STATE OF MICHIGAN

COURT OF APPEALS

W.G. WADE SHOWS, INC.,

Plaintiff-Appellee,

v

RICHARD HAMAN,

Defendant-Appellant,

and

BONNIE HAMAN,

Defendant.

UNPUBLISHED
March 1, 2012

No. 299987
Wayne Circuit Court
LC No. 07-723226-CZ

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

K. F. KELLY, J. (*dissenting*).

Because the indemnity contract did not require that the underlying claim or suit *actually* arise out of the actions or inactions of Haman, I must respectfully dissent from my colleagues. I would affirm the trial court's order.

The majority finds that the trial court erred in granting summary disposition to Wade regarding its express contractual indemnity claim because there was no evidence that the underlying claim or suit "arose out of" any actions or inactions of Haman. I disagree. The indemnity provision of the parties' agreement provided:

> **Hold harmless** The Concessionaire [Haman] agrees to indemnify and hold the Operator [Wade] harmless from *any claim or suit brought* for damages, losses or any payment, *arising out of Concessionaire's actions or inactions*, the deemed employment of the Concessionaire by the Operator, or the employment, termination or use of any person by Concessionaire for the purpose of discharging its contractual obligations with and to the Operator. This hold harmless provision also includes costs and legal fees incurred. [Emphasis added.]

The contract requires only that the *claim or suit* arise out of Haman's actions or inactions; it does *not* require proof that Haman was negligent or that Lukas's injuries were caused by Haman's

actions or inactions. The underlying suit alleged numerous claims relating to Haman's actions concerning the operation and design of the Beer Bust game. The Lukas lawsuit arose out of Haman's actions because Haman designed, constructed, provided and operated the Beer Bust game which the Lukas plaintiffs alleged was the source of the ball causing Lukas to suffer a broken nose. Defendants strive to impose an additional requirement – a jury determination that Haman's action or inaction caused Lukas's injury – to trigger coverage under the indemnity provision. No such additional requirement exists.

Haman relies on *Fowler v Detroit Symphony Orchestra,* unpublished per curiam opinion of the Court of Appeals, issued 03/12/09 (Docket No. 282978), in support of his position that a plaintiff's mere claims regarding conduct do not govern whether an indemnity provision applies absent express language in the provision. The indemnity language in *Fowler* provided:

> **12.1** To the fullest extent permitted by applicable law, Architect of Record agrees to indemnify and hold harmless [DSO] . . . for, from and against all liabilities, claims, damages, losses, liens, costs, causes of action, suits, judgments and expenses (including court costs, attorneys' fees, and costs of investigation), of any nature, kind or description of any person or entity, **directly or indirectly arising out of, caused by, or resulting from (in whole or in part), any negligent act or omission of Architect of Record**, any its Subcontractors, anyone directly or indirectly employed by them, or anyone that they control or exercise control over . . . . [*Id*., slip op at 7 (emphasis in original).]

The trial court in *Fowler* interpreted the above provision to apply when someone made a mere allegation of the DSO's liability based on the Architect's conduct. This Court rejected that conclusion, instead reasoning that negligence must have occurred:

> The trial court's interpretation of the indemnification provision ignores the plain and clear language in the indemnification provision requiring a "negligent act or omission" on the part of Diamond & Schmitt to trigger the duty to indemnify. The parties could have included a duty to defend provision, but did not do so. The parties also could have provided that Diamond & Schmitt would be required to indemnify DSO for any claims or cause of action caused by any "*alleged* negligent act or omission" of Diamond & Schmitt, but did not do so. Instead, the plain language of the indemnification provision reveals that the indemnification provision was triggered only if there was a "negligent act or omission" on the part of Diamond & Schmitt. In this case, there was no finding of negligence. To the contrary, the trial court explicitly found that plaintiff's fall was "not the fault of the architect[.]" The trial court therefore erred in concluding that the indemnification provision in the parties' contract required Diamond & Schmitt to indemnify DSO. [*Id*.]

In contrast to *Fowler*, the indemnification provision here did not specify that the act or omission must be negligent. Therefore, no finding of negligence was necessary to trigger the duty. It follows that the finding of the Lukas jury of no negligence is not material to the analysis. *Fowler* therefore is not as persuasive as Haman would have this Court believe. Only two conditions must exist to trigger the duty to indemnify here. First, a claim or suit must name

Haman as a defendant. Second, the claim or suit must have arisen out of Haman's act or omission. That broad language does not limit indemnity to when Haman "actually" was at fault. Instead, the language provides that where, as here, a lawsuit is based on Haman's actions or inactions, indemnity is triggered. Haman argues that mere allegations do not govern whether an indemnity provision applies. However, the indemnity agreement requires Haman to hold Wade harmless from "any claim or suit brought for damages" and, by its very nature, a lawsuit *is* an allegation. Moreover, it must be emphasized that the indemnity provision merely requires that the lawsuit be *brought*, not that it be successful.

Haman interprets the indemnity contract to require that the claimed injuries actually must have arisen from its actions or inactions. The contract does not expressly mention injuries; rather, it indicates that a "claim or suit" must arise out of Haman's actions/inactions. Because Lukas's lawsuit was based on defendants' actions/inactions, the indemnification clause is triggered. Lukas's lawsuit arose from her injuries, which she alleges were caused by a softball from defendants' game at the carnival. That the jury ultimately found that the injuries were not caused by Haman's negligence is irrelevant to whether the indemnity contract is triggered. For these reasons, I would affirm the trial court's order.

/s/ Kirsten Frank Kelly