NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2144

CHRISTOPHER LEE THERRELL

VERSUS

ROWAN COMPANIES, INC.

Judgment Rendered: December 22, 2010

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 104088

The Honorable John E. LeBlanc, Judge Presiding

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Charles A. Mouton **Lafayette, LA**	**Counsel for Third Party** **Defendant/Appellee,** **JLG Industries, Inc.**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. concurs.

Mc McClendon, J. concurs Mc assigns reasons.

WHIPPLE, J.

This matter is before us on appeal by Tidewater Dock, Inc. and Blue Tide, Inc. (hereinafter collectively referred to as "Tidewater") from a judgment of the trial court granting summary judgment in favor of NES Equipment Rental, L.P. (hereinafter "NES"). For the following reasons, we reverse the judgment of the trial court and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY[1]

As a result of an accident on July 18, 2006, involving a piece of equipment called a "man-lift," plaintiff, Christopher Lee Therrell, filed a petition for damages against his employer, Rowan Companies, Inc. (hereinafter "Rowan"), seeking recovery under the Jones Act and general maritime law. Rowan, in turn, filed third-party demands against: (1) NES, the owner of the man-lift involved in the accident herein; (2) Tidewater, who leased the man-lift from NES and provided it to Rowan; and (3) JLG Industries, Inc. (hereinafter referred to as "JLG"), the manufacturer of the man-lift.

In response to Rowan's claims, third-party defendants NES, Tidewater, and JLG filed motions for summary judgment contending that Rowan's instruction to Therrell, who had no certification, training, or repair experience, to "troubleshoot" or attempt to figure out what was wrong with the man-lift, without affording notice or an opportunity to repair to NES, Tidewater, or JLG, when Rowan knew that the man-lift was malfunctioning, constituted a superseding cause relieving them of any liability. Accordingly, the third-party defendants contended that Rowan was not entitled to contribution and indemnity for its own negligence in placing its seaman in harm's way. After hearing argument, the trial court granted

[1]As the background facts and procedural history are fully set forth in the companion case to this appeal also handed down on this date, we will note the facts particular to the issues before us in this appeal. See Therrell v. Rowan Companies, Inc., 2009-1546 (La. App. 1st Cir. __/__/__)(unpublished opinion).

summary judgment in favor of NES, JLG, and Tidewater, and finding that Rowan should not have attempted to fix the man-lift, noting the lack of notice by Rowan to any of the third-party defendants. Specifically, the trial court found that Rowan's acts constituted a superseding cause. Individual judgments were submitted and signed by the trial court. Rowan separately appealed each of the summary judgments in favor of the third-party defendants, which resulted in our reversing the trial court's judgments. See Therrell v. Rowan Companies, Inc., 2009-1546, 2009-1547, 2009-1548 (La. App. 1st Cir. __/__/__)(unpublished opinions) also rendered this date.

However, in the proceedings below, in response to Rowan's third-party demand, NES filed a cross-claim against Tidewater, contending that pursuant to an indemnification clause contained in the "Terms and Conditions" of NES's rental agreement with Tidewater, Tidewater was responsible for indemnifying and holding NES harmless from "any and all claims, demands, or suits, including any and all costs and attorney's fees associated with [NES's] defense" of this matter. As such, NES sought judgment against Tidewater for indemnification and contribution for its costs and attorneys' fees. After the dismissal on summary judgment of Rowan's claims against the third-party defendants, NES filed a motion for summary judgment on its indemnity claims against Tidewater. In support, NES contended because the trial court determined that NES had no negligence in the underlying personal injury matter, NES was contractually entitled to indemnity and repayment of its costs of defense, attorney's fees, expert witness fees, and all other costs of litigation from Tidewater.

After a hearing on September 4, 2009, the trial court determined that the indemnity clause was enforceable and ordered Tidewater to indemnify NES for the "costs of defense, attorney's fees, expert witness fees, and all other costs of

litigation." A written judgment granting NES's motion for summary judgment was signed by the trial court on October 9, 2009.[2]

On appeal, Tidewater contends that the trial court erred in determining that Tidewater must indemnify NES for its costs of defense, attorneys' fees, expert witness fees, and all other costs of litigation. Alternatively, Tidewater contends that the trial court erred in considering NES's motion for summary judgment and in failing to find the motion was premature, given the pending appeals to this court involving the dismissal of Rowan's third-party demands against NES, Tidewater, and JLG.

APPLICBLE LAW

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2). Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. Duplantis v. Dillard's Department Store, 2002-0852 (La. App. 1st Cir. 5/9/03), 849 So. 2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So. 2d 350. A motion for summary judgment will be granted 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 material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. Dickerson v.

[2]The trial court initially signed a judgment on September 15, 2009, granting NES's motion for summary judgment and ordering that Tidewater indemnify NES. However, that judgment failed to contain a required designation of finality pursuant to LSA-C.C.P. art. 1915(B). Thus, a show-cause order was issued by this court granting the parties leave to supplement the record with a proper final judgment for purposes of appeal. An amended judgment, containing the proper designation and signed by the trial court on October 9, 2009, was submitted by the parties. Accordingly, the appeal was maintained.

Piccadilly Restaurants, Inc., 99-2633 (La. App. 1st Cir. 12/22/00), 785 So. 2d 842, 844.

The substantive law applicable herein is the law governing the interpretation of indemnity contracts. A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent acts unless such an intention is expressed in unequivocal terms. Berry v. Orleans Parish School Board, 2001-3283 (La. 6/21/02), 830 So. 2d 283, 285, citing Perkins v. Rubicon, Inc., 563 So. 2d 258, 259 (La. 1990). The basis for this principle was succinctly expressed in 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): "[G]eneral 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."

The general rules which govern the interpretation of other contracts likewise apply in construing a contract of indemnity. Dean v. Griffin Crane & Steel, Inc., 2005-1226 (La. App. 1st Cir. 5/5/06), 935 So. 2d 186, 191, writ denied, 2006-1334 (La. 9/22/06), 937 So. 2d 387. The following codal principles apply and guide our interpretation of the contract, including its indemnity provisions. See Berry v. Orleans Parish School Board, 830 So. 2d at 285. Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. This is an objective inquiry; thus, "a party's declaration of will becomes an integral part of his will." LSA-C.C. art. 2045, Revision Comments-1984, (b). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be

made in search of the parties' intent. LSA-C.C. art. 2046. Instead, the words of a contract must be given their generally prevailing meaning. LSA-C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. LSA-C.C. art. 2048. Moreover, each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050.

ASSIGNMENT OF ERROR NUMBER ONE

The indemnity clause at issue herein provides, as follows:

> 19. Indemnity. Customer [Tidewater] agrees to indemnify and hold Company [NES] harmless against any and all claims, demands, or suits (including costs of defense, attorney's fees, expert witness fees, and all other costs of litigation) for any and all bodily injury, property damage, or any other damages or loss, regardless of whether such injury, damage or loss is caused in whole or part by negligence, which arises out of, result from, or relate to the use, operation, condition, or presence of the equipment except where such injury, damage or loss is caused solely by the Company [NES].

In its first assignment of error on appeal, Tidewater contends that the trial court erred in determining that the indemnity clause set forth above entitled NES to recover its costs of defense in this litigation.[3] Tidewater contends that pursuant to Louisiana jurisprudence, a contractual indemnity agreement will not be construed to require the indemnitor (Tidewater) to indemnify the indemnitee (NES) for the indemnitee's own negligence unless such an intention is clearly expressed in unequivocal terms.[4] Thus, Tidewater contends, because Rowan's third-party demand against NES alleges that NES's negligence caused the plaintiff's accident, the critical inquiry is whether Tidewater unequivocally

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[3]The parties do not dispute that the Louisiana Oilfield Indemnity Act ("LOIA"), which basically nullifies any provision in an agreement pertaining to wells for oil, gas, or water, or drilling for minerals that requires defense and/or indemnification where there is any negligence or fault on the part of the indemnitee, as codified in LSA-R.S. 9:2780, is inapplicable herein. See Meloy v. Conoco, Inc., 504 So. 2d 833, 838 (La. 1987).

[4]In support for this proposition, Tidewater cites Polozola v. Garlock, 343 So. 2d 1000 (La. 1977).

intended and agreed to indemnify NES for NES's own negligence. Tidewater argues that the indemnity clause would have expressed the unequivocal intent for Tidewater to defend and indemnify NES for NES's own negligence if the indemnity clause contained the word "Company's" before the word "negligence," as such:

> 19. Indemnity. Customer [Tidewater] agrees to indemnify and hold Company [NES] harmless against any and all claims, demands, or suits (including costs of defense, attorney's fees, expert witness fees, and all other costs of litigation) for any and all bodily injury, property damage, or any other damages or loss, regardless of whether such injury, damage or loss is caused in whole or part by **[Company's (NES's)]** negligence, which arises out of, result from, or relate to the use, operation, condition, or presence of the equipment except where such injury, damage or loss is caused solely by the Company [NES].

(Emphasis added.)

Thus, Tidewater contends, as worded in the contract, the indemnity provision at issue is ambiguous and unenforceable as it expresses no such intention.

NES counters that the terms at issue setting forth the indemnity provision are clear and contain no ambiguities. NES contends that in accordance with the terms of the provision, Tidewater owes indemnity to NES inasmuch as: (1) NES obtained a judicial determination in the underlying proceedings that it was free from fault, i.e., that plaintiff's accident was not "caused solely by [NES]"; and (2) NES has incurred and paid defense costs. NES further contends that Rowan's third-party demand against NES "[arose] out of, result[ed] from, or relate[d] to the use, operation, condition, or presence" of the man-lift NES leased to Tidewater, such that pursuant to the clear and plain wording of the indemnification clause, Tidewater must indemnify NES for its "costs of defense, attorney's fees, expert witness fees, and all other costs of litigation."

On review, we reject Tidewater's contention that the indemnity provision herein is ambiguous. Instead, we find that the trial court correctly concluded that the indemnity provision herein is unambiguous and that Tidewater's intention, i.e., to indemnify NES for any and all damage arising from use of the equipment, unless the damage is caused solely by the negligence of NES, is expressed in unequivocal terms. See Berry v. Orleans Parish School Board, 830 So. 2d at 285.

Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In its second assignment of error, Tidewater contends that the trial court's grant of summary judgment on NES's claim was premature, considering that Rowan appealed the grants of summary judgment in favor of the third-party defendants, including NES, which are pending before this court.

An indemnitor is not liable under an indemnity agreement until the indemnitee actually makes payment or sustains a loss. Suire v. Lafayette City-Parish Consolidated Government, 2004-1459, 2004-1460, 2004-1466 (La. 4/12/05), 907 So. 2d 37, 51, citing Meloy v. Conoco, Inc., 504 So. 2d at 839. Thus, a cause of action for indemnification for costs of defense does not arise until the lawsuit is concluded and defense costs are paid. Suire v. Lafayette City-Parish Consolidated Government, 907 So. 2d at 51.

As noted above, the judgments of the trial court, granting summary judgment in favor of each of the third-party defendants and dismissing Rowan's third-party claims against them, were considered by this court in the companion cases to this appeal. In the opinions rendered therein and also handed down this date, we have reversed the summary judgments rendered therein. See Therrell v. Rowan Companies, Inc., 2009-1546, 2009-1547, 2009-1548 (La. App. 1st Cir. __/__/__)(unpublished opinions). In particular, given our reversal of the judgment of the trial court granting summary judgment in favor of NES and

dismissing Rowan's third-party claims against NES, see Therrell v. Rowan Companies, Inc., 2009-1546 (La. App. 1st Cir. __/__/__)(unpublished opinion), we agree that the trial court's judgment ordering Tidewater to indemnify NES is premature, and must likewise be reversed until such time as there is a determination of fault. See Suire v. Lafayette City-Parish Consolidated Government, 907 So. 2d at 51.

Thus, although we affirm the trial court's determination that the indemnity provision herein is unambiguous, we find merit to Tidewater's second assignment of error that until a determination of negligence, if any, is made, an order of indemnification is premature.

This assignment of error has merit.

CONCLUSION

For the above and foregoing reasons, the October 9, 2009 judgment of the trial court, granting summary judgment in favor of NES and ordering that Tidewater indemnify NES for the costs of defense, attorney's fees, expert witness fees, and all other costs of litigation, is hereby reversed. This matter is remanded to the trial court for further proceedings.

Costs of this appeal are assessed equally to the appellee, NES Equipment Rentals, L.P., and appellant, Tidewater Dock, Inc. and Bluetide, Inc.

REVERSED AND REMANDED.

STATE OF LOUISIANA

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VERSUS

ROWAN COMPANIES, INC.

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McCLENDON, J., concurs and assigns reasons.

I agree that any order of indemnification is premature. Therefore, I respectfully concur with the result reached.