

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS SPARCKS,

Plaintiff,

UNPUBLISHED
January 30, 2001

v

WOLGAST CONSTRUCTION, INC., and
MCDONALD'S CORPORATION,

No. 221014
Saginaw Circuit Court
LC No. 94-002288-NI

Defendants/Third-Party
Plaintiffs-Appellees,

v

CHIPPEWA CONTRACTING, INC.,

Third-Party Defendant-Appellant.

Before: Collins, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant Chippewa Contracting, Inc. appeals as of right from a judgment in favor of plaintiff Wolgast Construction, Inc. We affirm in part, vacate in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Thomas Sparcks filed suit alleging that while employed by Chippewa, a subcontractor for Wolgast, he was injured while working on the site of a new McDonald's restaurant. Wolgast and McDonald's filed third-party complaints against Chippewa, alleging common law indemnity, express contractual indemnity, and breach of contract. The principal case settled for the mediation evaluation of \$300,000 in favor of Sparcks. Chippewa rejected the evaluation of \$100,000 in favor of both Wolgast and McDonald's. Subsequently, the trial court granted in part Chippewa's motion for summary disposition, and held that in light of the allegation of active negligence in the principal action, indemnification was not available to Wolgast on either a common law or an implied contract theory.

At trial, the evidence showed that Wolgast and Chippewa had a long-standing professional relationship. On some occasions the parties executed a purchase agreement which

contained express indemnification language. On other occasions no such written agreement was executed; however, on those occasions, the parties operated with the understanding that the terms and conditions included in the written agreements applied to those projects.

The trial court found that an indemnification agreement existed between Wolgast and Chippewa as part of the oral contract for work on the McDonald's project. Subsequently, the trial court entered judgment in favor of Wolgast and against Chippewa in the amount of \$150,000, and awarded Wolgast \$17,641 in attorney fees and \$51,460 in interest.

Chippewa argues that the trial court clearly erred in finding that it had an indemnity agreement with Wolgast on the McDonald's project. We disagree and affirm the trial court's finding on this issue. A trial court's findings of fact are sufficient if it appears that the court was aware of the issues in the case and correctly applied the law. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). We review a trial court's findings of fact for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). An express contract is one in which the terms are explicitly stated, either orally or in writing, at the time the contract is made. *Benson v Dep't of Management and Budget*, 168 Mich App 302, 307; 424 NW2d 40 (1988).

Here, the uncontradicted evidence established that when Chippewa and Wolgast entered into oral contracts, they did so with the understanding that those contracts contained all the same terms as did their written agreements, including indemnity provisions. The trial court's finding that the express, oral contract between Chippewa and Wolgast contained an indemnity provision and that Wolgast was entitled to indemnity on that basis was not clearly erroneous. MCR 2.517(A)(1); *Hertz Corp, supra*.

Wolgast sought an award of attorney fees as part of its indemnification agreement with Chippewa, and as an element of costs resulting from Chippewa's rejection of the mediation evaluation. MCR 2.403(O). The trial court awarded Wolgast \$17,461 in attorney fees for services performed from the date of the filing of the original complaint, but made no finding regarding the reasonableness of the fees requested.

We vacate the award of attorney fees, and remand for further proceedings. The language in Wolgast's purchase agreement which formed the basis of the indemnification provision of the parties' oral agreement contained no provision for payment of attorney fees. In the absence of such language, Wolgast was not entitled to attorney fees necessitated solely by its defense of the principal action. See *Beaudin v Michigan Bell Telephone Co*, 157 Mich App 185, 189; 403 NW2d 76 (1986); *Redfern v R E Dailey & Co*, 146 Mich App 8, 19; 379 NW2d 451 (1985). However, Wolgast was entitled to attorney fees as an element of actual costs based on its attainment of a more favorable verdict following Chippewa's rejection of the mediation evaluation. MCR 2.403(O)(1) and (6). We remand with instructions that the trial court determine what portion of the total fee requested by Wolgast resulted from Chippewa's rejection of the mediation evaluation, and whether that fee was reasonable. *Wood v DAIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ Martin M. Doctoroff

/s/ Helene N. White