COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 2, 1996

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(1), STATS.

NOTICE

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No. 95-3319

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

STEVE BERINGTON and JANET BERINGTON,

Plaintiffs,

v.

WAUSAU UNDERWRITERS INSURANCE CO. and JOHNSON-WILSON BUILDERS CO., INC.,

Defendants-Third-Party Plaintiffs-Respondents,

WAL-MART STORES, INC.,

Defendant,

v.

JERRY MATHISON CONSTRUCTION, INC. and GREAT AMERICAN INSURANCE COMPANY,

Third-Party Defendants-Appellants.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Jerry Mathison Construction, Inc., and Great American Insurance Company (Mathison) appeal a summary judgment granting Wausau Underwriters Insurance Co. and Johnson-Wilson Builders Co., Inc. (JWB), reimbursement and indemnification for amounts it paid as a result of an injury Steve Berington, an employee of Mathison, incurred while working at a construction site.[1] Mathison was a subcontractor on the job for JWB, the general contractor. Berington collected $126,704 in worker's compensation from JWB because JWB was the "contractor over" Berington's employer. *See* § 102.06, STATS.[2] Berington and his wife, Janet, also collected $50,000 in a tort settlement with JWB. JWB impleaded Mathison as a third-party defendant, alleging that § 102.06 required Mathison to reimburse it for the worker's compensation compromise JWB paid to Berington and also alleging that the subcontract agreement obligated Mathison to indemnify it for the amount JWB paid to settle the Beringtons' tort claim.

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[1] The Beringtons and Wal-Mart Stores, Inc., were dismissed from the case by stipulation.

[2] Section 102.06, STATS., provides in part:

> An employer shall be liable for compensation to an employe of a contractor or subcontractor under the employer who is not subject to this chapter, or who has not complied with the conditions of s. 102.28 (2) in any case where such employer would have been liable for compensation if such employe had been working directly for the employer, including also work in the erection, alteration, repair or demolition of improvements or of fixtures upon premises of such employer which are used or to be used in the operations of such employer. The contractor or subcontractor, if subject to this chapter, shall also be liable for such compensation, but the employe shall not recover compensation for the same injury from more than one party. The employer who becomes liable for and pays such compensation may recover the same from such contractor, subcontractor or other employer for whom the employe was working at the time of the injury if such contractor, subcontractor or other employer was an employer as defined in s. 102.04.

Mathison argues that it is entitled to a hearing on the reasonableness of the amount of the worker's compensation compromise before it must reimburse JWB. Mathison also argues that the indemnification agreement does not require it to indemnify JWB for the portion of the tort claim attributable to JWB's causal negligence. We conclude that the doctrine of claim preclusion bars Mathison's right to a hearing on the reasonableness of the worker's compensation compromise. We conclude that Wisconsin law controls the interpretation of the indemnity contract, and under Wisconsin law the contract excludes indemnification for the portion of the tort claim caused by JWB's negligence. We therefore affirm that part of the judgment reimbursing JWB for the worker's compensation settlement, but reverse that part of the judgment relating to tort indemnification and remand for a determination of the percentage of JWB's causal negligence and a reduction of JWB's claim by that percentage.

Berington, a Mathison employee, was injured while working on a construction site on which JWB was the general contractor and Mathison was a subcontractor. Mathison had worker's compensation coverage through the Minnesota Assigned Risk Plan, but the insurer declined coverage for Berington's claim. Mathison did not have Wisconsin worker's compensation insurance. Pursuant to the "contractor over" provisions of § 102.06, STATS., Berington submitted his claim to JWB.

After reaching a compromise, JWB paid worker's compensation benefits to Berington in a total amount of $126,704. DILHR approved the compromise.

After compromising his worker's compensation claim, the Beringtons commenced a § 102.29, STATS., third-party tort action against JWB, Wausau and Wal-Mart.[3] The Beringtons alleged that JWB was negligent in

[3] Section 102.29, STATS., provides in part:

> The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of the employe, the employe's personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party; nor shall the making of a

various respects and violated the safe place statute. JWB paid $50,000 to settle the claim. The settlement preserved all claims between JWB and Mathison.

JWB impleaded Mathison as a third-party defendant, alleging two claims for recovery. First, JWB alleged that the subcontract agreement obligated Mathison to indemnify it for the $50,000 tort settlement. Second, JWB alleged that § 102.06, STATS., required Mathison to reimburse it for the $126,704 of worker's compensation benefits and settlement paid to Berington.

After stipulating to certain facts, JWB and Mathison both moved for summary judgment. JWB requested summary judgment on both of its claims. Mathison moved for partial summary judgment, seeking dismissal of the tort indemnification claim but arguing that whether the amount of the worker's compensation compromise was reasonable is a material disputed fact that precludes summary judgment. The trial court granted JWB's motion on both claims, and denied Mathison's motion for partial summary judgment. Other facts are set forth in the discussion of the issues raised on appeal.

THE WORKER'S COMPENSATION REIMBURSEMENT CLAIM

Mathison's worker's compensation insurer would not pay Berington's claim. Berington sued JWB under § 102.06, STATS., and reached a

(..continued)

> claim by any such person against a 3rd party for damages by reason of an injury to which ss. 102.03 to 102.64 are applicable, or the adjustment of any such claim, affect the right of the injured employe or the employe's dependents to recover compensation. The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. If the department pays or is obligated to pay a claim under s. 102.81 (1), the department shall also have the right to maintain an action in tort against any other party for the employe's injury or death. However, each shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel.

compromise in which JWB paid Berington $126,704. DILHR approved the compromise. JWB then brought this claim against Mathison for reimbursement.

Mathison was notified of Berington's suit against JWB long before the compromise was reached, but chose not to participate in the negotiations or contest DILHR's approval of the compromise. Mathison also failed to petition DILHR to review the compromise within the statute of limitations for review of compromises. *See* § 102.16(1), STATS.[4]

It is undisputed that Mathison must reimburse JWB. *See* § 102.06, STATS. However, Mathison now argues that it is entitled to judicial review of the reasonableness of the amount of the compromise. We conclude that claim preclusion bars Mathison's asserted right to judicial review.

The application of claim preclusion to a given set of facts is a question of law that we review de novo. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995). Under the doctrine of claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." ***Id.*** at 550, 525 N.W.2d at 727 (quoting ***Lindas v. Cady***, 183 Wis.2d 547, 558, 515 N.W.2d 458, 463 (1994)).

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[4] Section 102.16(1), STATS., provides in part:

> Every compromise of any claim for compensation may be reviewed and set aside, modified or confirmed by the department within one year from the date the compromise is filed with the department, or from the date an award has been entered, based thereon, or the department may take that action upon application made within one year ... The employer, insurer or dependent under s. 102.51 (5) shall have equal rights with the employe to have review of a compromise or any other stipulation of settlement. Upon petition filed with the department, the department may set aside the award or otherwise determine the rights of the parties.

In this case, the compromise was filed on September 9, 1993, so the statute of limitations to petition DILHR for review of the compromise expired a year later. The complaint against Mathison for reimbursement was filed on May 13, 1994. Therefore, Mathison had adequate notice to challenge the reasonableness of the compromise before the statute of limitations expired.

Mathison could have participated in the compromise proceedings with DILHR and raised the reasonableness issue. The DILHR compromise approval process, including the right to review granted under § 102.16(1), STATS., constituted a former proceeding and final judgment for purposes of claim preclusion. *See* WIS. ADMIN. CODE § IND. 80.03. Mathison had notice of the settlement talks that led to the compromise and an opportunity to be heard. The doctrine of claim preclusion bars Mathison from challenging the reasonableness of the settlement now.

THE INDEMNIFICATION CLAIM

JWB paid $50,000 to settle the Beringtons' tort claims. It seeks indemnification from Mathison for the entire $50,000 payment, including the portion, if any, attributable to JWB's causal negligence.

A. Choice of Law

JWB contends that Minnesota law controls the interpretation of the contract. It argues that under Minnesota law, the indemnification clause at issue entitles JWB to summary judgment on its $50,000 claim, citing ***Holmes v. Watson-Forsberg Co.***, 488 N.W.2d 473 (Minn. 1992). We conclude that Wisconsin law controls.

The subcontract agreement does not contain a choice of law provision. In the absence of an express choice of law provision, contract rights are to be determined by the local law of the state with which the contract has its most significant relationships. ***Handal v. American Farmers Mut. Cas. Co.***, 79 Wis.2d 67, 73, 255 N.W.2d 903, 906 (1977). Factors to be considered in making this determination are:

1. The place of contracting;
2. The place of negotiating the contract;
3. The place of performance;
4. The location of the subject matter of the contract; and
5. The place of business and place of incorporation of the parties.

Haines v. Mid-Century Ins. Co., 47 Wis.2d 442, 446, 177 N.W.2d 328, 330 (1970). In our analysis of the grouping of contacts, our "method is not to count contacts but rather to consider which contacts are most significant and to determine where those contacts are found. It must be recognized that a contact can be considered significant only in terms of its relevance to a specific domestic law and the policy underlying that law." ***Id.*** at 447, 177 N.W.2d at 330-31.

In this case, JWB and Mathison negotiated and contracted in Minnesota. However, at the time of contracting, the parties realized that the performance and subject matter of the contract would be in Wisconsin. Both contractors are Minnesota corporations, but Berington, the injured employee, resided in Wisconsin.

In the context of insurance, we give the location of an insured risk greater weight than any other single contact in determining which state's law to apply. ***Utica Mut. Ins. Co. v. Klein & Son***, 157 Wis.2d 552, 559, 460 N.W.2d 763, 766 (Ct. App. 1990); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193, comments b and c (1971). The indemnity clause is analogous to an insurance contract in that the parties assigned risk through the clause. Further, "When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance." ***Id.***, § 188 comment e. Therefore, we give the location of the accident, Wisconsin, the most weight.

This dispute is intertwined with Wisconsin's worker's compensation law. Through this law, our legislature has arrived at a public policy decision regarding the rights of Wisconsin employees. ***Marson v. LIRC***, 178 Wis.2d 118, 503 N.W.2d 582 (Ct. App. 1993). We consider the fact that our supreme court has expressed a strong policy statement, as discussed hereafter, relating to indemnification for a party's own negligence. We conclude that the nature and quality of the contacts favor application of Wisconsin law.

B. Application of Wisconsin Law

In Wisconsin, an employer generally cannot be liable to an injured employee beyond the liability imposed by the Worker's Compensation Act. Section 102.03, STATS. However, an employer can waive this immunity if it

agrees to indemnify a third party for tort claims an employee has against the third party. ***Schaub v. West Bend Mut.***, 195 Wis.2d 181, 536 N.W.2d 123 (Ct. App. 1995).

The subcontract agreement between JWB and Mathison contains an indemnification clause that provides in part:

> The Subcontractor [Mathison] agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or resulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph ....

The provisions of this indemnification agreement are sufficient to require an employer to indemnify a third party for claims the third party paid relating to an injury to an employee caused by their employer's negligence. "Wisconsin law does not require the use of specific phrases such as an agreement to be 'liable to one's own employees' or to 'waive worker's compensation' in order to give up immunity." ***Id.*** at 183, 536 N.W.2d at 124. In ***Schaub***, we held that an indemnification agreement similar to the one in our case was sufficiently specific to allow an employer to waive its exclusive remedy right. ***Id***. at 184, 536 N.W.2d at 124-25.

Mathison argues that this subcontract clause does not require it to indemnify JWB for claims resulting from JWB's causal negligence. We agree. Indemnity contracts are strictly construed when the indemnitee seeks to be indemnified for its own causal negligence. ***Algrem v. Nowlan***, 37 Wis.2d 70, 154 N.W.2d 217 (1967); *see also* W. PROSSER & W. KEETON ON THE LAW OF TORTS § 51 at 341 n.4 (5th ed. 1984). The obligation to indemnify for the indemnitee's own causal negligence must be expressly and clearly set forth in the contract. ***Algrem***, 37 Wis.2d at 77, 154 N.W.2d at 220. Broad or all-encompassing language will not suffice. ***Id.***

For example, in ***Mustas v. Inland Const.***, 19 Wis.2d 194, 120 N.W.2d 95 (1963), the contract contained the following indemnification language:

> The Subcontractor assumes full responsibility and risk for any and all damage to person or property ... and shall hold the Owner and Contractor ... free from, and harmless of and from, any and all claims for injury ... resulting from, or arising out of, and in connection with, any of the Subcontractor's operations. Subcontractor shall defend any such claim asserted or suit brought against the Contractor ....

Id. at 205-06, 120 N.W.2d at 101. Our supreme court held this language did not expressly provide indemnification for the negligence of the indemnitee. *See* ***id.*** at 207, 120 N.W.2d at 102. Similarly, in ***Bialas v. Portage County***, 70 Wis.2d 910, 236 N.W.2d 18 (1975), our supreme court held that the following language in an indemnification clause was too broad to require indemnification for an indemnitee's own negligence: "The contractor and his surety shall indemnify and save harmless the State, its officers and employees, from all suits, actions or claims of any character ...." ***Id.*** at 913, 236 N.W.2d at 20.

By contrast, in cases that uphold indemnification of a negligent indemnitee, the contract language specifically stated that the indemnitee was entitled to indemnification even if the underlying claim was caused by the indemnitee. In ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis.2d 120, 301 N.W.2d 201 (1981), our supreme court held that the following language required indemnification of the negligent indemnitee: "You shall assume liability for, be

responsible for, indemnify ... and save harmless ourselves ... against any loss, damage, or expense ... (including any such injury, death, or damage *caused in part by our negligence*) ...." ***Id.*** at 124, 301 N.W.2d at 203-04 (emphasis added). Similarly, in ***Gunka v. Consolidated Papers, Inc.***, 179 Wis.2d 525, 508 N.W.2d 426 (Ct. App. 1993), we held that a contract that required indemnification of a claim "regardless of whether or not [it] is caused in part by a party indemnified hereunder" required indemnification of a claim based on the indemnitee's partial negligence, but did not require indemnification if the indemnitee was solely at fault. ***Id.*** at 532, 508 N.W.2d at 428.

The indemnification clause in our case contains broad language, but does not specifically state that the indemnitor is liable for claims caused by the indemnitee. Therefore, we conclude that Mathison need not indemnify JWB for the portion of the $50,000 settlement caused by JWB's causal negligence, if any.

Mathison argues that we should conclude that the settlement compensated the Beringtons solely for JWB's negligence. In support of its argument, Mathison asserts that the Beringtons exhausted their claim against it by accepting a worker's compensation settlement, citing § 102.03, STATS. Our supreme court rejected a similar argument in ***Larsen v. J. I. Case Co.***, 37 Wis.2d 516, 155 N.W.2d 666 (1968), deciding that "the rule of no liability of an employer over and above that imposed by the Workmen's Compensation Act does not apply in the case of an express agreement for indemnification." ***Id.*** at 520, 155 N.W.2d at 668.

Because the percentage of JWB's causal negligence in Berington's injury has not been determined, we must remand the case.[5] After that determination is made, the circuit court should enter a judgment requiring Mathison to indemnify JWB for the percentage of the settlement not attributable to JWB's causal negligence.

CONCLUSION

[5] For purposes of determining Mathison's indemnity obligation, Mathison's negligence, if any, should not be imputed to JWB under a theory of respondeat superior.

We reject Mathison's argument that the trial court erred when it denied Mathison the right to judicial review of the reasonableness of the amount of the compromise of worker's compensation JWB paid Berington. The doctrine of claim preclusion bars Mathison's right to a hearing on the issue. Therefore, we affirm that part of the judgment.

With regard to Mathison's indemnification claim, we conclude that Wisconsin law applies because the most significant contacts in this case are the place of performance of the parties and the state of residence of the victim. Under Wisconsin law, we conclude that Mathison's liability for indemnification of JWB does not include the percentage of the claim attributable to JWB's causal negligence. We reverse that part of the judgment and remand the case to determine JWB's percentage of causal negligence.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

Not recommended for publication in the official reports.