COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

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. 97-1840-FT

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

JOHN S. SARAMA AND MARY A. SARAMA, HUSBAND AND WIFE,

PLAINTIFFS-APPELLANTS,

V.

SHIRLEY L. DREW AND ELAINE R. DREW, HUSBAND AND WIFE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT A. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. John and Mary Sarama appeal a summary judgment awarding them only $1,975.99 of a larger sum sought under their hold

harmless agreement with Shirley and Elaine Drew.[1] In 1993, when the Drews were in the process of selling their condominium to the Saramas, they promised to indemnify the Saramas for certain liabilities "growing out of" claims for "past due" condominium complex costs then under litigation. The Drews were among a group of condominium owners litigating their duty to share the upkeep costs of the complex's recreational facility. Any liability for these costs would eventually devolve to the Saramas as the new owners. After the sale, the condominium owner group, now including the Saramas as the Drews' successors in interest, settled the recreational facility litigation. The Saramas became liable for an immediate $1,975.99 cash payment and an additional $5,000 payment due on the sale of their condominium. A condominium lien secured the $5,000 "due on sale" obligation. The Saramas sold their condominium and made the $5,000 "due on sale" payment. They asked the Drews to honor their hold harmless agreement.

The Drews denied a duty to indemnify on the ground that the $5,000 "due on sale" payment did not represent "past due" recreational facility costs and therefore fell outside the hold harmless agreement. The trial court initially denied summary judgment. On the day of trial, however, the trial court reversed its decision. The trial court reasoned that the $5,000 "due on sale" payment did not represent "past due" recreational facility expenses within the meaning of the hold harmless agreement. The trial court evidently reached this conclusion after examining provisions of the litigation settlement agreement concerning the $5,000 "due on sale" payment.

[1] This is an expedited appeal under RULE 809.17, STATS.

The Saramas essentially argue that the trial court overemphasized any connection the hold harmless agreement and the litigation settlement agreement may have had concerning the $5,000 "due on sale" payment. They also argue that the trial court wrongly denied them attorney fees for the Drews-Saramas lawsuit. A trial court correctly grants summary judgment if there is no dispute of material fact and a party deserves judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Because there is a factual issue as to whether the $5,000 was for pre- or post-settlement recreational facility costs, summary judgment was inappropriate. However, we agree with the trial court's denial of attorneys' fees. We therefore affirm the judgment in part, reverse it in part, and remand the matter for further proceedings.

Under the February 6, 1993 hold harmless agreement, the Drews indemnified the Saramas for various forms of liability that grew out of the pending claims for "past due maintenance and upkeep expenses" of the recreational facility. The hold harmless agreement, however, did not include a means to apportion any anticipated settlement payments among (1) "past due" recreational facility expenses incurred as of February 6, 1993, (2) recreational facility expenses incurred between February 6, 1993, and the settlement date, or (3) recreational facility expenses to be incurred after the settlement date. To resolve this problem, the trial court seemingly focused on paragraph eight of the litigation settlement agreement and its use of the expression "obligations: future" to refer to the $5,000 "due on sale" payment. The trial court evidently believed that the use of the word "future" indisputably showed what the $5,000 "due on sale" payment discharged—post-settlement recreational facility expenses. We note that paragraph seven of the settlement agreement lends a degree of support to the trial

court's view. It purports to designate the front-end payments as compromising and discharging all obligations and liabilities incurred before January 1, 1995. This tends to associate the front-end payments with pre-January 1, 1995 liabilities and the back-end payments with post-January 1, 1995 liabilities. This would tend to support the trial court's conclusion that the $5,000 "due on sale" back-end payment represented, compromised, and discharged no pre-February 6, 1993 recreational facility expenses.

Although we understand how the trial court relied on the settlement agreement to resolve the Drews' indemnification obligation, we disagree with its conclusion that such analysis permitted summary judgment. The trial court's inference was permissible, not indisputable; the settlement agreement did not show beyond dispute that the $5,000 "due on sale" payment represented nothing but post-February 6, 1993 recreational facility expenses. The trial court's decision implicitly rested on the following three-part inference: (1) the settlement agreement apportioned recreational facility liabilities between the front-end and back-end settlement payments; (2) the apportionment controlled how the hold harmless agreement apportioned expenses for purposes of indemnification; and (3) the settlement agreement's apportionment was a realistic one.

This was a disputable inference. The hold harmless agreement does not expressly state that the settlement agreement apportionment controls how the hold harmless agreement apportioned indemnification. Without such an express reference, the hold harmless agreement was ambiguous in this regard. Also, the facts as a whole permitted a reasonable inference that the parties may not have intended such a result. The Drews had no control over the settlement agreement; it might apportion liabilities between the front-end and back-end payments in an arbitrary way. The Drews had no way of knowing how it would structure the

payments or even whether it would try to link front-end and back-end payments with specific liabilities.

Beyond that, the trial court had insufficient facts to infer that the litigation settlement agreement successfully apportioned liabilities between front-end and back-end payments in a realistic, nonarbitrary way. The Drews never indisputably showed that the $5,000 "due on sale" payment, as a factual matter, bore the same or a similar ratio to the total settlement payments as the post-January 1, 1995 recreational facility expenses bore to the total recreational facility expenses. As a result, the trial court could not validly rule out the inference that the $5,000 "due on sale" payment embodied at least some part of the "past due," pre-February 6, 1993 recreational facility expenses. To resolve this issue, the trial court must reexamine the matter in terms of what financial obligations the front-end and back-end litigation settlement payments actually discharged and what time frames such financial obligations covered; the issue is a cost-identifying and cost-tracing problem. To the extent the parties anticipated such matters, the trial court must attempt to ascertain their mutual intent. In the end, however, in the absence of evidence of mutual intent, the trial court must arrive at a proportionate, nonarbitrary apportionment of the front-end and back-end settlement payments, including the $5,000 "due on sale" payment, between the indemnified, "past due," pre-February 6, 1993 recreational facility expenses and the nonindemnified, post-February 6, 1993 recreational facility expenses. On remand, the parties need to supply the trial court further proof for it to make a fair, equitable, and accurate apportionment.

Finally, the trial court properly rejected the Saramas' request for indemnification on attorney fees. The Drews' hold harmless agreement indemnified the Saramas for costs and expenses growing out of the recreational

facility cost litigation. This was not a sufficiently specific provision to effect an indemnification of the Saramas' attorney fees in a Drews-Saramas lawsuit. Under the American rule, litigants may not recover attorney fees without an express contractual provision on that form of indemnification. *See* ***Hunzinger Construction Co. v. Granite Resources***, 196 Wis.2d 327, 338-40, 538 N.W. 804, 809 (Ct. App. 1995). Otherwise, litigants are liable for their own attorney fees. ***Id***. Courts will not construe a contract to indemnify such fees unless it clearly and unambiguously supplies such indemnification. ***Id***. at 340, 538 N.W.2d at 809. Here, the parties' hold harmless agreement used words like "costs," "claims," and "expenses." Such terms encompass many different forms of expenditures, and this generality falls short of the specificity required by the American rule. If the Saramas wanted indemnification for attorney fees in the Drews-Saramas litigation, they needed to include a direct reference in the hold harmless agreement to attorney fees in a Drews-Saramas lawsuit or some other equally clear reference.

By the Court.—Judgment affirmed in part and reversed in part; cause remanded for further proceedings; no costs to either party.

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