STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NOS. 2015 CA 1656
AND
2015 CW 0455

JEFFREY PONDER

VERSUS

SDT WASTE & DEBRIS SERVICES, L.L.C. AND/OR
PROGRESSIVE WASTE SOLUTIONS OF LA, INC.
AND GREENWICH INSURANCE COMPANY

Judgment Rendered: AUG 16 2017

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On Appeal from
The 19th Judicial District Court,
Parish of East Baton Rouge, State of Louisiana
Trial Court No. C614617
The Honorable Donald R. Johnson, Judge Presiding

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* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, WELCH, CRAIN, AND HOLDRIDGE, JJ.

Holdridge J. concurs with reasons

Crain, J. agrees in part and dissents in part and assigns reasons

WELCH, J.

The third-party defendant, Stroubes Chop House, L.L.C. ("Stroubes"), appeals two judgments rendered in favor of the principal defendants, SDT Waste & Debris Services, L.L.C. and/or Progressive Waste Solution of LA, Inc., and its insurer, Greenwich Insurance Company (collectively "SDT"). The first judgment denied Stroubes' motion for summary judgment, granted SDT's motion for summary judgment, and declared that Stroubes owed a defense and indemnity to SDT for defending the plaintiff's claims and for the amount of the settlement SDT subsequently paid to the plaintiff. The second judgment awarded SDT the fees and costs that it expended in defending the plaintiff's action, the amount of the settlement SDT paid to the plaintiff, and attorney fees, costs, and expenses SDT incurred to enforce the defense and indemnification. For reasons that follow, we affirm in part and reverse in part the first judgment, and we vacate the second judgment.

FACTUAL AND PROCEDURAL HISTORY

On August 14, 2012, the plaintiff, Jeffrey Ponder, instituted this proceeding seeking to recover damages for injuries that he sustained in an accident that occurred on January 13, 2012, while he was working for Stroubes. According to the plaintiff's petition, he was injured when the wheels fell off a garbage dumpster causing the dumpster to fall on his foot. The plaintiff sued the owner of the dumpster, SDT, alleging that the sole cause of the accident was SDT's negligence, specifically, its failure to use reasonable care to keep the dumpster in a safe condition.

On October 1, 2012, SDT filed an answer generally denying liability, and then on April 4, 2013, SDT filed a third-party demand against Stroubes seeking indemnity and to have Stroubes provide a defense. SDT's demand for indemnity

and defense was based upon a provision in a July 22, 2009 service contract between SDT and Stroubes, which provided as follows:

> Customer [(Stroubes)] accepts responsibility, garde, safekeeping, and liability for Contractor's [(SDT's)] equipment and its contents . . . . Customer agrees to defend, indemnify, reimburse, and hold harmless the Contractor, its officers, agents, and employees, from and against any and all liability, suits, legal proceedings, demands, judgments, settlements, fines, damages, costs, or loss of any kind, and attorneys' fees arising out of, incident to, or resulting from any work or services done pursuant to this Agreement, theft of or damage to Contractor's equipment, and/or use, operation, confiscation, or impoundment of Contractor's equipment.

Stroubes filed an answer to the third-party demand on June 7, 2013, generally denying liability. Thereafter, on August 8, 2014, Stroubes filed a motion for summary judgment seeking the dismissal of the third-party demand on the basis that the indemnity provision did not cover SDT's alleged liability to Ponder. Stroubes claimed that the indemnity provision did not apply to losses resulting from SDT's own negligence, which, according to the plaintiff's petition, was the sole cause of the accident. In support of its motion for summary judgment, Stroubes relied on: (1) the plaintiff's petition for damages wherein the plaintiff alleged that the accident was caused solely and proximately by the gross and flagrant negligence of SDT; and (2) SDT's third-party demand against Stroubes, which had attached to it the July 22, 2009 service contract between SDT and Stroubes (containing the indemnity provision) and correspondence from SDT tendering defense of this matter to Stroubes.

SDT opposed Stroubes' motion and subsequently filed its own motion for summary judgment on December 3, 2014 seeking a judicial declaration that the indemnity provision obligated Stroubes to provide SDT with indemnity and a defense. SDT maintained that Stroubes accepted garde and legal responsibility for the dumpster and that the plaintiff's claims arose out of Stroubes' use of the dumpster; therefore, the terms of the indemnity provision were satisfied. SDT also

maintained that it was not at fault in causing the accident. In support of its opposition to Stroubes' motion for summary judgment, SDT relied on: (1) the plaintiff's petition for damages wherein the plaintiff alleged that he was injured in the course and scope of employment, as well as the claims of negligence alleged against SDT; (2) an excerpt from the deposition of the plaintiff wherein he described the accident; (3) Stroubes' responses to requests for admissions wherein Stroubes admitted that there were no prior accidents with the dumpster, that it did not observe any apparent or visible defects during its use of the dumpster, and that Stroubes had no notice or knowledge of any issues with the dumpster; and (4) the July 22, 2009 service contract between SDT and Stroubes. In support of its own motion for summary judgment, SDT essentially relied on the same documents it relied on in opposition to Stroubes' motion for summary judgment.

While both motions for summary judgment were pending, the plaintiff's claim was settled against SDT and was dismissed. The trial court then heard the cross-motions for summary judgment on the third-party demand and ruled in favor of SDT, signing a judgment on February 24, 2015, that granted SDT's motion for summary judgment declaring that Stroubes owed indemnity and a defense to SDT, including the cost of defending the plaintiff's claim and the resulting settlement. In the same judgment, the trial court denied Stroubes' motion for summary judgment.

SDT then filed a motion requesting a judgment against Stroubes for the amount of the settlement plus its defense costs. After a hearing on the motion, the trial court signed a judgment on June 3, 2015, awarding SDT the settlement amount of $35,000.00, attorney fees and costs to defend Ponder's claims in the amount of $39,320.20, and an unspecified amount for attorney fees and costs incurred to enforce the indemnity agreement.

Stroubes appealed the June 3, 2015 judgment. After the record was lodged on appeal, this court remanded the matter to the trial court for the limited purpose of signing, if appropriate, a judgment that contained proper decretal language disposing of the remaining claims and quantifying the amount of attorney fees awarded. On remand, the trial court signed another judgment on April 29, 2016, awarding the amounts set forth in the original judgment, plus $19,350.50 in attorney fees and costs to enforce the indemnity agreement through May 18, 2015, along with judicial interest on those amounts from that date until paid.[1]

On appeal, Stroubes seeks review of (1) the February 24, 2015 judgment granting SDT's motion for summary judgment and denying Stroube's motion for summary judgment, and (2) the June 3, 2015 judgment, later supplemented by the April 29, 2016 judgment, awarding the settlement amount, attorney fees, costs, and expenses to SDT.[2]

LAW AND DISCUSSION

A motion for summary judgment shall be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that the mover is

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[1] The remand was prompted by a rule to show cause issued by this court inquiring as to whether the appeal should be dismissed because the June 3, 2105 judgment appeared to be nonappealable. Finding that the April 29, 2016 judgment adequately addresses the concerns raised in this court's show cause order, we dismiss the rule to show cause and maintain the appeal.

[2] The rulings contained in the February 24, 2015 judgment are subject to review in connection with the unrestricted appeal of the final judgment signed on April 29, 2016. See **Dean v. Griffin Crane & Steel, Inc.**, 2005-1226 (La. App. 1st Cir. 5/5/06), 935 So.2d 186, 189, n.3, writ denied, 2006-1334 (La. 9/22/06), 937 So.2d 387. We also note that Stroubes filed a supervisory writ application with this court seeking review of the February 24, 2015 judgment, which was referred to this panel for consideration with this appeal. See **Ponder v. SDT Waste & Debris Services, LLC**, 2015-0455 (La. App. 1st Cir. 7/13/15). Since our decision herein disposes of the issues raised in the writ application, we deny the writ application as moot.

entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).[3] In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **In re Succession of Beard**, 2013-1717 (La. App. 1st Cir. 6/6/14), 147 So.3d 753, 759-760.

The determination of whether a contract is clear or ambiguous is a question of law. **Sims v. Mulhearn Funeral Home, Inc.**, 2007-0054 (La. 5/22/07), 956 So. 2d 583, 590. When a contract can be construed from the four corners of the instrument without looking to extrinsic evidence, the question of contractual interpretation is answered as a matter of law and summary judgment is appropriate. **Sims**, 956 So.2d at 590; **Claitor v. Brooks**, 2013-0178 (La. App. 1st Cir. 12/27/13), 137 So.3d 638, 644-645, writ denied, 2014-0198 (La. 4/4/14), 135 So.3d 1182.

The obligation to indemnify may be express, as in a contractual provision, or may be implied in law, even in the absence of an indemnity agreement. **Nassif v. Sunrise Homes, Inc.**, 98-3193 (La. 6/29/99), 739 So.2d 183, 185. Here, the indemnity obligation is expressed in a contract between the parties. As such, the contract of indemnity forms the law between the parties and must be interpreted according to its own terms and conditions. See **Naquin v. Louisiana Power & Light Company**, 2005-2103 (La. App. 1st Cir. 9/15/06), 943 So.2d 1156, 1161, writ denied, 2006-2476 (La. 12/15/06), 945 So. 2d 691.

The purpose of an indemnity agreement is to allocate the risk inherent in the activity between the parties to the contract. **Naquin**, 943 So.2d at 1161.

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[3] Louisiana Code of Civil Procedure article 966 was amended and reenacted by 2015 La. Acts, No. 422, § 1, eff. January 1, 2016. The amended version of La. C.C.P. art. 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act. In this case, the motions for summary judgment were adjudicated and appealed prior to January 1, 2016; therefore, we refer to the former version of the article in this case. See 2015 La. Acts, No. 422, §§ 2 and 3.

Indemnity is based on the principle that everyone is responsible for his own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss. **Nassif**, 739 So.2d at 185.

A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless such an intention is expressed in unequivocal terms. See **Berry v. Orleans Parish School Board**, 2001-3283 (La. 6/21/02), 830 So.2d 283, 285; **Barnett v. American Construction Hoist, Inc.**, 2011-1261 (La. App. 1st Cir. 2/10/12), 91 So.3d 345, 349; **Arnold v. Stupp Corporation**, 205 So.2d 797, 799 (La. App. 1st Cir. 1967), writ not considered, 251 La. 936, 207 So.2d 540 (1968). The established principle supporting the rule is that general words alone, *i.e.*, 'any and all liability,' do not necessarily import an intent to impose an obligation so extraordinary and harsh as to render an indemnitor liable to an indemnitee for damages occasioned by the sole negligence of the latter. **Berry**, 830 So.2d at 285; **Arnold**, 205 So.2d at 799.

In this case, the indemnity provision addresses the risk of liability arising out of the use of the dumpster. The parties agreed that Stroubes would "defend [and] indemnify" SDT from "any and all liability" arising out of the use of the dumpster. However, this court has found similar language insufficient to create an obligation to indemnify the indemnitee for losses caused by his own negligence. See **Barnett**, 91 So.3d at 348 and 350 (holding that the indemnity clause that applied to "all loss [and] liability" resulting from the use of the indemnitee's equipment did not cover losses caused by the indemnitee's negligence); **Arnold**, 205 So.2d at 798-799 and 803 (same holding where the indemnity provision applied to "any and all liability" arising out of the use of materials purchased from the indemnitee). Consistent with that jurisprudence, SDT concedes, and we find, that Stroubes'

agreement to indemnify SDT for "any and all liability" does not include losses caused by SDT's own negligence. See **Barnett**, 91 So.3d at 348 and 350; **Arnold**, 205 So.2d at 798-99 and 803.

SDT, however, focuses on the first sentence of the indemnity agreement, wherein Stroubes agreed to accept "responsibility, garde, safekeeping, and liability" for the dumpster. Citing that language, along with the undisputed fact that the plaintiff's claim arose out of the use of the dumpster, SDT maintains that Stroubes is obligated to indemnify it for the settlement amount and defense costs.

Initially, we note that the quoted language relied upon by SDT is somewhat contradicted by another provision in the contract stating that the "maintenance" and "service" of the dumpster "remains with" SDT. However, as explained hereinafter, even assuming that the agreement unambiguously transferred the garde of the dumpster to Stroubes, that transfer would not automatically vest SDT with a right of indemnity against Stroubes.

Custody or garde is an essential element to the imposition of liability for injuries caused by a vice or defect in property under La. C.C. arts. 2317 and 2317.1. See **Giorgio v. Alliance Operating Corporation**, 2005-0002 (La. 1/19/06), 921 So.2d 58, 73. The concept of garde is broader than ownership, and more than one party may have garde of a thing under La. C.C. arts. 2317 and 2317.1. See **Dupree v. City of New Orleans**, 99-3651 (La. 8/31/00), 765 So.2d 1002, 1009. Similarly, although an owner of a thing is presumed to have garde of the property, that presumption may be rebutted by establishing a contractual undertaking by another to maintain and control the property. See **Rodrigue v. Baton Rouge River Center**, 2015-0703 (La. App. 1st Cir. 11/9/15) (*unpublished*); **Davis v. Riverside Court Condominium Association Phase II, Inc.**, 2014-0023 (La. App. 4th Cir. 11/12/14), 154 So.3d 643, 648.

In accordance with the foregoing, SDT could contractually transfer the garde of the dumpster to Stroubes. If effective, that transfer would benefit SDT by shifting some or all of the legal responsibility for the dumpster to Stroubes. Under Louisiana's comparative fault system, any fault allocated to Stroubes would then reduce SDT's liability to any injured third-party. See La. C.C. arts. 2323, 2324(B); **Keith v. United States Fidelity & Guaranty Company**, 96-2075 (La. 5/9/97), 694 So.2d 180, 183. While that potential benefit of the provision to SDT is readily apparent, we are unaware of any support under the applicable law for the proposition that the transfer of the garde created a *right of indemnity* between Stroubes to SDT.

As previously recognized, any indemnity obligation owed by Stroubes to SDT must be either expressed in the agreement or implied by law. See **Nassif**, 739 So.2d at 185. We find that the contractual language purporting to transfer the garde of the dumpster to Stroubes is not sufficient to give rise to an indemnity obligation, express or implied, that *extends to losses resulting from SDT's own negligence*.

The sentence cited by SDT provides that Stroubes accepts "responsibility, garde, safekeeping, and liability" for the dumpster. For indemnity purposes, this language is not materially different from the clause appearing later in the same section of the contract, wherein Stroubes agreed to indemnify SDT for "any and all liability" arising out of the use of the dumpster. Accepting "responsibility" for the dumpster is not an unequivocal expression of an intent to accept responsibility for *SDT's negligence*. Thus, the language relied upon by SDT is not sufficient to "import an intent to impose an obligation so extraordinary and harsh as to render an indemnitor liable to an indemnitee for damages occasioned by the sole negligence of" SDT. See **Berry**, 830 So.2d at 285; **Arnold**, 205 So.2d at 799.

Likewise, the transfer of the garde did not give rise to a legally implied obligation of indemnity. When a party's liability is solely constructive or derivative, an implied contract of indemnity arises against the person who, because of his act, caused the constructive liability to be imposed. See **Nassif**, 739 So. 2d at 185. Thus, under the law in effect before 1996, a party held liable only on the grounds of strict liability was entitled to full indemnity from the party who actually caused the unreasonably dangerous condition. See **Dusenbery v. McMoRan Exploration Company**, 458 So. 2d 102, 105 (La. 1984). However, strict liability under La. C.C. art. 2317 was effectively eliminated and converted to a negligence standard by the enactment in 1996 of La. C.C. art. 2317.1, which imposes liability only if the owner or custodian knew or should have known of the defect and failed to use reasonable care to prevent the damage. See **Burmaster v. Plaquemines Parish Government**, 2007-2432 (La. 5/21/08), 982 So. 2d 795, 799 n.1; Maraist & Galligan, Louisiana Tort Law § 14-2, at 330-332 (1996).

Under current law, SDT could only be held liable to the plaintiff for its own negligent conduct. No allegations were made, nor any evidence offered, that suggests SDT was constructively or derivatively liable for any conduct of Stroubes. Regardless of how negligent Stroubes may or may not have been, SDT was not responsible for that negligence—SDT was only liable for its own alleged negligent conduct. See La. C.C. arts. 2317.1, 2323 and 2324. Thus, the transfer of garde did not create an implied obligation of indemnity; rather, the transfer of garde, if effective, was relevant only for purposes of allocating fault, if any, between SDT and Stroubes for liability arising out of the use of the dumpster. See La. C.C. arts. 2317, 2317.1, 2323 and 2324(A).

Under our comparative fault system, SDT could only be compelled to pay the loss attributable to its own, independent negligence. That liability is not

covered by the indemnity provision contained in the parties' agreement. See **Barnett**, 91 So.3d at 349; **Arnold**, 205 So.2d at 799; see also **Moore v. Kenilworth/Kailas Properties**, 2007-0346 (La. App. 4th Cir. 2/13/08), 978 So.2d 475, 481, writ denied, 2008-0584 (La. 5/2/08), 979 So. 2d 1287 (liability of lessor and lessee was limited to their respective allocations of fault, so lessor had no right of indemnity from lessee under indemnity provision that did not apply to losses caused by indemnitee's negligence); **Jackson v. America's Favorite Chicken Company**, 2000-0681 (La. App. 4th Cir. 1/31/01), 778 So. 2d 1257, 1262, writ denied, 2001-0596 (La. 4/27/01), 791 So.2d 633 (defendant had no right of indemnity from plaintiff's employer where defendant could only be held liable for its proportionate amount of negligence and indemnity agreement with employer did not apply to losses caused by defendant's negligence).

Therefore, we must conclude that Stroubes is not obligated to indemnify SDT for SDT's liability, if any, for the damages sustained by the plaintiff and the trial court erred in granting summary judgment in this regard. For the same reasons, we find that Stroubes had no obligation to defend SDT for claims arising from SDT's own negligence (or fault), and, therefore, the trial court erred in granting summary judgment declaring that Stroubes owed attorney fees and costs incurred by SDT in defending the plaintiff's claim.[4] See **Barnett**, 91 So. 3d at 350 (finding no duty to defend and affirming dismissal of claim for attorney fees and costs where indemnity provision did not cover indemnitee's negligence); **Boykin v. PPG Industries, Inc.**, 2008-0117 (La. App. 3rd Cir. 6/18/08), 987 So.2d 838, 845, writs denied, 2008-1635, 2008-1640 (La. 10/31/08), 994 So.2d 537 (denying claim for defense costs where third-party defendant had no obligation to provide

[4] As discussed hereinafter, whether Stroubes ultimately owes indemnity and costs of defense to SDT cannot be determined until there has been a determination of fault.

indemnity).[5] Accordingly, we reverse that portion of the February 24, 2015 judgment that granted summary judgment in favor of SDT declaring that Stroubes owed defense and indemnity to SDT. Having reached that conclusion, the June 3, 2015 judgment, later supplemented by the April 29, 2016 judgment, awarding the settlement amount, attorney fees, costs, and expenses to SDT, which was rendered in furtherance of that summary judgment, must be vacated.

However, with respect to Stroubes' motion for summary judgment, we must conclude that the trial court properly denied that motion. While we have determined, as a matter of law, that the indemnity agreement providing for indemnity to SDT for "any and all liability" did not include losses caused by SDT's own negligence (or fault), we must conclude that the indemnity agreement may be interpreted to provide for indemnity and defense for losses that are not caused by SDT's negligence or fault--*i.e.*, losses caused by the negligence or fault of Stroubes. Essentially, Stroubes maintained, as a defense to SDT's third-party demand, that the indemnity agreement did not cover the plaintiff's accident because the accident was caused by SDT's own negligence, and therefore, Stroubes owed no defense or indemnity to SDT. As such, it was Stroubes' burden on its motion for summary judgment to show that there was no genuine issue of material fact that the accident at issue was caused solely by SDT's negligence and that it was entitled to judgment as a matter of law. See **Buck's Run Enterprises, Inc. v. Mapp Const., Inc.**, 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428.

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[5] We note that in **Meloy v. Conoco, Inc.**, 504 So. 2d 833, 839 (La. 1987), the supreme court recognized that an indemnitee, although barred from recovering indemnity for its own negligence by the Louisiana Oil Field Indemnity Act, might be entitled to recover its cost of defense if it was completely free from fault. We distinguish **Meloy** as addressing the scope of the Louisiana Oil Field Indemnity Act, which is not applicable herein, and on the basis that the agreement therein contained a provision detailing the obligation to defend and imposing the obligation "even if such claim, demand, or suit is groundless, false or fraudulent." See **Meloy**, 504 So. 2d at 836, n.4. The present indemnity provision contains no such language and includes only a single mention of the word "defend," which we construe to be incidental to the indemnity obligation.

As previously set forth, in support of its motion for summary judgment, Stroubes relied on the plaintiff's petition wherein it was *alleged* that the accident was caused solely and proximately by the gross and flagrant negligence of SDT and SDT's third-party demand against Stroubes, which had attached to it the July 22, 2009 service contract containing the indemnity agreement and the correspondence from SDT tendering defense of this matter to Stroubes. In opposition to Stroubes' motion for summary judgment, SDT claimed that the accident arose out of Stroubes' use of SDT's equipment, the dumpsters, and that the indemnity clause covered that instance. As previously noted, in opposition to Stroubes' motion for summary judgment, SDT relied on the plaintiff's petition for damages wherein it was *alleged* that the plaintiff was injured in the course and scope of employment, as well as the claims of negligence *alleged* against SDT; an excerpt from the deposition of the plaintiff wherein he described the accident; Stroubes' responses to requests for admissions wherein Stroubes admitted that there were no prior accidents with the dumpster, no apparent or visible defects during the use of the dumpster, and no notice or knowledge of any issues with the dumpster; and the July 22, 2009 service contract between SDT and Stroubes.

Based on our *de novo* review of the evidence, we find that Stroubes failed to meet its burden of proving that there were no genuine issues of material fact remaining with respect to the accident being caused by Stroubes' sole negligence. Rather, the evidence establishes that material issues of fact remain with respect to the transfer of garde and maintenance of the dumpster and the allocation of fault between SDT and Stroubes. Therefore, the trial court properly denied Stroubes' motion for summary judgment and that portion of the trial court's judgment is affirmed.

CONCLUSION

For all of the above and foregoing reasons, the February 24, 2015 judgment of the trial court is reversed insofar as it granted summary judgment in favor of SDT Waste & Debris Services, L.L.C. and/or Progressive Waste Solution of LA, Inc., and its insurer, Greenwich Insurance Company, and is affirmed insofar as it denied the motion for summary judgment filed by Stroubes Chop House, L.L.C. We vacate the June 3, 2015 judgment, later supplemented by the April 29, 2016 judgment, awarding the settlement amount, attorney fees, and costs to SDT Waste & Debris Services, L.L.C. and/or Progressive Waste Solution of LA, Inc., and its insurer, Greenwich Insurance Company.

All costs of this appeal are assessed equally to the appellee/principal defendants, SDT Waste & Debris Services, L.L.C. and/or Progressive Waste Solution of LA, Inc., and its insurer, Greenwich Insurance Company, and to the appellant/third-party defendant, Stroubes Chop House, L.L.C.

RULE TO SHOW CAUSE DISMISSED AND APPEAL MAINTAINED; APPLICATION FOR SUPERVISORY WRIT DENIED AS MOOT; FEBRUARY 24, 2015 JUDGMENT REVERSED IN PART AND AFFIRMED IN PART; JUNE 3, 2015 AND APRIL 29, 2016 JUDGMENTS VACATED.

JEFFREY PONDER

VERSUS

SDT WASTE & DEBRIS SERVICES, L.L.C. AND/OR PROGRESSIVE WASTE SOLUTIONS OF LA, INC. AND GREENWICH INSURANCE COMPANY

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 1656 C/W 2015 CW 0455

CRAIN, J., dissenting in part.

I agree with reversing the summary judgment rendered in favor of SDT on February 24, 2015. However, I disagree with affirming the denial of Stroubes' motion for summary judgment.

The indemnity agreement is written solely for the benefit of SDT, but I agree that it does not indemnify SDT for its own negligence. Furthermore, I agree the relationship between Stroubes and SDT does not support a finding of an implied indemnity in favor of SDT. Consequently, the majority's conclusions that "SDT could only be held liable to the plaintiff for its own negligent conduct," and "SDT could only be compelled to pay the loss attributable to its own, independent negligence" are correct.

However, those conclusions are in conflict with the majority's conclusion that the indemnity agreement may be interpreted to provide indemnity to SDT for losses caused by the fault of Stroubes, the basis for the denial of summary judgment in favor of Stroubes. SDT cannot be liable for Stroubes' fault. As the majority correctly notes, there is no legal support for the proposition that the transfer of garde creates a right of indemnity between Stroubes and SDT. Consequently, the fact that the indemnity agreement extends garde over the dumpster to Stroubes is simply a fact to be considered in allocating fault between SDT and Stroubes, but each party is only liable for its own fault. Fault will be apportioned between the parties at trial. *See* La. Civ. Code art. 2323; La. Code

Civ. Pro. art. 1812C(2). A post-settlement determination of fault between SDT and Stroubes will not allow SDT to recoup the settlement amounts paid, because SDT only paid for its own fault. Stroubes has no legal obligation to indemnify or pay for SDT's fault.

The only argument for Stroubes paying any amount to SDT pursuant to the indemnity agreement would relate to the attorney fees and cost incurred by SDT to defend plaintiff's claims if SDT is free from fault, as suggested by *Meloy v. Conoco, Inc.*, 504 So. 2d 833, 839 (La. 1987). However, I agree *Meloy* is distinguishable and no such costs are due in this case. *See Barnett v. American Construction Hoist, Inc.*, 11-1261 (La. App. 1 Cir. 2/10/12), 91 So. 3d 345, 350; *Boykin v. PPG Industries, Inc.*, 08-0117 (La. App. 3 Cir. 6/18/08), 987 So. 2d 838, 845, *writs denied*, 08-1635, 2008-1640 (La. 10/31/08), 994 So. 2d 537. Stroubes is entitled to summary judgment dismissing all claims asserted against it by SDT.

Even if SDT could obtain indemnity for losses caused by the fault of Stroubes, SDT failed to produce any evidence to support a finding of fault on the part of Stroubes. Stroubes' motion for summary judgment sufficiently pointed out an absence of factual support for an essential element of SDT's indemnity claim, that is, that Stroubes knew or should have known of a defect in the dumpster. *See* La. Civ. Code arts. 2315, 2317, and 2317.1. The burden then shifted to SDT, who will bear the burden of proof at trial, to produce evidence sufficient to establish Stroubes' negligence. *See* La. Code Civ. Pro. art. 966C(2) (prior to amendment by 2015 La. Acts No. 422). SDT produced no such evidence. Summary judgment should be granted in favor of Stroubes.

JEFFREY PONDER

VERSUS

SDT WASTE & DEBRIS SERVICES, L.L.C. AND/OR PROGRESSIVE WASTE SOLUTIONS OF LA, INC. AND GREENWICH INSURANCE COMPANY

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HOLDRIDGE, J., concurs.

I concur in the result. I find that Stroubes and SDT had an indemnification agreement between them. However, there are genuine issues of material fact as well as a question of law as to the scope of the indemnification agreement and to the correct amount of indemnification, attorney's fees, and costs owed by Stroubes to SDT. These matters must be decided at a trial on the merits where Stroubes will have the burden of proving the percentage, if any, of fault that should be imposed on STD and why Stroubes should not be required to indemnify SDT for the entire amount, including attorney's fees and costs which it paid to defend and settle this suit.