IN THE COURT OF APPEALS OF IOWA

No. 8-939 / 08-0740
Filed March 26, 2009

KNUTSON CONSTRUCTION SERVICES MIDWEST, INC.,
Plaintiff-Appellee,

vs.

BOARD OF REGENTS, STATE OF IOWA,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Amanda Potterfield (motion for summary judgment) and Robert Sosalla (motion for directed verdict), Judges.

A defendant appeals district court rulings granting summary judgment and a directed verdict in favor of the plaintiff on the defendant's breach-of-contract counterclaim. **AFFIRMED.**

Thomas J. Miller, Attorney General, and George Carroll, Assistant Attorney General, for appellant.

Donald Thompson, Kevin Papp, and Natalie Ditmars of Bradley & Riley P.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ. Potterfield, J. takes no part.

VAITHESWARAN, J.

The Iowa Board of Regents appeals district court rulings granting summary judgment and a directed verdict in favor of Knutson Construction on the Board's breach-of-contract counterclaim. We affirm.

I. Background Facts and Proceedings

Knutson Construction Services Midwest contracted with the Iowa Board of Regents for construction of a facility at the University of Iowa. The contract provided that the Board would furnish insurance coverage for the project through an Owner Controlled Insurance Program (OCIP). As part of the OCIP, Knutson was to submit a list of subcontractors who would perform work on the project and was to enroll the subcontractors in the OCIP. Enrolled companies were obligated to comply with certain procedures, including drug testing and safety orientations.

Knutson subcontracted with AeroSaw to perform work on the project, but failed to enlist or enroll AeroSaw in the OCIP. One of AeroSaw's employees was injured on the jobsite. Following the injury, the employee tested positive for methamphetamines in his system.

The employee sued Knutson to recover for his injury. Under the terms of the OCIP, the Board's insurer defended the action. Knutson reached a pretrial settlement with the employee that obligated the Board of Regents, on behalf of the University of Iowa, to pay a $250,000 deductible and a $25,000 administrative fee.

After the project was completed, Knutson sued the Board of Regents for amounts due under its contract. The Board of Regents counterclaimed for indemnification of the $275,000 in insurance costs it expended. The Board also

asserted that Knutson breached the contract by failing to enroll AeroSaw in the OCIP and by failing to disclose AeroSaw as a subcontractor.

Eventually, the Board of Regents elected to pay Knutson what was owed under the contract. Its counterclaim remained. Knutson moved for summary judgment on the counterclaim. That motion was granted on the issue of whether Knutson had to indemnify the Board and was denied on the failure to list and enroll claims.[1]

The case proceeded to a jury trial on the claims that Knutson breached the contract by failing to list AeroSaw as a subcontractor and by failing to enroll AeroSaw in the OCIP. At the close of the Board's evidence, Knutson moved for a directed verdict. The district court granted the motion and dismissed the Board's counterclaim. The Board of Regents appealed.

II. Summary Judgment Ruling—Indemnity

Indemnification is a form of restitution that shifts the entire liability or blame from one legally responsible party to another. *Wells Dairy Inc. v. Am. Indus. Refrigeration Inc.*, ___ N.W.2d ___ (Iowa 2009). The general contract between the Board of Regents and Knutson contains the following indemnification clause:

> 3.18.1 To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the Owner and its consultants, agents, and employees from and against all Claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, in the event that any such Claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2)

[1] There was also a breach of statutory duty claim which is not at issue on appeal.

> is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in Paragraph 3.18.

The general contract also contains a provision requiring the contractor to purchase insurance:

> 11.1.1 The Contractor shall purchase from and maintain with a company or companies lawfully authorized to do business in the state of Iowa such insurance as will protect the Contractor from Claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:
> . . .
> .7 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

The Board of Regents argues that the indemnification provision required Knutson to reimburse it for the $275,000 in insurance costs expended in settling with AeroSaw's employee. Knutson counters that the Board ignores special conditions in the contract relieving it of the obligation to purchase insurance and relieving it of the obligation to indemnify the Board for these costs.

The pertinent special conditions address two forms of insurance: one provided by the University or one provided by the contractor:

> 2.2 OWNER CONTROLLED INSURANCE PROGRAM (OCIP)
> 2.2.1 The Base Bid is to be submitted without insurance costs. Prior to commencement of the Work, the Owner, at its sole option and cost, shall have the right to secure and thereafter maintain, except as otherwise provided herein, any or all of the insurance coverages described in Article 11 of the General Conditions, covering as insured parties the Owner, Contractor,

> its Subcontractors of all tiers and such other persons or interests as the Owner may designate in connection with the performance of the Work, and with limits not less than those specified for each coverage.
> 2.2.2 Contractor shall submit a good faith estimate of the anticipated insurance costs applicable to the Base Bid and the Alternates for this project, with the bid.
> 2.2.3 Contractor agrees to furnish, at its expense, the insurance described in this Article if, and only if the Owner does not elect to furnish said OCIP insurance.
> . . .
>
> OR
>
> 2.3 CONTRACTOR PROVIDED LIABILITY INSURANCE
> Each Prime Contractor shall take out and maintain throughout construction period, insurance in the following minimum requirements:
> . . .
> .2 Commercial General Liability insurance covering all operations under the contract of not less than $3,000,000 per occurrence and in the aggregate, per project. Completed operations coverage shall be extended to five years.

The district court focused on these special conditions in concluding that Knutson was not obligated to indemnify the Board of Regents. The court stated:

> The contract between Knutson and the Board of Regents, when read as a whole, and particularly in the context of the above-cited sections, does not require Knutson to indemnify the Board of Regents. The University provided insurance through the OCIP. Thus, pursuant to Article 2.2.3, Knutson was not required to furnish the insurance described in Article 2.2., which includes (by virtue of its reference to section Article 11) coverage for claims arising because of bodily injury. Because the University provided coverage through the OCIP, the University, and not Knutson, was responsible for payment of the amount covered by the claim under the OCIP policy. Knutson did not breach its contract with the Board of Regents in failing to indemnify the Board for payments made under the OCIP policy.

The question before us is whether the special conditions portion of the contract overrides the general provisions addressing the contractor's obligations to obtain insurance and indemnify the University. We believe reasonable minds could

differ on the answer to this question. Therefore, the contract is ambiguous. *See Iowa Fuel & Minerals, Inc. v. Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1993) ("Ambiguity exists when, after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists concerning which of two reasonable constructions is proper.").

When ambiguities exist, they are strictly construed against the drafter. *Id.* at 863. Additionally, "when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling." *Id.*

The Board was the entity that drafted the contract. It inserted the special conditions that modified the general terms of the agreement. The special conditions article provides for either the "owner controlled insurance program" "or" "contractor provided liability insurance." The provision specifically states that the contractor agrees to furnish insurance described in the article at its expense "if, and only if the owner does not elect to furnish said OCIP insurance." The only exception relates to "builders risk insurance." Under that provision, the contractor "shall be responsible for $25,000 deductible amount." The Board could have included another exception requiring contractors to indemnify it for all deductibles paid. It did not do so. This omission, together with the "either or" language of the insurance article in the special conditions portion of the contract are fatal to the Board's indemnification claim.

We acknowledge that this reading of the contract could be viewed as rendering the indemnification provision superfluous. However, "notwithstanding our desire to interpret a policy so as not to render any part superfluous, 'we will not do so when that [interpretation] is inconsistent with the structure and format

of the [provision] and when that [interpretation] is otherwise unreasonable.'" *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 685 (Iowa 2008) (quoting *Kibbee v. State Farm Fire & Cas. Co.*, 625 N.W.2d 866, 869 (Iowa 1994)). We are convinced that the Board's reading of the contract is unreasonable. Accordingly, we conclude the district court did not err in rejecting the Board's indemnification claim. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995) (reviewing summary judgment ruling for errors of law).

III. Directed Verdict Ruling—Breach of Contract

The district court granted Knutson's motion for directed verdict on the Board of Regents' breach of contract claim, stating: "there is a lack of causation to establish that any breach in the agreement was the cause of the damage suffered by the University of Iowa." The Board of Regents asserts this was an error. *See Felderman v. City of Maquoketa*, 731 N.W.2d 676, 678 (Iowa 2007) (reviewing grants of directed verdict motions on error). We disagree.

> The Board of Regents was required to prove all of the following:
>
> (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998). The element at issue here is the fifth one: whether the "plaintiff has suffered damages *as a result* of the breach." *Id.* (emphasis added); *see also Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 826 (Iowa 1993) (stating the plaintiff has "the burden to show the breach caused its damages").

At trial, the parties agreed that the claimed breaches were as follows:

> The failure to list AeroSaw on the list of subcontractors; the failure to enroll [in the OCIP], which will include the components that go with that of failing to comply with the drug testing policy and the failing to have [a safety orientation for AeroSaw employees], complying with the safety program.

The first claimed breach—Knutson's failure to list AeroSaw as a subcontractor—is not at issue on appeal.[2] Instead, the Board of Regents focuses on the second claimed breach—Knutson's failure to enroll AeroSaw in the OCIP and its concomitant failure to comply with the drug testing policy.

The contract provision addressing pre-employment drug testing, states:

> A Pre-employment drug test may be completed by all employment candidates before an individual begins work on the project. All employees shall have a current negative drug screen (within the last 45 days) prior to coming onto the construction project. No employment candidate shall be placed on the payroll without a current negative drug screen verification on file. The Contractor shall have a policy in place requiring all of its employees to submit to pre-employment drug testing prior to working on this project.

The Board of Regents argument goes as follows:

> If [AeroSaw's employee] failed the drug test, he would not have been allowed on site. It logically follows that, if [the employee] was not on site, or if he wasn't allowed to come on site until after he submitted a negative drug test, he would not have been there at the time the debris fell, and thus would not have been injured. This nexus of causation necessarily exists at least with regards to the breach of the health and safety provision requiring drug testing, if not with regards to the breach of the OCIP provision requiring the initiation of enrollment.

[2] At trial, the Board of Regents agreed it presented no evidence on this issue and agreed it could be "taken out" as an issue. The Board also does not focus on this aspect of the claimed breach on appeal.

Accepting the issue as framed,[3] the question becomes whether there was substantial evidence to support the finding that this breach caused the Board's damages. *See Felderman*, 731 N.W.2d at 678 (stating that if substantial evidence exists to support each element of a claim, the motion for directed verdict must fail).

The pertinent drug-testing provision was explained at trial by two witnesses. The first witness testified that the contract's forty-five day window for providing a negative drug screen prior to entering the construction project would only catch "the dimmest bulb." In describing the OCIP drug testing program, he stated,

> I thought it was full of holes, wasn't tight enough. It really didn't address the issue of what it was trying to address. I mean, it was—like I said, you were saying forty-five days, no random drug testing. It just really wasn't—didn't have any real teeth to it.

Similarly, a construction superintendent for Knutson testified that AeroSaw employees would have had a week or two after he contacted the company to produce a negative drug test before entering the worksite, if AeroSaw had enrolled in the OCIP and complied with the drug-testing rules.

The drug usage of Aerosaw's employee was explained by an expert testifying on behalf of the Board of Regents. The expert opined that the employee was a regular user of methamphetamine and he more likely used the methamphetamine before he came to the job site rather than after. He conceded, however, that he had no idea how frequently the employee used

[3] Knutson asserts that the Board of Regents has re-framed the issue on appeal. We need not address this question because we conclude that the Board did not generate a jury question on the challenged breach-of-contract element whether the issue is framed as it is on appeal or as it was before the trial court.

methamphetamine prior to the date of the accident and he did not have an opinion as to whether the employee could have stopped using the drug for a long enough period to pass the pre-employment drug screen. His opinions, therefore, did not generate a jury question on whether the employee would have failed a pre-employment drug test. As this is the predicate to the Board's entire argument on the fifth breach-of-contract element, the district court did not err in concluding that the Board failed to prove this element.

IV. Disposition

We conclude the district court did not err in granting Knutson's motion for summary judgment on the indemnity claim and in granting its motion for directed verdict on the breach-of-contract claim. We find it unnecessary to address any remaining issues raised by the parties.

AFFIRMED.