

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 99-0105

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PHILIP J. LEACH,

PLAINTIFF,

WEST BEND MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

v.

JAMES LUTERBACH CONSTRUCTION COMPANY, INC.,

**DEFENDANT-THIRD-
PARTY PLAINTIFF,**

**NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH AND DAWES RIGGING AND CRANE RENTAL,
INC.,**

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

v.

**PARKLAND ERECTING, INC., AND WEST BEND MUTUAL
INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANTS-
RESPONDENTS,**

**CARDINAL FABRICATING CORPORATION, ABC INSURANCE
COMPANY AND WISCONSIN ELECTRIC POWER COMPANY,**

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Dawes Rigging and Crane Rental, Inc. and National Union Fire Insurance Company of Pittsburgh (hereinafter Dawes) appeal from a judgment dismissing their third-party complaint for indemnification against Parkland Erecting, Inc. and West Bend Mutual Insurance Company (hereinafter Parkland). Because we conclude that the indemnification provision invoked by Dawes is not specific and express, we affirm the circuit court's dismissal of Dawes's indemnification claim against Parkland.

¶2 Philip J. Leach, an employee of Parkland, an iron work contractor, was injured while working on a construction site. Dawes had entered into a contract with Parkland to provide a crane and operator at the site. Leach was electrocuted when a joist being lifted by the crane came into contact with a live wire. Leach sued James Luterbach Construction Company, Inc., the general contractor, and Dawes. Dawes filed a third-party complaint against Parkland alleging that the crane rental agreement between Dawes and Parkland required

Parkland to indemnify Dawes for damages awarded against Dawes. Parkland sought dismissal of the indemnification claim on the grounds that the rental agreement's indemnification provision was not specific enough to require indemnification. The circuit court granted Parkland's motion to dismiss, and Dawes appeals.

¶3 A motion to dismiss tests whether the complaint is legally sufficient to state a claim upon which relief may be granted. See *Evans v. Cameron*, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). This inquiry presents a question of law which we review without deference to the circuit court's decision. See *Irby v. Macht*, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11, *cert. denied*, 513 U.S. 1022 (1994). Construction of a written contract also presents a question of law which we decide independently of the circuit court. See *Heritage Mut. Ins. Co. v. Truck Ins. Exch.*, 184 Wis.2d 247, 252, 516 N.W.2d 8, 9 (Ct. App. 1994).

¶4 The indemnification provision in the Dawes-Parkland crane rental contract states: "The party renting or leasing this equipment agrees to save and hold harmless Dawes Rigging & Crane Rental, Inc. against any and all claims arising out of its use of this equipment while on the job site" The parties are in conflict over the meaning of "its" in this provision.

¶5 Dawes reads the provision as follows: "The party renting or leasing this equipment agrees to save and hold harmless Dawes Rigging & Crane Rental, Inc. against any and all claims arising out of its [Dawes's] use of this equipment while on the job site" In arguing that "its" refers to Dawes, Dawes notes that one of its employees was operating the crane at the time Leach was injured. Dawes argues that under this interpretation of "its," Dawes's own negligence is implicated and the indemnification provision applies. Dawes also argues that it

has alleged that Parkland was negligent in the incident in which Leach was injured and that this is sufficient to avoid dismissal of its indemnification claim.

¶6 Parkland reads the provision as follows: “The party renting or leasing this equipment agrees to save and hold harmless Dawes Rigging & Crane Rental, Inc. against any and all claims arising out of its [Parkland’s] use of this equipment while on the job site” Because “its” refers to Parkland, Parkland does not owe indemnification because Dawes, not Parkland, operated the crane.

¶7 “Words or phrases within a contract are only ambiguous ‘when they are reasonably or fairly susceptible to more than one construction.’” *Id.* at 252, 516 N.W.2d at 10 (quoted source omitted). We conclude that the use of “its” in the indemnification provision renders the provision ambiguous.

¶8 An indemnification agreement will not be construed to indemnify an indemnitee for its own negligence unless there is a specific and express statement in the agreement to that effect. *See Dykstra v. McKee & Co.*, 100 Wis.2d 120, 124-25, 301 N.W.2d 201, 204 (1981). The agreement must clearly state that the indemnitee is covered for losses caused by its own negligent acts. *See id.* at 125, 301 N.W.2d at 204. Additionally, an agreement purporting to require indemnification of an employer who is otherwise subject to worker’s compensation must be sufficiently specific to avoid thwarting the goal of worker’s compensation.¹ *See Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 177-78, 290 N.W.2d 276, 278 (1980).

¹ It is undisputed that Parkland is subject to worker’s compensation relating to Leach’s injuries.

¶9 The ambiguity arising from the use of “its” in the indemnification provision precludes any conclusion that the indemnification provision specifically and expressly requires Parkland to indemnify Dawes for Dawes’s own negligence or requires Parkland, an employer subject to worker’s compensation in this incident, to indemnify Dawes for Parkland’s negligence. Because the indemnification provision is lacking, we affirm the dismissal of the third-party complaint for indemnification.²

By the Court.—Judgment affirmed.

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

² We note that the circuit court relied upon the law of exculpatory contracts in reaching its decision to dismiss Dawes’s indemnification claim. Because our review is de novo, we need not rely upon this analysis in order to affirm the circuit court.

