IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CANTEX INC., a Delaware corporation, *Plaintiff/Appellee*,

v.

GILES ENGINEERING ASSOCIATES, INC., *Third Party Defendant/Appellant*.

Nos. 1 CA-CV 15-0620
1 CA-CV 15-0631
(Consolidated)
FILED 11-21-2017

Appeal from the Superior Court in Mohave County
Nos. S8015CV201201247
S8015CV201100076
The Honorable Lee Frank Jantzen, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Margaret H. Downie (retired) joined.

C A M P B E L L, Judge:

¶1 This appeal arises out of a dispute over an indemnity agreement in a construction contract between Appellee Cantex Inc. and Appellant Giles Engineering Associations, Inc. The dispositive issue is whether the superior court erred, as a matter of law, by granting summary judgment in favor of Cantex, finding that Cantex had no duty to defend or indemnify Giles for claims brought by a third-party general contractor.[1] We conclude it did. Accordingly, we vacate and remand for further proceedings in the superior court.

FACTS AND PROCEDURAL BACKGROUND[2]

¶2 In late 2006 and early 2007 Cantex, a manufacturing company, contracted with RBR Construction, Inc., a general contractor, to build a pipe manufacturing and distribution facility in Kingman (the "project"). RBR hired a subcontractor, Concrete Management Corporation ("CMC"), and both hired other subcontractors to assist with the construction of the project.

¶3 In 2007, Cantex separately contracted with Giles to provide observation and field testing of construction materials, including grading and compaction of soil, inspecting the reinforced steel (rebar), field testing the concrete, visual weld inspection and bolt testing, laboratory concrete testing, transportation, and report review by a professional engineer (the "contract"). The contract included the following indemnity clause:

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[1] This appeal involves two separate actions, consolidated for this appeal. Both actions involve the same legal issues between Cantex and Giles. *See infra* ¶¶ 9-10.

[2] We view the evidence in the light most favorable to Giles, the non-prevailing party. *See Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 433, ¶ 10 (App. 2001) (citation omitted).

> To the fullest extent permitted by law, Client shall hold harmless, indemnify, and defend Giles from and against all claims and causes of action for bodily injury, death, and property damage that may arise from the performance of services under this Agreement, except where such bodily injury, death, or property damage arises directly from the *sole* negligence, errors, or omissions of Giles.

(Emphasis added.) The contract also provided that Wisconsin law would govern the terms, interpretation, and performance of the contract.

¶4 In 2011, Cantex brought suit against RBR alleging breach of contract due to excessive cracking and deterioration in exterior concrete work performed by RBR (the "2011 action"). It specifically alleged breach of warranty, breach of contract, and breach of the implied covenant of good faith and fair dealing.

¶5 In turn, RBR filed a third-party complaint against two third-party defendants involved in the project, CMC, Sunshine Concrete and Materials Inc., and defendant Giles. RBR alleged that "concrete distress resulted from problems associated with both the material supplied by Sunshine as well as the concrete installation work performed by CMC." RBR further alleged that the soils Giles tested and approved "did not meet the Project specifications and should not have been approved for the Project." Noting that "RBR may be held responsible for the liability of various parties including CMC, Sunshine, and Giles Engineering," RBR alleged a common law indemnity claim against Giles.

¶6 In 2012, Cantex brought a separate suit against RBR, alleging breach of contract based on defects in the interior concrete, building foundation, and subsurfaces (the "2012 action"). RBR brought claims against numerous third and fourth party defendants, again, including Giles.[3] Again, lacking any contractual claims against Giles, RBR brought a claim for common law indemnity and in this matter, also for negligence. Pursuant to the indemnity agreement contained in the contract between Cantex and Giles, Giles tendered its defense to Cantex in both actions. Cantex refused the tender.

¶7 In the 2011 action, the superior court held a five-day jury trial to resolve the liability between RBR and the concrete subcontractor CMC.

[3] The final amended complaint named 10 other defendants and various unknown parties.

The jury returned verdicts confirming CMC had breached its contract with RBR and apportioned fault between the two parties. The jury concluded that CMC was 85 percent at fault and RBR was 15 percent at fault. The breach of contract claim between Cantex and RBR proceeded to a bench trial. The superior court found that the concrete work was defective and entered judgment in favor of Cantex on its breach of contract claim against RBR. The superior court also found that RBR was expressly responsible for conducting its own testing and inspections and was not authorized to rely on any independent testing results. Accordingly, the superior court determined that Giles was not liable to RBR. Per stipulation between RBR and Giles, the superior court later dismissed, with prejudice, RBR's cause of action against Giles in the 2011 action.

¶8 Giles filed a cross-claim against Cantex in the 2011 action and the ongoing 2012 action seeking contractual indemnification in both actions. Giles again tendered its defense to Cantex, which Cantex again rejected. Cantex later answered and asserted that it had "no obligation to indemnify Giles because any damages awarded against Giles, and in favor of third-party plaintiff RBR [] will arise directly from the sole negligence, error, or omissions of Giles."

¶9 Giles and Cantex filed cross-motions for summary judgment in both actions. The superior court joined the two matters for resolution of the summary judgment motions only. The sole dispute was whether, pursuant to the contractual indemnity clause, *see supra* ¶ 3, Cantex owed Giles a duty to defend and indemnify against RBR's third-party claims.

¶10 After holding oral argument on the summary judgment motions, the superior court denied Giles relief and granted summary judgment in favor of Cantex. The superior court found that RBR's claims against Giles fell within the exception to the indemnity agreement because "[t]he allegations by RBR against Giles [were] based on Giles['] 'sole' negligence against RBR." It later granted Cantex its costs and attorney fees in both actions as the successful party in its contract dispute with Giles. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 12-341, -341.01.

DISCUSSION

¶11 Giles appeals the superior court's ruling on both parties' motions for summary judgment in both actions. We review the superior

court's ruling on a motion for summary judgment de novo. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 433, ¶ 10 (App. 2001).[4]

I. Wisconsin Law Applies

¶12 As an initial matter, the parties agree that pursuant to the contract's choice of law provision, Wisconsin law governs the interpretation of the contract. This court nonetheless applies de novo review to determine whether that choice is "valid and effective" under the Restatement (Second) of Conflicts of Law § 187 (1971). *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 266, ¶ 6 (2003) (choice of law provisions involve issues of law) (citations omitted).

¶13 Under the Restatement § 187(1), "the parties' choice of law applies if the parties could have resolved explicitly a particular issue in their contract." *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207 (1992) (citing Restatement § 187(1)). If, under Arizona law, the parties could have contractually agreed to the indemnity agreement, their choice of law provision will govern. *See Swanson*, 206 Ariz. at 267, ¶ 10 ("Arizona law applies to [§ 187(1)'s] threshold issue.").

¶14 Arizona allows parties to a construction contract to include an indemnity agreement purporting to indemnify, hold harmless, or defend the indemnitee so long as it does not purport to do so when the indemnitee is solely negligent. *See* A.R.S. § 32-1159; *See also Grubb & Ellis Mgmt. Servs., Inc., v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 10 (App. 2006) (Arizona permits contractual indemnity). Here, the indemnity agreement expressly excludes indemnity for Giles' sole negligence. *See supra* ¶ 3. The indemnity agreement at issue here would be permitted under Arizona law. Accordingly, Wisconsin law governs the terms, interpretation, and performance of the contract.

II. Sole Negligence

¶15 Giles argues the superior court erred, as a matter of law, when it found that Cantex was relieved of its contractual responsibility to indemnify and defend Giles because RBR's claims were for Giles' "sole negligence." Applying de novo review, we agree. *See Ceria M. Travis Acad.*,

[4] Although the denial of a motion for summary judgment is generally not reviewable, we will review such a denial when, as here, it involves an issue of law "identical" to the opposing parties' successful motion for summary judgment. *Strojnik*, 201 Ariz. at 433, ¶ 11.

Inc. v. Evers, 887 N.W.2d 904, 909, ¶ 14 (Wis. Ct. App. 2016) (interpretation of a contract is subject to de novo review).

¶16 The interpretation of the word "sole" is the crux of the issue before this court. Where an indemnitee such as Giles is alleged to have been negligent, this court must strictly construe the indemnity agreement. *Fabco Equip., Inc. v. Kreilkamp Trucking, Inc.*, 841 N.W.2d 542, 548, ¶ 11 (Wis. Ct. App. 2013). Under Wisconsin law, interpretation of an indemnity agreement begins with the language of the agreement. *Id.* at 546, ¶ 6. This court may look to dictionary definitions to interpret the meaning of a contract. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 853 N.W.2d 618, 622, ¶ 14 (Wis. Ct. App. 2014).

¶17 The common language definition of "sole" includes "being the only one" or "belonging exclusively or otherwise limited to one." Merriam-Webster's Collegiate Dictionary, 1187 (11th ed. 2014); *see also* The American Heritage Dictionary, 1666 (5th ed. 2011) (defining sole as "[o]f or relating to only one individual or group; exclusive"). To determine whether RBR's claims fell within the "sole negligence" exception to the indemnity agreement, or whether the indemnity agreement requires Cantex to defend and indemnify Giles if it is found to be one of multiple parties at fault, we look at the allegations of RBR's third-party complaints. *See Fabco Equip., Inc.*, 841 N.W.2d at 547, ¶ 9; *Time Warner, Inc. v. St. Paul Fire & Marine Ins. Co.*, 633 N.W.2d 640, 646, ¶ 15 (Wis. Ct. App. 2001). As noted, *see supra* ¶¶ 5-6, RBR never alleged that Giles was solely negligent. It instead alleged liability by multiple parties involved in completing the concrete work. In the 2012 action, Cantex admitted that Giles could not be the only party responsible for the damage.[5]

¶18 Cantex argues, however, that under *Time Warner*, 633 N.W.2d 640, we must construe RBR's causes of action against Giles as asserting Giles' "sole negligence." Cantex's reliance on *Time Warner*, however, is misplaced. Although that case also involved an indemnity clause excluding "sole negligence" from its ambit, the only claims asserted in that action were negligence claims against the would-be indemnitee, an electric company. *Id*. at 642, ¶¶ 4-6.

[5] Cantex admitted "that all Defects and Property damage alleged by [Cantex] result from or were caused or contributed to, in whole or in part, by the negligence or breach of contract of RBR and/or one or more Subcontractor Defendants and/or other parties."

¶19 The Wisconsin Court of Appeals affirmed the circuit court's grant of summary judgment to a cable hardware company that had agreed to indemnify Time Warner that in turn agreed to indemnify the electric company unless a claim was brought for the would-be indemnitee's sole negligence. *Id*. at 646, ¶ 15. Specifically, the court noted:

> [C]laims alleged the negligence of [the electric company], only. Without a claim in the [] suit triggering *Time Warner's* potential liability, Time Warner's obligation to [the electric company], under its indemnification agreement with [the electric company], was not engaged. And absent that, [the cable hardware company's] obligation to Time Warner, under its indemnification agreement with Time Warner, simply was never engaged in this case.

Id. Here we have multiple defendants. RBR alleged multiple parties were liable, including Giles. Accordingly, the superior court erred as a matter of law when it found that RBR's claims against Giles were for its "sole negligence" triggering the preclusion under the indemnity clause.

¶20 Cantex also argues that Arizona's Uniform Contribution Among Tortfeasors Act ("UCATA") further demonstrates that RBR's claims against Giles were for Giles' "sole" negligence. Specifically, Cantex points to A.R.S. § 12-2506, which abolished joint and several liability, with a few limited exceptions. *See* A.R.S. § 12-2506(A), (D). Cantex reasons that because RBR did not allege any of the exceptions in its third-party claims against Giles, "[i]t is therefore a certainty that the claims by RBR against Giles could only result in a judgment against Giles for its sole negligence." UCATA is inapposite. UCATA "eliminat[ed] plaintiffs' ability to recover jointly from any or all liable defendants" and thus, absent certain exceptions "the liability of each defendant for damages is several only." *Cramer v. Starr*, 240 Ariz. 4, 7, ¶ 11 (2016) (citation omitted). Thus, "UCATA's ultimate effect was to prevent a partially responsible defendant from being held liable for the damages caused by his co-defendant[s]." *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 26, ¶ 21 (2016) (citation omitted). "Most important, the clear text of UCATA does not require that a defendant's liability be limited by apportioning damages, but only by apportioning fault." *Piner v. Super. Ct. in and for Cty. of Maricopa,* 192 Ariz. 182, 188, ¶ 24 (1998). By the use of the word "apportioning," the supreme court impliedly indicated that there must be more than one defendant involved in an action to trigger the application of UCATA's joint liability and apportionment of damages statutory scheme. If we adopted the argument postulated by Cantex—that UCATA's apportionment of fault equates to each party being solely

negligent—there would never be a case where parties could contract for the delegation of tort liability. Accordingly, UCATA does not convert joint liability to sole liability through apportionment. Because the indemnity clause would be valid in Arizona, we apply Wisconsin law as set forth in the contract.

III. Giles' Own Negligence

¶21 The parties also dispute whether the indemnity agreement applies to Giles' "own negligence." We conclude it did.

¶22 Wisconsin courts strictly construe an indemnity agreement when the indemnitee is the negligent party. *Fabco*, 841 N.W.2d at 548, ¶ 11. The general rule "is that an indemnification agreement will not be construed to cover an indemnitee for [the indemnitee's] own negligent acts absent a specific and express statement in the agreement to that effect." *Spivey v. Great Atl. & Pac. Tea Co.*, 255 N.W.2d 469, 472 (Wis. 1977) (citation omitted). If, however, "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.* Thus, "even in the absence of such specific language the court will construe the agreement to provide such indemnity if that is the only reasonable construction." *Fabco*, 841 N.W.2d at 548, ¶ 11 (citation omitted); *see also Dykstra v. Arthur G. McKee & Co.*, 301 N.W.2d 201, 204 (Wis. 1981) ("strict construction . . . cannot be used to defeat the clear intent of the parties") (citation omitted).

¶23 Cantex agreed to "hold harmless, indemnify, and defend Giles from and against *all claims and causes of action* for . . . property damage that may arise from the performance of [Giles'] services under [the] Agreement." (Emphasis added.). Negligence constitutes a claim or cause of action. *See Nichols v. Progressive N. Ins. Co.*, 746 N.W.2d 220, 225, ¶ 11 (Wis. 2008) (elements of negligence claim); *see also* Black's Law Dictionary (10th ed. 2014) ("cause of action" means "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person" and "[a] legal theory of a lawsuit"). While general language alone may not be sufficient to constitute an express statement that Cantex will indemnify Giles for its own negligence, this language, in combination with the clause excluding indemnity for property damage "aris[ing] directly from the sole negligence, errors, or omissions of Giles" demonstrates a clear intent to require indemnity as long as Giles is not the sole cause of the property damage. To conclude otherwise would render the provision excluding indemnity for

Giles' sole negligence meaningless. *See Arnold v. Shawano Cty. Agric. Soc.*, 317 N.W.2d 161, 166 (Wis. Ct. App. 1982) ("A contract is to be construed to give a reasonable meaning to each of its provisions, and a construction that would render any of its provisions meaningless, inexplicable, or mere surplusage is to be avoided."), *aff'd*, 330 N.W.2d 773 (Wis. 1983).

¶24 Further, the relationship between the parties demonstrates that the indemnity agreement required Cantex to indemnify Giles for its own negligence. Cantex hired Giles to perform "observation and/or field testing." The scope of Giles' work, as the testing company for the project, necessarily required it to evaluate other contractors' work. Specifically, Giles was hired to provide an expert opinion about "whether the work [of the contractor or contractor's employees or agents] compli[ed] with the project requirements." The nature of Giles' work as a concrete tester, as Cantex concedes, "involve[d] only the testing of other contractors' work." Giles did not produce, construct or provide anything other than information. This necessarily requires the liability of other actors for there to be property damage derived from normal construction activities. Therefore, the contract demonstrates a clear intent to indemnify Giles for its own negligence as long as Giles was not solely negligent.[6] *Cf. Spivey*, 255 N.W.2d at 472-73 (indemnity agreement in which beef company only expressly indemnified tea company from injury or property damages incurred when beef company was on premises of tea company did not indemnify tea company for its own negligence; agreement had clear purpose other than to indemnify tea company from consequences of its own negligence); *Time Warner*, 633 N.W.2d at 648, ¶ 24 (indemnity agreement that expressly excluded indemnity for indemnitee's sole negligence or joint negligence of indemnitee and/or other licensees demonstrated "clear and unequivocal statement" indemnitee would not be indemnified for its negligent acts).

[6] Cantex argues that to construe the agreement in this way would render the sole negligence exception superfluous because "as a practical matter Giles will always be able to point the finger at other contractors to ensure the 'sole negligence' exception never applies at the allegation stage." We disagree. For example, Giles may be liable for the sole negligence of one of its field representatives causing damage at the project while he or she was performing testing services.

¶25 Accordingly, the indemnity agreement afforded Giles a defense and indemnity for its own negligence, except if Giles were solely negligent.

IV. Limitation of Liability Provision

¶26 Cantex argues the limitation of liability provision in the contract demonstrates that it did not agree to defend or indemnify Giles for its own negligence. Specifically, Cantex argues, to conclude otherwise would "transform [the] indemnity clause to an unintended release of liability for prospective claims that the indemnitor might assert directly against its indemnitee."

¶27 To support this claim, Cantex asserts that "Wisconsin courts have explicitly refused to require defense or indemnity under [] circumstances" in which the indemnitor is the injured party and is required to indemnify the indemnitee who caused indemnitor's injury. In support of its argument it relies on *Arnold*, 317 N.W.2d 161. That case involved a contract between a race car driver and various owners of a race track. The driver signed a release of all liability for any injury he might incur within a defined "restricted area." *Id*. at 163. The driver crashed his car outside the guardrail and race track. *Id*. The car caught on fire and the driver alleged the track personnel negligently used fire extinguishing chemicals, which they sprayed directly on the driver, causing severe injury. *Id*. After the driver sued, the trial court granted summary judgment for the owners. *Id.* at 162-63. The court of appeals reversed because it found a genuine issue of material fact existed as to whether the driver's injuries occurred outside of the "restricted area," and if the driver's injuries from the fire extinguisher were part of the risks that the parties contemplated in the release of liability. *Id*. at 165.

¶28 The court rejected the owners' argument that the contract's indemnity provision barred the driver's claims. It concluded that when "an agreement contains one clause releasing a party from liability or limiting that party's liability, and another clause providing for that party's indemnification," the contract will not be construed to indemnify the indemnitee for losses the indemnitee may incur as a result of damages to the indemnitor. *Id*. at 166 (citation omitted). The court specifically noted that to construe the indemnity provision to cover the driver's own losses would render the release clause "mere surplusage because the indemnity provision alone would completely protect the defendants." *Id*.

¶29 Cantex overstates *Arnold's* application here. When a claim is brought by the injured party, an exculpatory clause applies to the exclusion of an indemnity clause; if a claim is brought by a third-party, the indemnity clause applies as written. *Id*. at 165. We have the latter circumstance here: RBR, a third party, brought suit against Giles, the indemnitee.

¶30 Accordingly, the limitation of liability provision does not insulate Cantex from the contractual duty to defend Giles, even if under a reservation of right, in this third-party action, and, as explained below, *see infra* ¶ 33, to indemnify Giles against RBR's claims in the 2011 action, in which Giles was found to have no liability,[7] as well as in the 2012 action if they are determined to be one of many actors who prove the cause in fact.[8]

V. Additional Argument

¶31 Finally, Cantex argues that the superior court properly denied Giles' motions for summary judgment because Giles did not produce any evidence demonstrating amounts it paid to defend or settle RBR's claims. Cantex claims Giles was required to prove incurred expenses in order for the superior court to grant its motions for summary judgment.

¶32 No genuine issue of material fact exists as to whether the contract required Cantex to provide Giles a defense in the 2011 and 2012 actions. *See Estate of Kreifall v. Sizzler USA Franchise, Inc.*, 816 N.W.2d 853, 869-70, ¶¶ 59-60 (Wis. 2012) ("the duty to defend arises when potential liability is asserted against the indemnitee"; indemnitor had duty to defend indemnitee upon its tender of claim against it for acts or omission arguably within purview of indemnitee agreement); *Fabco*, 841 N.W.2d at 547, ¶ 7 (indemnitor breached indemnity agreement when it refused to defend indemnitee from claim within purview of agreement).

¶33 The parties do, however, dispute the amount of attorney fees that Giles incurred in the 2011 action. Specifically, Giles stated redacted billing statements would be produced upon the superior court's resolution of the summary judgment motions. This dispute presents a genuine issue

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[7] The only parties to have been apportioned any fault in the 2011 action were CMC and RBR. *See supra* ¶ 7.

[8] Based on our resolution of the issues, we need not, and do not, address Cantex's additional arguments that Giles' position is not supported by "foreign cases" or Arizona public policy, nor its argument that Giles waived any arguments regarding unconscionability.

of material fact precluding summary judgment in favor of Giles on its right to indemnity in the 2011 action. *See Estate of Kriefall, Inc.*, 816 N.W.2d at 865, ¶ 35 ("The right to receive [] indemnification . . . requires a party seeking payment to prove it has made a payment, part or all of which the party seeks to recover."). Because the superior court still needs to determine Giles' costs and fees in the 2011 action, and, based on the record before the court, Giles' liability in the 2012 action has not yet been resolved, we remand this matter to the superior court for further proceedings consist herewith.

CONCLUSION

¶34 For the foregoing reasons, we vacate the superior court's rulings granting summary judgment in favor of Cantex and its award of attorney fees. We also vacate its denial of Giles' motions for summary judgment and direct the court to enter partial summary judgment in Giles' favor in the 2011 and 2012 actions affirming that, under the contract, Cantex has duty to defend. Finally, we remand the matter to the superior court for further proceedings consistent with this court's ruling. We deny Cantex's request for attorney fees and costs on appeal, and grant Giles its attorney fees under A.R.S. § 12-341.01 and its costs on appeal contingent upon its compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA