COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC,	§	No. 08-20-00219-CV
Appellant,	§	Appeal from the
v.	§	327th Court District Court
RANCHOS REAL LAND HOLDINGS, LLC,	§	of El Paso County, Texas
Appellee.	§	(TC# 2019DCV1661)

O P I N I O N

This is a breach of contract and indemnification case. Appellant CEMEX Construction Materials Pacific, LLC (CEMEX) appeals the trial court's summary judgment order in favor of Appellee Ranchos Real Holdings, LLC (Ranchos). We reverse and render judgment in favor of CEMEX.

I. BACKGROUND[1]

In January of 2016, Johnny Borrego was driving with four passengers along a private road,

[1] Our summary of the facts is taken from the pleadings, affidavits, and other evidence contained in our record. As we must, we note where evidence is in conflict, and resolve those conflicts in the light most favorable to the non-movant. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

informally known as Jobe Road, located in El Paso County. As Borrego approached a 90-degree turn in the road, he lost control of his vehicle. As a result, the vehicle left the roadway, crashed into a construction berm, and rolled onto its roof before coming to a full rest. Borrego and two of his passengers were killed and the other two passengers were seriously injured. Jobe Road is a privately-owned road situated on land owned by Ranchos and leased to CEMEX under a surface lease (the Surface Lease) that originated in 1996 between the parties' predecessors.[2] In addition to the Surface Lease, CEMEX also holds an easement on two small portions of land adjacent to the land covered by the Surface Lease.

The two injured passengers and families of the decedents filed suit against CEMEX and Ranchos, among other defendants, for wrongful death and personal injuries, (the *Borrego* suit or *Borrego* case), alleging that Jobe Road posed an unreasonably dangerous condition such that it proximately caused the resulting crash.[3] Specifically, the plaintiffs alleged that CEMEX and Ranchos were negligent and grossly negligent in failing to limit public access to Jobe Road; failing to provide appropriate signage and lighting on Jobe Road; and failing to erect barriers that might have mitigated the damages resulting from the crash. Ranchos cross-claimed against CEMEX for contractual indemnity, seeking attorney's fees and expenses incurred in defending the *Borrego* suit. Eventually, the *Borrego* plaintiffs nonsuited Ranchos from their suit. Soon afterwards, the trial court severed Ranchos' indemnity claim against CEMEX and transferred the case into a new cause number.

The *Borrego* case ultimately proceeded to trial, where a jury returned a verdict for the plaintiffs and a final judgment was entered against CEMEX.

---

[2] Ranchos' predecessor was the State of Texas and CEMEX's predecessor was Jobe Concrete Products, Inc.

[3] *Borrego v. Ranchos Real Land Holdings, LLC*, No. 2017DCV1047 (327th Dist. Ct., El Paso County, Tex. Mar. 28, 2017).

The Indemnity Action

In June of 2020, in the severed cause of action, Ranchos filed a traditional motion for summary judgment on its indemnity claim for its attorney's fees and litigation costs. Ranchos claimed it was entitled to indemnity from CEMEX under either of two separate and independent contractual provisions: first, under Paragraph 16 of the Surface Lease, and second, under Paragraph 12 of the easement agreement signed in 2007 (the Easement Agreement).

CEMEX responded to Ranchos motion for summary judgment, and also cross-motioned for summary judgment against Ranchos' claim. In its cross-motion, CEMEX argued that collateral estoppel barred Ranchos from asserting indemnity based on the Surface Lease. Specifically, CEMEX pointed out that in 2019, a different court in El Paso County ruled against Ranchos on the same indemnity issue in a similarly situated case (the *Ochoa* case), which we discuss in more detail below. CEMEX further argued that Ranchos was not entitled to indemnity under the Easement Agreement for three reasons: (1) Ranchos did not seek indemnity under the Easement Agreement in its original cross-claim; (2) the crash did not occur in the area covered by the Easement Agreement; and (3) in the *Borrego* suit, Ranchos was defending against claims of not only negligence, but also gross negligence, the latter of which CEMEX argues were explicitly excluded from the indemnity provision in the Easement Agreement.

The trial court heard oral argument on the competing motions for summary judgment and ultimately granted Ranchos' motion and denied CEMEX's motion. The order did not indicate whether the trial court relied upon the indemnity clause in the Surface Lease—which would have also required a determination that collateral estoppel did not bar Ranchos' claim for indemnity—or whether it granted Ranchos' motion based upon the Easement Agreement. The trial court entered a final judgment awarding Ranchos $226,733.65, plus costs of court and post-judgment

interest. This appeal followed.

II. ISSUES ON APPEAL

CEMEX raises two issues on appeal. First whether collateral estoppel should bar Ranchos from raising its indemnity claim based on the Surface Lease, and if not, whether the indemnity agreement satisfies the express negligence doctrine. Second, whether Ranchos' indemnity claim based on the Easement Agreement must fail because the underlying crash did not occur on the land covered by the easement.

We consider each issue in turn.

III. STANDARD OF REVIEW

We review traditional motions for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail, the movant must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003). If the movant satisfies this burden, the burden shifts to the nonmovant to provide evidence that raises a genuine issue of material fact, thus avoiding summary judgment. *See Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). When, as here, cross-motions for summary judgment are filed, we consider each motion and render the judgment the trial court should have reached. *Coastal Liquids Transp., LP v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001). When, also as here, "a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious." *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).

IV. THE SURFACE LEASE AGREEMENT

In the first issue, CEMEX argues it is entitled to judgment as a matter of law on Ranchos' indemnity claim based on collateral estoppel, and alternatively, that the indemnity clause does not comply with the express negligence doctrine. ~~AntBr,10,13~~ Ranchos counters that collateral estoppel does not apply because the facts and issues of this case are different from the facts and issues of the prior case. It further argues that the express negligence doctrine is inapplicable; and alternatively, that the indemnity clause satisfies the express negligence doctrine.

A. Collateral Estoppel

1. Applicable Law

Collateral estoppel, also known as issue preclusion, "prevents relitigation of particular issues already resolved in a prior suit." *Barr v. Resolution Tr. Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). The doctrine "serve[s] the vital functions of bringing litigation to an end, maintaining stability of court decisions, avoiding inconsistent results, and promoting judicial economy." *Calabrian Corp. v. All. Specialty Chems., Inc.*, 418 S.W.3d 154, 157-58 (Tex. App.—Houston [14th Dist.] 2013, no pet.). To successfully invoke the defense of collateral estoppel, a party "must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

2. The Ochoa case

In responding to Ranchos' summary judgment motion in the *Borrego* case, CEMEX attached the briefing and the summary judgment order relevant to Ranchos' indemnity claim in

the *Ochoa* case.[4] These documents, along with the remainder of the record from the *Borrego* case, show, as a matter of law, that CEMEX established the three elements of its collateral estoppel defense, as it relates to Ranchos' claim for indemnity under the Surface Lease.

The *Ochoa* case was another negligence and gross negligence case involving a motor-vehicle crash on Jobe Road. In that case, 18-year-old Destinee Ochoa was a passenger, riding home with three friends in a Jeep Wrangler. The group was traversing Jobe Road when the driver lost control of his vehicle, which left the pavement and rolled over before coming to a rest on its roof. Ochoa was killed in the crash, and her parents filed suit against the driver, as well as CEMEX and Ranchos. Like in this case, the Ochoas made claims of negligence and gross negligence against CEMEX and Ranchos, alleging they had actual and constructive knowledge of premises defects along Jobe Road that posed an unreasonable risk of harm to the public. As happened in this case, Ranchos filed a crossclaim for contractual indemnity against CEMEX, relying on the indemnity terms in Paragraph 16 of the Surface Lease. Like here, Ranchos' indemnity crossclaim in *Ochoa* was severed into a new action. Importantly, however, unlike in this case, Ranchos eventually settled with the Ochoas before trial.[5]

In the separate action, Ranchos moved for summary judgment against CEMEX—as they did here—arguing that CEMEX owed Ranchos indemnity as a result of Paragraph 16 of the Surface Lease and CEMEX filed a cross-motion for summary judgment. In its cross-motion for summary judgment on Ranchos' indemnity claim in the *Ochoa* case, CEMEX argued that the indemnity provision contained in Paragraph 16 of the Surface Lease did not obligate CEMEX to indemnify Ranchos for Ranchos' own alleged negligence, because, CEMEX argued, the indemnity

[4] *Ochoa v. Quintana*, No. 2016DCV4685 (384th Dist. Ct., El Paso County, Tex. Dec. 27, 2016).

[5] Also, CEMEX settled with the Ochoas during trial.

provision did not satisfy the express-negligence rule. After a hearing on the competing motions for summary judgment, the trial court ruled that the indemnity provision in the Surface Lease did not satisfy the express-negligence rule, and thus did not require CEMEX to indemnify Ranchos for its attorneys' fees and litigation expenses incurred in defending the *Ochoa* case. In line with that ruling, the trial court denied Ranchos' motion for summary judgment and granted CEMEX's cross-motion for summary judgment.

Ranchos did not appeal the trial court's summary judgment order, and the merits of the trial court's judgment in that case is not the subject of this opinion. However, we must analyze whether the trial court's decision in the *Ochoa* case precludes Ranchos from raising the issue of indemnity—as it pertains to the indemnity clause in the Surface Lease—in this case.

3. Analysis

The record from the *Ochoa* case shows that the issue of whether the Surface Lease requires CEMEX to indemnify Ranchos for expenses incurred while defending against claims arising from a motor-vehicle crash occurring on Jobe Road was fully and fairly litigated. There, Ranchos had every opportunity and incentive to put forth evidence and argument regarding this issue. Indeed, Ranchos' motion for summary judgment in the *Ochoa* case included over eighty pages of evidence. Additionally, Ranchos filed a response to CEMEX's cross-motion for summary judgment, and participated in an oral hearing. The record in this case also shows that the same issue was before the trial court in the *Borrego* case: in its motion for summary judgment below, Ranchos argued—again—that, pursuant to Paragraph 16 of the Surface Lease, CEMEX was required to indemnify Ranchos for all costs associated with defending against the *Borrego* suit. We now move to the second element of collateral estoppel, whether the facts and issues litigated in the first action were essential to the judgment in that action. We determine that they were; in fact, the only issue before

each trial court was whether Paragraph 16 of the Surface Lease required CEMEX to indemnify Ranchos for claims of negligence and gross negligence arising from a motor-vehicle crash on Jobe Road.

Ranchos argues that the facts and issues of this case are different than the facts and issues in the *Ochoa* case. Specifically, it argues that in this case, unlike in the *Ochoa* case, there is a second indemnification provision—in the Easement Agreement—that they claim applies. We agree that collateral estoppel cannot bar Ranchos from arguing for indemnity based on the Easement Agreement, but we address the indemnity claim as it relates to the Easement Agreement below. It has no effect on the collateral estoppel defense as to indemnity under the Surface Lease.

Ranchos also points out the two cases arise from completely separate and different crashes that occurred at two different places on Jobe Road. Again, while we agree with Ranchos' assertion, those differences do not present any difference in the legal analysis of the issue that was to be decided in both cases. Both crashes occurred on Jobe Road, on land covered by the Surface Lease. The plaintiffs in both cases made essentially the same claims against Ranchos and CEMEX. Aside from the resolution, which we address in the next paragraph, the procedural history is almost identical between the two cases. And, in both cases, Ranchos argued that Paragraph 16 of the Surface Lease provides indemnity.

Finally, Ranchos points out that it—as well as CEMEX—settled with the plaintiffs in the *Ochoa* case. But in the *Borrego* case, the plaintiffs dismissed Ranchos with prejudice, and then proceeded to trial against CEMEX. Leading up to trial, CEMEX attempted to designate Ranchos as a responsible third party. Ultimately, however, the record shows that Ranchos was not listed in the charge as a potentially responsible party. But Ranchos' settlement in *Ochoa* did not create the express-negligence issue in that case; the absence of express language in the Surface Lease created

the issue when the Ochoas made claims against Ranchos. Whether the Ochoas' claim was ultimately proved has no bearing on the express negligence analysis; the Supreme Court of Texas has held that the express-negligence doctrine does not depend on the outcome of the underlying suit, but its applicability is established as a matter of law from the pleadings. *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 815 (Tex. 1994). As a result, we find the factual difference in the resolution of the claims against Ranchos in the two cases to be immaterial to this analysis.

Moving to the third element of collateral estoppel, it is undisputed that the parties were cast as adversaries in the first action; Ranchos was the sole plaintiff in the severed causes of action stemming from *Ochoa* and *Borrego*, while CEMEX was the sole defendant in both cases. In sum, we determine that, with regard to Ranchos' claim for indemnity under Paragraph 16 of the Surface Lease, the three elements of collateral estoppel were met. Thus, Ranchos is barred from relitigating the same issue here.

B. Express Negligence Doctrine

Even if Ranchos was not collaterally estopped from claiming indemnity based on the Surface Lease, we determine that the indemnity provision in that agreement does not satisfy the express negligence doctrine.

"The express negligence requirement is not an affirmative defense but a rule of contract interpretation." *Fisk Elec. Co.*, 888 S.W.2d at 814. Whether the express-evidence-rule applies is a determinable as a matter of law. *Id*. Under this doctrine, for a party to indemnify another party from the consequences of the second party's own negligence, the agreement to do so must express that intent in specific terms. *See Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 709 (Tex. 1987). "The purpose of the express negligence rule 'is to require scriveners to make it clear

when the intent of the parties is to exculpate an indemnitee for the indemnitee's own negligence.'" *Fisk*, 888 S.W.2d at 815 (quoting *Atl. Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724, 726 (Tex. 1989)). This rule is rigorously applied in Texas. *See, e.g., Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239, 239-40 (Tex. 1987) (agreement by contractor to indemnify plant owner for losses "arising out of or in any way connected with or attributable to the performance or non-performance of work here under by contractor . . ." failed the express negligence doctrine because the language did not specifically and expressly state that the losses included those resulting from the plant owner's own negligence); *Fisk Elec. Co.*, 888 S.W.2d at 815-16 (demonstrating an indemnity clause that provided, "[t]o the fullest extent permitted by law, [Fisk] shall indemnify, hold harmless, and defend [Constructors] . . . from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees . . ." arising out of or resulting from the performance of Fisk's work, did not provide "fair notice" that Fisk was obligated to indemnify Constructors for Constructors' own negligence) (alteration in original).

In relevant part, the indemnity clause in Paragraph 16 states:

> Except as to only injury, death or property damage proximately caused by the sole negligence or willful misconduct of [Ranchos], for which [Ranchos] is legally liable, [CEMEX] agrees to <u>indemnify</u> and hold [Ranchos and its officers, agents, and employees] harmless from any and all losses, claims, suits, actions, damages and liability whatsoever . . . .[6]

Provisions such as these, that explicitly state one or more scenarios that are excluded and then by extension, attempt to include all other possible indemnity scenarios fail the express negligence doctrine's requirements. *See Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690, 691 (Tex. 1987). When the Supreme Court of Texas has allowed indemnification of a party

[6] The original text appears in bold font with all letters capitalized. These qualities have been omitted here to improve the readability and legibility of the quoted text.

for its own negligence, it did so when the provision at issue explicitly stated as much. *See, e.g.*, *Enserch Corp. v. Parker*, 794 S.W.2d 2, 6-7 (Tex. 1990) (where the provision provided that the indemnitor would indemnify for any claims "regardless of whether such claims are founded in whole or in part upon alleged negligence of [the indemnitee]"). Because the provision in the Surface Lease used language of exclusion as opposed to explicit language of inclusion, we determine that it did not conform to the requirements of the express negligence doctrine.

Appellant's first issue on appeal, whether it is entitled to judgment as a matter of law on Ranchos' indemnity claim under the Surface Lease, is sustained.

V. THE EASEMENT AGREEMENT

In the second issue, CEMEX argues it is entitled to judgment as a matter of law on Ranchos' indemnity claim under the Easement Agreement.

A. Additional background

The Surface Lease described in this opinion was signed in 1996 and covered just over eighty-four acres, comprised of small portions of four sections of land relatively close to one another, and in some cases, adjacent.

Section	Block	Township	Survey	Acres	County
16	78	2	T&P Ry. Co.	23.872	El Paso
18	78	2	T&P Ry. Co.	12.209	El Paso
48	79	2	T&P Ry. Co.	23.996	El Paso
2	79	3	T&P Ry. Co.	23.9476	El Paso

The section numbers leased are labeled at their respective locations on the map below:

The location of Jobe Road can be seen on the map above, spanning the southern borders of sections 16 and 18, as well as the eastern and southern borders of sections 48 and 2. On May 16, 2007, Ranchos' predecessor-in-interest granted an easement under the Easement Agreement, giving CEMEX permission to use a thirty-five by thirty-five foot portion of the southeastern corners of sections 37 and 47 for the purpose of providing vehicular access on and around Jobe Road.

B. Analysis

The indemnity provision in the Easement Agreement states that CEMEX must indemnify Ranchos for suits arising out of "[CEMEX]'s exercise of the rights granted herein or activities or operations hereunder . . . ." The parties agree that Borrego and his passengers were traveling westbound through section 18 immediately prior to the crash, approaching the 90-degree left turn near where sections 18, 37, and 48 meet. The parties also agree that the vehicle traveled into and came to a rest within section 37. However, Ranchos' position is that the "accident occurred in the turn that is encompassed by the easement" whereas CEMEX argues that the vehicle passed just north of the easement area, never crossing into the same.

As support for Ranchos' argument, it points to two pieces of deposition testimony. First, it

points to the following exchange during the deposition of its own corporate representative, Doug Schwartz:

> Q: And we were talking about this earlier when we looked at the map, but based on your knowledge, it's this property that this easement agreement covers. Is that where the accident in question occurred on January 2nd of 2016?
>
> A: I don't know exactly where the accident started, but I understand that the truck ended up on this property, on one of these properties.
>
> Q: And this is -- the accident occurred on the same curve that -- that moves through this easement?
>
> A: Yes.

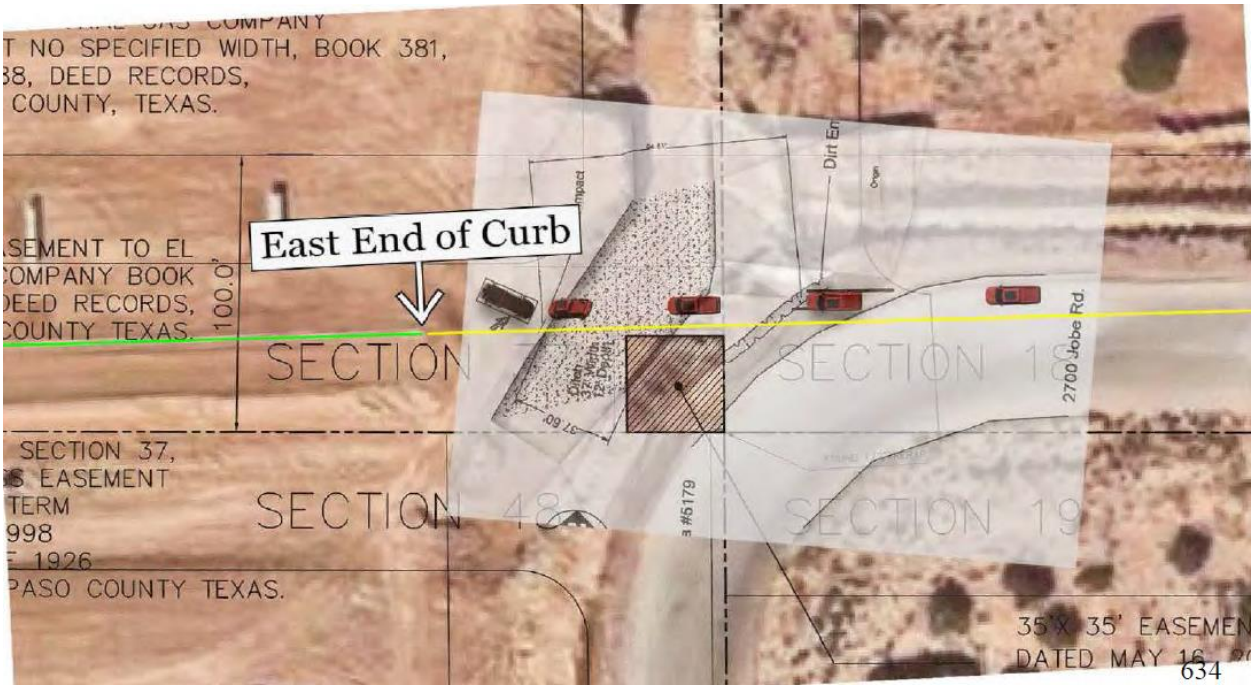
Second, Ranchos points to the following small section of the deposition transcript of CEMEX's corporate representative, Ignacio Rivero:

> Q: -- because Section 37 is where this accident occurred.
>
> A: Right.

Alternatively, CEMEX, in support of its position that no part of this crash occurred on the land covered by the easement, points to the affidavit of Ranchos' own crash reconstruction expert, Dr. Mike Scott, in which he wrote:

> Based on the pickup's positions [], the pickup always remained north of the easement during the crash. It is my opinion, based on the information that I have reviewed, that the pickup operated by Mr. Borrego during the crash never came in contact with the easement or was over the easement during the crash that occurred on January 2, 2016.

CEMEX also points to a diagram created by Dr. Scott:



In the above diagram, the shaded square in the center is the thirty-five-by-thirty-five-foot property covered by the Easement Agreement, and the pictures of the vehicle represent the travel of Borrego's pickup truck, according to Dr. Scott.

After reviewing the parties' arguments and the evidence they point to, we determine that the evidence does not conflict; thus, there is no genuine issue of material fact as to whether the property covered by the Easement Agreement had anything to do with the crash, other than being nearby. We find Dr. Scott's affidavit and diagram particularly compelling on this issue, especially considering he was Ranchos' own expert. Doug Schwartz's testimony that the crash occurred on the same curve that moves through the easement, is not specific as to where on the curve the crash occurred, or whether the vehicle actually traveled through the easement property. Stated differently, we can see from the map that while a small part of the curve falls within the easement property, the vast majority of the curve does not. Schwartz's statement does not indicate that the crash occurred on the easement property; in fact, Ranchos' argument that it does is belied by Schwartz's statement that he did not know where the accident started.

Similarly, Ignacio Rivero's statement does not contradict Dr. Scott's affidavit. First, we note that Rivero's statement should not be taken out of context. The transcript leading up to Rivero's statement indicates that the attorneys for Ranchos and CEMEX had been intermittently talking between themselves about whether Rivero was prepared to testify about a numbered item from the corporate representative deposition notice. Rivero had been confused as to why counsel for Ranchos had asked a question about section 37 when the exchange reproduced above occurred. At any rate, a statement that this crash occurred on Section 37 would in no way contradict Dr. Scott's affidavit. But the question is not whether the crash occurred on Section 37, but whether it occurred on a very small part of Section 37. The trial court was not presented with any evidence that this crash occurred or passed through or over the part of Section 37 covered by the Easement Agreement. And, as we have stated, Ranchos' own expert, Dr. Scott, testified unequivocally that the land covered by the Easement Agreement was not involved. As a result, we determine, as a matter of law, that the indemnity provision in the Easement Agreement did not apply.

Appellant's second issue is sustained.

VI. CONCLUSION

We conclude that Ranchos was not entitled to indemnity from CEMEX under the Surface Lease. The issue of the applicability of the Surface Lease's indemnification clause in a case where a plaintiff alleged negligence against Ranchos had already been decided in the previous *Ochoa* case; Ranchos, therefore, was barred by the doctrine of collateral estoppel from raising the issue again in this underlying case. Even if it was not barred, we further determine that Ranchos would not be entitled to indemnity under the Surface Lease because the plaintiffs made claims against Ranchos itself, and the Surface Lease indemnity clause does not satisfy the express negligence doctrine. We have also determined that Ranchos was not entitled to indemnity from CEMEX under

the Easement Agreement because the easement area was not directly involved in this crash.

As a result, CEMEX is entitled to summary judgment on Ranchos' indemnity claims. The trial court is reversed and we render judgment in CEMEX's favor.

GINA M. PALAFOX, Justice

September 30, 2022

Before Rodriguez, C.J., Marion, C.J. (Ret.), and Palafox, J.
Marion, C.J. (Ret.), sitting by assignment