employee then filed negligence claims against the general contractor and the owner of the building. ***Id.*** The general contractor impleaded the sub-contractor and sought indemnification pursuant to the indemnity provision in their contract, and the sub-contractor moved for summary judgment against indemnification. ***Id.*** at 519. Our supreme court held that "summary judgment must be denied because issues of fact remain as to the negligence of both [the general contractor] and [the sub-contractor]." ***Id.*** at 522.

¶16 Shortly after ***Larsen***, our supreme court addressed another similar case, again involving an employer, an injured employee, and a third-party tortfeasor, where there was an indemnity or save harmless provision in a contract between the employer and the third-party tortfeasor. *See* ***Young***, 43 Wis. 2d at 40-41, 53. The injured employee filed a negligence claim against the third-party, who then filed a cross-complaint against the employer. ***Id.*** at 39-40. A jury found that the employer was twenty percent "causally negligent," the injured employee was ten percent "causally negligent," and the third party was seventy percent "causally negligent." ***Id.*** at 42.

¶17 Referring to the employer as the indemnitor and the third party as the indemnitee under the indemnity provision, the court held that where "the injury to the employee was caused by the *combined negligence* of the indemnitee and the indemnitor ... the indemnitor [employer] *is not liable* for such portion of the total liability as is attributable to the acts of the indemnitee [third-party tortfeasor] unless the indemnity contract by express provision and strict construction so provides; and that the indemnitor [employer] *is liable* for such portion of the total liability as is attributable to the indemnitor's [employer's] acts if provided for without a strict construction of the agreement." ***Id.*** at 55 (emphasis added).

¶18 We understand ***Larsen*** and ***Young*** to mean the following. Where an employer has waived the immunity from suit it has under the worker's compensation law by expressly agreeing to indemnify a third-party tortfeasor, the issue of liability must first be determined before there can be "an application of the law of indemnification contracts." ***Larsen***, 37 Wis. 2d at 523. Once liability has been determined, the circuit court examines the indemnity agreement to determine how much, if any, of the total liability the employer-indemnitor is responsible for. *See* ***Young***, 43 Wis. 2d at 55. The indemnity agreement is *strictly* construed when determining whether the employer-indemnitor is liable for portions of the total liability that are attributable to the third-party-indemnitee, but it is *liberally*

construed when determining whether the employer-indemnitor is liable for portions of the total liability that are attributable to itself. *See* ***id.***[8]

¶19 Here, Capn's Steakhouse's argument—that it is entitled to declaratory judgment on the issue of indemnification because the indemnity agreement does not require it to indemnify Cintas for Cintas's own alleged negligence—is premature because it assumes that a jury would find that negligence by Cintas, if any, was the sole cause of Zenoni's injuries. However, there has not yet been a determination of liability. Whether Capn's Steakhouse or Cintas was negligent, and whether such negligence, if any, was a cause of Zenoni's injuries are questions of fact for the jury to decide.

¶20 Even if the indemnity agreement—strictly construed—does not require Capn's Steakhouse to indemnify Cintas for damages attributable to *Cintas's* alleged negligence,[9] the indemnity agreement—liberally construed—requires Capn's Steakhouse to indemnify Cintas for damages attributable to *Capn's Steakhouse's* alleged negligence. As stated above, the indemnity agreement broadly provides:

> [Capn's Steakhouse] hereby agrees to defend, *indemnify* and hold harmless [Cintas] from *any claims and damages*

[8] *See also* ***Heritage Mut. Ins. Co. v. Truck Ins. Exchange***, 184 Wis. 2d 247, 253, 516 N.W.2d 8 (Ct. App. 1994) ("'Such agreements are liberally construed when they deal with the negligence of the indemnitor, but are strictly construed when the indemnitee seeks to be indemnified for his own negligence.'" (quoted source omitted)); ***Algrem v. Nowlan***, 37 Wis. 2d 70, 78, 154 N.W.2d 217 (1967) ("Where the indemnitor merely contracts to indemnify another against *his own acts* there is no reason in law, logic or policy to apply strict construction. Rather, public policy would seem to call for a rule of broad construction in such instances.").

[9] Cintas does not dispute that, strictly construed, the indemnity agreement does not provide that Capn's Steakhouse is obligated to indemnify Cintas for damages attributable to Cintas's own alleged negligence.

> arising out of or *associated with this agreement*, including any claims arising from defective products.

(Emphasis added.) Liberally construed, the phrase "any claims ... associated with" the service agreement includes Zenoni's claims that involve Capn's Steakhouse's use of the floor mats provided under the service agreement. We now address and reject the two arguments that Capn's Steakhouse makes to the contrary.

¶21 First, Capn's Steakhouse contends that its indemnity agreement does not require Capn's Steakhouse to indemnify Cintas for damages attributable to Capn's Steakhouse's alleged negligence because, unlike the provision in ***Larsen***, the indemnity provision in its service agreement does not contain any agreement by Capn's Steakhouse to "indemnify Cintas against all claims arising out of injuries to any person by reason of Capn's Steakhouse negligence." However, ***Larsen*** never required, and Capn's Steakhouse fails to point to any legal authority requiring, that such specific language be included in an indemnification agreement in order for an indemnitor to agree to indemnify an indemnitee for the indemnitor's negligence.

¶22 Capn's Steakhouse, in effect, asks us to strictly construe the indemnity provision with respect to Capn's Steakhouse's negligence. To the contrary, under the law cited above, the indemnity agreement is to be liberally construed. As we concluded above, the indemnity provision, liberally construed, provides that Capn's Steakhouse agrees to indemnify Cintas for damages attributable to Capn's Steakhouse's negligence.

¶23 Second, Capn's Steakhouse argues that none of Zenoni's claims "arise out of or are associated with" the service agreement, but that Zenoni's claims arise out of "representations made by Cintas prior to the parties entering

into the" service agreement. However, this timing element is irrelevant. Even if the alleged representations were made earlier, they would necessarily be "associated with" the agreement that resulted, under a plain language interpretation of the indemnification provision.

¶24 In sum, we conclude that the indemnity agreement requires Capn's Steakhouse to indemnify Cintas for damages attributable to Capn's Steakhouse's alleged negligence. However, because the liability for Zenoni's alleged injuries has not been determined, we conclude that Capn's Steakhouse is not entitled to declaratory judgment dismissing the claims against it at this point in the litigation. Therefore, we remand for further proceedings to determine liability for Zenoni's injuries. After that determination is made, consistent with "application of the law of indemnification contracts," *see* ***Larsen***, 37 Wis. 2d at 523, we instruct the circuit court to enter a judgment requiring Capn's Steakhouse to indemnify Cintas for the percentage of the settlement or damages award attributable to Capn's Steakhouse's causal negligence.

### *D. Capn's Steakhouse's Duty to Defend Cintas*

¶25 Capn's Steakhouse argues that because "the Services Agreement does not require Capn's Steakhouse to indemnify Cintas, Capn's Steakhouse has no duty to defend Cintas." This argument is premised on the assumption that Capn's Steakhouse has no contractual duty to indemnify Cintas. However, we have rejected that assumption and concluded that Capn's Steakhouse has a duty to indemnify Cintas for damages attributable to Capn's Steakhouse's negligence. Accordingly, Capn's Steakhouse's argument fails because it is based on a faulty premise.

¶26 A plain language interpretation of the indemnity agreement itself also defeats Capn's Steakhouse's argument. "'The language of a contract must be understood to mean what it clearly expresses…. [W]hen parties to a contract adopt a provision which does not contravene a principle of public policy, and which contains no element of ambiguity, the court has no right, by a process of interpretation, to relieve one of them from any disadvantageous terms which he has actually made.'" ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979) (quoted source omitted).

¶27 Here, the indemnity agreement unambiguously requires Capn's Steakhouse "to defend" Cintas against "any claims ... arising out of or associated with" the service agreement. Capn's Steakhouse conceded—in its motion to compel arbitration under a different provision of the service agreement—that Zenoni's claims arise from or are associated with the service agreement. Capn's Steakhouse identifies no legitimate reason to relieve it from the disadvantageous terms to which it has agreed. Therefore, we reject Capn's Steakhouse's argument that it has no duty to defend Cintas against Zenoni's claims.

## CONCLUSION

¶28 For the reasons discussed above, we conclude that Cintas is entitled to indemnification by Capn's Steakhouse for damages attributable to Capn's Steakhouse's alleged negligence, and that Capn's Steakhouse has a duty to defend Cintas against Zenoni's claims. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

*By the Court.*—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.