COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP537 **Cir. Ct. No. 2012CV1027**

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

KAREN COLLERAN,

PLAINTIFF,

UNITED HEALTHCARE GROUP, INC., D/B/A UNITED HEALTHCARE SERVICES, INC.,

INVOLUNTARY-PLAINTIFF,

V.

ERIK C. WILDES,

DEFENDANT,

SOO LINE RAILROAD COMPANY, D/B/A CANADIAN PACIFIC RAILWAY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

AMERICAN SERVICE INSURANCE COMPANY, M.D. TRANSPORTATION, INC. AND MATTHEW HENSHAW,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed in part, reversed in part, and cause remanded for proceedings consistent with this opinion.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. M.D. Transportation, Inc. (M.D. Transportation) contracted with Soo Line Railroad (Soo Line) to provide transportation services to Soo Line employees. On January 26, 2012, Karen Colleran, a Soo Line employee, filed a lawsuit against Soo Line, M.D. Transportation, and Matthew Henshaw for injuries she allegedly sustained while a passenger in a vehicle operated by Henshaw. On March 13, 2012, Soo Line tendered its defense to M.D. Transportation, pursuant to an indemnification clause in the contract between the two. The clause stated:

> Section 9. INDEMNITY.
>
> ….
>
> Company agrees to indemnify and hold harmless CTSI and Railroad from all claims, demands, costs and expenses including attorney and court costs for any accident, injury, property damage or any other loss incurred by CTSI and Railroad or their employees, agents, representatives or others using said Transportation Services regardless of the nature of the claim or the theory of recovery against CTSI and Railroad, including claims that CTSI and/or Railroad was at fault, negligent or strictly liable. Company agrees to provide current proofs of insurance as requested by CTSI or Railroad.
>
> Company's duty to indemnify CTSI and Railroad is not contingent upon Company obtaining or not obtaining insurance to cover the liability. In addition, Company agrees to not raise the defense that it cannot obtain

> insurance as a defense against its liabilities under this indemnity provision. [1]

¶2 M.D. Transportation denied the tender, prompting Soo Line to file a cross-claim against M.D. Transportation for indemnification pursuant to the contract. Soo Line proceeded to defend Colleran's case. Following an investigation by Soo Line's attorneys, Colleran ultimately stipulated to dismiss all of her claims against all of the parties, leaving only Soo Line's cross-claim against M.D. Transportation.

¶3 On December 7, 2012, Soo Line filed a motion for summary judgment and declaratory judgment on its cross-claim, requesting judgment "granting Soo Line Railroad Company's claims against M.D. Transportation, Inc. for defense costs, including attorney fees incurred in defending this action." The circuit court granted Soo Line's motion, and subsequently clarified the order for summary judgment by confirming summary judgment and awarding defense costs including actual attorney fees to Soo Line. The circuit court noted that Soo Line's recovery of attorney fees was governed by the parties' contract.

¶4 Soo Line submitted its attorney fees and costs in the amount of $88,566.39. M.D. Transportation objected to the amount and sought discovery with respect to the reasonableness of the fees. The circuit court permitted the parties to conduct discovery. At the time of the hearing on attorney fees, on October 23, 2014, Soo Line sought a total of $142,631.03. Soo Line alleged that its fees increased by $54,064.64 as a result of additional costs incurred to "litigate the reasonableness of its fee indemnification claim" against M.D. Transportation. M.D. Transportation opposed the amount, arguing that Soo Line's initial claim of

[1] CTSI stands for "Crew Transportation Specialists, Inc." CTSI is an agent of Soo Line.

$88,566.39 was not recoverable pursuant to WIS. STAT. § 814.045 (2013-14),[2] and that the additional claim of $54,064.64 was not recoverable because the parties' agreement does not permit Soo Line to recover fees to prosecute its own indemnification claim. Ultimately, the circuit court found that § 814.045 permits Soo Line to recover $84,159.39 in attorney fees,[3] but that Soo Line was not entitled to the $54,064.64 it incurred to litigate its fee indemnification claim.

¶5 M.D. Transportation now appeals the circuit court's order granting Soo Line attorney fees in the amount of $84,159.39. Soo Line cross-appeals, arguing that it is entitled to its full claim for attorney fees.

DISCUSSION

¶6 On appeal, M.D. Transportation contends that: (1) the indemnification clause is unenforceable because it is not sufficiently conspicuous pursuant to WIS. STAT. § 401.201; (2) the clause is unenforceable because it is ambiguous as to a situation in which Soo Line is solely negligent; (3) WIS. STAT. § 814.045 precludes Soo Line from recovering attorney fees where there has been no compensatory damages award; and (4) if Soo Line is entitled to attorney fees, the amount should not exceed $20,000. Soo Line, in its cross-appeal, argues that it is entitled to the full amount of attorney fees claimed pursuant to the indemnification clause. We conclude that the indemnification clause is enforceable, the indemnification clause is not ambiguous, and the clause allows for Soo Line to recover *all* of Soo Line's *reasonable* attorney fees.

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

[3] The circuit court, in assessing Soo Line's statement of attorney fees, determined that Soo Line was not entitled to $4407 of the costs listed.

Standards of Review.

¶7 This appeal comes to us following the circuit court's initial grant of summary judgment, in which the court found the indemnification agreement between the parties enforceable. We review summary judgments independently, employing the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶8 The interpretation of a contract "is a question of law that we review de novo." ***Osborn v. Dennison***, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20. "The interpretation and application of statutes are questions of law that we also review independently." ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶36, 319 Wis. 2d 1, 768 N.W.2d 615. "We uphold a circuit court's findings of fact unless they are clearly erroneous." ***Id.***, ¶34.

¶9 "When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. We uphold the circuit court's determination unless the circuit court erroneously exercised its discretion." *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58 (internal citation omitted). A circuit court "erroneously exercises its discretion when its decision is based upon an error of law." *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶71, 281 Wis. 2d 173, 696 N.W.2d 194.

The Indemnification Clause is Sufficiently Conspicuous.

¶10 M.D. Transportation contends that because "nothing makes the Soo Line indemnification clause sufficiently conspicuous to a reasonable person … the indemnification clause [is] unenforceable as a matter of law." We disagree.

¶11 As stated, the clause at issue reads:

> Section 9. INDEMNITY.
>
> ….
>
> Company agrees to indemnify and hold harmless CTSI and Railroad from all claims, demands, costs and expenses including attorney and court costs for any accident, injury, property damage or any other loss incurred by CTSI and Railroad or their employees, agents, representatives or others using said Transportation Services regardless of the nature of the claim or the theory of recovery against CTSI and Railroad, including claims that CTSI and/or Railroad was at fault, negligent or strictly liable. Company agrees to provide current proofs of insurance as requested by CTSI or Railroad.
>
> Company's duty to indemnify CTSI and Railroad is not contingent upon Company obtaining or not obtaining insurance to cover the liability. In addition, Company agrees to not raise the defense that it cannot obtain insurance as a defense against its liabilities under this indemnity provision.

¶12 Here, the circuit court analyzed whether the indemnification clause was sufficiently conspicuous and determined that the clause met the conspicuous standard as set forth by ***Deminsky v. Arlington Plastics Machinery***, 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411, and WIS. STAT. § 401.201(2)(f). In ***Deminsky***, the Wisconsin Supreme Court held that in judging whether an indemnity contract is too inconspicuous to enforce, the contract should be tested against the standards governing Uniform Commercial Code contracts, under WIS. STAT. § 401.201. *See* ***Deminsky***, 259 Wis. 2d 587, ¶28. Contracts meeting those standards can be said

to "unmistakably inform the signer of what rights are being waived" and "'clearly and unequivocally communicate to the signer the nature and significance of the document being signed.'" ***Id.*** (citation omitted). WISCONSIN STAT. § 401.201(2)(f) defines "conspicuous":

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include any of the following:
>
> 1. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size.
>
> 2. Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

¶13 Applying these standards to the facts of this case, we agree with the circuit court's analysis that the indemnification provision here was sufficiently conspicuous to be enforceable. We observe that the font of the entire contract here is sufficiently large to be easily read. There are large margins on both sides of each page and the contract is printed on only one side of each page. The specific sections appear to be single spaced, but there is double spacing between each paragraph within the section and before and after each section. The headings of each section, including the indemnification section, are numbered, in all capital letters, and underlined. Thus, the subject of each section is easily identified by a reader. "Indemnity" is a separate section beginning on the third page of the ten-page contract. (Underlining omitted.) The eighth page and the tenth page are only half filled, each containing added space immediately above the signature lines. We conclude that in the context of the entire Agreement, the indemnity clause is

sufficiently conspicuous to give a reader reasonable notice of both the subject matter and the content of that section.

The Indemnity Clause is Not Ambiguous.

¶14 M.D. Transportation argues that the indemnification clause cannot be enforced because the clause "makes no specific, express mention of what happens when Soo Line's sole negligence has been alleged." We understand M.D. Transportation's argument to be that the clause is unenforceable because it is ambiguous. We disagree.

¶15 "Words or phrases in a contract are ambiguous when they are reasonably or fairly susceptible to more than one construction." ***Katze v. Randloph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 213, 341 N.W.2d 689 (1984). "When construing contracts that were freely entered into, our goal 'is to ascertain the true intentions of the parties as expressed by the contractual language.'" ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (citation omitted). "We construe the contract language according to its plain or ordinary meaning." ***Id.*** "'If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract.'" ***Id.*** (citation omitted). "Contractual indemnification assigns the risk for a potential loss as part of the bargain of the parties." ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶34, 342 Wis. 2d 29, 816 N.W.2d 853. The law in Wisconsin is skeptical of liability-shifting provisions which attempt to protect a party against its own negligence, *see* ***Deminsky***, 259 Wis. 2d 587, ¶22; however, parties are not prohibited from agreeing to such provisions. Indeed, our supreme court has held that "indemnity contracts in which

parties agree to indemnify the indemnitee for the indemnitee's own negligence are … to be strictly construed." ***Id.***, ¶28.

¶16 Here, the relevant portion of the indemnification clause states that M.D. Transportation:

> agrees to indemnify and hold harmless … [the] Railroad from *all claims, demands, costs and expenses including attorney and court costs for any* accident, injury, property damage or any other *loss incurred by ... Railroad* or their employees, agents, representatives or others using said Transportation Services *regardless of the nature of the claim* or the theory of recovery against … Railroad, *including claims that ... Railroad was at fault, negligent or strictly liable.*

(Emphasis added.) The indemnification applies to "*all* … expenses including attorney fees and court costs," incurred by Soo Line because of *anyone* using the transportation services M.D. Transportation provides. (Emphasis added.) The indemnification applies "regardless of the nature of the claim" and includes claims that Soo Line "was at fault, negligent or strictly liable." There is nothing in that language that would cause a reader to believe indemnification of Soo Line did *not* apply if Soo Line was the negligent party. The exact opposite is clearly stated. The clause specifically requires indemnification based on a claim that the "Railroad was … negligent." The clause defines the indemnification responsibility broadly; it does not carve out exceptions to the scope of that responsibility. The complaint contains specific allegations that Soo Line was negligent, and thus liable under the Federal Employees Liability Act. The plain language of the clause is thus invoked by the allegations in Colleran's complaint. Consequently, we conclude that the clause is not ambiguous.

¶17 Our conclusion is reinforced when we consider the contract as a whole. "Contractual indemnification assigns the risk for a potential loss as part of

the bargain of the parties." ***Kriefall***, 342 Wis. 2d 29, ¶34. Here, the contract as a whole is an agreement between three business entities whereby the Railroad (Soo Line) agrees to use CTSI as a broker to procure transportation for Railroad employees, for which the Railroad agrees to pay M.D. Transportation fees as outlined in an attachment to the contract. The contract also states that M.D. Transportation will provide "transportation services for the employees" of the Railroad, will indemnify both the Railroad and the CTSI from any claims or expenses by anyone using M.D. Transportation's service, and will obtain public liability insurance of at least $1.5 million per occurrence naming Soo Line and CTSI as additional insureds. M.D. Transportation did in fact obtain the required insurance and name Soo Line as an additional insured.

¶18 It is apparent that without M.D. Transportation's broad indemnity obligations in Section 9, M.D. Transportation had absolutely no reason to agree to the preceding section, which required it to obtain the substantial public liability insurance naming the Railroad and CTSI as additional insureds.[4] The benefit to M.D. Transportation of payments to be received was part of the bargain for M.D. Transportation to indemnify and insure Soo Line against any loss because of a

[4] The preceding section, "Section 8. INSURANCE REQUIREMENTS.[,]" provides, as relevant:

> Company agrees, at its sole cost and expense, to obtain and keep in force at all times during the performance of this service a policy or policies of Automobile Public Liability Insurance providing bodily injury and property damage coverage with a combined single limit of not less than $1,500,000 per occurrence or claim.
>
> ….
>
> Railroad and CTSI are to be named as additional insured[s] on all polices of insurance required by this Agreement.

claim by someone using M.D.'s Transportation's service. The allocation of risk makes sense as a practical business matter: M.D. Transportation controlled the daily operation of the transportation service, thus was the only party to this contract able to actually oversee the safety of the transportation service. Because Soo Line still owed some responsibility to its employees, it would logically want some protection from risk while Railroad employees were being transported by M.D. Transportation. Those risks are allocated by the indemnification specified in the contract.

¶19 Accordingly, we conclude that the indemnification clause is unambiguous, both standing alone and in the context of the contract as a whole.

Soo Line is Entitled to the Full Amount of Reasonable Attorney Fees it Sought.

¶20 Both M.D. Transportation and Soo Line contend that the circuit court's award of attorney fees was erroneous. M.D. Transportation contends that Soo Line is not entitled to attorney fees, or, at a maximum, Soo Line is entitled to $20,000. Soo Line contends that it is entitled to the full amount of attorney fees it sought, $142,631.03, and that the circuit court erred in refusing to award Soo Line attorney fees incurred while litigating the reasonableness of its indemnification claim against M.D. Transportation. We conclude that based on the indemnification clause, Soo Line is entitled to $142,631.03.

¶21 In ***Kriefall***, the Wisconsin Supreme Court explained the general rule regarding the award of attorney fees and the limited exceptions to the rule:

> The American Rule provides that parties to litigation typically are responsible for their own attorney fees. Limited exceptions do exist, such as where statutes provide for the recovery of attorney fees for prevailing

> parties, or where the parties contract for the award of attorney fees. In addition, we have developed a narrow exception to the American Rule, as we explained in ***Weinhagen*** [***v. Hayes***, 179 Wis. 62, 190 N.W. 1002 (1922)].

Kriefall, 342 Wis. 2d 29, ¶72 (internal citations omitted). The ***Kriefall*** court explained that it "reaffirmed the American Rule [in ***Weinhagen***], but held that an innocent party, wrongfully drawn into litigation with a third party, may recover those fees reasonably incurred in defending against such action." ***Kriefall***, 342 Wis. 2d 29, ¶73. The court explained:

> The general rule is that costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act.

Kriefall, 342 Wis. 2d 29, ¶73 (citing ***Weinhagen***, 179 Wis. at 65). The exceptions to this rule apply when "(1) the party from whom fees are sought must have committed a wrongful act against the party seeking attorney fees; and (2) the commission of such wrongful act forced the party seeking fees into litigation with a third party, or required the party seeking attorney fees to incur expenses protecting that party's interests against claims arising from the wrongful act." ***Kriefall***, 342 Wis. 2d 29, ¶74.

¶22 Here, the contract clause at issue is broadly written. It does not carve out exclusions to its application. By Section 9, M.D. Transportation promised to indemnify for "*all* claims, demands, costs and expenses including attorney and court costs for any… *loss incurred by … Railroad … regardless of the nature of the claim* or the theory of recovery *against … Railroad*." (Emphasis

added.) Colleran's complaint undoubtedly stated a claim of negligence against the Railroad, which is precisely the type of "claim" that would fall under this clause.

¶23 The exception to the American Rule originally described more than ninety years ago is apt here. M.D. Transportation agreed by contract to indemnify Soo Line from *all* costs and attorney fees Soo Line might incur because of exactly the conduct alleged by Colleran. M.D. Transportation nonetheless denied that the plain language of the contract meant what it said, and did nothing to obtain a court ruling on the validity of its legal conclusion before refusing to defend Soo Line. By electing that course of action, M.D. Transportation made it necessary for Soo Line to incur expenses to protect its interests. Soo Line had to protect two interests: (1) its defense of the Colleran litigation; and (2) its enforcement of the indemnity obligations M.D. Transportation had to Soo Line. As with an insurance company that refuses defense of a policy holder *before* a determination of coverage has been made, M.D. Transportation's unilateral decision to roll the litigation dice in the apparent hope that the indemnity section would not mean what it clearly says requires a price to be paid for its wrongful act. *See* ***Kriefall***, 342 Wis. 2d 29, ¶59 ("*Indemnitors who deny their responsibility after tender* of a potential suit or liability '*cannot* subsequently be allowed to turn around and *evade the consequences which their own conduct and negligence have superinduced*.'") (emphasis added; citations omitted). Here, the cost of both litigating the Colleran claims and enforcing the indemnity section of the contract were inextricably intertwined with M.D. Transportation's attempt to avoid its indemnification obligations. We conclude that all of these costs and expenses are the legal consequence of the original wrongful act by M.D. Transportation in refusing to accept defense when tendered without obtaining a prior ruling on its obligation to defend.

¶24 We conclude that Soo Line is entitled to the $54,064.64 spent litigating M.D. Transportation's responsibility under the indemnification clause. We remand with directions to amend the judgment to award that amount to Soo Line. In addition, because Soo Line has prevailed on appeal, we remand for the circuit court to determine Soo Line's reasonable attorney fees and costs on appeal.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded for proceedings consistent with this opinion.

Not recommended for publication in the official reports.