COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 96-3159, 96-3597

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

NO. 96-3159

NAOMI ANDERSON, INDIVIDUALLY AND AS THE ESTATE PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD ALLAN ANDERSON,

PLAINTIFF,

V.

CON/SPEC CORPORATION,

DEFENDANT-
THIRD PARTY PLAINTIFF,

AMERICAN FAMILY INSURANCE,

DEFENDANT,

ZAPPA BROTHERS AND CONTINENTAL WESTERN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

DONALD BAKER AND GARY LEONARD GRIFFITHS,

DEFENDANT,

v.

BE ARCHITECTS, INC., AND WESTFIELD INSURANCE COMPANY,

THIRD PARTY DEFENDANTS-APPELLANTS,

BERNARD G. STROH, D/B/A STROH ENGINEERING, INTERNATIONAL INSURANCE CO., ADVANCED CONCRETE & MASONRY, CNA INSURANCE COMPANY,

THIRD PARTY DEFENDANTS.

NO. 96-3597

NAOMI ANDERSON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD ALLAN ANDERSON,

PLAINTIFF,

v.

CON/SPEC CORPORATION,

DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT,

AMERICAN FAMILY INSURANCE,

DEFENDANT-APPELLANT,

ZAPPA BROTHERS AND CONTINENTAL WESTERN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

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V.

BE ARCHITECTS, INC., WESTFIELD COMPANY, BERNARD G. STROH D/B/A STROH ENGINEERING, INTERNATIONAL INSURANCE CO., ADVANCED CONCRETE AND MASONRY, AND CAN INSURANCE COMPANY

THIRD PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, P.J., Myse and Nolan, JJ.

CANE, P.J. Con/Spec Corporation and BE Architects, Inc., appeal a judgment entered on a jury verdict.[1] The jury decided the sole issue of negligence and comparative fault for the death of a worker at a construction site. Although the jury apportioned fault among the deceased worker and five other parties, only three parties were involved in the trial, the other parties having settled their claims. The jury found Con/Spec twenty-five percent at fault; BE Architects fifteen percent at fault; and Zappa Brothers, the third party in the suit, not negligent and, therefore, zero percent at fault.[2] Both Con/Spec and BE Architects filed motions after verdict. Con/Spec moved for a new trial, judgment notwithstanding the verdict (JNOV), and indemnification by Zappa in accordance with their contract. BE Architects moved for a new trial. The trial court denied all

[1] The respective appeals of Con/Spec and BE Architects, Nos. 96-3159 and 96-3597, were consolidated by this court sua sponte by order dated March 10, 1997.

[2] The verdict further reflected the following apportionment of fault: Todd Anderson, 10%; Bernard Stroh, 15%; and Advanced Concrete and Masonry, 35%.

motions and entered judgment in favor of Zappa and against Con/Spec and BE Architects. This appeal followed.

Con/Spec and BE Architects both claim the trial court erroneously exercised its discretion when it denied their respective motions for a new trial. In addition, Con/Spec raises two other issues on appeal. Con/Spec claims that the trial court erred (1) when it denied its motion for judgment notwithstanding the verdict and (2) when it concluded that Con/Spec was not entitled to indemnification by Zappa. Because we conclude that the trial court reasonably exercised its discretion by refusing to grant either motion, we affirm the trial court. Regarding the indemnification agreement between Con/Spec and Zappa, we affirm the trial court because the parties' agreement does not specifically and expressly state that Con/Spec would be indemnified by Zappa where Con/Spec was negligent but Zappa was not.

BACKGROUND

This case arose out of an accident at a construction site that resulted in the death of Todd Anderson when the trench he was working in caved in. Anderson's widow, individually and as personal representative of her husband's estate, brought a wrongful death action against Con/Spec, the general contractor, and Zappa, the excavating subcontractor. Con/Spec then brought third-party claims against BE Architects, the architect on the project; Bernard Stroh, d/b/a Stroh Engineering, the structural engineer; and Advanced Concrete and Masonry, the concrete subcontractor and deceased's employer. Anderson subsequently amended her complaint to include direct claims against the third-party defendants joined by Con/Spec.

Prior to trial, the parties entered into a settlement agreement, in which Stroh and Advanced settled their claims with Anderson; and Con/Spec, BE Architects, and Zappa also agreed to settle their claims with Anderson but left the issue of determining negligence and apportioning fault to the jury. The parties agreed to contribute in proportion to the amount of fault the jury found for each.

After a six-day trial, the jury returned a verdict finding Zappa zero percent at fault, and Con/Spec and BE Architects twenty-five percent and fifteen percent at fault, respectively. Con/Spec and BE Architects filed motions after verdict, which the trial court denied in its order for judgment.

The parties are in general agreement regarding the facts elicited at trial surrounding the contracts entered into and the events leading up to the accident. Their disagreement lies not in the facts themselves, but the jury's interpretation of the facts and the determinations made thereon.

Con/Spec contracted with the owner of the project to build a new structure on a site that had existing structures. Con/Spec performed as administrative general contractor. In that capacity, it arranged for all work except cleanup to be done by subcontractors. Con/Spec contracted with BE Architects, with whom it had an ongoing relationship, to provide architectural and structural engineering services for the project. BE Architects retained responsibility for the above-ground architectural work, and contracted with Stroh Engineering to perform the below-ground structural work.

In addition, Con/Spec subcontracted with Zappa to excavate a trench adjacent to the existing retaining wall where the new wall would be constructed. Advanced Concrete was awarded the subcontract for the work on the new wall structure itself.

Considerable evidence was introduced regarding the circumstances surrounding the decision to erect a new wall adjacent to the existing retaining wall. The project site included a loading dock area situated between an existing building and the location of the new structure. Con/Spec decided to use the existing loading dock between the buildings and to construct a building linking the existing building to the new building. The "link building" was to run along the existing loading dock. The retaining wall that the excavation was dug next to ran alongside the existing loading dock.

BE Architects provided drawings showing the location of the foundation wall. The plans eventually required the new wall to be constructed adjacent to the old wall approximately three inches away from the old wall. It is undisputed that the subsurface depth of the existing retaining wall was unknown at the time the plans were prepared; in addition, the parties were aware of the possibility that the excavation for the new wall would extend below the bottom of the existing wall. This situation did, in fact, arise when the new excavation was completed. There was evidence to the effect that a review of the drawings would easily reveal that the old wall could be undermined by the proposed excavation. There was also testimony that Zappa created the hazard and thereby exposed employees to danger, and that Zappa had a resulting duty to recognize the hazard it had created.

The excavation was begun and completed on Tuesday, June 23, 1992. The original plan was for Advanced Concrete to perform its work the following day. However, the concrete work was not actually started until three days later, on Friday, June 26. At that time, two Advanced Concrete employees, John Rose and Todd Anderson, entered the trench to prepare the bottom for the concrete footings. In the course of their work, they did some finishing grade

work, including the removal of small amounts of dirt from the underside of the retaining wall. The trench eventually caved in; Rose was able to escape, but Anderson was not and he was fatally injured in the accident.

Evidence was also introduced on the issue of the qualifications of Zappa's employee, Mark Stahnke, to oversee and execute the excavation of the trench, specifically his lack of training in OSHA regulations and whether he was a "competent person" as defined in the OSHA regulations. Testimony on the amount of slope or shoring required for this type of excavation was also elicited. The evidence revealed that Mark Stahnke, the Zappa employee who performed the excavation, did not have prior experience digging a trench that resulted in the exposure of the footing of an existing wall. He did not inform his employer that he was unfamiliar with the situation or ask for any instruction. He testified that he thought the wall was stable, based on his view of the work and the assumption that the wall was somehow anchored to the existing earth surface.

DISCUSSION

Motions for New Trial

BE Architects contends that its motion for a new trial should have been granted in the interest of justice because the jury's finding that Zappa was zero percent at fault was contrary to the great weight and clear preponderance of the evidence. Con/Spec contends the same, and asserts, in the alternative, that the motion for a new trial should have been granted because the court's instructions to the jury were confusing and did not provide the jury with the correct principles of law to apply in deciding whether Con/Spec was negligent.

The parties state differing standards of review for determining whether the trial court erred when it denied the motions for a new trial. We begin, then, by summarizing the standard of review we apply to the trial court's denial of the post-verdict motions for a new trial filed by Con/Spec and BE Architects.

The trial court has discretion under § 805.15(1), STATS., to grant a new trial "in the interest of justice" when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd,* 190 Wis.2d 623, 528 N.W.2d 413 (1995). A trial court's ruling on a motion for a new trial, being highly discretionary, will not be reversed on appeal absent a showing of abuse of discretion. *See* ***Johnson v. American Family Mut. Ins. Co.***, 93 Wis.2d 633, 649-50, 287 N.W.2d 729, 737 (1980). We will sustain a trial court's discretionary ruling if we determine that it was made based upon the facts in the record and the applicable law. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Zappa posits that the standard for granting a motion challenging "the sufficiency of the evidence" in a motion after verdict is that the motion should not be granted unless there is no credible evidence to support the jury's finding for the prevailing party.[3] *See* ***Sievert***, 180 Wis.2d at 433, 509 N.W.2d at 79. This is a

[3] This standard is set forth in § 805.14(1), STATS., which provides:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict ... shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

stricter standard than that required for granting a motion for a new trial when the verdict is contrary to the law or the weight of the evidence or in the interest of justice.[4] ***Id.*** at 433-34, 509 N.W.2d at 79. Zappa contends that we should affirm the trial court if we find "any credible evidence" to support the verdict. Here, however, Con/Spec and BE Architects asked the court to grant a new trial in the interest of justice because the jury's findings were contrary to the great weight of the evidence. Accordingly, we review the trial court's decision to determine whether it erroneously exercised its discretion when determining that the verdict was not against the great weight of the evidence and not whether there was any credible evidence to support the verdict.

When the jury's findings are perverse and contrary to the overwhelming weight of the evidence, then the trial court should have granted the defendant's motion for a new trial. ***Wilfert v. Nielsen***, 250 Wis. 646, 650, 27 N.W.2d 893, 896 (1947). Finally, this court will not exercise its own discretion[5] to order a new trial in the interest of justice "unless it has been convinced that there has been a probable miscarriage of justice, viewing the case as a whole." ***Michels v. Green Giant Co.***, 41 Wis.2d 427, 434, 164 N.W.2d 217, 221 (1969) (citation omitted).

We give great deference to the trial court's ruling. The trial court is in a better position than this court to evaluate the evidence adduced at trial. We

[4] *See* § 805.15(1), STATS., which provides: "A party may move to set aside a verdict and for a new trial ... because the verdict is contrary to law or to the weight of evidence ... or in the interest of justice."

[5] *See* § 752.35, STATS., which gives the court of appeals discretion to grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …."

review the record to determine whether the court's decision was based on the facts in the record and the applicable law. ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20.

Con/Spec and BE Architects point to evidence in the trial transcript indicating that no hazard existed until Zappa dug the trench; that Zappa did not comply with OSHA standards by either bracing, shoring, or sloping the excavation; that Zappa had a duty to recognize the hazardous situation and notify Con/Spec; and that Zappa had the duty to prevent vehicular traffic in the area surrounding the excavation to prevent destabilization and to warn of the possibility of destabilization of the trench if left exposed to the elements over time.

In response, Zappa argues that the record also includes credible evidence which supports its theory of the case. Zappa presented evidence that the accident occurred because the plans were defective as prepared and designed by Con/Spec and BE Architects. Evidence was also presented that Zappa satisfactorily performed the work it was hired to do according to the plans provided by Con/Spec, that the accident occurred three days after Zappa had finished its work, and that after completing the excavation, Zappa had no further control over the excavation itself or the subsequent work to be done in the trench that resulted in the cave-in.

We affirm the trial court's denial of the motions to grant a new trial in the interest of justice. Here, there was contradictory evidence on the issue whether Zappa was at fault in this fatal accident. The jury listened to the evidence and determined the credibility of the witnesses and the weight to be given to the testimony, matters wholly within their province. *See* ***Thompson v. Village of Hales Corners,*** 115 Wis.2d 289, 318, 340 N.W.2d 704, 718 (1983). The

apportionment of negligence is a matter peculiarly within the province of the jury, and a reviewing court cannot reject the jury's apportionment unless it was wrong as a matter of law. ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 409-12, 331 N.W.2d 585, 594-95 (1983). The jury's conclusion that Zappa was not negligent was neither perverse nor contrary to the great weight of the evidence. Furthermore, we are not convinced from a review of the record that the verdict represents a probable miscarriage of justice. The trial court denied the motion based on the facts in the record and the applicable law. The court properly exercised its discretion in denying the motion and we, therefore, affirm.

Jury Instructions

Next, Con/Spec contends that a new trial should have been granted because the instructions were confusing and misled the jury about the law applicable in determining negligence. A trial court has broad discretion in instructing the jury. ***State v. Turner***, 114 Wis.2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). In determining whether a particular instruction is appropriate, the trial court must decide whether the evidence reasonably requires it. ***Larson v. State***, 86 Wis.2d 187, 195, 271 N.W.2d 647, 650 (1978).

Counsel for Con/Spec objected to the use of WIS J I--CIVIL 1022.2,[6] stating that the evidence did not support a finding that Con/Spec committed an affirmative act, as required by the instruction. According to Con/Spec, the only showing of negligence on its part, if any, is evidence of an omission or a failure to

[6] The court instructed the jury as follows: "A general subcontractor (sic) who sublets all or a part of a contract to a subcontractor has a duty not to commit an affirmative act which would increase the risk of injury to an employee of the subcontractor. An affirmative act is an act of commission, that is, something that one does, as opposed to an act of omission, which is something one fails to do."

act. The trial court determined that the issue of whether Con/Spec's actions amounted to affirmative acts that increased the risk of injury to Todd Anderson was an issue for the jury to decide and was best addressed in the closing arguments of counsel. We agree. The jury heard evidence regarding the nature and scope of Con/Spec's actions, as well as the arguments of counsel, and it was for the jury to decide whether Con/Spec's actions were affirmative acts, as opposed to omissions or failures to act.

Con/Spec also argues that when the court decided to give the instruction, it should have explained that it applied to Con/Spec only. In addition, it claims that WIS J I--CIVIL 1022.4, explaining the duty of a building contractor, should have been given with an admonition that it applied to Zappa and BE Architects. Regarding WIS J I--CIVIL 1022.6, explaining a general contractor's liability to a third person for the negligence of an independent contractor, Con/Spec argues that it is in direct conflict with 1022.2. We disagree. The instructions given thoroughly provided the jury with the appropriate standards to apply. The record reflects evidence upon which the jury could find that Con/Spec was acting as a designer of the project along with BE Architects, and not merely as a general contractor. The instructions given were not conflicting; they correctly stated the duties that applied to the various situations the jury might find existed based on the evidence.

Motion for JNOV

Con/Spec contends that it was entitled to a judgment notwithstanding the verdict because the jury had no basis to find Con/Spec negligent. Con/Spec argues that in order for the jury to find Con/Spec negligent, the jury had to find that Con/Spec did an affirmative act that increased the risk of

injury to employees of subcontractors. Con/Spec argues that the record is barren of any reference to any such affirmative act and, therefore, it was entitled to JNOV.

We review de novo a trial court's denial of a motion for JNOV. ***Logterman v. Dawson***, 190 Wis.2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994). The focus of a motion for JNOV is not whether there is sufficient evidence to support the verdict, but whether the facts found are sufficient to permit recovery as a matter or law. ***Id***. Con/Spec argues that under WIS J I--CIVIL 1022.2 and ***Wagner v. Continental Cas. Co.***, 143 Wis.2d 379, 421 N.W.2d 835 (1988), it is essential that Con/Spec commit an affirmative act which increases the risk of injury to the employees of Advanced Concrete, including Todd Anderson. Con/Spec contends that, if it was negligent at all, that negligence was in the form of an omission and that the jury could not reasonably have found that Con/Spec did any affirmative act as required by the instruction to find Con/Spec negligent. Thus, it argues the verdict is flawed because the jury's interpretation of the facts does not conform to the requirement of law. We do not agree.

As noted above, the issue of whether any of Con/Spec's conduct as designer of the project amounted to an affirmative act was a question for the jury to decide. Credible evidence was presented upon which the jury could find that Con/Spec and BE Architects, by providing incomplete plans for the project, increased the risk of injury to other workers. The trial court accepted the jury's verdict, and denied Con/Spec's post-verdict motion for JNOV. Our review of the record indicates that the jury's findings that Con/Spec was negligent is supported by the evidence and the inferences permissibly drawn therefrom. We conclude that the jury's findings do permit recovery against Con/Spec as a matter of law and, therefore, affirm.

Motion for Indemnification

Finally, Con/Spec asserts that the trial court erred when it denied its motion for indemnification from Zappa. Con/Spec argues that the indemnification agreement is clear and unambiguous and, therefore, entitles it to indemnification from Zappa.

Construction of an unambiguous contract is a question of law we review de novo. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Whether the contract is ambiguous is also a question of law we determine independently of the trial court. ***Id***.

"The general rule accepted in this state and elsewhere is that an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a *specific and express statement* in the agreement to that effect." ***Spivey v. Great Atlantic & Pacific Tea Co.***, 79 Wis.2d 58, 63, 255 N.W.2d 469, 472 (1977) (emphasis added). Also, when an indemnitee seeks to be indemnified for his own negligence, the contract must be strictly construed. ***Bialas v. Portage County***, 70 Wis. 2d 910, 912, 236 N.W.2d 18, 19 (1975). The goal of construing the indemnification provision is to determine whether it was, in fact, the intention of the parties that the non-negligent indemnitor be responsible to the negligent indemnitee for liability arising from the indemnitee's acts. ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis.2d 120, 125, 301 N.W.2d 201, 204 (1981). If the agreement clearly states that the indemnitee will be covered for liability resulting from its own negligent acts, then the indemnitee may recover under the contract. If the agreement does not clearly state the coverage arrangement, but it is clear from the contract that "'the purpose and unmistakable intent of the parties

in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence, indemnification may be afforded.'" ***Id.*** (quoting ***Spivey***, 79 Wis.2d at 63-64, 255 N.W.2d at 472).

There are two separate indemnification provisions in the subcontract between Con/Spec and Zappa. One is contained in paragraph 7 of the "STANDARD SUBCONTRACT AGREEMENT" (subcontract); the other is at Section 4.17.1 of the "GENERAL CONDITIONS OF SUBCONTRACT" (general conditions).

Con/Spec concedes that the language of the general conditions at 4.17.1 does not allow indemnification from Zappa under ***Gunka v. Consolidated Papers, Inc.***, 179 Wis.2d 525, 531, 508 N.W.2d 426, 428 (Ct. App. 1993), and we agree.

However, Con/Spec goes on to assert that it is still entitled to indemnification by Zappa under paragraph 7 of the subcontract. Con/Spec points to the first sentence of 4.17.1 which says that 4.17.1 applies "unless otherwise specified in the Contract." It argues that the provisions of the subcontract control over the general conditions of subcontract and that Zappa agreed to comply with the "highest or most stringent standard" in the event of a conflict in the subcontract documents. *See* paragraph 1.2.2 of the general conditions. Zappa agrees at paragraph 7 of the subcontract:

> 7. [T]o assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons ... arising out of it, resulting from, or in any manner connected with, the execution of the work provided for in this Subcontract ... and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor ... from all such claims,

> including … claims for which the Contractor may be or may be claimed to be liable ….

Con/Spec argues that the language of paragraph 7 is broader than that construed in ***Gunka*** and its indemnity provision should be upheld. We are not persuaded.

The ultimate issue is whether Zappa is obligated under the terms of its contract with Con/Spec to indemnify Con/Spec for damages resulting solely from Con/Spec's own negligence where Zappa, the indemnitee, has been found not at fault. When making this determination, we must strictly construe the language of the subcontract to determine whether it contained a "specific and express" statement that Con/Spec would be indemnified for its own negligent acts. *See* ***Spivey***, 79 Wis.2d at 63, 255 N.W.2d at 472. It does not. There is no clause in either paragraph 6 or paragraph 7 of the subcontract which "clearly states" that Con/Spec is entitled to indemnification from Zappa for Con/Spec's own negligent acts where Zappa is not negligent at all. ***Id.*** at 63-64, 255 N.W.2d at 472. Furthermore, an examination of the subcontract provisions does not clearly indicate that the "purpose and unmistakable intent" of Con/Spec and Zappa when they entered into the contract was "for no other reason than to cover losses occasioned by [Con/Spec's] own negligence." ***Id.***

"Clear language is required to show that a contract of indemnification was intended to cover conditions or operations not under the control of the indemnitor." ***Hortman v. Otis Erecting Co.,*** 108 Wis.2d 456, 464, 322 N.W.2d 482, 486 (Ct. App. 1982). This is especially true in a situation where, as here, the indemnitor did not have responsibility for preparing the plans, deciding where to excavate, left the site at least three days before the accident occurred, and had no further control over the accident scene between completion of the excavation and the occurrence of the accident. Additionally, during that

period of time, Zappa did not have control over the vehicular traffic near the excavation, nor supervision of the workers who subsequently entered the trench.

Because the parties did not clearly state nor evidence their purpose and unmistakable intent to indemnify Con/Spec for its own negligent acts in the absence of negligence by Zappa, we conclude that Con/Spec is not entitled to indemnification. Therefore, we do not address the construction of other language in the contract provisions.

Zappa urges this court to read paragraphs 6 and 7 together and conclude that paragraph 6 requires fault by Zappa in carrying out the provisions of the subcontract[7] and that paragraph 7 limits Zappa's obligation to indemnify Con/Spec only for such claims arising out of the work done by Zappa. It is unnecessary to follow Zappa's suggested approach. While we agree that paragraph 6 does include a fault element, i.e., a failure by Zappa to carry out the work of the subcontract, this distinct provision of the subcontract relates to holding Con/Spec harmless for Zappa's failure to carry out,[8] that is, to either start or complete, the work required under the subcontract. It is not an agreement to hold Con/Spec harmless for its negligence.

Paragraph 7 is the provision that deals with the issue of Zappa's obligation to assume responsibility for and provide indemnification to Con/Spec

[7] Zappa agrees in paragraph 6 of the subcontract to: "[S]ave harmless the Contractor and all other subcontractors from any and all losses or damage ... occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract unless such failure results from causes beyond the control of the Subcontractor."

[8] WEBSTER'S THIRD NEW INT'L DICTIONARY at 344 (unabr. 1976), describes "carry out": "**1 :** to put into execution **2 :** to bring to a successful issue **3 :** to continue to an end or stopping point."

for the type of damage and injury suffered by the deceased, Todd Anderson. That paragraph provides, in pertinent part, that Zappa contracts to assume entire responsibility and liability for all damages or injury to persons arising out of, resulting from, or in any manner connected with the *execution of the work provided for in this subcontract*, and also agrees to indemnify and save harmless Con/Spec from all such claims, including claims for which Con/Spec may be or may be claimed to be liable. *See* STANDARD SUBCONTRACT AGREEMENT, Paragraph 7 (emphasis added). Paragraph 1 of the subcontract describes the "work covered by this Subcontract" as follows: "The demolition, grading, excavating, backfill, sand cushion, and utility work per Addendum #1 in accordance with the plans and specifications. The plans are enumerated in the special conditions of the specifications and are thereby incorporated herein."

There is nothing in the language of paragraph 7, nor any other provision of the subcontract or general conditions, which contains a specific and express statement that Con/Spec would be indemnified for its own negligent acts. Nor does the agreement clearly reflect that the purpose and unmistakable intent of the parties was for no other reason than to cover losses occasioned by Con/Spec's own negligence. *See* ***Dykstra***, 100 Wis.2d at 124-25, 301 N.W.2d at 203-04 (citing ***Spivey,*** 79 Wis.2d at 63-64, 255 N.W.2d at 472).

Accordingly, we conclude the trial court reasonably exercised its discretion when denying the motions for a new trial in the interest of justice, denied the motion for a judgment notwithstanding the verdict, and concluded Con/Spec was not entitled to indemnification from Zappa.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.