COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2457 **Cir. Ct. No. 2014CV003930**

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

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, STATE AUTO INSURANCE COMPANY OF WISCONSIN, PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, FAY WALTERS AND FARMERS INSURANCE EXCHANGE,

PLAINTIFFS,

H.O.L.I.E. OF GREENFIELD AVENUE, INC., DENNIS KLEINHANS, DOROTHY GRABOWSKI, VIRGINIA WERNER, MERNLYN GOODRICH, THEODORE KOLODZYK, JUDITH GORSKI, LINDA SUTTON , AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY SUTTON AND ALICE CAREY,

INVOLUNTARY PLAINTIFFS,

V.

CINTAS CORPORATION NO. 2,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

DEFENDANT-THIRD-PARTY
PLAINTIFF-CO-APPELLANT,

v.

BECKER PROPERTY SERVICES LLC,

THIRD-PARTY
DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Reversed and cause remanded for further proceedings.*

Before Kessler, Dugan and Brash, JJ.

¶1 DUGAN, J. Cintas Corporation No. 2 ("Cintas") and The Travelers Indemnity Company of Connecticut ("Travelers") appeal from the trial court's decision granting summary judgment in favor of Becker Property Services LLC ("Becker"), dismissing all of Cintas and Travelers' claims against Becker. Becker cross-appeals the trial court's ruling that if Ohio law applied under the contract, Becker would have a duty to defend and indemnify Cintas for the claims against it in the underlying action. The issue before this court is whether the contract between Cintas and Becker obligates Becker to defend and indemnify Cintas for Cintas' alleged negligent acts and breach of implied warranty. Additionally, the parties dispute the enforceability, under Wisconsin law, of the contract's choice of law provision designating Ohio law as governing the rights and obligations of the parties.

¶2 We find that under Wisconsin law, Becker has a duty to defend and indemnify Cintas in the underlying action alleging negligence and breach of

implied warranty. We conclude that there is no need to answer the choice of law question because we find that, even applying Wisconsin law as argued by Becker, Becker has a duty under the contract to defend and indemnify Cintas and Travelers in the underlying action.

BACKGROUND AND PROCEDURAL HISTORY

¶3 This action was originally brought by American Family Mutual Insurance Company ("American Family"), along with other plaintiffs seeking subrogation claims against Cintas. Becker is a property management company that, at all times relevant to this litigation, provided property management services for the Valentino Square Apartments ("Valentino Square") located at 12030 West Greenfield Avenue, West Allis, Wisconsin. The involuntary plaintiffs include H.O.L.I.E. of Greenfield Avenue, Inc., the owner of the property, and various tenants of Valentino Square. Plaintiffs amended their complaint to include Travelers, Cintas' insurer.

¶4 Plaintiffs allege that on or about January 6, 2013, a pipe connected to the Valentino Square fire suppression system burst. Plaintiffs further allege that Cintas failed to properly inspect and maintain the system and that, as a result, the system "catastrophically failed, causing substantial damage to the building and other property at Valentino Square." Plaintiffs brought claims against Cintas and Travelers for the loss, alleging causes of action sounding in negligence and breach of implied warranty. Cintas has denied committing any acts of negligence or breach of warranty or being legally responsible for the alleged damages in any way.

¶5 Cintas filed a third-party complaint against Becker alleging that Becker breached its contract with Cintas to defend and indemnify Cintas pursuant

to the contract. Travelers also filed a third-party complaint against Becker, seeking indemnification for any amount it is required to pay on behalf of its insured, Cintas.

¶6 Cintas and Becker entered into the subject contract on March 29, 2012. The first page of the contract entitled "Service Scope of Work and Price," contains the following language in the "Term" provision: "This quotation is subject to the Terms and Conditions of Sale – Fire Equipment Goods and Services." The following language also appears at the bottom of the first page: "All work performed will be according to NFPA, State and City Fire Department requirements and is guaranteed, insured and done by licensed personnel."

¶7 Additionally, the contract, in part, includes the following language:

> **CINTAS FIRE PROTECTION**
> **TERMS AND CONDITIONS OF SALE -**
> **FIRE EQUIPMENT GOODS AND SERVICES**
>
> 1. Acceptance and Modification. These terms and conditions supplement the ... contract ... entered into between Cintas Fire Protection or its parent ("Seller") and Seller's customer ("Purchaser") ... *Purchaser agrees that the terms and conditions set forth herein shall govern the relationship between Seller and Purchaser with respect to the goods and services that are the subject matter hereof, and no other terms or conditions not specifically agreed upon by the Seller shall be binding upon Seller*.
>
> * * *
>
> 7. Inspection. Seller strongly recommends that Purchaser conduct an on-site inspection of the goods and services sold hereunder after delivery, installation or other service call. *Seller shall not be responsible for the consequences of Purchaser's failure to inspect the goods or services or for any defects, malfunctions, inaccuracies, insufficiencies or omissions in such goods or services*.

8. Limited Warranty: Liability Limitation. Because of the great number and variety of applications for which Seller's goods and services are purchased, Seller does not recommend specific applications or assume any responsibility for use, results obtained or suitability for specific applications. Purchaser is cautioned to determine the appropriateness of Seller's goods and services for Purchaser's specific application before ordering and to test and evaluate thoroughly all goods before use. Seller warrants that title to all goods sold by Seller shall be good and marketable. THERE ARE NO OTHER WARRANTIES EXPRESSED OR IMPLIED IN CONNECTION WITH THE SALE OF GOODS INCLUDED ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NO DISCLAIMER, EXCLUSION, LIMITATION OR MODIFICATION OF ANY OF THE AFORESAID WARRANTIES SHALL BE DEEMED EFFECTIVE UNLESS IN WRITING SIGNED BY THE SELLER. SELLER DOES NOT WARRANT THAT ANY GOODS OR SERVICES PROVIDED WILL BE IN COMPLIANCE WITH ANY STATUTE, RULE, REGULATION, ORDINANCE OR OTHER LAW. SELLER SHALL IN NO EVENT BE LIABLE TO PURCHASER OR ANY OF ITS SUCCESSORS OR ASSIGNS FOR ANY LOSS, CLAIM, DEMAND, LIABILITY, COST, DAMAGE, EXPENSE, LOSS OF BUSINESS PROFITS, OR ANY PUNITIVE, CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, WHETHER ARISING IN TORT, CONTRACT, WARRANTY, STRICT LIABILITY OR OTHERWISE.

9. Claims. Claims for defective goods or negligent services must be made within thirty (30) days after delivery and *Purchaser's exclusive remedy shall be, at Seller's option, replacement of the defective goods or remedying any negligence in services or credit or refund of the purchase price paid. Seller shall be given a reasonable opportunity to investigate any claims. Neither Purchaser nor Seller shall be liable for incidental, consequential, indirect, special, exemplary or punitive damages for default, and Seller shall not be liable for any claim in excess of the purchase price of the goods or services to which the claim relates, whether involving defective goods or negligent services otherwise arising in contract or tort, including strict liability and negligence.*

10. Indemnity. *Purchaser, at its own expense, shall defend, indemnify and hold harmless Seller from any claim,*

> *charge, liability, or damage arising out of any goods or services provided by Seller hereunder, including any failure of the goods or services to function as intended[.] Purchaser acknowledges that Seller shall have no liability or responsibility for any loss or damage to persons or property resulting from any fire or equipment malfunction.*
>
> 11. Insurance. *Purchaser understands and agrees that protection for the above-referenced costs, expenses, losses and damages is Purchaser's sole responsibility and that it is Purchaser's responsibility to obtain and maintain insurance coverage for such costs, expenses, losses and damages. Purchaser releases and waives all rights of recovery against Seller by way of subrogation.*
>
> * * *
>
> 15. Governing Law; Disputes. The rights and obligations of the parties contained herein shall be governed by the laws of the State of Ohio, excluding any choice of law rules which may direct the application of the laws of another jurisdiction. Any dispute or matter arising in connection with or relating to the Contract shall be resolved by binding and final arbitration under applicable state or federal laws providing for the enforcement of agreements to arbitrate disputes. Any such dispute shall be determined on an individual basis, shall be considered unique as to its facts, and shall not be consolidated in any arbitration or other proceeding with any claim or controversy of any other party.

(Emphasis added in paragraphs 1, 7, 9 10, 11.)

¶8 Cintas filed a motion for summary judgment against Becker, seeking an order requiring Becker to defend and indemnify Cintas in this lawsuit. Becker filed its own motion for summary judgment, seeking an order dismissing Cintas' complaint. Travelers joined in Cintas' motion for summary judgment.

¶9 After hearing oral arguments from the attorneys, the trial court noted, "from my perspective, it goes without saying this is one of the more difficult summary judgment motions I've had to deal with over the past 25 years. The issues really to me are—in part they're simple but in part very, very

complex." The court then provided a thorough analysis of the choice of law issue, addressing the analysis in cases cited by the parties and a case not cited by the parties, ***Algrem v. Nowlan***, 37 Wis. 2d 70, 154 N.W.2d 217 (1967). Ultimately, the court concluded:

> The contract calls for Ohio law, but I find under these circumstances that public policy applied in this particular case is such that the choice of law must be Wisconsin law. And when I apply Wisconsin law to this contract, it clearly does not have any specific and express statement in the agreement to the effect that Cintas gets coverage for its own negligent acts. And there's nothing in the contract that can lead me to the conclusion that the purpose—that its clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence…. [A]pplying Wisconsin law, Cintas is not … entitled to defense or coverage.

The court then denied Cintas' motion for summary judgment, granted Becker's motion for summary judgment, and directed Becker's attorneys to submit a proposed order.

¶10 Cintas' attorney followed up by asking the trial court to clarify if it was withholding its decision whether, if Ohio law applied, there would be a duty to defend and indemnify. As a clarification, the trial court indicated that its opinion was that Ohio law did not apply and that, under Wisconsin law, the indemnification provision is not enforceable. The trial court further stated that, "if it had determined that it was not contrary to Wisconsin public policy and [it] would have said Ohio law applies, under Ohio law, [Becker] would have a duty to defend and there would be a duty of indemnification." Becker's attorney asked if he had to include that statement in the proposed order and the trial court stated he did. This appeal followed.

STANDARD OF REVIEW

¶11 We review a grant of summary judgment by using the same standards the circuit court applied in making its initial determination. *See* ***Verdoljak v. Mosinee Paper Corp.***, 200 Wis. 2d 624, 630, 547 N.W.2d 602, 604 (1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[1]

¶12 Where no material facts remain in dispute, this court determines which party is entitled to judgment as a matter of law. *See* ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411. We review these issues *de novo*, without deference to the trial court's decision. *See* ***Lucas v. Godfrey***, 161 Wis. 2d 51, 56, 467 N.W.2d 180 (Ct. App. 1991). Interpretation of a contract is a question of law, which this court reviews *de novo*. *See* ***Deminsky***, 259 Wis. 2d 587, ¶15.

DISCUSSION

Because We Find Under Wisconsin Law That Becker Has A Duty To Defend And Indemnify Cintas We Need Not Decide The Choice Of Law Question

¶13 Cintas and Travelers appeal the trial court's order granting Becker summary judgment on its claims and denying their motion for summary judgment. Becker cross-appeals the trial court's order holding that, if the contract's choice of

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

law provision providing for the application of Ohio law governed, Becker would be liable to defend and indemnify Cintas for all the claims against it in the action. Because Cintas and Travelers are aligned in interest, we will refer to them collectively as Cintas throughout this decision.

¶14 Cintas argues that the contract unambiguously chooses Ohio law and Wisconsin courts generally enforce choice of law provisions. Although Becker acknowledges Wisconsin law recognizes that "parties to a contract may expressly agree that the law of any particular jurisdiction shall control their contractual relations," it argues that "Wisconsin law does not permit such choices where doing so will be 'at the expense of important public policies of a state.'"

¶15 Becker further contends that Wisconsin's public policy requires that "an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect." By contrast, Cintas argues that strictly construing an indemnification contract is not a matter of important public policy such that the choice of law provision in the contract should be unenforceable.

¶16 The choice of law issue is significant in this case because Cintas maintains that "Ohio law does not require that contracts purporting to hold an indemnitee harmless for its own negligence contain express language to that effect." It also argues that "Ohio courts broadly enforce indemnification agreements, including in instances where the indemnitee is the negligent party."

¶17 Thus, this court is faced with the issue whether the choice of law provision in the contract is applicable and, therefore, Ohio law applies to this case or whether Wisconsin's practice of strictly interpreting indemnification clauses which indemnify the indemnitee from its own negligence is an important public

policy that overrides the contract clause and, therefore, Wisconsin law must be applied. In ***Hernandez v. BNG Management Ltd. Partnership***, 2012 WI App 65, ¶8, 341 Wis. 2d 726, 815 N.W.2d 725, this court noted "[a]s Justice Felix Frankfurter observed, however, '[c]onflict-of-law problems have a beguiling tendency to be made even more complicated than they are.'" ***Id.*** (citing ***Vanston Bondholders Protective Comm. v. Green***, 329 U.S. 156, 169 (1946) (Frankfurther, J., concurring)). This court further stated "[l]uckily, we need not attempt to untangle the knot because we will assume, as Hernandez argues, but not decide, that Wisconsin law applies, because even under Wisconsin law the … clause in Hernandez's agreement with BNG Management defeats his entitlement to the commissions he seeks." ***Hernandez***, 341 Wis. 2d 726, ¶8 (citing ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶61, 312 Wis. 2d 251, 752 N.W.2d 800 ("A court need not resolve a conflict-of-laws dispute when that would not affect the result")).

¶18 Similarly, in this case we assume, as Becker argues, but not decide, that Wisconsin law applies, because even under Wisconsin law we find that under the contract language Becker has a duty to defend and indemnify Cintas.

The Contract Clearly Reflects the Intent Of The Parties That Becker Would Defend And Indemnify Cintas

¶19 The second issue in this case is whether under Wisconsin law Becker is required to defend and indemnify Cintas for all the claims in the complaint against Cintas. The parties generally agree on the applicable law regarding interpretation of indemnification contracts that indemnify an indemnitee for its own negligence. However, they disagree on how that law should be applied to the contract between Cintas and Becker.

¶20 The parties agree that ***Spivey v. Great Atlantic & Pacific Tea Co.***, 79 Wis. 2d 58, 63-64, 255 N.W.2d 469 (1977), and ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis. 2d 120, 125, 301 N.W.2d 201 (1981), set forth the standard applicable to interpretation of an indemnity contract. In ***Spivey***, the court stated:

> The general rule accepted in this state and elsewhere is that an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect. As Prosser states, *Torts* (4th Ed.), sec. 51, p. 310, n. 90:
>
> > "A contract agreeing to indemnify a party against the consequences of his own negligence is not against public policy …. But such a construction will not be put upon a contract unless it is very clearly intended."

Spivey, 79 Wis. 2d at 63. The court further stated:

> If the agreement clearly states that the indemnitee is to be covered for losses occasioned by his own negligent acts, the indemnitee may recover under the contract. *Additionally*, if it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence, indemnification may be afforded.

Id. at 63-64 (emphasis added).

¶21 In ***Dykstra***, the court noted the general rule that "'an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect.'" ***Id.***, 100 Wis. 2d at 125. However, the court explained, "[i]n ***Spivey***, …we nevertheless pointed out that this rule of 'strict construction … cannot be used to defeat the

clear intent of the parties.'" ***Dykstra***, 100 Wis. 2d at 125. (brakets added; ellipses in ***Dykstra***).

¶22 ***Spivey*** and ***Dykstra*** hold that an indemnification contract must be strictly construed to determine whether it is indeed the intent of the parties that a negligent indemnitee be indemnified for its own negligent conduct. Intent may be shown in one of two forms: (1) by a specific and express statement in the agreement to the effect that the indemnitee will be indemnified for its own negligent acts; or (2) it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence. We find that the contract between Cintas and Becker clearly states that Cintas is to be indemnified by Becker for losses occasioned by Cintas' own negligent acts and that it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no reason other than to cover losses occasioned by the indemnitee's own negligence.

¶23 The heading in the contract clearly states that the terms and conditions of the contract between Cintas (the seller) and Becker (the purchaser) were set forth in the paragraphs that followed.[2] The introductory paragraph, numbered as paragraph one, states, "Purchaser agrees that the terms and conditions set forth herein shall govern the relationship between Seller and Purchaser with respect to the goods and services that are the subject matter hereof."

[2] Becker references language on the first page of the contract. However, that language does not define the terms and conditions of the contract. The terms and conditions are clearly set out under the heading "Cintas Fire Protection Terms and Conditions of Sale."

¶24 Paragraph seven provides that the Seller shall not be responsible for the consequences of Purchaser's failures to inspect the goods or services or for any defects, malfunctions, inaccuracies, insufficiencies or omissions in such goods or services. Paragraph eight provides in part, "SELLER SHALL IN NO EVENT BE LIABLE TO PURCHASER OR ANY OF ITS SUCCESSORS OR ASSIGNS FOR ANY LOSS, CLAIM, DEMAND, LIABILITY, COST, DAMAGE, EXPENSE, LOSS OF BUSINESS PROFITS, OR ANY PUNITIVE, CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, WHETHER ARISING IN TORT, CONTRACT, WARRANTY, STRICT LIABILITY OR OTHERWISE."

¶25 Paragraph nine of the contract addresses claims for defective goods or negligent services. It states, "Purchaser's exclusive remedy shall be, at Seller's option, replacement of the defective goods or remedying any negligence in services or credit or refund of the purchase price paid." The paragraph continues stating: "*Seller shall not be liable for any claim in excess of the purchase price of* the goods or *services to which the claim relates*, whether involving defective goods or negligent services otherwise arising in contract or tort, *including* strict liability and *negligence*." (Emphasis added.) Clearly, this language specifically refers to negligence, torts, and negligent services, stating that it is the intent of the parties that Cintas would not be liable to Becker beyond the refund of the purchase price for any such claims.

¶26 Having clearly established the intent of the parties that Cintas would not be liable to Becker for any claims that Cintas was negligent relating to the goods and services provided under the contract, paragraph ten addresses the issue of indemnification. That paragraph provides:

> 10. Indemnity. Purchaser, at its own expense, shall defend, indemnify and hold harmless Seller from any claim, charge, liability, or damage arising out of any goods or services provided by Seller hereunder, including any failure of the goods or services to function as intended. *Purchaser acknowledges that Seller shall have no liability or responsibility for any loss or damage to persons or property resulting from any fire or equipment malfunction.*

(Emphasis added.) This paragraph plainly shows that it was the intent of the parties that Becker would defend, indemnify, and hold Cintas harmless from any claim, liability or damage arising out of any goods or services provided by Cintas, including any failure of the goods or services to function as intended. The last sentence provides that Becker acknowledges that Cintas shall have no liability or responsibility for any loss or damage to persons or property resulting from any fire or equipment malfunction.

The Purpose And Unmistakable Intent Of The Parties In Entering Into The Contract Was For No Other Reason Than To Cover Losses Occasioned By Cintas' Own Negligence

¶27 The contract between Cintas and Becker not only clearly reflects the intent of the parties that Becker would defend and indemnify Cintas for its own negligent acts for its services under the contract, it is also clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by Cintas' own negligence. *See* ***Spivey***, 79 Wis. 2d at 63-64; ***Dykstra***, 100 Wis. 2d at 125. Addressing this prong of the strict interpretation of an indemnity contract, the court in ***Spivey*** cited ***Herchelroth v. Mahar***, 36 Wis. 2d 140, 146, 153 N.W.2d 6 (1967) and ***Hastreiter v. Karau Buildings, Inc.***, 57 Wis. 2d 746, 749, 205 N.W.2d 162 (1973).

¶28 In ***Herchelroth***, the supreme court considered an indemnification agreement, which provided in part: "'The lessor agrees to secure and pay for

property damage and public liability insurance on the leased equipment and to save the lessee harmless from any damage thereby during the duration of this agreement….'" ***Id.***, 36 Wis. 2d at 144-45 (some capitalization omitted). In that case, the lessor owned a truck that he leased to the lessee. ***Id.*** at 143. During the term of the lease, the lessee was involved in an accident with the truck. ***Id.*** The driver of the other vehicle sued the lessee and the lessee sought indemnification from the lessor truck owner. ***Id.*** The issue before the court was whether the indemnification agreement required the lessor to indemnify the lessee from the lessee's own negligence. ***Id.*** at 145.

¶29 The court concluded that the agreement was drawn in an effort to protect the indemnitee from the consequences of his own negligent acts. ***Id.*** at 147. Specifically, the court explained that the second clause, "to save the lessee harmless from any damage thereby during the duration of this agreement," was intended by the parties as a means of indemnifying the lessee for the consequences of his own negligent acts. ***Id.*** Specifically addressing the hold harmless language in the agreement in light of the requirement that the lessor purchase insurance, the court stated:

> Read in light of the first clause where the parties could not have but intended that the insurance appellant [lessor] was to secure and pay for was to protect the respondent [lessee] from the consequences of his own negligence, the additional language would be meaningless and inoperative if it did not oblige [lessor] to indemnify respondent [lessee] for consequences of his own negligent acts.

Id.

¶30 In ***Hastreiter***, the supreme court reached a similar conclusion. There, the issue was whether the indemnification clause in the lease required the tenant to hold the landlord harmless from the landlord's own negligence. ***Id.***, 57

Wis. 2d at 747-49. The tenant argued that an indemnification clause should not be construed to provide for the indemnification of a party from the effects of his own negligence without clear and unequivocal language. ***Id.*** at 748. The court noted that:

> The rule relied on by the tenant is a rule of construction. The purpose of the construction of an agreement is to ascertain the intent of the parties. Another rule of construction is that, if possible, a reasonable meaning should be given to all the provisions of an agreement.

Id.

¶31 The court then compared the indemnification language in ***Herchelroth*** with the clause before it, which read, "'The Lessee agrees to carry and pay for public liability insurance and to hold the Lessor harmless from any liability arising out of the occupance of said leased premises by the Lessee.'" ***Hastreiter***, 57 Wis. 2d at 748-49. Turning to the ***Herchelroth*** case, the court explained:

> We construed the save harmless clause in light of the insurance clause, where it was clear that the purpose was to protect the indemnitee from the consequences of his own negligence. If the obligation of the indemnitor had been limited to the purchase of insurance, the save harmless clause would have been surplusage. We adopted the construction which gave meaning to the save harmless clause.

Id. at 748-49. The court concluded that "the public liability insurance clause is intended to protect the landlord [indemnitee] from the effects of his own negligence…. To construe the indemnification provision as the appellant [Lessee] argues would be to make the hold harmless clause surplusage." ***Id.*** at 749.

¶32 The same reasoning applies in this case. The contract between Cintas and Becker provides that Becker shall defend, indemnify, and hold harmless Cintas from any claim, charge, liability or damage arising out of any goods or services provided by Cintas under the agreement. The agreement also requires Becker to obtain and maintain insurance coverage. Like the supreme court in ***Herchelroth*** and ***Hastreiter***, we conclude the public liability insurance clause is intended to protect Cintas from the effects of its own negligence.

¶33 Additionally, in ***Heritage Mutual Insurance Co. v. Truck Insurance Exchange***, 184 Wis. 2d 247, 516 N.W.2d 8 (Ct. App. 1994), this court addressed the significance of an insurance clause in relation to a duty to indemnify an indemnitee for its own negligence. This court first noted that the issue involved construction of the contract and explained: "'[t]he objective in interpreting and construing a contract is to ascertain the true intention of the parties. A construction which gives reasonable meaning to every provision of a contract is preferable to one leaving part of the language useless or meaningless.'" ***Id.*** at 252. (Citations omitted.) This court then explained, "[c]onsequently, an indemnification agreement is not to be interpreted in a vacuum, but rather in conjunction with the intent of the parties." ***Id.*** at 254.

¶34 Similar to this case, the court in ***Heritage*** noted that the parties did not dispute that nothing in the indemnification agreement specifically purported to protect the indemnitee in the event of damages sustained by its negligence. ***Id.*** at 256. However, the court explained that this does not end the matter, stating, "[r]ather, as mandated by ***Spivey***, we must look to see if the purpose and unmistakable intent of the parties in entering into the agreement was for no other reason than to cover losses occasioned by [the indemnitee's] own negligence." ***Heritage***, 184 Wis. 2d at 256.

¶35 The ***Heritage*** court then discussed the ***Herchelroth*** and ***Hastereiter*** cases and compared the language in those cases with the language in the agreement before it. ***Heritage***, 184 Wis. 2d at 256-58. The language in the agreement in ***Heritage*** stated:

> 12. *Damage to Lessee's Property*. The lessor [Gillfoy] shall not be liable to the lessee [Hart] for damage caused by fire, explosion, elements and act of God or any other casualty and the parties shall respectively secure from their insurance carriers waivers of subrogation to any claim of one against the other which has been compensated by insurance.

Id. at 252. The court held that, "the lease provision in the present case clearly manifests an intent by the parties to cover losses occasioned by each other's negligence." ***Id.*** at 258. The court explained:

> Specifically, we believe that a reasonable interpretation of the language "and the parties shall respectively secure from their insurance carriers waivers of subrogation to any claim of one against the other which has been compensated by insurance" manifests the intent to protect Gillfoy [lessor] from liability incurred by its own negligent acts upon Hart [lessee]. Without such a construction, the clause would be rendered mere surplusage.

Id. The court further held:

> Consequently, we conclude that the *only* reasonable interpretation, one which imports all the language of the clause, requires that the subrogation clause was intended to create another peril against which the parties were protected—acts of one's negligence. As recognized above, the general rule of construction is that an interpretation of an agreement which gives reasonable meaning to all provisions is preferable to one which leaves part of the language useless or inexplicable or creates surplusage.

Id.

¶36 Lastly, in ***Mikula v. Miller Brewing Co.***, 2005 WI App 92, ¶36, 281 Wis. 2d 712, 701 N.W.2d 613, the court held that the provision to purchase insurance and the provision to indemnify and save harmless in an agreement evidences the intent to indemnify and hold harmless, even against the indemnitee's own negligence:

> Similarly, here, when the two provisions are taken together, J.F. Cook's agreement to purchase additional insurance and to
>
> > indemnify and save harmless the Owner [Miller] … from any and all liability, payments, and expenses of any nature for injury or death to any person, or persons, or for damage to any property, caused by the Sub-Contractor, or incidental to the execution of work under this contract by the Sub-Contractor, his agents or employees[,]
>
> evidences J.F. Cook's intent to indemnify and hold Miller harmless, even though Miller may be negligent.

Id. The court went on to explain:

> An agreement to purchase insurance indicates an intention to affect the burden of covering the cost of liability that may arise, and considered in combination with an agreement to "indemnify and save harmless" a party from "any and all liability" … evidences a clear intent to indemnify the party for all liability, including that resulting from the indemnitee's own alleged negligence. The contract evinces no other purpose for the inclusion of both agreements.

Id. (alteration added).

¶37 This line of cases explicitly holds that where a provision to purchase insurance is combined with a provision to indemnify and hold harmless the indemnitee, those provisions show the clear intent of the parties to indemnify the indemnitee for its own negligence. We, therefore, conclude that the language in the contract between Cintas and Becker requiring Becker to obtain insurance and

to defend, indemnify, and hold Cintas harmless, clearly expresses the intent of the parties that Becker would defend and indemnify and hold Cintas harmless for any claims against Cintas, including for its own negligence. Additionally, we hold that the purpose and unmistakable intent of the parties in entering into the agreement with these terms was for no other reason than to indemnify Cintas for its own negligent acts.

This Court Will Not Address Becker's Other Issues Raised For The First Time On Appeal

¶38 The last issues we address are Becker's arguments, which it did not first raise in the trial court, that the indemnification provision in the contract is unenforceable because it is unconscionable because it was inconspicuous and that it is more appropriately classified as an exculpatory clause. In ***Wirth v. Ehly,*** 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*, the court stated "[i]t is the often repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *See also* ***State v. Dowdy,*** 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691. Because Becker did not raise these issues before the trial court we do not address them in this appeal.

¶39 Moreover, although as noted in ***Wirth***:

> This rule however is not absolute and exceptions are made. "These exceptions to the general rule, however, involve questions of law which, though not raised below, may nevertheless be raised and decided by this court on appeal.… [W]here the question raised for the first time on appeal involves factual elements not …. brought to the attention of the lower court, this court …. will not generally decide such questions."

Wirth, 93 Wis. 2d 443-44. (one set of ellipses added, citations omitted). If this court addressed this argument, it would not just be addressing a question of law. A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶33, 290 Wis. 2d 514, 714 N.W.2d 155. A court considers such factors as "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract." ***Id.***, ¶34. These factors involve factual issues that are properly addressed by the trial court. *See* ***id.***, ¶25.

¶40 Further, as Cintas notes, pursuant to WIS. STAT. § 402.302(2), when it is claimed that a contract or any of its clauses may be unconscionable "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determinations." Therefore, because the determination of whether a contract is unconscionable is a mixed question of fact and law, ***Wisconsin Auto Title Loans, Inc.***, 290 Wis. 2d 514, ¶25, it does not fall within the exception to the general rule that matters will not be considered for the first time on appeal. Consequently, we will not consider the issue on this appeal. ***Wirth***, 93 Wis. 2d at 443.

CONCLUSION

¶41 In conclusion, we hold that the indemnification provision in the contract between Cintas and Becker clearly expresses the parties' intent that Becker would defend, indemnify and hold Cintas harmless from the affects of its

own negligence. Further, we hold that the contract combines the requirement that Becker purchase insurance and waive any subrogation claims against Cintas and indemnify and hold Cintas harmless from claim, charge, liability, or damage arising out of any goods or services provided by Cintas under the contract, including any failure of the goods or services to function as intended, evidencing a clear intent to indemnify Cintas for all liability, including that resulting from Cintas' own alleged negligence. The contract evinces no other purpose for the inclusion of both provisions.

¶42 We reverse the trial court's decision granting summary judgment in favor of Becker and denying Cintas and Travelers' motion for summary judgment. We remand for entry of summary judgment in favor of Cintas and Travelers and for further proceedings.

By the Court.— Order reversed and cause remanded for further proceedings.

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