COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2734

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

DIANE D. BELL, AND TOM BELL,

PLAINTIFFS,

V.

MIDAS-LIN CO., LTD. AND MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

J.C. PENNEY COMPANY, INC., ABC, A PERSON, FIRM OR CORPORATION, GHI INSURANCE CORPORATION, JKL INSURANCE CORPORATION, PQR INSURANCE CORPORATION, STU, A PERSON, FIRM OR CORPORATION, VWX INSURANCE CORPORATION, THE CONTINENTAL INSURANCE COMPANY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY AND NORTHWEST AIRLINES,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Midas-Lin Co., Ltd., and its insurer, Michigan Millers Mutual Insurance Company (collectively, "Midas-Lin"), appeal from the circuit court order dismissing, with prejudice, the action filed by Diane D. Bell and her husband, Tom Bell. Midas-Lin argues that the court "erred in ordering 'all rights, claims or causes of action' between the parties to [the] action be dismissed 'on the merits and with prejudice' because the issues of indemnification and … contribution were not pleaded or tried or put at issue or litigated by any of the parties to [the] action before the court's dismissal order." We affirm.

¶2 Diane D. Bell fractured her ankle when a folding patio barstool, on display at a J.C. Penney's store, collapsed as she sat on it. The Bells sued several parties including J.C. Penney and its liability insurer, Liberty Mutual, and Midas-Lin Co., Ltd., the distributor of the stool.

¶3 J.C. Penney and Liberty Mutual asked the circuit court to compel Midas-Lin to assume their defense and potential liability, based on an indemnification agreement contained in the J.C. Penney/Midas-Lin Company purchase agreement for the stool. In relevant part, the agreement stated:

> Indemnification. (a) [Midas-Lin Company] will indemnify and hold harmless [J.C. Penney Purchasing Corporation, J.C. Penney Company, Inc.], the agents and employees of either from and against any and all loss, liability or damage, including counsel fees and costs of settlement which shall arise out of or result from any of the following: (1) any injury to person or property arising or resulting from any actual or alleged defect in the Merchandise or any act or omission of [Midas-Lin Company] or [its] agents,

> employees or subcontractors with respect to the Merchandise.

Midas-Lin opposed the request, in part, advising the court that it would accept the defense of J.C. Penney, but not of Liberty Mutual, because the agreement expressly provided for its indemnification of J.C. Penney, but did not mention Liberty Mutual.

¶4 The Bells settled their claims. According to the terms of the settlement release, the Bells resolved their claims against "Midas-Lin West, Inc., Michigan Millers Mutual Insurance Company, J.C. Penney Co., Inc., and Liberty Mutual Insurance Company, their successors and assigns, and all other persons, firms, and corporations" for $150,000. The release also provided:

> It is further understood and agreed that this release and the payment made pursuant thereto is not to be construed as a waiver by or as an estoppel of any parties hereby released to prosecute a claim or cause of action against any person, firm or corporation, including any of the parties released, for damages sustained as a result of the accident …, or to deny liability to and defend against any claim or action brought by any person, firm or corporation as a result of the accident ….

According to Midas-Lin:

> The reservation of rights language was specifically included in the Release to allow Michigan Millers Mutual Insurance Company to seek contribution or indemnification from Liberty Mutual Insurance Company because it had appeared from the evidence obtained during discovery that it was Penney's employees who were negligent and therefore responsible for the accident and Liberty Mutual was, of course, Penney's liability insurance carrier.

Thus, Midas-Lin, maintaining that the collapse of the stool was J.C. Penney's fault, sought indemnification or contribution from Liberty Mutual, J.C. Penney's liability insurer.

¶5 Following the settlement with the Bells, Midas-Lin, intending to file a separate action for indemnification or contribution from Liberty Mutual, asked the circuit court to dismiss the claims between the defendants "without prejudice."[1] Liberty Mutual, however, refusing to sign a stipulation for dismissal without prejudice, brought a motion "to dismiss this action and all claims between any of the parties to this action, on the merits, with prejudice." Granting Liberty Mutual's motion, the circuit court concluded that "[a]s a matter of law, the insurer of the retailer has no liability." The court explained that Midas-Lin, by virtue of the manner in which it had litigated the case, had "accepted the responsibility of indemnity [for Liberty Mutual as well as J.C. Penney] even though it may not have actually been required to do so by the indemnity agreement."

¶6 Midas-Lin argues that the court's explanation reveals its misinterpretation of the indemnity agreement. Midas-Lin maintains:

> It appears to be without dispute that the issues of contribution and indemnity were not litigated in this case before the court dismissed it. It appears to be without dispute that at some point in the legal proceedings Michigan Millers and Midas-Lin are entitled to have those issues resolved and fully litigated.

Midas-Lin is incorrect.

¶7 As Liberty Mutual responds, the issue of whether it had any possible liability was extensively litigated. Liberty Mutual presents numerous references to the trial court pleadings, briefs, and oral arguments establishing, beyond any question, that the parties and trial court were confronting the issues of Liberty Mutual's potential liability for contribution or indemnification. And further,

[1] According to the briefs on appeal, following the dismissal in this case, Michigan Millers filed a separate action against Liberty Mutual, which was dismissed on summary judgment, on the basis of claim preclusion.

contrary to Midas-Lin's assertion in its brief to this court that any such proceedings involved only Midas-Lin Company, and not Michigan Millers, the record confirms that virtually all of these pleadings, briefs, and arguments included Michigan Millers. Other than claiming, incorrectly, that "[n]owhere in [Liberty Mutual's] brief [to this court] does it point out where the issues of contribution or indemnification were litigated," Midas-Lin offers nothing to counter Liberty Mutual's contention. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶8 As Liberty Mutual points out, Midas-Lin, on appeal, has not challenged any of the circuit court's substantive findings or conclusions. Rather, it has only argued, incorrectly, that the trial court failed to address the questions of contribution and indemnification. Because the record refutes Midas-Lin's premise, our analysis could end here. We go on, however, to briefly explain why the trial court's decision, on the merits, was correct.

¶9 In its brief to this court, Midas-Lin continues to concede that, by virtue of the indemnification agreement, J.C. Penney has no liability. Midas-Lin, however, sets forth the basis for its claim that Liberty Mutual may be liable for contribution or indemnification. Midas-Lin writes:

> The basis of the proposed indemnification and/or contribution action was that discovery proceedings before the settlement showed that, in the opinion of an engineering expert, Professor John Johnson of the University of Wisconsin Engineering Department, it was the negligence of Penney's employees in setting up the display that caused the plaintiff's injuries and damages and not any defect in the product or act or omission of Midas-Lin's agents or employees with respect to the product.

Midas-Lin never explains, however, how this theory that apparently aims at *J.C. Penney and its employees*, somehow reaches some separate liability for Liberty Mutual. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

¶10 Wisconsin's statute governing direct actions against insurers "predicates the liability to which an insurer is exposed on the liability of the insured; the right of action against the insurer exists only to the same extent it exists against the insured for his negligence." *See* ***Biggart v. Barstad***, 182 Wis. 2d 421, 428, 513 N.W.2d 681 (Ct. App. 1994); *see also* WIS. STAT. § 632.24 (1997-98).[2] In the trial court, Midas-Lin expressly and repeatedly acknowledged that, by virtue of the release and the indemnification agreement, J.C. Penney had no liability. It is undisputed that Liberty Mutual's only connection to this case is as the liability insurer for J.C. Penney. If J.C. Penney had no liability, Liberty Mutual could have no liability for indemnification or contribution on J.C. Penney's behalf. *See* ***Biggart***, 182 Wis. 2d at 428.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] All references to the Wisconsin Statutes are to the 1997-98 version.