COURT OF APPEALS
DECISION
DATED AND RELEASED

January 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0622

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LUNDA CONSTRUCTION COMPANY, AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Plaintiffs-Respondents-Cross Respondents,

v.

ALLIANCE STEEL CONSTRUCTION,

Defendant-Respondent-Cross Appellant,

THE AMERICAN INSURANCE COMPANY,

Defendant-Appellant,

LISCOMB-HOOD-MASON COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Alliance Steel Construction (Alliance) and its liability insurer The American Insurance Company appeal from a judgment in favor of Lunda Construction Company (Lunda) and its insurer St. Paul Fire and Marine Insurance Company. The trial court held that where Lunda had paid a settlement to Alliance's employee, Alliance must indemnify Lunda, pursuant to a contract between them. We affirm the judgment.

STANDARD OF REVIEW

Construction of a contract is a question of law, ***Lambert v. Wrensch***, 135 Wis.2d 105, 115, 399 N.W.2d 369, 373-74 (1987), and we determine questions of law independently of the trial court. ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

BACKGROUND

Lunda, a general contractor, contracted with Alliance for the latter to provide structural steel for use by Lunda in a bridge construction project. Lunda and Alliance are Wisconsin corporations, and they contracted in Wisconsin. The bridge project was located in Minnesota.

During the course of the contract, an Alliance-employed worker fell and suffered injury. Alliance paid worker's compensation, but because Lunda was not his employer, the worker was free to, and did, sue Lunda. Alleging that the worker's injury resulted from Lunda's negligence in maintaining a scaffolding, Alliance sued Lunda in Minnesota for indemnification for the worker's compensation Alliance paid to the worker. Lunda counterclaimed alleging Alliance would be contractually liable for any sums Lunda had to pay the injured worker. Lunda settled with the injured worker, and the Minnesota case, including Lunda's counterclaim for contractual indemnification, was dismissed without prejudice. Lunda then brought this

action in Wisconsin against Alliance for contractual indemnification for the amount of Alliance's settlement with the Alliance worker.[1]

CONTRACT

All parties agree that the relevant contractual provision is paragraph four of the Lunda/Alliance subcontract. We quote the provision in pertinent part, highlighting those parts about which the parties offer specific argument:

> THE SUBCONTRACTOR [Alliance] AGREES AS FOLLOWS:
>
> To obtain, effect, maintain and pay for all workers' compensation insurance that may be required by the General Contract or by law and public liability insurance protecting the Sub-Contractor against claims for bodily injury, death or damage to property and for such other risks as are specified below occurring upon, or in connection with, the execution of work covered under this Contract.... The Sub-Contractor agrees to assume entire responsibility and liability for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of, resulting from or in any manner connected with *the execution* of the work provided for in this Contract or occurring or resulting from the use by the Sub-Contractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Sub-Contractor or third parties, and the Sub-Contractor agrees to indemnify and save

[1] Both Alliance and Lunda argue extensively concerning the applicability of Minnesota law. Under Minnesota case law, this appeal would be settled in Lunda's favor. ***Johnson v. McGough Const. Co., Inc.,*** 294 N.W.2d 286 (Minn. 1980). We find it unnecessary to resort to Minnesota law. As set forth below, Lunda prevails under Wisconsin law.

> harmless the Contractor, his agents and employees, the owner, the engineer, and other Sub-Contractors from all such claims *including*, without the generality of the foregoing, claims for which the Contractor may be, or may be claimed to be, liable, and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph, and the Sub-Contractor further agrees to obtain, maintain and pay for such general liability insurance coverage as will insure the provisions of this paragraph.

PARTIES' ARGUMENTS

Alliance argues that the contract must be strictly construed because Lunda seeks indemnification for its own negligence. ***Barrons v. J.H. Findorff & Sons, Inc.***, 89 Wis.2d 444, 452, 278 N.W.2d 827, 831 (1979). Next, Alliance argues that under strict construction to hold one party contractually liable to indemnify a second party for the latter's own negligence is permitted only when the contract specifically so provides or when no other construction is possible. ***Id***. at 452-53, 278 N.W.2d at 831.

Because the contract does not specifically reference Lunda's own negligence, Alliance argues that under the strict construction standard, the quoted contract language does not operate to hold Alliance liable for Lunda's negligence, since other constructions of the contract are possible. Specifically, referring to the "execution" of the work, Alliance argues the contract requires a link between Alliance's negligence and the event for which Lunda could seek indemnification. Further, by its "including" clause, the contract addresses Lunda's *status* as a party possibly liable, rather than its *conduct* as a party possibly negligent. Alliance finally argues that the clause exists only for situations involving Lunda's vicarious liability as the general contractor, such as might arise under the safe-place statute, and the clause was never intended to cause Alliance to function as its general insurer for Lunda's own negligence.

Lunda argues that, as the trial court held, the language is broad enough to require Alliance to indemnify Lunda for injuries resulting from Lunda's own negligence.

ANALYSIS

We agree with Alliance that the contract must be strictly construed and we should not construe it to require Alliance to indemnify Lunda for Lunda's own negligence unless no other construction is possible. But, we agree with Lunda and the circuit court that the language at issue requires Alliance to indemnify Lunda for Lunda's own negligence. Although the result may seem harsh, the court cannot, through the guise of construing a contract, insert what has been omitted or rewrite the contract. ***Batavian Nat'l Bank v. S & H, Inc.,*** 3 Wis.2d 565, 569, 89 N.W.2d 309, 312 (1958).

The contract provides that Alliance "agrees to assume entire responsibility and liability for ... injury to all persons, whether employees or otherwise ... arising out of, resulting from or in any manner connected with the execution of the work provided for in this contract...." Although Alliance focuses on "execution" to limit the broad assumption of "entire responsibility" to acts of Alliance's own negligence, the language does not specify that Alliance had to be the "executing" party. Instead, by this language Alliance assumes "entire responsibility and liability" for injury "in any manner connected" with execution of the work in the contract, by whomever the work was accomplished.

This reading is bolstered not merely by the plain language of the contract clause, but also by the continuation phrase. Not only is Alliance to be "entirely responsibl[e] and liabl[e]" for all injuries arising out of the work provided for by the contract, but *also* ("or") for those injuries "occurring or resulting from the use by the Sub-Contractor, his agents or employees, of materials, equipment, instrumentalities or other property...." Were Alliance the only party targeted by the "execution" language, there would be no reason to specify Alliance (the "Sub-Contractor") in the very next phrase.

Further, Alliance agreed "to indemnify and save harmless the Contractor ... from such [personal injury] claims including ... claims for which the Contractor may be ... liable," yet the contract contains no limitation on how the Contractor's (Lunda's) liability may have arisen. Such broad language includes liability for Lunda's own negligence. Because we must construe the

contract as written, ***Batavian***, 3 Wis.2d at 569, 89 N.W.2d at 312, we affirm the circuit court judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.