Opinion issued October 19, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00045-CV

HENSEL PHELPS CONSTRUCTION CO., Appellant

V.

ROYAL AMERICAN SERVICES, INC., Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2014-00593

MEMORANDUM OPINION

During a severe rainstorm, water leaked into the Methodist Hospital Outpatient Center. The cause of the leak was determined to be a lack of roof flashing around a rooftop doorway. The general contractor who built the facility settled with

Methodist and then sued its roofing subcontractor and another subcontractor for indemnity.

The case proceeded to a bench trial solely against the roofer. The roofer presented evidence from Methodist's investigation into the cause of the leak that showed that flashing had existed around the rooftop doorway, but had been removed.

At the conclusion of the evidence, the trial court rendered a take-nothing judgment in favor of the roofer. It also awarded $4,500 in damages plus prejudgment interest and attorney's fees on the roofer's counterclaim for unpaid repair work. The general contractor appeals, contending that it proved its claim for indemnity against the roofer as a matter of law. Because there is sufficient evidence from which the trial court reasonably could have concluded that the roofer did not cause the leak, we hold that the general contractor did not prove its claim for indemnity as a matter of law, and accordingly, we affirm.

BACKGROUND

Methodist Hospital hired Hensel Phelps Construction Co. as the general contractor to construct a new outpatient center. Royal American Services, Inc. installed the outpatient center's roof from November 2008 through February 2009. A certificate of substantial completion for the roof work was issued in May 2010. Hensel Phelps signed a final inspection report for the roof in June 2010, indicating

that it had accepted Royal American's work as complying with the subcontract's specifications.

Houston experienced a severe rainstorm in January 2012. During the storm, a large amount of water infiltrated the outpatient center, causing extensive failure of the facility's electrical switch gear. Methodist Hospital hired Zero/Six Consulting to find the source of the water infiltration. Zero/Six determined that the water entered the facility under a rooftop door's threshold.

Hensel Phelps paid Methodist Hospital about $1 million to settle Methodist's claim for the water damage. It then sued two of its subcontractors for indemnity: Royal American, the roof installer, and Arrowall Company, the door installer. Arrowall had modified the rooftop door after the roof installation.

Hensel Phelps settled with Arrowall for $110,000 before trial. The remaining claims between Hensel Phelps and Royal American were tried to the bench. Hensel Phelps asserted claims for negligent construction, breach of express and implied warranties, and breach of contract, including breach of a contractual indemnity clause, against Royal American. Royal American counterclaimed, seeking recovery of the costs it incurred in repairing the roof of the outpatient center at Hensel Phelps's request.

At trial, the principal dispute between Hensel Phelps and Royal American concerned whether Royal American had installed sheet-metal counter-flashing

beneath the rooftop door. The flashing was a critical part of a weather resistant barrier system designed to prevent leaks into the building. Hensel Phelps contended that Royal American had failed to install the flashing and this failure caused the leak. Royal American responded that it had installed the flashing, but that another party—presumably Arrowall—had removed it after Royal American completed its work on the roof.

The rooftop door, which was outside of the scope of Royal American's work, originally was installed to swing outward onto the roof. Arrowall modified the door in August 2010 to swing inward into the outpatient center because the outward-swinging door violated city code. When Arrowall modified the door, Royal American already had left the construction site, having previously completed its work on the roof. It was undisputed at trial that Royal American neither knew of nor participated in the modification of the door.

There was conflicting testimony as to whether Royal American had installed any flashing beneath the rooftop door's threshold. In summary,

- Michael Dwight, Hensel Phelps's project manager, wrote a letter to Arrowall asserting that preliminary reports indicated that the water infiltration resulted from the removal of flashing beneath the door's threshold;
- Dwight agreed that Damian Lee, a Hensel Phelps engineer who observed Zero/Six's investigation, reported that it was obvious that someone had removed flashing from beneath the door's threshold;
- Dwight conceded that the only proof that Hensel Phelps had that Royal American failed to install flashing beneath the door's threshold was the

discovery of its absence during Zero/Six's investigation into the source of the water infiltration;

- John Arnold, Royal American's project superintendent, said that another party removed the flashing that Royal American installed beneath the door's threshold, but conceded that he did not have any proof as to who removed it;
- relying on the presence of silicone caulk beneath the threshold, Arnold opined that Arrowall likely removed the flashing when it changed the door's swing, explaining that Royal American does not use silicone caulk, which does not adhere to asphalt, but companies like Arrowall that work with glass and windows do use it;
- Eric McFarland, Hensel Phelps's project engineer and project superintendent, testified that Arnold told him before Royal American completed its work on the roof that he had installed the proper flashing but later noticed that "something" had been removed from beneath the door's threshold;
- McFarland conceded that he did not ask Arnold whether he replaced the flashing once he saw it had been removed;
- Daniel Hodge, an employee of Zero/Six Consulting, testified that the flashing had been installed beneath the threshold at one point but was later removed by an unknown party;
- Hodge based this conclusion on a dark impression in the roofing that would correspond to where flashing once was installed as well as the presence of sealant or caulking residue indicative of the installation of flashing;
- Hodge conceded that this conclusion was preliminary in nature and that further investigation, which Methodist Hospital did not request, would have been necessary to conclude to a reasonable degree of scientific certainty that flashing was installed under the threshold.

These witnesses also offered contradictory testimony as to whether it was necessary to alter or replace the door's threshold—and remove the flashing beneath it—when reversing the door's swing.

In addition, each side presented an engineering expert. Laura Bolduc testified for Hensel Phelps and James Craddick testified for Royal American.

Bolduc opined that Royal American failed to install flashing beneath the door's threshold based in part on the absence of anchor holes in the roofing membrane or concrete deck for fastening the flashing. Bolduc further opined that, whether or not flashing was installed, the membrane had voids or gaps between the roofing membrane and the concrete substrate that should not have been there—called "fish mouths"—through which water possibly could infiltrate. Regarding this possibility, however, she merely stated, "It's possible with the fish mouths, I guess." She agreed that if flashing had been installed and later removed, Arrowall was the most likely to have removed it. Moreover, while she maintained that she did not think the flashing was installed, she conceded that there was evidence to support the contrary conclusion.

Craddick concluded that Royal American had installed flashing beneath the rooftop door's threshold. In support of this conclusion, he noted that an impression in the roofing membrane indicated the presence of flashing. New flashing installed after the water infiltration to remedy the absence of flashing matched this impression. Craddick likewise relied on the presence of sealant or adhesive material beneath the threshold that ordinarily would be associated with flashing. In addition, Craddick testified that a severe rainstorm in July 2010 that did not result in water

infiltration indicated that flashing was in place at that time but had been removed before the January 2012 storm that damaged the outpatient center. According to Craddick, the lone change made between Royal American's substantial completion of the roof's installation and the water infiltration was Arrowall's modification of the rooftop door in August 2010. He opined that the absence of flashing caused the water infiltration. He agreed that there should not have been "fish mouths" in the roofing membrane, but testified that flashing is the primary means of keeping water out of a structure.

Finally, the trial court heard evidence about Royal American's repair of the roof after the outpatient center sustained water damage. This included proof that Royal American invoiced Hensel Phelps for the repair and that Hensel Phelps did not pay the invoice. There also was evidence that the repair, which Royal American claimed included installation of the same flashing it previously had installed, was inspected and prevented further water infiltration when tested.

After hearing the evidence, the trial court entered a take-nothing judgment on Hensel Phelps's claims. It awarded Royal American about $4,500 in damages plus prejudgment interest and attorney's fees in connection with its counterclaim for the roof repair.

The trial court also entered findings of fact and conclusions of law. It found that Royal American "did not fail to install the flashing at issue" and that the flashing

"was removed after Royal American had completed its work." It further found that Royal American "did not breach any material term of its subcontract, whether pertaining to indemnity or otherwise" and neither made an express warranty outside of the terms of the subcontract nor breached any express warranty. It further found that any failure by Royal American "to comply with the submittal process under the subcontract was immaterial" and caused no damages, and that no other act or omission of Royal American was negligence or "was a cause-in-fact or a proximate cause of any damages." The trial court ultimately concluded that Hensel Phelps did not prove a right to recover from Royal American, but that Royal American had proved its right to recover on its "breach-of-contract counterclaim and, alternatively, on its quantum meruit counterclaim."

DISCUSSION

On appeal, Hensel Phelps contends that it proved its claim for indemnity as a matter of law because the parties have a valid written indemnity agreement and conclusive evidence demonstrates that Royal American at least partly caused the roof leak. It further challenges the trial court's take-nothing judgment on its negligence claim as unsupported by the evidence.

I. The written indemnity agreement requires indemnity for damages caused or allegedly caused by Royal American.

Hensel Phelps contends that Royal American must indemnify it for any claims allegedly arising from Royal American's roofing subcontract and thus extends even

to claims solely resulting from a third party's modification of that work. Royal American responds that there must be a causal connection between the work that it performed and the alleged claim to fall within the scope of the indemnity agreement.

The indemnity agreement provides that Royal American must indemnify Hensel Phelps against losses "arising or allegedly arising from" Royal American's work under the agreement, including errors made by Hensel Phelps relating to that work:

> The subcontractor expressly agrees to indemnify, defend and hold harmless the contractor and the owner's authorized agent and any other party the contractor is obligated to indemnify under the contract (collectively, "the indemnitees") from and against any and all liability, claims, losses, damages, causes of action, costs and expenses (including attorneys' fees), *arising or allegedly arising from the work performed by the subcontractor* or for the subcontractor's account under this agreement, including any claim or liability arising from any act, error, omission, or negligence of the contractor occurring concurrently with that of the subcontractor or contributing to any loss indemnified hereunder, except for the sole negligence or willful misconduct of the contractor. The claims to which this indemnity obligation shall apply include, but are not limited to, claims for personal injury or death to any person or persons (including but not limited to officers, agents and employees of contractor, subcontractor or lower-tier subcontractors to subcontractor), property damage (including loss of use thereof), economic loss or other damage, *arising or allegedly arising from subcontractor's work*.

(Emphasis added; capitalization in original omitted).

A. Standard of review and applicable law

An indemnity agreement is a contractual commitment by one party to protect another or hold it harmless from existing or future loss, liability, or both. *Dresser*

Indus. v. Page Petrol., 853 S.W.2d 505, 508 (Tex. 1993); *Audubon Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.3d 309, 319 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). These commitments generally do not apply to claims between the parties but rather to claims made by others who are not parties to the agreement. *MEMC Elec. Materials v. Albemarle Corp.*, 318 S.W.3d 405, 413 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 20 S.W.3d 119, 130 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

As with any other contract, the interpretation of an unambiguous indemnity agreement—one that can be given a definite or certain meaning—is a question of law, which we review de novo. *Crowder v. Scheirman*, 186 S.W.3d 116, 119 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Tesoro Petrol. Corp. v. Nabors Drilling USA*, 106 S.W.3d 118, 133 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

Our interpretation must effectuate the intent of the parties as expressed in the agreement. *Ideal Lease Serv. v. Amoco Prod. Co.*, 662 S.W.2d 951, 953 (Tex. 1983); *E.I. Du Pont De Nemours & Co. v. Shell Oil Co.*, 259 S.W.3d 800, 805 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The terms of the agreement are controlling regarding its scope. *See Crimson Expl. v. Intermarket Mgmt.*, 341 S.W.3d 432, 443–44 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see also Myers v. Hall Columbus Lender*, 437 S.W.3d 632, 636–39 (Tex. App.—Dallas 2014, no pet.). Unless the agreement indicates a contrary intent, we give its terms their ordinary, generally

accepted meaning. *Shell Oil Co.*, 259 S.W.3d at 805; *Amtech Elevator Servs. Co. v. CSFB 1998-P1 Buffalo Speedway Office Ltd.*, 248 S.W.3d 373, 379 (Tex. App.—Houston [1st Dist.] 2007, no pet.). We interpret the agreement as a whole to give effect to all of its provisions so that none are left meaningless. *MEMC Elec. Materials v. Albemarle Corp.*, 241 S.W.3d 67, 71 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). But we cannot expand the agreement beyond its terms. *Ideal Lease*, 662 S.W.2d at 953; *Hong Kong Dev. v. Nguyen*, 229 S.W.3d 415, 458 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Once the proper scope of an indemnity agreement is ascertained, we determine whether indemnification is required under its terms based on the facts established at trial. *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 334 S.W.3d 217, 219 (Tex. 2011) (per curiam). In other words, the duty to indemnify ultimately turns on the trier of fact's findings rather than the parties' pleadings. *See id.* at 219–20; *Tesoro Petrol.*, 106 S.W.3d at 125.

B. Analysis

The plain language of the parties' indemnity agreement requires Royal American to hold Hensel Phelps harmless from losses arising from, or allegedly arising from, the work performed by Royal American. Phrases like "arising from" signify a causal relationship. *See Plains Expl. & Prod. Co. v. Torch Energy Advisors*, 473 S.W.3d 296, 308–10 (Tex. 2015); *Lancer Ins. Co. v. Garcia Holiday*

Tours, 345 S.W.3d 50, 54–58 (Tex. 2011); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004). Thus, to obtain indemnity, Hensel Phelps had to prove at trial either that:

(1) Royal American's performance caused the loss; or

(2) its performance allegedly caused the loss.

Regarding the second basis for indemnity, Hensel Phelps had to show that a third party alleged that Royal American caused the loss because indemnity agreements apply to claims made by third parties, not disputes between the parties themselves. *See MEMC Elec.*, 318 S.W.3d at 413; *Coastal Transp.*, 20 S.W.3d at 130.

We reject Hensel Phelps's contention that the agreement goes still further and requires Royal American to indemnify Hensel Phelps for losses resulting from something that a third party allegedly did to Royal American's work. That contention is incompatible with the agreement's "arising from" language because it would oblige Royal American to provide indemnity even if its performance was not a cause or an alleged cause of the loss. *See Plains Expl.*, 473 S.W.3d at 308–10; *Lancer Ins.*, 345 S.W.3d at 54–58; *Utica Nat'l Ins.*, 141 S.W.3d at 203. Thus, we turn to whether the evidence supports the trial court's finding that Royal American's work did not cause the loss.

II. The trial court reasonably could have concluded that Royal American did not cause the loss and was not alleged to have caused the loss.

Hensel Phelps asserts that the evidence conclusively establishes that Methodist Hospital alleged that Royal American's performance was a cause of the loss or, alternatively, that the evidence conclusively shows that Royal American's performance was a cause the loss. Royal American disputes that Hensel Phelps conclusively proved either of these alternatives.

A. Standard of review and applicable law

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. *Thompson v. Smith*, 483 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2015, no pet.). When challenged, its findings are not conclusive if, as here, there is a complete reporter's record. *Id.* Under these circumstances, the trial court's fact findings are only binding if the evidence supports them, and we assess the legal sufficiency of this evidence under the same standards that we apply when reviewing the legal sufficiency of the evidence supporting jury findings. *Id.*

Hensel Phelps bore the burden of proving sufficient facts to show that American Royal breached its indemnity obligation under the agreement. *See Crowder*, 186 S.W.3d at 118–19. Because it challenges the legal sufficiency of a finding on which it bore the burden of proof at trial, Hensel Phelps must show on appeal not only that no evidence supports the trial court's finding, but also that the evidence conclusively proves the contrary. *Jones v. Pesak Bros. Constr.*, 416

S.W.3d 618, 624 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Under this standard of review, we must reject Hensel Phelps's legal-sufficiency challenge unless the evidence proves all vital facts in support of its position as a matter of law. *Id.*

In our review, we consider the entire record in the light most favorable to the trial court's findings, crediting favorable proof and disregarding contrary proof so long as a reasonable factfinder could do so. *Republic Petrol. v. Dynamic Offshore Res.*, 474 S.W.3d 424, 433 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *N.Y. Party Shuttle v. Bilello*, 414 S.W.3d 206, 211 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). The factfinder is the lone judge of the witnesses' credibility and the relative weight of their testimony. *Republic Petrol.*, 474 S.W.3d at 433. The factfinder may believe one witness instead of another, accept or reject any given witness's testimony in whole or part, and resolve conflicts in the proof. *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce*, 403 S.W.3d 360, 367 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

B. Analysis

1. There is no evidence that Methodist Hospital or its agents alleged that Royal American's performance caused the water infiltration at the outpatient center.

Hensel Phelps argues that Methodist Hospital alleged that Royal American negligently caused the water infiltration at the outpatient center. Because Methodist

Hospital did not file a lawsuit, however, there are no pleadings on which Hensel Phelps may rely. Nor did Methodist Hospital ever send any party a demand letter. No representative of Methodist Hospital testified at trial. So in support of its position, Hensel Phelps instead relies on the following proof:

- a report prepared by Zero/Six Consulting, which was hired by Methodist Hospital to identify the sources of water infiltration;
- an e-mail from a Methodist Hospital employee regarding the water infiltration into the outpatient center; and
- correspondence between Hensel Phelps and Royal American or its attorneys about the water infiltration.

None of these documents show that Methodist Hospital alleged that Royal American's performance caused its losses.

Zero/Six Consulting's report states that it was hired to determine the sources of water infiltration, not to assess fault. Zero/Six's report concludes that the water infiltration resulted from "construction defects," but it does not assign blame for them. Among other things, Zero/Six found that the flashing under the rooftop access door "was not properly terminated" and opined that fixing this defect would "eliminate most (if not all) water infiltration." This defect was within Royal American's scope of work. But consistent with Royal American's defense, Zero/Six's report suggests that Royal American's work had been altered. In particular, Zero/Six found that there was "sealant residue from what appeared to be a previous flashing installation" and that it appeared that the existing flashing was

intended to "seal a flashing that is no longer part of the installation." The report neither states nor implies that Royal American was to blame.

The e-mail from Methodist Hospital reported the existence of the water infiltration and noted the resulting damage to the outpatient center's electrical switch gear. But it further stated that the "the manner of water infiltration" was unknown. It did not mention Royal American.

In its correspondence with Royal American, Hensel Phelps alleged that Royal American was to blame for the water infiltration and attributed this allegation to Methodist Hospital. In one letter, for example, Hensel Phelps wrote that the hospital had notified it "of allegedly defective work performed by Royal American." But Hensel Phelps's correspondence was admitted for the limited purpose of proving that Royal American had notice of its contents, not for the truth of the matters asserted in these letters. Thus, these letters, which conveyed Hensel Phelps's own characterizations of the hospital's claims, provide no proof that the hospital alleged that Royal American was to blame.

In sum, no proof shows that Methodist Hospital alleged that Royal American's performance was negligent or deficient. Hensel Phelps alleged that Royal American was to blame, but the would-be indemnitee's own allegations cannot trigger a contractual indemnity obligation. *See MEMC Elec.*, 318 S.W.3d at 413; *Coastal Transp.*, 20 S.W.3d at 130.

2. There is conflicting evidence as to whether Royal American's work caused water to infiltrate the outpatient center and, therefore, legally sufficient proof to support the judgment.

Hensel Phelps further contends that the evidence proves that Royal American negligently caused the water infiltration. The proof about the cause of the leak, however, is in conflict.

Royal American called two witnesses at trial: Daniel Hodge, an employee of Zero/Six Consulting who participated in its investigation and in the preparation of its report; and James Craddick, an engineering expert retained by Royal American to investigate the water leak's cause. Their testimony supports Royal American's position that it installed flashing beneath the rooftop door's threshold that would have prevented water infiltration had another party not subsequently removed the flashing.

Hodge testified that he thought flashing had been installed beneath the door before the direction of its swing was changed. When he investigated after the leak, flashing was not present. But he saw signs that flashing had been there before, including a dark impression indicating where flashing had once sat and the presence of sealant or caulking that would have been used with flashing. Zero/Six concluded that flashing had been installed but was removed later by an unknown party.

Craddick unequivocally opined that flashing was installed beneath the rooftop door. Like Hodge, Craddick based this opinion on a dark impression in the roof's

membrane indicating where flashing once was installed and on the presence of sealant associated with flashing. Craddick noted that the new flashing installed beneath the door's threshold after the water infiltration matched the preexisting dark impression in the roof's membrane. He also considered the timing of water infiltration relative to the change of the direction of the rooftop door's swing. The infiltration occurred during a rainstorm in January 2012 after Arrowall changed the swing of the rooftop door; a prior rainstorm in July 2010 before the change, however, did not result in any water infiltration into the outpatient center. Craddick concluded that the removal of the flashing explained the different outcomes.

There is evidence to the contrary. But because the testimony of Hodge and Craddick support the trial court's finding that Royal American installed flashing beneath the rooftop door only to have another remove it, we reject Hensel Phelps's contention that the evidence conclusively proves that Royal American caused the water infiltration. *See Jones*, 416 S.W.3d at 624.

Hensel Phelps contends that Bolduc's testimony nevertheless shows that Royal American negligently caused the water infiltration. She testified that there should not have been gaps or voids—the "fish mouths"—in the roofing membrane under the rooftop door, and that these gaps may have caused the leak even if the flashing had been installed. But her testimony in this regard is equivocal: "It's possible with the fish mouths, I guess." Craddick disagreed, opining that it was the

absence of flashing on the date of the rainstorm that caused the water infiltration. It was for the trial court sitting as factfinder to resolve these conflicts in the proof. *See Republic Petrol.*, 474 S.W.3d at 433; *Flanagan Shipping*, 403 S.W.3d at 367.

Hensel Phelps further contends that the flashing did not conform to the project's specifications. Royal American does not dispute that the flashing that it installed did not conform to its submittals. Nonetheless, no one testified that Royal American's failure to abide by its submittals or supplement them caused the leak. Accordingly, Hensel Phelps did not conclusively prove that any failure by Royal American to comply with the contractual submittal requirements caused its loss.

III. Legal sufficiency – negligence claim

Finally, Hensel Phelps challenges whether the proof is legally sufficient to support the trial court's adverse judgment on its negligence claim. This claim required Hensel Phelps to prove that an act or omission of Royal American was a cause in fact of the water infiltration and resulting damages. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016). Thus, the same conflicting evidence about causation relating to the indemnity provision likewise is legally sufficient to support the trial court's judgment with respect to Hensel Phelps's negligence claim.

CONCLUSION

We conclude that legally sufficient evidence supports the trial court's rejection of the general contractor's claims for indemnity and negligence. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Brown.